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APPLETON v. MOOREHEAD.

Higgins J.

far as they apply to trade and commerce, as well as industry, other than that referred to in sec. 51 (1); but that sec. 15B of the Act of 1908 is valid.

*Appeal of Huddart, Parker & Co. Propy. Ltd. allowed.*

*Appeal of Appleton dismissed.*

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitor, for the respondent, *C. Powers*, Commonwealth Crown Solicitor.

B. L.

Foll *Waterside Workers Federation* v *Gilchrist Watt & Sanderson Ltd* (1924) 34 CLR 482

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[HIGH COURT OF AUSTRALIA.]

## THE KING *v.* THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

## EX PARTE THE BROKEN HILL PROPRIETARY COMPANY LIMITED.

## THE COMMONWEALTH OF AUSTRALIA INTERVENING.

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SYDNEY, *April* 14, 15, 16, 19, 20, 21, 23.

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

*Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Industrial dispute extending beyond the limits of one State—Undertaking carried on by one employer in two States—Relationship of employer and employé—Temporary cessation of work owing to dispute—Conditions precedent to jurisdiction—Acquiescence in jurisdiction by party seeking prohibition—Discretion of High Court—Excess of jurisdiction—Matters not in dispute between the parties—Submission of dispute by plaint—Prohibition quoad—Commonwealth Conciliation and Arbitration Act* 1904 (*No.* 13 *of* 1904), *secs.* 19 (*b*), 38 (*u*)—*The Constitution* (63 & 64 *Vict c.* 12), *sec.* 51 (*xxxv.*), (*xxxix.*).

Where the employés engaged in different branches of one industry carried on in different States by a single employer take concerted action in making a

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common demand of their employer for certain conditions of employment, and the employer, understanding that the demand is so made on behalf of all the employés, refuses to accede to it, there arises an industrial dispute extending beyond the limits of one State within the meaning of sec. 51 (xxxv.) of the Constitution, cognizable by the Commonwealth Court of Conciliation and Arbitration.

The Commonwealth Court of Conciliation and Arbitration cannot exercise jurisdiction under sec. 19 of the *Conciliation and Arbitration Act* 1904 unless there is in fact such a dispute which has been submitted to the Court for settlement in one of the methods stated in that section, and, in the case of a dispute submitted by plaint, the plaint should be sufficiently definite to indicate to the Court and to the other parties the subject matter of the dispute.

Though the Court is not bound to award the particular form of relief claimed in the plaint, and though it may, under sec. 38, sub-sec. (*u*) deal with all matters incidental and ancillary to the dispute submitted to it, and make such order as it deems expedient for the settlement of the dispute, it has no jurisdiction to make an award as to matters not substantially involved in or connected with the dispute. So, where the Court embodied in its award for the settlement of an industrial dispute properly submitted to it directions making important changes in conditions of employment, as to which no claim had been made in the original plaint, as to which there had not been in fact any dispute between the parties, which were altogether unconnected with the matter submitted to the Court, and which the Court had refused on those grounds to incorporate in the plaint by amendment:

*Held*, that the Court had exceeded its jurisdiction in so far as it purported to deal with those matters, and should be restrained by prohibition *quoad hoc*, from proceeding to enforce its award.

Where the validity of an award is challenged on the ground that the facts necessary to give jurisdiction did not exist, the High Court is not bound by any findings of the inferior Court as to those facts, but may examine the evidence independently in order to see whether there was or was not jurisdiction.

The cessation of work in an industry owing to the existence of an unsettled industrial dispute, does not in itself amount to a termination of the relationship of employer and employé within the meaning of the Act. That depends upon whether the conduct of the parties evinced an intention that the relationship should come to an end.

*Semble, per Griffith* C.J. and *O'Connor* J. The rule that the superior Court may in its discretion refuse a writ of prohibition to restrain an inferior Court which has exceeded its jurisdiction, if the defect of jurisdiction does not appear on the face of the proceedings, and the party seeking the writ has allowed judgment to pass without objection, does not ordinarily apply to an application for a prohibition against the enforcement of an award of the Con-

ciliation and Arbitration Court in an industrial dispute, because such an award may affect the rights of persons who were not parties, and who, therefore, had no opportunity of objecting to the jurisdiction.

Award of the Commonwealth Court of Conciliation and Arbitration, 12th March 1909 (*Higgins* J. President), held to be in excess of jurisdiction, and rule made absolute for a writ of prohibition *quoad* the excess.

MOTION to make absolute a rule *nisi* for a prohibition to the Commonwealth Court of Conciliation and Arbitration.

On 12th March 1909 the Commonwealth Court of Conciliation and Arbitration, *Higgins* J. President, made an award in an industrial dispute submitted to the Court by plaint by the Barrier Branch of the Amalgamated Miners' Association of Broken Hill against the Broken Hill Proprietary Company Limited. The facts out of which the dispute arose and the proceedings up to the making of the award are sufficiently stated in the judgments hereunder.

The Broken Hill Proprietary Company Limited applied to the High Court for an order *nisi* for a writ of prohibition to restrain further proceedings on the award, and on 1st April 1909 an order was granted on the following grounds:—(1) That there was no dispute in an industry extending beyond the limits of any one State; (2) that there was no dispute extending beyond the limits of any one State; (3) that the employment of all the members of the Barrier Branch of the Amalgamated Miners' Association by the Broken Hill Proprietary Company Limited had ceased before the hearing of the plaint in the said proceedings and the making of the said order and award; (4) that clauses 1 and 3 of the award and order prescribe terms of employment at the works of the Broken Hill Proprietary Company Limited at Port Pirie—(*a*) which were not in dispute between the parties to the said proceedings, (*b*) which were not submitted to the Court in the plaint originally filed in the said proceedings or in any amendment thereof; (5) that the subject matter of clause 6 of the award and order, (*a*) was not in dispute between the parties to the said proceedings, (*b*) was not submitted to the Court in the plaint originally filed in the said proceedings or in any amendment thereof; (6) that the subject matter of clause 6 is beyond the jurisdiction of the said Court under the *Commonwealth Conciliation and*

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*Arbitration Act* 1904; (7) that if that Act purports to give jurisdiction in respect of the subject matter contained in clause 6 of the order and award, it is unconstitutional.

The award contained a number of clauses and a schedule dealing with wages and conditions of employment generally as between the company and its employés. The only clauses to which it is necessary for the purpose of this report to make particular reference are the following: (1) Forty-eight hours per week shall constitute a full week's work . . . (3) Overtime shall be paid for at the rate of time and a quarter, including all time of work on a seventh day in any week or on official holidays, and all time of work done in excess of the ordinary shift during each day of twenty-four hours shall be reckoned as overtime . . . (6) No contracts shall be set by the company except as to work for which contracts have been annually set by the company since 11th December 1906.

After the making of the order *nisi* leave to intervene was granted to the Commonwealth on the ground that one of the questions that might arise was the constitutionality of the *Commonwealth Conciliation and Arbitration Act* 1904.

On the motion to make absolute the order *nisi* the Court considered the question whether they would follow the practice of the English Courts in prohibition, viz., that the party showing cause should begin, and decided to adopt that as the most convenient practice.

*Blacket*, for the Court of Conciliation and Arbitration. The company undertook to raise no general objections to jurisdiction. It was, therefore, unnecessary to give evidence of facts upon which jurisdiction depended. The withdrawal of that undertaking only applied to the new matter, not to the main issue.

[GRIFFITH C.J.—Consent will not give jurisdiction, though it may be a reason for refusing relief to the party who has consented.

ISAACS J. referred to *Colonial Bank of Australasia* v. *Willan* (1).]

This is a case in which the Court should exercise its discretionary

(1) L.R. 5 P.C., 417.

power to refuse the writ: *Broad* v. *Perkins* (1); *Reg.* v. *Justices of Salop* (2); *Reg.* v. *Committeemen for South Holland Drainage* (3); *Reg.* v. *Sheward* (4). There are only two claims alleged to be outside the original dispute.

Employment had not ceased before the dispute: *Colliery Employés Federation of the Northern District New South Wales* v. *Brown* (5).

As to the objection that the award deals with matters not in dispute, the Court had jurisdiction to settle the dispute by providing for all conditions of employment. These matters were, in the opinion of the President, ancillary to the main issue, and necessary to be dealt with for the effectual settlement of the dispute. [He referred to *Barrier Branch of the Amalgamated Miners' Association* v. *Broken Hill Proprietary Co.* (6); *Commonwealth Conciliation and Arbitration Act* 1904, secs. 16, 18, 23 (1) (2), 24, 25, 38 (*u*), (*g*).] Clause 6 comes within the wide power given to the President by sec. 38. [He referred to *Cookson* v. *Lee* (7); *Ex parte Brown* (8).] The Court has not merely to decide *inter partes*, but to secure the harmonious working of the industry in the future.

[GRIFFITH C.J.—But a dispute on one particular question does not give him general control of the industry.]

On the main point the industry admittedly extended beyond the limits of one State.

[GRIFFITH C.J.—The Constitution does not refer to an industry extending beyond one State, but to a dispute extending &c.]

If an amendment or fresh evidence would have given jurisdiction the appellants must fail: *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (9). The erroneous finding of the President that there was one industry would not be a ground for prohibition: *Joseph* v. *Henry* (10). Even if the Court refuses the writ, it will not prejudice those who may subsequently attack the award.

(1) 21 Q.B.D., 533.
(2) 29 L.J.M.C., 39.
(3) 8 A. & E., 429, at p. 437.
(4) 5 Q.B.D., 179; 9 Q.B.D., 741.
(5) 3 C.L.R., 255.
(6) Vol. II., Pt. 6 Ind. Arb. Rep. (N.S.W.), 538.
(7) 23 L.J. Ch., 473.
(8) (1905) 5 S.R. (N.S.W.), 412.
(9) 5 C.L.R., 33.
(10) 19 L.J.Q.B., 369.

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*Arthur*, for the Barrier Branch. The Port Pirie employés are members of an organization on an equal footing with those at Broken Hill since July 1908. There can be no prohibition as to grounds 1, 2 and 3. No evidence appears that ousts jurisdiction. The plaint satisfies all the requirements of the Statute to give jurisdiction. Even if there is any defect on the face of the proceedings the applicants acquiesced, and are now objecting in breach of faith. They should not be aided at this stage. If an amendment is necessary the Court should allow it now. There was a claim that the 48 hours a week in the agreement should apply at Port Pirie as far as practicable. This is distinguishable from *Clancy v. Butchers' Shop Employés Union* (1). There it appeared on the face of the proceedings that there was no industrial dispute. [He referred to *Brown* v. *Cocking* (2).]

[GRIFFITH C.J. referred to *The Queen* v. *Commissioners for Special Purposes of Income Tax* (3).]

A claim is not a technical pleading. Even if the matters dealt with in clause 6 were not a dispute, the President had power to deal with them if they were in his opinion necessary and incidental to the award: sec. 38, sub-sec. (*u*); *Trolly, Draymen and Carters' Union of Sydney and Suburbs* v. *Master Carriers Association of New South Wales* (4). If the employer could substitute contract work for wages he could nullify the award. The award merely says that if the employer carries on he must employ the men on wages. That is not a command to carry on, any more than an order to pay higher wages would be.

[O'CONNOR J.—But the President cannot go altogether outside the matter in dispute in order to make his award effective.

ISAACS J.—The President could have effected the object suggested by fixing the minimum rate for contracts.]

Natural difficulties may prevent the men from earning the wage. Clause 6 may be restricted to contracts involving the relationship of employer and employé. It is not contract in the ordinary sense, but a method of fixing the remuneration for employés. [He referred to the Constitution, sec. 51 (xxxix.); *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners'*

(1) 1 C.L.R., 181.
(2) L.R. 3 Q.B., 672.
(3) 21 Q.B.D., 313.
(4) 2 C.L.R., 509.

*Association* (1); *Beath Schiess & Co.* v. *Martin* (2); Victorian *Factories Act*; *Tighe and Russell, Master and Servant and Employers Liability Acts*, p. 63, and cases there cited.]

The industry was one. The employés belonged to one registered organization. The business has one general manager, one memorandum of association, one report and balance sheet, and the enterprise, though consisting of different processes, is all devoted to the one object, the production of metals from the ores raised at Broken Hill. [He referred to *Australian Workers' Union* v. *Pastoralists' Federal Council of Australia* (3).] The dispute extends beyond the limits of one State within the meaning of the Constitution. One union asked for certain conditions for all its members at both Broken Hill and Port Pirie. All had made common cause for the settlement of their grievances. The rates of pay at the two places, though they were different, always fluctuated together. The relationship of employer and employé subsisted at the date of the hearing. The cessation of work was temporary, both parties acting with a view to continuing the work later on under conditions laid down by the Court. [He referred to *Newcastle Wharf Labourers* v. *Newcastle and Hunter River Steam Navigation Co.* (4); *Merchants Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (5), and in further support of his contentions adopted the argument of *Blacket* generally.]

*Irvine* K.C., and *Starke* (*Kelynack* with them), for the Broken Hill Proprietary Company. The withdrawal of submission to jurisdiction by the company was general, and was not limited to the new matter, and it was justified because the threatened inclusion of the questions of the contract system and the six shifts at Port Pirie completely changed the nature of the claim, and was quite outside the area of the dispute which the company had been willing to submit to the jurisdiction. There had never been any dispute in reference to either of these matters. The President's power to make general provisions to prevent evasion of the

(1) 6 C.L.R., 309.
(2) 2 C.L.R., 716.
(3) 1 C.A.R., 62.
(4) 1 Ind. Arb. Rep. (N.S.W.), 1, at p. 5.
(5) 1 C.A.R., 1, at p. 18.

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award is limited by the nature of the dispute. He cannot bring in matters of this kind, in respect of which there had never even been a claim either in or out of the Court. His opinion as to whether they were really involved in the dispute is shown clearly enough by his refusal to allow an amendment which would include them. If the Act conferred upon him such a power it was *ultra vires*. Sec. 51 (XXXIX.) does not cover it.

The writ should not be refused on the ground of the acquiescence of the applicants unless their conduct has prevented the proof of the basic facts giving jurisdiction.

[GRIFFITH C.J.—No. The refusal is based upon the applicant's lying by and taking his chance. He referred to *Mayor of London* v. *Cox* (1).]

The meaning of "industrial dispute" in the Constitution cannot be enlarged by the *Commonwealth Conciliation and Arbitration Act* 1904. Such a dispute occurs where a considerable number of employés engaged in the same industry take concerted action in demanding from or refusing to employers some defined change in the conditions of employment in the industry. If other industries join in the demand there must, in order to constitute one dispute, be some *nexus* between them. It is not enough merely to make a demand in common. In this case the evidence shows that there was no concerted demand, and therefore no single dispute. Separate disputes cannot be made one by bringing them together into one plaint in the Court.

The claim for six shifts a week at Port Pirie was not within the cognizance of the Court. It was not part of the dispute, and the Court had no power to introduce it by amendment. The amendment having been refused, evidence was not directed to the point. The plaint must state the dispute in accordance with the statutory requirements; sec. 19 (*b*) and rule 26 of Statutory Rules 1908. This Court is not bound by the President's opinion, if the matter was not in fact involved in the dispute.

The relationship of employer and employé had ceased when the plaint was filed: *Colliery Employés Federation of the Northern District of New South Wales* v. *Brown* (2). The men could have submitted the dispute without ceasing work.

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

(2) 3 C.L.R., 255.

The limitation of contract work was not in dispute. It was not submitted in the plaint, and was not necessary or expedient for the award. [They referred to *Ex parte Long* (1).]

If disputes can be brought within the cognizance of the Commonwealth Court by joining them in one plaint, the jurisdiction of the State Courts would be practically cut down to nothing.

*Cullen* K.C., (*Holman* with him), for the Commonwealth. As to sec. 19 of the *Commonwealth Conciliation and Arbitration Act* 1904, the legislature did not intend that the jurisdiction of the Court should depend on the question whether a plaint was regularly drawn up. Sec. 38, sub-sec. (*q*) frees the Court from all restraint of technicalities.

[GRIFFITH C.J. referred to *Master Retailers' Association of New South Wales* v. *Shop Assistants' Union of New South Wales* (2); *McIntosh* v. *Simpkins* (3).]

The legislature has given the Court power to deal with matters requiring its intervention without requiring demands to be specifically stated in the plaint. That is within the power conferred by sec. 51 (xxxv.) and (xxxix.) of the Constitution. The Court could inform the party against whom a claim is made of the nature of the claim without formal pleadings. There is no reason why by mutual concession the character of the dispute should not be altered after its cognizance by the Court.

[ISAACS J. referred to *Ledgard* v. *Bull* (4).]

If Parliament has power to create a Court of Conciliation it must have power to prevent the jurisdiction of that Court being ousted by a strike or lockout. If such a cessation of employment could oust the jurisdiction, the power of legislation would be rendered futile.

*Irvine* K.C., in reply to *Cullen* K.C. The plaint must be read with the rules under which it was filed.

[ISAACS J. referred to sec. 25 of the *Commonwealth Conciliation and Arbitration Act* 1904.]

*Cur. adv. vult.*

(1) 16 N.S.W. L.R., 120.
(2) 2 C.L.R., 94.
(3) (1901) 1 K.B., 487.
(4) L.R. 13 Ind. App., at p. 445.

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April 23.

GRIFFITH C.J. This is an order *nisi* for a prohibition, addressed to the Commonwealth Court of Conciliation and Arbitration, to prevent the Court from proceeding to enforce an award made on a plaint submitted by an organization called the Barrier Branch of the Amalgamated Miners' Association of Broken Hill against the Broken Hill Proprietary Company Ltd.

The award is dated 12th March 1909, and by it the Court prescribed the rates of wages for a large number of men employed by the Broken Hill Proprietary Co. Ltd., and gave some further directions, to which I shall afterwards call attention. The validity of the award is impeached on the ground of want of jurisdiction and excess of jurisdiction. It is important to bear in mind that the functions of this Court in dealing with the matter are in no sense those of a Court of Appeal. We have absolutely nothing to do with the merits of the dispute as between the parties. We are only concerned to see that the Court has not transgressed the limits of the jurisdiction prescribed for it by law. Before referring to the facts of the case it will be convenient to say a few words with the respect to the nature of the operations of the company, in respect of which the question has arisen. The Broken Hill Proprietary Co., as is well known, carries on very large operations both in New South Wales and South Australia. At Broken Hill they have mines, and works in connection with mines; and at Port Pirie in South Australia they have smelting works. I will read from the judgment of the learned President his statement of the operations of the company (*vide* folios 166, 167 and 168). After pointing out the number of men employed, which exceeds 4,000, he says:—"At Broken Hill the crude ore is obtained by mining, and is put through various processes of milling and concentration. The concentrates are sent to Port Pirie and are there smelted and refined for metallic lead, metallic silver, and some metallic gold. The tailings left after taking the lead and silver concentrates, contain zinc concentrates, and are reduced at Broken Hill to zinc concentrates. These zinc concentrates have hitherto been sold to certain foreign syndicates; but the company has recently taken measures for the extraction of the metallic zinc (spelter) at its works at Port Pirie. The company also produces materials for flux at Iron Knob, and

at Point Turton in South Australia, and produces coal and makes coke at Bellambi in New South Wales; but the employés at these latter places are not brought within the ambit of this dispute." And at folio 266 he added:—"At Port Pirie the company smelts and refines concentrates, as well as the concentrates which it buys from other companies, and produces metallic lead and other metals."

The first condition of jurisdiction of the Court is that there should be a dispute extending beyond the limits of any one State. That is the condition contained in the Constitution (sec. 51, pl. xxxv.). It is only with respect to such disputes that the Commonwealth legislature has power to legislate. The present litigation was commenced by a plaint filed in the Court on 29th December 1908. I shall have occasion afterwards to refer to some extent to the rules of the Court and the rules prescribed by the Act. For the present purpose the form is quite immaterial. The plaint as originally filed began "The Barrier Branch," and so on, "being in dispute with the company claims as follows": Then it alleged that the company was desirous of reducing the current rate of wages paid to its employés at both places, and had posted notices to that effect, and that the reduction was to take effect on 4th January 1909. Then followed a claim that "The copy agreement hereunto annexed marked 'A' which has been entered into between the several mining companies therein mentioned carrying on operations at Broken Hill, and several organizations of employés employed by those companies in connection with their operations, shall govern and regulate the relation of the Broken Hill Proprietary Co. with the Barrier Branch of the Amalgamated Miners' Association of Broken Hill and of the employés of the Broken Hill Proprietary Co. Ltd. at Port Pirie." The substance is a claim that the terms of the agreement which had been entered into at that time between the other companies at Broken Hill and the employés of those other companies should regulate also the relations between the Broken Hill Proprietary Co. Ltd. and their employés, not only at Broken Hill but also at Port Pirie.

The company at first submitted to the jurisdiction of the Court to decide the questions raised by that plaint. That desire was

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not unnatural; it was a great dispute, affecting a great industry, on the carrying on of which depended the prosperity of a large number of people, not only in New South Wales but in South Australia. At any rate, they submitted to the jurisdiction, and stated that they raised no objection to it. On 15th February, while the hearing was proceeding, an application was made to the Court by the claimants for leave to amend the plaint by including certain other matters to which I shall afterwards have occasion to refer in more detail. Certain amendments were allowed, but the amendments relating to those matters were objected to by the Broken Hill Proprietary Co., and were refused by the Court. But at the same time the learned President asserted for himself authority to go beyond the limits of the dispute set out in the claim, and to make any order, although not relating to any part of the dispute submitted, which he thought would be beneficial for the purpose of facilitating a continuance of amicable relations between the employers and employés in future. The company disputed the President's power to do anything of the kind; but on his continued assertion of it they said they considered themselves relieved from any obligation to submit to his award, and hold themselves at liberty to object to the jurisdiction of the Court altogether. The hearing then went on, and, as I have said, on 12th March 1909 an award was made which dealt with all the matters submitted by the plaint as amended. It also included directions in regard to matters as to which the amendment had been refused; and also as to a matter which had been raised by the President himself for the first time, which had never been raised by either of the parties, and had never been in dispute between them. The company then applied to this Court for an order *nisi* for a prohibition, and that order was granted. The grounds on which it was granted attacked the whole of the award and, more particularly, the two other matters to which I have referred. When the case came before this Court for argument the objection was taken on behalf of the learned President, and also on behalf of the complainants, that the company having submitted to the jurisdiction of the Arbitration Court, this Court in the exercise of its discre-

tion should not allow objection to be now raised to jurisdiction, and reliance was placed on the case of *Broad* v. *Perkins* (1).

That case, which of course is of the very highest authority, established that, since the writ of prohibition, although a writ of right, is not of course, if a party lies by and does not bring to the notice of the Court matters which would show that it had not jurisdiction, then the superintending Court, as I may call it, will not in the exercise of its discretion grant prohibition, but will leave the objection to be taken in some other way. I have some doubt whether that doctrine should be applied to a case of this kind, because, under the Statute by which this Court is established, the award, although made between the parties, really affects the rights of a great number of persons who are not present parties to the proceedings. It may be the foundation of many other rights. It may be perhaps the foundation of a common rule. And yet if the Court had no jurisdiction to make the award all these subsequent proceedings would be void, and the objection might be taken in any of the cases, or it might not, and the burden of objection to the jurisdiction might be cast upon persons very ill able to sustain it. Under these circumstances, I say, it is doubtful whether the rule laid down in *Broad* v. *Perkins* (1) should be held to be applicable to objections to the jurisdiction of the Commonwealth Court of Arbitration if it clearly appeared that it had no jurisdiction. I only say it is open to considerable doubt. But in any circumstances that rule ought not to be applied where the Court asserts the right to go beyond the matters as to which the parties were willing to submit themselves to its jurisdiction, beyond those that were in the minds of the parties when they made the submission. So that in any view I think the objection may now be taken.

I will now proceed to consider the objections to the validity of the whole award. The first objection taken formally is that there was no dispute in an industry extending beyond the limits of any one State. I only remark upon that that those are not the words of the Constitution, and that *a priori* I do not see why there may not be one dispute embracing or extending over several industries, just as much as there may be several disputes within the limits

(1) 21 Q.B.D., 533.

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of one industry. It is not however necessary to express any decided opinion upon the point.

I pass to the second objection, which is that there was "no dispute extending beyond the limits of any one State," and proceed to consider the question—Was there in this case such a dispute?—that is a single dispute extending beyond the limits of any one State, extending over both New South Wales and South Australia. That is a question of fact to be determined upon the evidence, and we may take it that all the available evidence is before us. If there is any further evidence material to the respondents or the complainants they might have brought it before us, but, as that has not been done, we may take it that all the evidence is before us. In the *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1) a tentative definition of "industrial dispute" was given by myself and my learned brother *O'Connor*. I will read what I there said, premising that I did not intend, nor do I think my learned brother *O'Connor* intended, the words we used to be an exhaustive definition of all possible industrial disputes. But it is only when these conditions exist, that there can be an industrial dispute extending beyond the limits of any one State. I said "an industrial dispute exists where a considerable number of employés engaged in some branch of industry make common cause in demanding from or refusing to their employers (whether one or more) some change in the conditions of employment which is denied to them or asked of them." My learned brother *O'Connor* used language almost to the same effect, using the words "concerted action" instead of "common cause," and pointed out, which I perhaps did not point out with sufficient distinctness, that it must be the same dispute. Again, the dispute must precede the submission to the Court. The Court can only have cognizance of an existing dispute. That being so, there appear to me to be two questions to be answered in this case, in order to determine whether there was jurisdiction or not. The first is: Did the Broken Hill and Port Pirie men make, before the institution of proceedings, common cause, or take concerted action in support of a common

(1) 6 C.L.R., 309, at p. 332.

demand. Secondly: Did the company understand that they were parties to such a dispute?

I will examine the evidence now to see what it establishes. I have already referred to the nature of the operations of the company, which are carried on in both places, although the operations in the two States are altogether different. Another material fact to be mentioned is that for some years past, owing to differences of conditions, the wages paid at Broken Hill have always been higher than the wages paid at Port Pirie, but there has always been a relationship between them. The position has always been treated, by common consent, on the basis that there was to a certain extent a community of interest. At any rate the wages have fluctuated together. Another material fact is that the men at Port Pirie were at first members of separate organizations, organizations separate from those to which the men at Broken Hill belonged, but before December last year they all joined in forming the claimant organization. In 1903 an award had been made by the New South Wales Court of Conciliation and Arbitration regulating the conditions of employment of the Broken Hill men. That award expired formally in 1905, but the terms were continued for a time; that is, work was continued for a time on the same terms, and in 1906 a formal agreement was entered into giving the men higher wages and more favourable terms of employment. That continued in operation till the end of 1908. No similar proceedings were taken, and no formal agreement made, with the men at Port Pirie. But, following the previous practice, the wages of the men at Port Pirie were raised in proportion to the increase that had been given to the men at Broken Hill. In August of last year it became known that the company would not continue to adhere to the terms of this agreement after its expiration in December, and formal notice was given by the company to terminate it, as required by the law of New South Wales. On 11th November a conference was held at Broken Hill between the representatives of all the mining companies there and the representatives of all the men employed in the different mines. After that had gone on for some time the representatives of the Broken Hill Proprietary Co. withdrew from the conference. The men went on with the conference

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with the representatives of the other companies, and the result was that an agreement was made to which I have already referred as being the agreement which the complainants in their plaint asked to have made applicable to the Broken Hill Proprietary Co. as well. On 21st November the General Manager of the Broken Hill Proprietary Co. wrote to the representative of the employés (*vide* folio 432) as follows:—"Dear Sir, I beg to inform you that my company have withdrawn from the Conference being held with the Mine Managers' Association, but that I will be very happy to meet your representatives at a suitable date to be mutually agreed upon, in order to discuss the question of wages, etc."

For some reason that proposed conference did not come off, and on 7th December formal notice was given:—"The Combined Unions not having accepted our suggestions made a fortnight ago to discuss the question of wages, etc., I have been instructed by my Board to notify that: (1) Work at the mine will be stopped from Monday December 21st to Monday January 4th for the Christmas holidays; (2) The bonus granted for two years, dated the 1st January 1907, will cease on January 1st 1909, and that the present rate of wage, less the bonus, will remain in force."

I remark, in passing, that the General Manager treated the increase given as a bonus and not an increase of wages. Nothing however turns upon that. On 10th December the secretary representing the employés replied as follows:—"Dear Sir, Yours of the 6th inst. copy of notices posted on the mine enclosed to hand. The Combined Committee of the Trades Unions has given careful consideration to your letter and having regard to the developments that have taken place including the notices you have issued, they are of the opinion that no good purpose could be served by conferring with the management of the B.H.P. Company as it appears to them to have gone beyond the stage when such a conference would settle matters, so the Combined Committee have decided to await developments in the hope that we may yet be able to arrive at an adjustment satisfactory to all."

The reply was that the matter would be referred to the Board of Directors of the company in Melbourne. Then on 12th

December a letter was written by the representative of the employés to the General Manager (*vide* folio 443) as follows:— "Dear Sir: The organizations of employés at Broken Hill which have registered under the *Commonwealth Conciliation and Arbitration Act* 1904 have instructed me to write notifying you that such organizations regret extremely that the notices signed by you and bearing date 7th December 1908, referring to the reduction of wages on the re-opening of the mine at Broken Hill and of the works at Port Pirie respectively, after Christmas holidays, should have been posted or given at Broken Hill or Port Pirie respectively. Since writing to you on the 10th inst., the Combined Unions have agreed in conference with all the Mining Companies here saving only your company and Block 10 for a renewal for two years of the present wages agreement with certain small amendments which have been published and which are doubtless well known to you. I have now been instructed to notify you that we are quite prepared to extend the provisions of this agreement to you so as to include your company or in the alternative the said organizations have instructed me to express their willingness to confer with your company on the question of wages and terms of employment and they trust that your company will intimate that they are prepared to so confer. Failing this, no other course will be open to the organizations than to set in motion the procedure prescribed by the above Act" —that is, the *Commonwealth Conciliation and Arbitration Act*—"as in such event the said notices posted as above at Broken Hill and Port Pirie can only be regarded, first, as a hostile declaration in the refusal to confer upon certain differences as to wages and terms of employment; and secondly, as a threat to arbitrarily reduce wages immediately after the Christmas holidays without any *bonâ fide* attempt at a friendly adjustment. Trusting to hear at your earliest convenience that your company is agreeable to become a party to the agreement with the other companies as aforesaid, or else is willing to confer with the organizations on the matters in question."

I call attention particularly to the reference to the *Commonwealth Conciliation and Arbitration Act* and to the notices given at Broken Hill and Port Pirie respectively, and the intima-

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tion that unless some arrangement is come to the parties will be obliged to take advantage of "the above Act." "The above Act," as everyone knew, was an Act that had no application except to disputes extending beyond the limits of more than one State. Nothing in the nature of an agreement followed, but on 23rd December the company wrote as follows:—"Dear Sir: Under instructions from the General Manager I have to advise you that the Board adheres to its determination, notified on the 7th December 1908, that the increase of wages granted for two years dating from 1st January 1907 will cease on 1st January 1909, and that the present rate of wages less the increase will remain in force. The Board will co-operate with the Combined Unions or the Amalgamated Miners' Association in bringing the dispute as to wages before the Federal Court of Conciliation and Arbitration, and will raise no question as to its jurisdiction." And they offered in the meantime to pay the reduced rates, and pay any larger rate under the award. Notice was published simultaneously at Port Pirie, the only difference being that in that the company did not say that they would raise no question as to jurisdiction. That is what happened at Broken Hill. Before the publication of the notice at Port Pirie this happened,—a notice was given on 7th December that the old rate of wages would be paid after 1st January. On 7th December a representative of the Port Pirie employés wrote to the General Manager of the company saying they were prepared to meet the company's representatives in conference. They met accordingly on 15th and 16th December, and various accounts are given of what took place then. Amongst other things discussed there was an application that a system called the "six shifts system" should be adopted. I shall have to refer to that later. It is sufficient now to mention it. Nothing came of that. Mr. Delprat in his evidence said that, after they had asked him for increased wages all round and so on, and when they were half through the list, he stopped them and said "Look here, boys, it is no use talking about an increase, how are we going to carry on the job? I want to see if we can scheme in some way to carry on the work." Nothing came of that. I have said that on 23rd December a notice was published in the terms stated. It is apparent from that

correspondence that at that time the matter was treated on both sides as a matter within the cognizance of the Commonwealth Court of Conciliation and Arbitration, which could only be, if in fact there was a dispute extending beyond the limits of one State. And, as I have also said, on 29th December proceedings were instituted, and for some time after those proceedings were instituted both parties acted on the assumption of the existence of a dispute of which the Court could have cognizance, although that would not be sufficient to estop the company from afterwards taking the objection that the Court had no jurisdiction. Yet it is material evidence on the two questions of fact which I have already mentioned, whether there was concerted action before the institution of proceedings, and whether the company were aware there was such concerted action. I think that, although there is no express evidence of a formal demand having been made by one person on behalf of both, or by one organisation on behalf of both, yet the proper inference to be drawn, the almost necessary inference, is that there was a "dispute extending beyond the limits of any one State." I think, therefore, that that objection fails.

The next objection to the jurisdiction of the Court is that before the hearing the relationship of employer and employé between the employés and the company had come to an end, and that therefore the dispute could no longer be called an industrial dispute. *Colliery Employés Federation of the Northern District, N.S.W.* v. *Brown* (1) in this Court was referred to, in which the Court held that when such a state of things existed the Court had no jurisdiction to go on and determine the matter. The decision in that case depended upon the facts, as must every decision on a similar point. The facts of the present case are these:—After 31st December none of the men worked. They had intimated that they would not. The question, then, is whether the relationship of employer and employés had ceased, using those words in the sense in which they are used in the Act, and having regard to the provisions of the Constitution. The subject matter of the legislation is industrial disputes. Ordinarily in industries the men are not bound for any long period of

(1) 3 C.L.R., 255.

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service, the masters are not bound to employ the men for any particular period, nor are the men bound to continue to work for any particular period. Very often the men are paid wages by the day or by the week. But, although the men who are employed for the moment are not actually bound to come to work the next day, still in the ordinary acceptation of the terms the relation of employer and employé is understood to continue to exist. When there is a strike the relation has, in one sense, ceased. The employés have gone out of employment and have refused to work. But in another sense in which the terms may be understood they were the very class of persons with whom the legislature was dealing when it made provision for the prevention and settlement of industrial disputes. I think that some light may be thrown on the matter by the application of the principle which is applied in a somewhat analogous case, where the question is whether, in an ordinary case of contract between two persons, either party is entitled to treat the contract as repudiated by the other, so that obligations under the contract no longer exist. The last case on that subject is one decided in December last: *General Billposting Co.* v. *Atkinson* (1). Dealing with that subject Lord *Collins* said, and the other learned Judges concurred, that in such a case "the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." I think in determining under this Act whether the relationship of employer and employé is determined, the test is this:—Did the acts and conduct of the parties evince an intention that the relationship between them should come to an end? If that is the question there is only one possible answer. All the proceedings since have been on the assumption that both parties were anxious that their relation should not come to an end. Therefore, interpreting the words "employer" and "employé" in the sense in which I think that they were used by the legislature, I think that the answer to the question is that the relation did not come to an end. The objections to the general jurisdiction of the Court, therefore, in my opinion, fail.

The next question is whether the Court exceeded its jurisdiction.

(1) (1909) A.C., 118, at p. 122.

It is alleged to have exceeded it in two respects; first, in making an award to prohibit the extension of what is called the "contract system"; and secondly, in making an order in respect of what has been spoken of as the "six shifts" system. This question of jurisdiction arises under sec. 19 of the Act, which provides that "The Court shall have cognizance of the following industrial disputes: . . . (*b*) All industrial disputes which are submitted to the Court by an organization, by plaint, in the prescribed manner" and sec. 38 which defines the powers of the Court, and limits it to industrial disputes of which the Court has cognizance. This then is a condition of jurisdiction; the dispute must not only exist but must be submitted to the Court. It is said that that must be done by plaint in the prescribed manner. I attach little weight to those words, having regard to sec. 25, which provides that the Court is to act in the determination of industrial disputes according to the substantial merits of the case, without regard to technicalities and legal forms; and a provision of sec. 38, par. (q.), gives power to "amend or waive any error defect or irregularity whether in substance or in form." The substance of the matter is, in my opinion, that the organization must deliberately submit for the determination of the Court an existing dispute which it desires to have settled, and the formal proceedings must identify the dispute—if there are two disputes and only one submitted—then the jurisdiction of the Court is limited to that one. But another may be afterwards brought in, whether by amendment or by supplemental plaint. But it must be submitted. I take that as merely an instance of the general rule of fair play that a man should be informed of the charge he has to meet before he is condemned. I mean that it must be submitted in some formal manner, deliberately submitted to the Court.

I now proceed to the facts relating to these two subjects. The first is the contract system, which is simpler than the other, and I will deal with it first. The learned President by clause 6 of his award directed that no contract shall be set by the company except as to work for which contracts were usually set by the company since 11th December 1906. Now the original plaint asked that the terms of the Broken Hill agreement with the

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other companies should be applied to the Broken Hill Proprietary Co. Under that agreement it was stipulated by clause 5 that "in setting contracts for breaking ore underground the representatives of the company and the contractors shall exercise their very best judgment so as to provide that each contractor shall earn 12/- per shift of 8 hours in lieu of 11/- per shift of 8 hours as heretofore." There was no mention made in that agreement or in the plaint of any other kind of contract work, excepting that relating to breaking ore underground. It appears that a great deal of other work was done on the contract system at Broken Hill and Port Pirie as to which no question had ever been raised between the employers and employés. The plaint, as I said, was allowed to be amended on 15th February, but the amendments made no difference in this respect; the plaint continued to ask that effect be given to the terms of that agreement. But the learned President asserted on that same 15th February a larger jurisdiction, which is the one now in question. In dealing with the application for amendment he said:—"You will remember that I have only powers in dealing with the dispute to which you referred in your first claim. I have full power to settle the dispute on such terms as I think fit. I can bring in these things in my own way"; and, again, he said:—"It must be the dispute referred to in the plaint. I have come to the conclusion that it is my duty to strike out and refuse the amendment from the words 'and the said amendment.' The change will be made by striking out claim 2 at the end. Mr. *Kelynack* will understand that, rightly or wrongly, I hold myself free to make any order which will be most expedient for settling the dispute."

Later on the President said:—"I cannot go beyond the dispute as it originally was, but in settling the dispute I have power to do anything in pursuance of the Act that may settle the dispute."

I cannot assent to that assertion of power in those terms. Sec. 38, par. (*u*), of the Act authorizes the Court to give all such directions and do all such things as it deems necessary or expedient in the premises. I apprehend that those words empower the President to deal with all matters incidental and ancillary, provided they are within the ambit of the dispute submitted to him. But the Court cannot of its own motion give directions in a matter not substan-

tially involved in or connected with the disputes submitted to it. In the case of the *Master Retailers' Association of N.S.W.* v. *Shop Assistants Union of N.S.W.* (1), dealt with by the New South Wales Court of Conciliation and Arbitration, this Court said:— "The object of the Act therefore is to establish a new tribunal called a Court of Arbitration, for the hearing and determination of industrial disputes in matters referred to it. It is not to constitute a board of trade, or a municipal body with power to make by-laws to regulate trade, but a Court of Arbitration, for hearing and determining industrial disputes in matters referred to it." Nor is the Court a subordinate legislature. For the reasons I have given this part of the award was in excess of jurisdiction.

Another point was taken in respect to clause 6 of the award. It was said that, construed literally, that clause applied to all sorts of contracts, and prohibited the company from making any contracts at all with anybody or for anything. It was not contended that it would be valid, if it did go so far as that. It was argued, on the other hand, that it really referred to piece work, piece work being a well known form of remuneration in industries in which the relationship of employers and employés nevertheless exists. From that point of view it is said that there was no objection to it. The award does contain a direction in the terms of the agreement made with the Broken Hill men, which I have already read, as to breaking ore underground, and no objection has been taken to it. I express no opinion whether there is anything in the objection so taken, though I certainly think that the power of the Court does extend to piece work.

"The six shift" question is rather more difficult because the facts are not quite so simple. It arises in this way—The award directs (cl. 1) that 48 hours per week shall constitute a full week's work, and by cl. 3, that overtime shall be paid for at the rate of time and a quarter "including all time of work on the seventh day in any week." Those terms are perfectly intelligible. Work at Broken Hill is carried on for six days a week only, with one or two exceptions; but at Port Pirie, where the operations of smelting and the furnaces require to be kept continually going, the

(1) 2 C.L.R., 94, at p. 107.

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work is carried on continuously for seven days in the week. Applying those two clauses to Port Pirie, where continuous work is carried on, the direction amounts to this, that a man having done six shifts of eight hours might say "I have done my full week's work," and further that for any work done on the seventh day in the week he would be entitled to overtime pay. I have already mentioned incidentally that the question of six shifts a week was discussed at the conference at Port Pirie on 15th and 16th December. The witness Edwards, who was spokesman of the men at that conference, at folio 534, said:— "Q. When you were asked about the six shifts did Mr. Delprat promise to arrange for those six shifts? A. Mr. Delprat's words were that if it was possible to show him that it could be done by working six shifts a week he would be only too pleased to do it." There the matter seems to have ended, because the conference went off on another point. The first question is whether that was a dispute at all, or whether the matter was one which had not yet passed the stage of friendly negotiation. I will assume that it was a dispute. But the original plaint did not include it as part of the dispute submitted, unless indeed it can be read into it by what I might call a wresting of the language. On 15th February the Court, however, was formally asked to include that claim as one of the matters to be submitted for decision. Several things were asked to be added, one of which—taking the most favourable meaning for the claimants, and paying no attention to the form of the language—was that no employé shall be required to work (at Port Pirie) more than six shifts per week of eight hours per shift. The learned President said that he thought it would not be fair to the company to allow the claim to be so. He said that the evidence had been going on for days, that witnesses might have been cross-examined about it, and he refused to allow an amendment of the claim so as to include it. There was, therefore, a determination by the Court that this claim should not be treated as part of the dispute for decision. That was a decision of the Court, that it was not part of the dispute, and the parties acted on that assumption. I think, then, it would be unfair to allow it to be afterwards treated as being part of the dispute for the

purposes of decision. It was, however, contended that it did come within the words of the amended plaint as literally construed, that is to say, that the words are capable of bearing that meaning. The argument was put in this way; the amended claim (though the amendment was not made till a fortnight after leave had been given to make it) said that what the Port Pirie men had asked was that the then rate of wages and conditions of employment maintained at Port Pirie should be continued, and that the company had refused. It then asked that the company should pay to its employés at Broken Hill and Port Pirie wages at the rates and on the conditions contained in the agreement already referred to. As I have already pointed out, that agreement referred only to Broken Hill, but it did contain a stipulation that 48 hours should be a full week's work, which is inconsistent with working seven shifts at Port Pirie. It was argued that there was, therefore, a claim that six shifts only per week should be allowed at Port Pirie. But as I previously stated, that claim was made in a context relating only to Broken Hill where work is only carried on six days a week. It would be a strange perversion of those words to put them in an entirely different context and then apply them to Port Pirie in a sense which would include a claim that there should be only six shifts a week in the smelting operations at Port Pirie, a sense which was quite contrary to the understanding of the parties when the claim was made, as was shown by the formal application by the complainants to be allowed to make the claim in express terms, and the refusal of the Court to allow them to do so. I think, therefore, that the real dispute at Port Pirie was only as to existing conditions being continued. The result is that this clause stands on the same footing as the clause dealing with the contract system, and to that extent the award, in my opinion, is beyond the jurisdiction of the Court. I think that the rule should be made absolute for a prohibition restraining further proceedings on the award—

First: In so far as the award purports to direct that 48 hours per week shall constitute a full week's work with respect to any work at Port Pirie other than work as to which 48 hours per week was immediately before 31st

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December 1908 recognized and treated as constituting a full week's work:

Second: In so far as the award purports to direct that overtime shall be paid for at a higher rate in respect of any work at Port Pirie which was not immediately before 31st December 1908 recognized and treated as overtime work:

Third: In so far as the award directs that no contracts shall be set by the company except as to work for which contracts have been usually set by the company since 11th December 1906.

The net result is that the complainants have obtained all they came into Court to ask for, and no more.

O'CONNOR J. The grounds upon which the Broken Hill Company have relied in support of their application for a prohibition naturally divide themselves into two classes; the first three are objections to the jurisdiction of the Court to entertain the claim. The others are objections that the Court has in certain particulars exceeded its jurisdiction in the method of settlement. In regard to the former class an appeal has been made to the discretion of this Court that under the circumstances it should not permit the Broken Hill Co. to take the objections because of its acquiescence in the jurisdiction during the trial. Our attention was called to portions of the evidence and to the observations of the learned President on many occasions during the trial in support of that view. I do not think it necessary to determine whether the consent, which the company by acquiescence undoubtedly gave in the first instance to the jurisdiction of the Court, was or was not at any time withdrawn. The evidence seems to me to be susceptible of either interpretation. Undoubtedly consent was in the first instance given. After that it was to a certain extent withdrawn. Whether the withdrawal was only with regard to the matters particularly mentioned or whether it was a general withdrawal it is difficult on the evidence to decide, but I find myself relieved from determining that question by reason of other considerations. The principle

laid down in *The Mayor of London* v. *Cox* (1), in the judgment of Mr. Justice *Willes*, is well established that a writ of prohibition though of right is not of course, and that the Court may therefore consider the conduct of the parties, and may be justified in refusing to give the relief in a case where a party has by his own action forfeited his right to claim it. But in considering the exercise of jurisdiction by the tribunal constituted under the *Federal Arbitration Act*, it appears to me that a view may have to be dealt with which cannot arise in the ordinary litigation between subject and subject. This award affects directly over 4,000 men; it may affect indirectly the whole business of mining at Broken Hill if it should be made a common rule under the provisions of the Act. The decision of this Court respecting the rights of the parties now before it will have no binding effect in any proceedings to enforce the award against other individuals or companies. Having regard to the object of the Act, to bring about industrial peace, it seems to me that the Court would not be fully discharging its duty to the large section of the public directly and indirectly interested if it now declined to express its opinion on these objections on the ground that the applicants had acted in such a way as to acquiesce in the jurisdiction. I agree with my learned brother the Chief Justice that the first ground must be taken as being merely an elaboration of one element of the second, namely, that the dispute did not extend beyond the limits of any one State. The third ground, which I shall deal with first in order to dispose of it at once, is substantially that at the time when the proceedings were entered upon the relation of employer and employé between the Broken Hill Proprietary Company and the claimant union had ceased to exist. It is purely a question of fact whether the relationship of employer and employé had or had not ceased. No doubt the men had stopped work, but whether it was intended that the stopping of work should operate as a cessation of the relations of employer and employed is a matter to be determined by inference from the conduct of the parties. Without repeating what the learned Chief Justice has said on this part of the case I have no doubt at all that the conduct of both parties all through

(1) L.R. 2 H.L., 239, at p. 283.

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showed that it was intended that the men should remain employés although they had temporarily stopped work. The whole course of the proceedings on the hearing before the Arbitration Court was conducted on the footing that when the Court had determined the dispute work should be resumed under the old relation of employer and employé. I therefore agree with the view of my learned brother the Chief Justice that that objection cannot be sustained.

I come now to the ground involving the important question whether this was a dispute extending beyond the limits of one State. This Court has laid down in the *Jumbunna Case* (1) some general principles for determining what does or does not amount to a dispute extending beyond the limits of any one State. Neither in that nor in any other case has the Court ever attempted the unnecessary and almost impossible task of laying down an exhaustive definition of what amounts to a dispute extending beyond the limits of any one State. But it has laid down certain general principles for the purpose of indicating the class of facts which would be material in determining whether an industrial dispute extended beyond the limits of one State. I shall quote the following passage of my judgment in that case dealing generally with the essentials which go towards constituting a dispute within the meaning of the Constitution and of the Act (2):—"If all the workers throughout the State in the same trade unite in the making and endeavouring to enforce the same demand from their respective employers, there is an industrial dispute involving the whole trade throughout the State. If the workers so united obtain the co-operation of their fellow-workers in the same trade in another State in such a way that the combined workers in the trade in both States take concerted action against their respective employers in both States for the making and enforcing of the same demands, there is an industrial dispute extending beyond the limits of one State." Applying that principle to the industrial dispute with which we are now dealing, there are certain facts which it is necessary to take into consideration. In the first place, it is clear that the company's business, though carried

(1) 6 C.L.R., 309.

(2) 6 C.L.R., 309, at p. 352.

on in two States, is one industry. From the operation of getting ore out of the mine until the ore is turned into an ingot at Port Pirie, it is one business, carried on by the one company, managed by the same Manager, in every respect treated as one undertaking. In the second place, it is plain that the wages at Port Pirie and the wages at Broken Hill have followed proportionately the same rise and fall. An important illustration of this occurred at the beginning of the agreement of 1906. The miners at Broken Hill had been up to that time working under a New South Wales industrial award. On the expiration of the award there was a conference, at which the agreement of 1906, with an increase in wages, was made. Thereupon the increase given at Broken Hill was extended to Port Pirie; all these employés being thus treated as employés of the same firm, carrying out different processes of the same business. When the Broken Hill Company determined to bring to an end the increase in wages thus granted they posted a notice to that effect at both places, intimating to representatives of the workmen that the increase should cease after 31st December in the year 1908, and that notice was given to the secretary of the one union. There was no separate notice given to the men at Port Pirie through any special representative of theirs; the only notice given to a representative of the Port Pirie men was that given to the secretary of the general organization which then represented the men working in the company's employment in both places. There is no doubt that the men in both places accepted the position that the alteration in their conditions was intended to operate proportionately in both places. It is true that conferences between the men and the company were held separately at Broken Hill and Port Pirie. But these were conferences in respect of different branches of the same business, and they were naturally held separately, although the different branches of the claims were all included in the same demand. It was suggested during the argument that it was necessary that the demands should be presented separately by representatives of each branch before there could be that concerted action which the Act requires. In my opinion that was not necessary. The Port Pirie men were members of the general Union in October

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1908. From that date, therefore, everything done by the Union was done in the name of the Port Pirie men as well as in that of the men at Broken Hill. In my opinion no more was necessary than that these demands should be made by one authority on behalf of both these groups of employés making common cause in that demand. Irrespective of antecedent controversies, it may be taken that the joint demand was made on the 12th December. On that date the secretary of the combined Unions, in a letter to the Manager of the Broken Hill Proprietary Company, uses these words:—"The organizations of employés at Broken Hill which have registered under the *Commonwealth Conciliation and Arbitration Act* 1904, have instructed me to write notifying you that such organizations regret exceedingly that the notices signed by you and bearing date December 7th 1908, referring to the reduction of wages on the re-opening of the mine at Broken Hill and of the works at Port Pirie respectively, after the Christmas holidays, should have been posted or given at Broken Hill and Port Pirie respectively. Since writing to you on the 10th instant the combined Unions have agreed in conference with all the mining companies here saving only your company and Block 10 for a renewal for two years of the present wages agreement with certain small amendments which have been published and which are doubtless well known to you. I have now been instructed to notify you that we are quite prepared to extend the provisions of this agreement to you so as to include your company, or in the alternative the said organizations have instructed me to express their willingness to confer with your company on the question of wages and terms of employment, and they trust that your company will intimate that they are prepared to so confer." Leaving out matter immaterial to the present contention, the letter goes on:—"Failing this no other course will be open to the organization than to set in motion the procedure prescribed by the above Act." That is the Act the basis of whose jurisdiction is an industrial dispute extending beyond the limits of one State—an Act which could have no application unless the demand by the Port Pirie men and Broken Hill men was one demand being enforced by this Union of which they were both members. That letter was answered

by the company's Manager, Mr. Horwood, who replies on 23rd December 1908. In that reply it is clear that he recognizes the letter of 12th December as a demand for better conditions of wages and employment, not only on behalf of the Broken Hill men only, but on behalf of the Port Pirie men also. I see no escape from the conclusion that the terms of that letter are such as to indicate the existence of a dispute extending beyond the limits of one State, and to bring that feature of it prominently and directly before the notice of the Broken Hill Proprietary Company. That being so, I am of opinion that the industrial dispute under consideration was within the jurisdiction of the Federal Arbitration Court.

I come now to the fourth ground, namely, that the Court has in its award exceeded its jurisdiction in certain respects. I propose first to consider some general principles applicable to the objections to clauses 1, 3, and 6 of the award. Clauses 1 and 3 are those relating to the changes of shifts from 7 a week to 6 a week. Clause 6 restricts the operation of the contract system in certain particulars. The objection as to both these matters is that the learned Judge has acted without jurisdiction. Now, it is clear that the *Commonwealth Arbitration Act* intended to create a Court which within the limits of its jurisdiction should be absolutely independent of all control by any other Court. No prohibition or *certiorari* will go to it while it keeps itself within those limits. While acting within its jurisdiction, it is not bound by forms or technicalities. It may make its own rules, it may admit evidence in any way it deems fair, it may take any step it thinks fit for the purpose of informing itself as to the subject brought before it for inquiry; but the fundamental condition under which it exercises all these powers is that it shall confine itself to the matters which are by the Act handed over to its jurisdiction. There are three conditions requisite to give jurisdiction. The dispute must be an industrial dispute, and it must extend beyond the limits of one State. It must be between employer and employé, in other words it must be really an industrial dispute. The third condition is that it shall be duly brought under the cognizance of the Court. That is, after all, no more than a recognition of one

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of the first principles of judicial determination, that no person should be called upon to answer a claim unless it is put in such a form as will give him notice of what he has to answer. Sec. 19, which makes this condition of jurisdiction necessary, provides three ways in which the Court may have cognizance of a dispute. It may be brought before the Court by the Registrar who certifies it as proper to be dealt with in the public interest. It may be by a State industrial authority, or by the Governor in Council of a State in which there is no industrial authority, or it may be by the parties. The condition required in all these cases is, to my mind, substantially the same, that is to say, the general body of a dispute, if I may so describe it, must be brought before the Court in terms which, however general, however inartificial, are sufficiently definite to enable the Court to know what it is called upon to decide. The parties themselves can give the Court cognizance of an industrial dispute in one way only, that is, by submitting it by plaint in the prescribed manner. The prescribed manner may be altered by the Court whenever it chooses to make rules on the subject. But what the rules for the time being prescribe must be followed or the jurisdiction cannot attach. It was never intended, in my opinion, that the plaint should do anything more than generally describe the subject matter of the dispute of which the complainants wish to give the Court cognizance. It has been stated in this case by the learned President himself that he may make an award in regard to matters not claimed in the plaint if he awards them in settlement of claims which are duly made. In one sense that is true. Parties are not bound to claim any particular mode of relief. The dispute being before the Court the President may adopt any method he thinks fit of settling it, and so long as the award does nothing more than settle that dispute, although it may do so by means of a remedy not claimed, it is within his jurisdiction. But the Court cannot do indirectly what it is prohibited from doing directly, and it cannot, under the guise of applying a remedy to a dispute within its cognizance, make an order which will have the effect of determining a dispute which the parties have never brought before it. In other words, the learned President cannot by adopting a particular form of relief

give himself jurisdiction to decide a dispute which the parties have never submitted to him. Those are the general principles which it appears to me must be applied in dealing with this matter. I now turn to the plaint. As originally submitted it was in its terms exceedingly general. But an application was made to the learned President by the complainants for an amendment. It is difficult to say whether the original plaint did or did not include a claim in respect of altering the number of shifts at Port Pirie. But the application to amend distinctly asks leave to add a claim for the alteration of shifts at Port Pirie. The learned President considered and refused to allow the amendment. The result was that although the matter was touched on in the evidence there was no real inquiry into the best method of carrying out the claims made by the men for lessening the weekly number of shifts at Port Pirie. The learned President had, therefore, no opportunity of getting the material necessary to enable him to arrive at a conclusion inasmuch as that subject was not included in the plaint which alone gave him cognizance of the matters in dispute. Such being the plaint before the President he made his award as follows:—"First: Forty-eight hours per week shall constitute a full week's work." The effect of that direction, applied in that unrestricted way, to the work at Port Pirie is that, with regard to all the processes which must be carried on continuously for the whole seven days of the week, a man's week's work is done when he has worked six days, and there is no power to compel him to work on the seventh day. That is an entire alteration in the conditions of employment in existence at Broken Hill on 31st December 1908, and which the claimants by clause 6 said they wished to maintain. In connection with the same matters the third clause in the following words must also be considered:—"Overtime shall be paid for at the rate of time and a quarter, including all work on the seventh day in any week." Which shows that the learned President made six shifts a week, that is six days a week, a full week's work, overtime rates being payable in respect of the seventh day if the workman chose to work on that day. That is made abundantly plain by the following recital in the award:—"And the claimants having also undertaken on the 1st March

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1909 that if the award should provide for six shifts, each of eight hours, per man per week, at the smelters at Port Pirie aforesaid, they, the claimants, would furnish sufficient men for the work to meet the requirements of the respondents." That is the very claim which the learned President, in refusing the amendment asked for by the claimants, declined to allow them to bring within his cognizance. The learned President has apparently based this portion of the award on his authority to grant relief in respect of a claim which is within the cognizance of the Court. I cannot assent to that view of his jurisdiction. It apparently does not give any weight to those provisions of the Act which confer jurisdiction on the President only with regard to the dispute which the parties chose to submit to his cognizance. For these reasons that portion of the award is, in my opinion, beyond the jurisdiction of the Court as not being included in the plaint which gave the Court cognizance of the dispute. The other objection being as to the portion of the award restricting contracts stands upon exactly the same footing. It was not contended by Mr. *Arthur*, on behalf of the claimants, that this was ever part of the dispute. It was, indeed, never in dispute between the parties, and it was certainly not in the plaint. It is clear to my mind that the learned President could not, in settlement of the dispute which was before him, make an award restricting the contracts of the Broken Hill Company to the class of contracts which had been usually made by them at the time when the dispute arose. No doubt the object of the restriction was to prevent the direction as to wages being evaded by the letting of contracts at a rate which would result in lower rates of remuneration than that awarded. The powers conferred on the Court by sec. 38 would, I think, include the authority to prescribe safeguards against evading provisions of the award in reference to any matter included in the plaint, but they certainly cannot include the exercise of a power such as this, which has no relation to any question that had been brought before the learned President for his decision. As to that portion of the award, therefore, I agree that prohibition must go. Fortunately for the parties, it is quite possible to separate the good part of the award from the bad. The separation may well be carried

out by the form of order which has been considered by the parties on the suggestion of Mr. *Irvine*. If that form is adopted the general result will be this: With regard to all the substantial portions of the award which were in dispute, and which were brought before the Court, the award stands; with regard to those as to which the learned President assumed jurisdiction under his authority to grant relief, the award cannot stand. I therefore agree that as to those portions an order must be made for prohibition.

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Isaacs J. read the following judgment:—

If the learned President acted wholly within his jurisdiction this application should fail. In view of the express words of the Act there is no general appellate power over the decisions of the Commonwealth Court of Conciliation and Arbitration, and no power to interfere on any ground but want of jurisdiction. That Court, like every other tribunal acting within the ambit of its authority, may decide the matters entrusted to it rightly or wrongly, and either in fact or in law. And general appeal being excluded, the determination is final and conclusive, whether it seems right or wrong, just or unjust. If, however, in making this award the learned President has acted partly within or partly beyond his jurisdiction, if he has overstepped the boundary of his judicial domain, then, no matter how meritorious the decision may appear to be, it is the duty of this Court having regard to the nature of the case to grant a prohibition *quoad* the excess, according to long-established principles. See *per Brett* L.J. in *South Eastern Railway Commissioners* (1), citing older authorities. Lord *Lindley* said in *Free Church of Scotland* v. *Overtoun* (Ld.) (2): "The distinction between an erroneous decision by a body having jurisdiction to deal with a particular subject matter, and a decision by a body having no jurisdiction over the matter decided, is familiar to all lawyers, and must be steadily borne in mind in this case."

The validity of the whole award has been challenged by the company. The first three grounds of impeachment are matters of fact. I agree with the argument that matters of fact are

(1) 6 Q.B.D., 586, at p. 605. (2) (1904) A.C., 515, at p. 702.

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examinable by this Court upon an application like the present, where the existence of certain facts is necessary to give the Court jurisdiction to exercise the functions it has assumed; *Liverpool Gas Co.* v. *Everton* (1); *Colonial Bank of Australasia* v. *Willan* (2); *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (3).

The first question raised is as to whether the industry extended beyond the limits of any one State. Assuming (without here deciding) that it is necessary to jurisdiction that the industry in the two States should be identical, I am of opinion the condition is satisfied. For mingled reasons of necessity and convenience, the company obtains the metal in the shape of ore from its mine in one State as the first step in a continuous scheme, and after some intermediate processes there, completes its series of operations by finally separating the metallic zinc from the concentrates at its smelting works in another State.

The next question is whether the dispute extended beyond the limits of the one State. In the *Jumbunna Case* (4) I investigated the meaning of industrial dispute and need not repeat what I said. The employer in the present case was the same in both States; the industry the same, the employés were all members of the one organization; the practice long observed and recognized by all concerned was that the wages at Port Pirie regularly fluctuated with the wages at Broken Hill; the notifications reducing them at both places were simultaneous, and the reason for doing so in each case was the same, namely, the attitude of the combined unions, the letter of 12th December, from the secretary of the combined union to the company's manager was written in support of the employés at Broken Hill and Port Pirie alike; the company in its letters of 23rd December (Exhibits N. and L. 2) referred to "the dispute" (not "disputes"), and as one which it was willing to co-operate in bringing before the Federal Court of Concilation and Arbitration; and no indication whatever appears that either of the contending parties regarded the claims as unconnected.

It is true that no one said expressly that the respective

(1) L.R. 6 C.P., 414.
(2) L.R. 5 P.C., 417, at p. 443.
(3) 5 C.L.R., 33.
(4) 6 C.L.R., 309.

demands of the two places were not independent of one another, but merely different items of the one combined claim of the employés. But as was well known, they were not only engaged in the one business undertaking in the same industry, but also were recently united in the one trade organization for common purposes of which the matters in controversy were typical.

Taking all circumstances into consideration, I feel no doubt the proper inference is that the dispute was really one, and extended beyond the limits of one State.

The third question is answered by the fact that there never was any abandonment of the dispute or any real and final severance of the relations of employer and employé. On the contrary, the cessation of work was intended by the men, and understood and accepted by the employers as temporary only, not as an end, but as a means to an end, and merely a method of securing better terms for the very purpose of continuing in future the course of employment as before. The fourth objection denies that the question of hours and overtime was in the dispute with regard to Port Pirie. If hours were, then overtime necessarily was. The evidence of Renton and Delprat is sufficient to show that 6 shifts instead of 7 were demanded—in other words, 48 hours a week.

The same objection also denies that the dispute as to hours and overtime was submitted to the Court in the plaint. This depends on the construction to be given to sec. 19 of the Act. Parliament might have enacted that wherever the Court found an industrial dispute extending beyond the limits of any one State it should have power to settle it. But that unrestricted authority has not been given. The President has the power and the duty of endeavouring by mediation to prevent disputes and to settle them, whether they are judicially cognizable or not, but so long as they are not judicially cognizable he can go no further than friendly good offices will carry him. Immense compulsive powers are indeed conferred upon the Court, but only when its action is requested. Sec. 19 provides that the Court shall have cognizance of certain industrial disputes only namely :—

(1) All industrial disputes which are certified to the Court by

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the Registrar as proper to be dealt with by it in the public interest;

(2) All industrial disputes which are submitted to the Court by an organization, by plaint, in the prescribed manner; and

(3) All industrial disputes with which any State Industrial Authority, or the Governor in Council of a State in which there is no Industrial Authority, requests the Court to deal.

The present case falls under (*b*). Although the Port Pirie demand for 48 hours a week existed as a fact and was refused by the company, yet unless that particular element of dispute was also *submitted to the Court* (i.) by the organization, (ii.) by plaint, and (iii.) in the prescribed manner, these three requirements being as I read the section separate, it would not satisfy the conditions of sec. 19, and unless there is found elsewhere in the Act some relaxing provision, the question of 48 hours a week as an independent part of the dispute would be outside the purview of the Court. The Court is not allowed by the Act to intrude into a quarrel unless invited as required by the Statute. Nor can the parties by consent extend the jurisdiction conceded by Parliament. The claim for 48 hours, or 6 shifts per week, was submitted by the organization and in the prescribed manner, that is, by being filed with the Registrar or Deputy Registrar of the State (Rule 26). But was it submitted "by plaint" as required by the Act? It is argued that it was not, because in the body of the plaint it is not mentioned, and the dispute there referred to is confined to the maintenance of then existing conditions which did not include the claim for 48 hours a week at Port Pirie. It is answered on behalf of the employés that the relief claimed is couched in words large enough to cover the demand, and that is sufficient.

Now it is true that Rule 26 says the submission shall be "by plaint in Form No. 4 hereto," and when that Form is looked at, it prescribes a very clear method of stating the controversy for the information of the Court, and requires the organization to first briefly state the matters in dispute, and then to state its claim, the direction as to the latter being "here state in separate paragraphs numbered consecutively the substance of the award asked."

But while observance of the form of the plaint is important, for convenience of the Court and the parties, it is not essential to jurisdiction. The Act requires no special form of plaint. It sets itself entirely against technicalities and forms as insuperable obstacles. Section 25 directs the Court to determine disputes "without regard to technicalities or legal forms."

Sec. 38 (*g*) empowers it "to correct amend or waive any error defect or irregularity whether in substance or in form." And when it is remembered that sec. 27 forbids any party, except by consent or leave, being represented by counsel or solicitor, it is evident that legal precision is not expected, and so long as a particular item in the dispute is fairly contained in the plaint—not in any special part of it, because there is no more virtue in one part than in another—that is enough to satisfy the exigencies of sec. 19 (*b*) of the Act.

The Court would know and the opposite party would have to be prepared to meet the demand made, and if that demand had really been in dispute before the plaint filed or amended, the requirements of the Statute and natural justice would alike be satisfied. Applying the words of *Lindley* L.J. in *In re King & Co.'s Trade Mark* (1), what you want is to give your opponent notice of what you are going to do and what you want, and to give him an opportunity of showing cause why your application should not be entertained. That is all that is required in substance.

Now, in my opinion, the problem, and the only problem, on this part of the case is whether the last paragraph of the plaint —the relief paragraph—fairly conveys to the respondent company, who was required to answer, an intimation that the claimants were insisting on the 48 hours a week at Port Pirie. If it does, the Court had jurisdiction; if it does not, the Court had not jurisdiction.

Literally read, it is, I think, clearly susceptible of being so regarded; but it is also susceptible of being read otherwise. It is capable of being read, and perhaps most precisely, in this way —that the said respondent company (*a*) shall pay to its employés at and near Broken Hill aforesaid and at Port Pirie aforesaid,

(1) (1892) 2 Ch., 462, at p. 479.

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being members of the said organization, wages at the rates contained in the agreement, and (*b*) shall observe the conditions of employment contained in the agreement "A." That would cut out the 48 hours question from Port Pirie and leave no measure to ascertain overtime. And it may be read so as to make all the words down to "organization" apply to both wages and conditions, though perhaps not so easily. It is, therefore, ambiguous taken alone. Reading it with the antecedent part of the document, the more limited meaning is favoured.

What, however, has decided my mind most of all is the all important fact that the learned President on the objection of the company absolutely refused to allow the 48 hours question to be submitted by the amended plaint as an independent element of the dispute, he expressly excluded it as such, and there was a clear understanding by all parties that it was so excluded, and henceforth in the proceedings the plaint was treated as so excluding it, and having regard to the acts of original ambiguity, this circumstance compels me to construe the plaint as it was construed in the Arbitration Court, that is, as not containing anywhere the question of 48 hours a week as part of the dispute. The respondent company, therefore, were never called upon to meet it on its merits as a separate element, and any decision treating it as a separate element and standing on its own basis would be made not only without calling upon the company for its answer, but after actually throwing it off its guard. The Privy Council recently (1906) in *Laliteswar Singh* v. *Mohunt Das* (1) approved of the doctrine that "it is an elementary principle which is binding on all persons who exercise judicial or quasi-judicial powers, that an order should not be made against a man's interest without there being given to him an opportunity of being heard."

The company might well have thought, as it apparently did think, that apart from being a distinct item in the dispute, it could not be dealt with at all by the learned President.

I agree that, having regard to the fact that the highest amount of wages claimed on behalf of Port Pirie employés has been awarded, the number of hours per week is not capable in this

(1) L.R. 33 Ind. App., 138.

case of being drawn in under the "necessary or expedient" clause. If it were so capable, the opinion of the learned President as to the actual necessity or expediency would be decisive.

But fixing the number of hours per week cannot in any way prevent evasion of the fixed regulation amount of wages, and, therefore, I concur in the opinion that a prohibition *quoad* as proposed should be granted. The last question, clause 6 of the award, is still more clearly beyond the jurisdiction of the Court. No one claimed that it ever was part of the dispute, it was never inserted directly or indirectly in the plaint, the learned President refused to permit it being raised independently, and I can see no possible necessity or expediency in relation to the settlement of the actual dispute submitted, that any contract work should be prohibited altogether. Had a minimum wage been fixed for contract work, a more difficult question would have arisen, as to which I give no opinion, but this would, I think, at all events, have been the farthest possible limits of necessity or expediency to preserve the rates otherwise declared.

The Court of Conciliation and Arbitration has the most unrestricted power to settle any dispute of which it has cognizance, but not to travel outside it into a region not disputed, nor submitted, and not having any possible connection of necessity or expediency to effectuate the settlement of the dispute actually existing and submitted.

I would only add that it is not necessary to decide whether on the evidence of this case the men working on contract were substantially employés for the purposes of the Act. I, therefore, agree in the judgment proposed.

*Prohibition granted from proceeding to enforce the award*: (1) *In so far as the award purports to direct that* 48 *hours a week shall constitute a full week's work with respect to any work at Port Pirie other than work as to which* 48 *hours per week was immediately before* 31*st December* 1908 *recognized and treated as constituting a full week's work.* (2) *In so far as the award purports to direct*

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*that overtime shall be paid for at a higher rate in respect of any work at Port Pirie which was not immediately before* 31*st December* 1908 *recognized and treated as overtime work.* (3) *In so far as the award directs that no contracts shall be set by the company except as to work for which contracts have been usually set by the company since* 11*th December* 1906. *No order as to costs.*

Solicitors, for Broken Hill Proprietary Co. Ltd., *Minter, Simpson & Co.*

Solicitors, for Amalgamated Miners Association, *Anthony Hall* by *A. W. E. Weaver.*

Solicitor, for Arbitration Court and Commonwealth, *Commonwealth Crown Solicitor.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

## IN RE THE APPLICATION OF THE AUSTRALIAN MILK FERMENT PROPRIETARY FOR A TRADE MARK.

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MELBOURNE, *June* 16, 17.

ISAACS J.

*Trade Mark—Application—Opponent—Security for costs—Jurisdiction of High Court—Matter pending before Registrar—Residence out of jurisdiction—Trade Marks Act* 1905 (*No.* 20 *of* 1905), *sec.* 46.

The jurisdiction given respectively to the Registrar, the Law Officer and the Court by sec. 46 of the *Trade Marks Act* 1905 to order a party to give security for costs is referrable only to matters pending before the Registrar, the Law Officer and the Court respectively.