Adpt Aust Boot Trade Employees Federation v Whybrow & Co (1910) 10 CLR 266

[HIGH COURT OF AUSTRALIA.]

THE FEDERATED SAW MILL, TIMBER YARD, AND GENERAL WOODWORKERS EMPLOYES' ASSOCIATION OF AUSTRALASIA . . . . . } CLAIMANTS;

AND

JAMES MOORE AND SONS PROPRIETARY LIMITED AND OTHERS . . . . } RESPONDENTS.

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MELBOURNE, *June* 8, 9, 10, 11, 14, 15, 16, 17, 18, 25.

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

Commonwealth Court of Conciliation and Arbitration—Jurisdiction—Industrial dispute extending beyond the limits of one State—Demand by employés—Necessity for preconcert among employers—Demand for higher wages in one State than in others—Industry subdivided into branches—Interference with State law—Award of State Arbitration Court—Industrial agreement under State law—Determination of Wages Board—Adding parties—Commonwealth of Australia Constitution Act (63 & 64 *Vict. c.* 12), *Cl. V.*; *The Constitution, secs.* 51 (*xxxv.*), 99, 109—*Commonwealth Conciliation and Arbitration Act* 1904 (*No.* 13 *of* 1904), *secs.* 4, 19, 30, 38 (*p*).

Assuming the existence of all other circumstances which constitute an industrial dispute extending beyond the limits of one State, including a demand by combined and organized employés on their employers, want of preconcert on the part of the employers in refusing the demand does not either under sec. 51 (xxxv.) of the Constitution or under the *Commonwealth Conciliation and Arbitration Act* 1904 deprive the Commonwealth Court of Conciliation and Arbitration of jurisdiction to make an award on a plaint brought before the Court by the organization of employés.

So *held* by *O'Connor*, *Isaacs* and *Higgins* JJ.

By *Griffith* C.J.—The absence of such preconcert may be evidence to negative the existence of a dispute within the meaning of sec. 51 (xxxv.) of the Constitution, but, on the assumption mentioned, the mere want of such preconcert on the part of the employers does not, under the *Commonwealth Conciliation and Arbitration Act* 1904, deprive the Commonwealth Court of such jurisdiction.

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Where part of the demand made by an organization of employés is that the wages in one State shall be higher than those in the other States the Commonwealth Court of Conciliation and Arbitration may, nevertheless, make an enforceable award in respect of the employés in that State.

If an industry has several different and well recognized branches, the Commonwealth Court of Conciliation and Arbitration may make an award enforceable in all the States to which the particular dispute extends as to wages and conditions of labour in that industry, notwithstanding that, at the time the dispute is brought before the Court,

(1) In one or more States no member of the organization of employés which is bringing the plaint is actually employed in one of the branches of the industry, or

(2) In one of the States one of the branches of the industry is not carried on, or

(3) One of the employers, who carries on all the branches in one State and only one branch in another State, is not in the former State employing any members of the organization in one of the branches, or

(4) An employer carrying on all the branches in one State is not in one branch employing any members of the organization.

So *held* by *Isaacs* and *Higgins* JJ.

So *held*, also, by *Griffith* C.J., with the provisoes that the branches of the industry are such that a question which affects one branch affects the others in every State concerned, so that the industrial dispute is really a single dispute, and, as to (3), that the businesses carried on by the employer in both States constitute in fact one business.

The Commonwealth Court of Conciliation and Arbitration has power to make an enforceable award inconsistent with—(1) an award of a State Arbitration Court, (2) an industrial agreement made and registered pursuant to a State Statute, or (3) an industrial agreement enforceable under State law; but (*Isaacs* and *Higgins* JJ. dissenting) it has no power to make an enforceable award which is inconsistent with a determination of a Wages Board empowered by a State Statute to fix a minimum rate of wages.

A company which, after the filing of a plaint, purchased the business of one of the respondents to the plaint, *held* to be rightly added as a party under sec. 38 (*p*) of the *Commonwealth Conciliation and Arbitration Act* 1904.

Requisites of an industrial dispute extending beyond the limits of one State considered.

CASE stated by the President of the Commonwealth Court of Conciliation and Arbitration.

On the hearing of the plaint in the above Court, wherein the Federated Saw Mill, Timber Yard, and General Woodworkers Employés Association of Australasia were claimants, and James Moore & Sons Proprietary Ltd., Millar's Karri & Jarrah Co. (1902) Ltd., E. A. Robinson, Benjamin J. Fenton, Globe Timber Mills Co., W. H. Burford & Sons Ltd., Lion Timber Mills, James Campbell & Sons Ltd., Bunning Bros. Ltd., Davis Bros. & Burgess Ltd., Saxton & Binns Ltd., Goodlet & Smith Ltd., and the Queensland Pine Co. Ltd., were respondents, the President stated the following case for the opinion of the High Court :—

"A plaint has been submitted to the Commonwealth Court of Conciliation and Arbitration in the prescribed manner (section 19 (*b*)), by the claimant organization. The claimants hold a certificate from the Registrar under section 22 (*c*). Inasmuch as the defences raised divers objections to the jurisdiction of the Court, as well as objections based on State awards, agreements, determination of Wages Boards, &c., I decided to hear all the evidence of both sides bearing on these objections before hearing evidence bearing on the wages and conditions of labour demanded. In the course of the proceedings, the following questions—which, in my opinion, are questions of law—have arisen ; and I submit them for the opinion of the High Court :—

"1. The claimants are an association of employés, registered as an organization under section 55, and said to have about 6,500 members in all of the States of the Commonwealth (except, perhaps, Tasmania). The dispute is with employers carrying on business in the several States respectively, and employing members of the organization. With one exception, which is immaterial for the purpose of the present question, the respondents in each State have no business or other connection with the respondents in the other States, and have refused the demands of the organization independently and without preconcert of any kind with the employers in the other States.

Does the dispute extend beyond the limits of any one State—

(*a*) Within the meaning of section 51 (xxxv.) of the Constitution ?

(*b*) Within the meaning of section 4 of the *Commonwealth Conciliation and Arbitration Act* 1904 ?

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"2. Under the schedule of wages submitted by the claimants to the respondents, and rejected, an additional 15 per cent. is claimed for the employés in Western Australia, in these words—'West Australia—15 per cent. to be added on above rates for extra cost of living.'

Has this Court power to make any enforceable award so far as regards the Western Australian employés?

"3. The two respondents who belong to Western Australia, have bush mills for cutting up logs, and have also timber yards in towns, of the usual character. Several of the trades or occupations referred to in the schedule of wages—such as the trade of glaziers—are not carried on at the bush mills; and no member of the claimant organization is employed by either of the said respondents in their timber yards; but one of the said respondents has a timber yard in Melbourne and employs there members of the organization.

The respondents who belong to South Australia have no such bush mills, but they have timber yards; and several of the trades or occupations referred to in the schedule of wages—such as the occupation of fellers or of spotters—are not carried on at timber yards.

The schedule of wages demanded applies both to employés in bush mills and to employés in timber yards.

One of the New South Wales respondents has a bush mill as well as a timber yard; one of the Victorian respondents has a bush mill but no timber yard; the others have timber yards.

The Queensland respondents have both timber yards and bush mills.

Has this Court power to make any enforceable award with respect to wages and conditions of labour in Western Australia as to those trades or occupations in which no member of the claimant organization is employed?

Has the Court power to make any enforceable award with respect to wages and conditions of labour in South Australia as to those trades and occupations which are not carried on by any of the South Australian respondents?

"4. The exception referred to in para. 1 is that of the Millar's Karri and Jarrah Co. (1902) Ltd. This company carries on bush

mills and timber yards in Western Australia; but it has not been shown that any member of the claimant organization is employed by the company in its timber yards. The company has in Melbourne a timber yard to which it sends timber the product of its bush mills in Western Australia; the Melbourne business is under the control of the local board in Western Australia; and the company employs in its said timber yard members of the organization. At the filing of the plaint, the company carried on in Queensland bush mills and a timber yard, but it has not been shown that it sends there timber of the product of its bush mills in Western Australia, or that any member of the claimant organization is employed in the bush mills in Queensland.

In the case of the said company does the dispute extend beyond the limits of any one State—

(*a*) Within the meaning of section 51 (xxxv.) of the Constitution?

(*b*) Within the meaning of section 4 of the Act?

(*c*) Has this Court power to make an award applicable to this company, and to what extent?

"5. There is an award of the late New South Wales Arbitration Court, made on 12th May 1908, coming into operation on 16th June 1908, and expiring on 16th June 1911, and made between the New South Wales branch of the claimant organization and certain of the New South Wales respondents (*inter alios*).

Has this Court power to make any enforceable award inconsistent with the New South Wales award, either to operate immediately or to operate on the expiration of the New South Wales award?

"5A. There is a determination of the Woodworkers' Board (duly made under the provisions of the *Factories and Shops Acts* of Victoria) dated 20th February 1908, and duly published in the Victorian *Government Gazette* of 3rd March 1908—which determines certain conditions of employment and the lowest prices and rates of wages to be paid in respect of certain of the persons or classes of persons employed in Melbourne by (amongst others) the respondents, James Moore & Sons Proprietary Ltd. and Millar's Karri and Jarrah Timber Co. (1902) Ltd. which are described in the plaint—

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Has this Court power to make any enforceable award inconsistent with the said determination?

"6. There is an industrial agreement registered under the Western Australian *Industrial Conciliation and Arbitration Act* 1902, and made between the Western Australian branch of the claimant organization and Millar's Karri and Jarrah Co. (1902) Ltd. The agreement is dated 7th February 1908, and it expires on 30th June 1910.

Has this Court power to make any enforceable award inconsistent with the agreement, either to operate immediately or to operate on the expiration of the agreement?

"7. There is an industrial agreement—not registered—made between the Sorters' and Stackers' Union and (amongst others) James Moore & Sons Prop. Ltd., one of the Victorian respondents. The agreement is dated 11th May 1908, and it expires on one month's notice, but not before 11th May 1909. Some of the members of the claimant organization are members of the said union.

Has this Court power to make any enforceable award inconsistent with the agreement, either to operate immediately or to operate on the expiration of the agreement?

"8. The plaint in this case was filed on 23rd October 1908. One of the respondents was Millar's Karri and Jarrah Co. (1902) Ltd., a company which carries on business in Western Australia, in Victoria, and in Queensland. Subsequently, on 26th November 1908, this company granted an option to purchase its Queensland business as a going concern. On 17th February 1909 the option was exercised, and the business bought by the Queensland Pine Co. Ltd., and possession was given on 1st March 1909, and the business was carried on under the same manager without cessation and without change of employés. The fact of the sale having been disclosed early in the proceedings, counsel for the claimant asked that the Queensland Pine Co. Ltd. should be added as a respondent. I made an order to that effect, but expressly without prejudice, in order that the Queensland Pine Co. Ltd. might appear and contest, if it saw fit, the right to make it a party. The company accordingly applied to have its name struck out.

Has this Court power to order that the Queensland Pine Co. Ltd. be added as a party (section 38 (*p*))?

"For the purposes of these questions reference may be made if necessary to the plaint and to the award, determination and agreements and to the option and other documents relating to the sale of the Queensland business in this case mentioned."

It is not necessary for the purposes of this report to set out the plaint, the award, the determination or the agreements above referred to.

The Commonwealth and the State of New South Wales obtained from the High Court leave to intervene.

Arthur, for the claimants. As to the first question, as long as a common demand is made in more than one State by the parties on one side which is refused by the parties on the other side, so that there is a real dispute, the absence of combination on the side on whom the demand is made does not negative the possibility of the dispute being one that does not extend beyond the limits of one State. Combination is not necessary on either side, although some common demand must be made. He referred to *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (1); *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (2). As to the second question, the fact that the claimants demand for Western Australian employés a rate of payment different from that for employés in other parts of the Commonwealth makes it none the less one demand and one dispute. The demand as to Western Australia is one demand in the whole dispute, in which all the employers and all the employés are participants. There being a dispute extending beyond one State, in order to settle that dispute fairly the Court must award higher wages in those parts of the Commonwealth where the cost of living is higher. This involves no discrimination between States: *The King* v. *Barger* (3). Sec. 99

(1) 6 C.L.R., 309, at pp. 313, 332, 341, 350, 371.

(2) 4 C.L.R., 488, at p. 497.

(3) 6 C.L.R., 41, at pp. 78, 109.

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of the Constitution only applies to regulations of trade, commerce or revenue. No preference is given, nor is any intended, by awarding higher wages in one part of the Commonwealth. As to the third question, there being one dispute, there are persons who are members of the claimant association employed in timber yards, and that gives the Court power to make an award as to timber yards wherever they are. Once there is a dispute extending beyond one State, the boundaries of the States may be disregarded. Then, if within the whole area of the dispute there are members of the association employed in timber yards, an award can be made in respect of all timber yards in the area. As to South Australia, where there are no bush mills, the demand is as to wages in respect of certain classes of operatives, and if some of those operatives are employed by any of the respondents in South Australia, an award can be made in respect of that class of operatives there. [He referred to *Coastal District Committee Amalgamated Society of Engineers Industrial Association of Workers* v. *Millar's Karri and Jarrah Co.* (1); *In re Pitman* (2).] As to the fourth question, the business carried on by Millar's Karri and Jarrah Co. (1902) Ltd. in Western Australia and in Melbourne is one business, and the Court can make an award in respect of all employés of the company: *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.* (3). The facts stated do not prevent the dispute from being one extending beyond one State. As to the fifth question the Commonwealth Court of Conciliation and Arbitration has power to make any award it pleases whether or not it is inconsistent with an award under a State law. Under sec. 51 (xxxv.) of the Constitution there is power to make an award in the case of a dispute extending beyond the limits of one State. If that circumstance exists, the power is absolute. Under the New South Wales *Industrial Arbitration Act* 1901, an award is binding on the parties and is the law of the land. See secs. 35, 37, 39. If that award is inconsistent with an award of the Commonwealth Court, the latter, which is a law of the Commonwealth,

(1) (1902) 4 W.A.A.R., 171. (2) 5 Arb. Rep. (N.S.W.), 298.
(3) 8 C.L.R., 419.

prevails under sec. 109 of the Constitution, and that is made plain by sec. 30 of the *Commonwealth Conciliation and Arbitration Act* 1904, sec. 30; *Quick and Garran's Constitution of the Australian Commonwealth*, p. 938; *Gulf, Colorado and Santa Fé Railway Co.* v. *Hefley* (1); *Master Retailers' Association of N.S.W.* v. *Shop Assistants Union of N.S.W.* (2); *Morgan's Steamship Co.* v. *Louisiana Board of Health* (3); *Harrison Moore's Commonwealth of Australia*, 1st ed., p. 172.

[ISAACS J. referred to *Attorney-General for Ontario* v. *Attorney-General for Dominion of Canada* (4); *Wheeler's Laws of Canada*, p. 1054.

HIGGINS J. referred to *Prentice and Egan's Commerce Clauses*, p. 183.]

The same arguments apply to question 5A, and also to the sixth question. Although there may be an agreement between employers and their employés, that does not prevent an industrial dispute, *i.e.* an industrial disturbance, existing, and an award may be made by the Commonwealth Court disregarding the agreement. As to the seventh question, if a registered agreement does not stand in the way of an award by the Commonwealth Court, neither does an agreement that is not registered. [He referred to *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (5); *Amalgamated Saw Mills Employés Union of Workers* v. *Millar's Karri and Jarrah Co.* (6); *Western Australian Amalgamated Society of Railway Employés Union of Workers* v. *Commissioner of Railways for Western Australia* (7).]

[ISAACS J. referred to secs. 26, 92, 93 of the *Industrial Conciliation and Arbitration Act* 1902 (W.A.).

O'CONNOR J. referred to *Australasian Institute of Marine Engineers* v. *Howard Smith Co. Ltd.* (8).]

As to the eighth question, there is nothing to prevent a company which has come into existence after the demand was made from being added as a party.

(1) 158 U.S., 98, at p. 104.
(2) 2 C.L.R., 94, at p. 107.
(3) 118 U.S., 455, at p. 464.
(4) (1896) A.C., 348.
(5) 6 C.L.R., 309, at p. 374.
(6) 5 W.A.A.R., 72, at p. 81.
(7) 3 C.L.R., 66, at p. 72.
(8) 1 C.A.R., 44, at p. 46.

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Mitchell K.C., (with him *Harrison Moore*), for all the respondents except Millar's Karri and Jarrah Co. (1902) Ltd. and Benjamin J. Fenton. The first and fifth questions depend upon what is the power of the Commonwealth Parliament under sec. 51 (xxxv.) of the Constitution. That power is limited in two ways: it must be exercised for the prevention and settlement of disputes, and the disputes must extend beyond the limits of one State. These limitations must be interpreted in the same broad way as the power itself: *Kansas* v. *Colorado* (1). If the views contended for by the claimants are right, the limitation that the dispute must extend beyond the limits of one State might for all practical purposes have been omitted. For if in one State there were an award of a Court of the State, either party dissatisfied with it might, by bringing in a party in another State, have an appeal to the Commonwealth Court. There must be some point at which it can be said that a dispute is not one extending beyond the limits of one State, and that point is reached when in a dispute in an industry not in its nature Inter-State, on one side or the other, the parties, either employers or employés, are absolutely independent and not acting in concert in the dispute. There is no other logical halting place which will not in reality turn this provision in the Constitution from one for allaying existing disputes to one for provoking disputes. The intention was that the Commonwealth Parliament should have power to deal with disputes with which the States alone could not deal, and not to secure uniformity of wages and conditions of employment throughout the Commonwealth. The meaning of "a dispute extending beyond the limits of any one State" is the same whether it is the prevention or the settlement of it which is being considered. So that a dispute with which the Commonwealth Parliament can deal is one of which it can be predicated before it comes into existence that it will be a dispute extending beyond the limits of one State: *Jumbunna Coal Mines, No Liability* v. *Victorian Coal Miners' Association* (2). According to the view put forward for the claimants, every dispute is one that can extend beyond the limits of one State. A demand on one side and a refusal to comply with it on the other do not constitute a dispute.

(1) 206 U.S., 46, at p. 91.

(2) 6 C.L.R., 309, at p. 333.

[HIGGINS J.—In *Jumbunna Coal Mines, No Liability* v. *Victorian Coal Miners Association* (1), the words seem to imply the contrary: "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."

GRIFFITH C.J.—There must at least be a persistence in the demand.]

In order that a dispute may be within sec. 51 (xxxv.) of the Constitution, it must be a dispute between employers and employés as to what those employers shall pay those employés and as to what other employers will pay their employés. [He referred to *Australian Workers' Union* v. *Pastoralists' Federal Council of Australia* (2).] As to the fifth, sixth and seventh questions and question 5A, the power conferred by sec. 51 (xxxv.) is to settle disputes in a way not contrary to, but in accordance with, the laws applicable to the subject matter of the dispute; if the Commonwealth has power to deal with that subject matter, then in accordance with the law of the Commonwealth, but if the Commonwealth has no such power, then in must be in accordance with the law of the States. So that where by the law of a State a person is bound to obey an award or to perform a contract, the Commonwealth Court cannot make an award inconsistent with that law, and it is not competent for the parties to that award or contract to engage in an industrial dispute in respect to the subject matter of such award or contract.

[ISAACS J. referred to *Clemson* v. *Hubbard* (3), as to the meaning of "dispute."]

It was not intended by sec. 51 (xxxv.) of the Constitution to empower the Commonwealth Parliament to take away from the State Courts the right to give damages for breach of contract. The award referred to in the fifth question was made in respect of a dispute which was admittedly not an Inter-State dispute, but was wholly confined to New South Wales. That dispute, which was settled by a Court having exclusive jurisdiction to

(1) 6 C.L.R., 309, at p. 332. (2) 1 C.A.R., 62, at p. 78.
(3) 1 Ex. D., 179.

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deal with it, cannot be said to be open for the purpose of giving the Commonwealth Court jurisdiction. As to such a dispute the laws of the Commonwealth and the States are not in conflict within the meaning of sec. 109 of the Constitution, for they are in respect of different subject matters: *D'Emden* v. *Pedder* (1). As to the third question, there is no power to make an award in respect of employés in timber yards in Western Australia because there is no dispute as to them in Western Australia. Assuming that there are two employers in the same industry in different States whose businesses are distinct and who are not acting in concert, and assuming further that each employer employs a number of classes of employés, and that there is an organization of the employés in all those classes except that the employés in some of those classes who are employed by one of the employers do not belong to the organization, and are quite content with their wages and conditions of employment, then a demand by the organization for higher wages for the employés of all the classes is not the same dispute extending beyond the limits of one State. A dispute between an employer and an organization of employés as to whether the employer should pay higher wages to his employés who are quite contented with what they are getting is not an industrial dispute. A dispute with an employer must be a dispute as to his business and not as to that of someone else in another State. [He referred to *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (2).] As to the second question, sec. 51 (xxxv.) of the Constitution does not involve a power to decide rights as between employers. A demand for one rate of wages in one State and for a different rate in another is not one dispute, at any rate where the parties on both sides are not organized. The power does not extend to giving one State a preference over another: See sec. 99 of the Constitution.

[ISAACS J. referred to *Quick and Garran's Constitution of the Australian Commonwealth*, p. 515.]

As to the sixth question, although industrial awards were well known at the time the *Commonwealth Conciliation and Arbitration Act* 1904 was passed, there is no mention in sec. 30 of

(1) 1 C.L.R., 91, at pp. 110, 111. (2) 1 C.A.R., 4, at p. 18.

industrial agreements, and they are not inconsistent with the Act, one of whose main objects was to bring parties into agreement. As to the eighth question, sec. 38 (*p*) of the *Commonwealth Conciliation and Arbitration Act* 1904 does not authorize the Court to add a party who was not a party to the industrial dispute.

Irvine K.C. (with him *Wanliss*), for Millar's Karri and Jarrah Co. (1902) Ltd. As to the third question, when the Constitution was enacted in 1900 the words "conciliation and arbitration for the prevention and settlement of disputes" had a fairly definite and legal meaning. The word "arbitration" can only be applied to the settlement of disputes, though conciliation may apply to both prevention and settlement. Conciliation is in its very nature non-compulsory. Arbitration for the settlement of disputes involves the existence of definite parties and definite issues relating to the conditions of employment of the parties who are employed: *Collins* v. *Collins* (1). The words would involve the recognition of conflicting bodies who might be parties to disputes. The settlement of a trade dispute is not necessarily limited to persons in the actual employment of the employers at the time. But although it may involve a conflicting body of disputants, there must be definite issues which relate to the conditions of employment by the disputing employers of the members of the disputing association. A general disturbance was in one sense intended to be affected by sec. 51 (xxxv.) of the Constitution, but suppose there are disturbances over several States, the power given is limited to appointing arbitrators whose duty it is to ascertain what are the disputes and between whom, and then to settle the disputes between the persons who are engaged in them. Assuming there is a union of employés over several States which has a dispute with employers in several States, but that a number of men who are qualified to be members of it are not members and therefore make no demand, and that those who are not members are perfectly satisfied with their employment, can the Commonwealth Parliament invest a Court with power not only to settle the dispute between the union and the employers, but also to deal with the conditions of labour of those who are not dissatis-

(1) 28 L.J. Ch., 184, at p. 186.

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fied ? [He referred to *Curran* v. *Treleaven* (1).] The words "trade dispute" were first used in the *Conspiracy and Protection of Property Act* 1875 (38 & 39 Vict. c. 86), sec. 3, as meaning what was afterwards called an "industrial dispute." Under that section it was held that a strike for the purpose of raising the wages of men employed by those against whom the demand is made would be a legal combination in furtherance of a trade dispute, but that if the strike was for the purpose of compelling another employer to pay higher wages to his operatives, it would not be legalized: *J. Lyons & Sons* v. *Wilkins* (2). [He also referred to 5 Geo. IV. c. 96; *Councils of Conciliation Act* 1867 (30 & 31 Vict. c. 105); *Arbitration (Masters and Workmen) Act* 1872 (35 & 36 Vict. c. 46); *Conciliation Act* 1896 (59 & 60 Vict. c. 30).]

[ISAACS J. referred to *Gozney* v. *Bristol &c. Trade and Provident Society* (3).]

In the legislation until the Act of 1875 the words "trade dispute" had the limited meaning of a dispute as to legal rights under existing contracts. But in the Act of 1875 and the subsequent legislation it had the wider meaning which it has in the Constitution. In New Zealand the *Industrial Conciliation and Arbitration Act* 1894 provided for the settlement of existing industrial disputes, but there was no provision for anything like the common rule. See secs. 42 and 43 of that Act. The power of the Commonwealth Parliament is limited to the creation of a Court whose powers are limited by the ordinary accepted meaning of the words "arbitration for the settlement of disputes." Whatever the form or character of the arbitration may be the power is still limited to arbitration. The power given by sec. 51 (XXXV.) of the Constitution cannot be said to have repealed existing laws of the States relating not only to arbitration for the settlement of disputes but also to the conditions under which work is to be carried on or persons are to be employed. The power is not to make laws for the settlement of disputes, but to make laws for arbitration for the settlement of disputes. There cannot be an industrial dispute which is based on a claim which is a breach of the law. An industrial dispute must be something different from an ordinary dispute which can be settled in the Courts of

(1) (1891) 2 Q.B., 545. (2) (1896) 1 Ch., 811. (3) (1909) 1 K.B., 901.

law. The federal power was not intended to be a power to create a Court which could decide disputes which could be settled in the Courts of law. So that a Court so created cannot make an award which is inconsistent with an award enforceable in the Courts of a State as a law of that State. Industrial disputes arise not out of contractual relations, but out of the general relation of employers and employés which it is reasonable to expect will continue. [He referred to *Von Schultz-Gaëvernitz on Social Peace, A Study of Trades Unions in England*, p. 135; *C. Wright's Outlines of Practical Sociology*, pp. 294 *et seq.*]

[ISAACS J. referred to *Webb's History of Trades Unionism* (1894), p. 241.]

Sec. 75 (iv.) of the Constitution bears some analogy to sec. 51 (xxxv.), in that its purpose is to give an effective power as to matters in respect of which the powers of the States were not effective. With regard, then, to existing contracts and to State laws which are police laws or partly police laws and partly industrial laws, provided that they are laws which regulate the subject matter of what in 1900 were known as industrial disputes, the Commonwealth Court cannot make awards inconsistent with the law. As to the second question, the demand is by all the employés both in and out of Western Australia for higher wages in Western Australia than in the rest of the Commonwealth, or, in other words, for a general rise in wages, and, in case the general rise is granted, a further rise of 15 per cent. in Western Australia. That is most cogent to show that there is not a single dispute. There is not one demand, but a different demand in Western Australia from that in the other States. As to the third question, there is not sufficient community of interest between the operatives in the different States to constitute one dispute.

Blacket, for the State of New South Wales. As to the first question, there cannot be a dispute extending beyond the limits of one State unless it is a dispute which can be brought about by one demand and one refusal. There must be an organization of employés on one side and an employer carrying on business in more than one State, or an organization of employers, on the other. If the present application can be entertained by the Common-

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wealth Court, there is no industrial dispute as to which the jurisdiction of the State Courts could be ousted. The power of the States to deal with domestic affairs was not intended to be affected by sec. 51 (xxxv.) of the Constitution : *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1); *The King* v. *Barger* (2) ; *Attorney-General for N.S.W.* v. *Brewery Employés Union of N.S.W.* (3). But the Commonwealth Court has impliedly every power which will make the express power given by the Constitution effective.

[HIGGINS J. referred to *Southern Realty Investment Co.* v. *Walker* (4) ; *Harvard Law Review* 1909, p. 489. The extending of the dispute to other States may in some circumstances be a fraud upon the Court.]

No one party can, at its own will, create a dispute extending beyond the limits of one State. Even if under sec. 51 (xxxv.) of the Constitution it was sufficient that one party only should be acting in concert, sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904 limits industrial disputes to cases in which one employer or an organization of employers is concerned, and such a dispute does not include one in which a number of employers who are not organized are concerned. Sec. 73 bears out that view. A dispute with respect to which the Commonwealth Parliament can legislate is one of which it can be said that it does extend, or may extend, to more than one State, such as a dispute as to shipping or shearing. The jurisdiction of the Commonwealth Parliament under sec. 51 (xxxv.) cannot be ascertained until it is known what is reserved to the States : *Attorney-General for Ontario* v. *Attorney-General for the Dominion of Canada* (5).

[HIGGINS J. referred to *Camfield* v. *United States* (6)].

Although the Commonwealth Court must necessarily have those powers necessary to the jurisdiction expressly given by the Constitution, that jurisdiction is not to be extended, at the cost of the State powers, by any consideration that a wider power would conduce to the benefit of the public, or of the government of the

(1) 6 C.L.R., 309, at p. 332.
(2) 6 C.L.R., 41, at p. 71.
(3) 6 C.L.R., 469, at p. 503.
(4) 211 U.S., 603.
(5) (1896) A.C., 348.
(6) 167 U.S., 518.

Commonwealth. If sec. 30 of the *Commonwealth Conciliation and Arbitration Act* 1904 means that the Commonwealth Court can issue prohibition to the State Courts, it is *ultra vires*. The words "lawfully made" do not mean made in accordance with the rules made by the Court, but made within the jurisdiction of the Court. If that is so, the section is unnecessary except as showing that the Parliament meant to cover the whole ground over which it has jurisdiction. As to the third question, assuming that employment in bush mills is different from that in timber yards, bush mills are not within the dispute.

Duffy K.C. and *McArthur*, for the Commonwealth. The true antithesis in sec. 51 (xxxv.) of the Constitution is between conciliation and arbitration, and not between prevention and settlement. The idea is that there may be conciliation for an anticipated dispute, and arbitration for an existing dispute or for an issue of a contemplated dispute. The words "industrial dispute extending beyond the limits of any one State" are a description of a state of things which exists, or may exist, in the future, and, just as conciliation may be used for dealing with questions within that area, so may arbitration.

[HIGGINS J.—Secs. 2 and 3 of the *Conciliation Act* 1896 (Eng.) use the word "arbitration" where a dispute is apprehended.]

This point should be left open. As to the argument that the existence of a State law, or an industrial agreement under a State industrial law, or a voluntary agreement in a State prevents there being a dispute extending beyond one State so far as that State is concerned, if it is sound the existence of the State law does not determine the matter. The principle would equally apply if there were no law, but the State had power to make the law but had not done so. It could be said in either case that the Commonwealth Parliament was intruding upon the domain of State authority. On the other hand, if it is said that a State law has settled the dispute in the State, the answer is that the dispute is temporarily quelled by the State legislation, but it still exists. The State law has not stopped the dispute, but has prevented one party getting what it wants. The dispute is not as to whether the State law shall be repealed, but whether one party

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shall or shall not get what it asks. The power given by sec. 51 (xxxv.) of the Constitution is given so that disputes extending over an area greater than one State may be settled by a tribunal having paramount authority, and it should not be trammelled by the fact that there are State laws dealing with disputes in States. There is no suggestion in sec. 51 (xxxv.) that arbitration should be barred by limitations which local authorities have imposed. If it were so, a local State authority could prevent any dispute extending beyond other States into that State. If an agreement as to the rate of wages is inconsistent with the award which the Commonwealth Court is authorized to make, that agreement goes. There is no estoppel here, because the parties who are bound by the State award are not the same persons as those who are claimants in this case. That applies to the fifth, sixth and seventh questions. As to the seventh question, the agreement goes. Whether any of the parties will have rights for breach of agreements or not is immaterial now. It does not affect the universality of the law. If it be necessary to inquire exactly what solidarity of parties is necessary to constitute an industrial dispute, it is at most confined to the party making the dispute, and it is entirely beside the question to investigate what union there need be between the persons on whom the dispute is sought to be fixed. In dealing with the meaning of an industrial dispute it is an error to start from what is a legal dispute, namely, a dispute in which there is one cause of dispute on both sides. That can happen in no industrial dispute. In law every man who asks for higher wages has a distinct dispute with his employer. Assuming an industrial dispute to be established by the parties on one side joining together and using their joint efforts to enforce the demands of each, how does it affect the matter that the parties on the other side do not join together? The dispute must be really a general dispute, and that is a question of fact. The mere fact of making one paper demand is not sufficient to constitute an industrial dispute.

[GRIFFITH C.J.—The parties who are attacked must at least know that there is a general dispute.

ISAACS J. referred to *Webb's History of Trades Unionism*, p. 390, as to a dispute extending.]

If all the parties on one side join in making one homogeneous claim, it is sufficient, notwithstanding that part of the claim is that in one State there should be a higher rate of wages than in others. An award giving a higher rate of wages in Western Australia would not be a preference within sec. 99 of the Constitution. The words "trade" and "commerce" in that section are confined to the sale or barter of articles: *United States* v. *E. C. Knight Co.* (1). Once there is a number of men in one industry associated together and making claims against a number of employers in that industry, the fact that some of the employers do not then and may never engage in a particular branch of that industry, so that they do not and may never employ certain classes of workmen, a general award may be made which will apply to those particular employers if they ever do employ any of those classes of workmen belonging to the association. The fact that a man can say he is engaged in one industry does not prevent him being at the same time engaged in another industry if one of these industries can be fairly said to be a part of the other industry. The case of two employers in partnership must at any rate be included in the definition of "industrial dispute" in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904.

[GRIFFITH C.J.—That definition is for the purpose of describing the kind of thing with which the Parliament is dealing, and in that view "employer" may include "employers."]

Throughout the Act there are indications that a number of employers not organized may be parties to a dispute: See secs. 27, 32 (*a*).

Mitchell K.C., in reply. In the use of the words "industrial disputes" in English legislation there is no conception of a dispute between master and servant as to which an Act of Parliament prescribes a rule of conduct. If the views put forward on behalf of the Commonwealth are correct, the President of the Commonwealth Court is entitled to deal with matters with which the Commonwealth Parliament itself cannot deal directly, and if he does so and the result is found to be prejudicial, the Common-

(1) 156 U.S., 1.

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wealth Parliament has no power to interfere. Such a power was not intended to be granted. If the power given by the Parliament to the Commonwealth Court of Conciliation and Arbitration were put in the same words as the power given by sec. 51 (XXXV.), it would be a power to act in accordance with the law applicable to the facts, and the same meaning should be given to the words in sec. 51. (XXXV.) of the Constitution. The award referred to in the fifth question acts as an estoppel. A party, who has a choice of going to one of two jurisdictions and having gone to one is dissatisfied, is estopped from then going to the other: *Barber* v. *Lamb* (1); *Taylor* v. *Hollard* (2); *Scarf* v. *Jardine* (3); *Everest and Strode on Estoppel*, 2nd ed., p. 35. If an award of the Commonwealth Court were inconsistent with an agreement there could not be an action for breach of the agreement if the award were lawful: *Gibson* v. *Lawson* (4).

Irvine K.C., in reply to *Duffy* K.C. As to sec. 99 of the Constitution, the result of the American cases is not necessarily that a combination to restrict production is not a restraint of Inter-State trade and commerce: *Eddy on Combinations*, vol. II., pp. 923 *et seq.*

[ISAACS J. referred to *Montague & Co.* v. *Lowry* (5).]

Arthur, in reply, referred to *Webb's Industrial Democracy*, p. 222; *Cromwell and Bannockburn Colliery Co.* v. *Board of Conciliation for Otago* (6); *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (7).

Cur. adv. vult.

June 25.

GRIFFITH C.J. This case, which occupied the Court for nine days, comes before us as a case stated by the President of the Commonwealth Court of Conciliation and Arbitration for the opinion of the Court, under sec. 31 of the *Commonwealth Con-*

(1) 8 C.B.N.S., 95.
(2) (1902) 1 K.B., 676.
(3) 7 App. Cas., 345, at p. 365.
(4) (1891) 1 Q.B., 545, at p. 560.
(5) 193 U.S., 38.
(6) 25 N.Z.L.R., 986.
(7) 4 C.L.R., 488, at p. 539.

ciliation and Arbitration Act, which provides that the President may state a case for the opinion of the High Court upon any question arising in any proceeding which, in his opinion, is a question of law.

The applicants are an organization registered under the Act. The respondents are thirteen companies and firms engaged in what I will for convenience call the timber trade in five of the States of the Commonwealth—in which we are told that there are some hundreds of similar firms and companies. Some of the respondents have timber yards, in which, as I understand, they carry on the business of dealing with log timber, whether Australian or imported, cutting it up into planks and boards, and sometimes manufacturing it into doors and window sashes, which may or may not be also fitted with glass. Others of the respondents are engaged in what is called in America the lumber trade, *i.e.*, felling timber in the forests, cutting it into logs or railway sleepers or ties, and sending the logs or sleepers to market in Australia or abroad. Some of them are engaged in both trades. The complainants are an organization representing operatives engaged in both trades, and they ask that a common "log" or schedule of wages with other conditions of labour may be adopted with respect to both these trades throughout the five States, but that in Western Australia the rates of wages paid should be higher by 15 per cent. than elsewhere.

The questions submitted in the case are to a great extent of an abstract character. In my judgment the provisions of sec. 31 were not intended to allow the submission of hypothetical or abstract questions of law which may never arise for actual decision. Any opinions expressed by the Court on such questions can only be *obiter dicta* of more or less weight, but having no binding authority. And I regret to have to say that in my judgment most, if not all, of the questions which have been so laboriously and exhaustively discussed before us are of that character. I was reminded during the course of the argument of *M'Naghten's Case* (1), in which the Judges, much against their will, were asked to express an opinion upon questions of law not necessary for the decision of an actual case.

(1) 10 Cl. & F., 200.

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I will read the introductory words of the opinion of *Tindal* L.C.J. (speaking for all the Judges except *Maule* J. (1)):—"My Lords, her Majesty's Judges (with the exception of Mr. Justice *Maule*, who has stated his opinion to your Lordships), in answering the questions proposed to them by your Lordships' House, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions." The precedent has never been followed.

It appears necessary, however, if only to show why I feel bound to refuse to give a categorical answer to some of the questions submitted, to express my opinion on some of the points argued, even though it may be only *obiter*, and to state some propositions which appear to me to be elementary, and indeed little more than truisms, although nearly all of them have been explicitly or implicitly controverted in the arguments for the claimants.

The main questions discussed depended upon the proper construction of sec. 51 (pl. xxxv.) of the Constitution, which confers upon the Parliament power to make laws for the peace, order, and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The Constitution, as this Court has often pointed out, is to be construed by the application of the same rules that are applicable to the construction of other laws. The rule laid down in *Heydon's Case* (2), is especially applicable. "Four things are to be

(1) 10 Cl. & F., 200, at p. 208. (2) 3 Rep. 7, at p. 7b.

discerned and considered:—(1) What was the common law before the making of the Act. (2) What was the mischief and defect for which the common law did not provide. (3) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and (4) The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." Before the establishment of the Commonwealth "industrial disputes" (as to the meaning of which term I shall have more to say) had occasionally arisen in the different Colonies, and in two of them (New South Wales and South Australia) tentative legislation had been passed for the purpose of dealing with them by conciliation and arbitration. A similar law had been passed in the neighbouring Colony of New Zealand. Tentative efforts had been also made in the United Kingdom to deal with the same subject. Each Colony had absolute power to deal with the matter within its own limits, but in the event of a single dispute covering an area not within the bounds of any one Colony, there was no legislative authority (except the Parliament of the United Kingdom) which could have dealt with it. This was the state of the law, and this was the defect. The remedy was to authorize the Commonwealth Parliament to make laws for dealing with such disputes, not in any way they might think desirable, but by conciliation and arbitration for their prevention and settlement.

It is necessary at the outset to consider the meaning which the term "industrial dispute" conveyed in 1900 to the minds of persons conversant with the English language. It may be that the words have since been used in a larger sense, or that an artificial sense has been attributed to them by Statute (*e.g.*, the English Act of 1906), but this is not relevant to the present inquiry. In the *Jumbunna Case* (1), the meaning of the term was discussed as far as was necessary for the decision of the questions then before the Court. I used the following language (2):—

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

(2) 6 C.L.R., 309, at p. 332.

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"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. The form of combination is immaterial, though it most commonly arises where there are organized associations of employés or employers. The degree of permanency of the combination is also immaterial, but there must be some continuity of action." This definition was not, of course, and was not intended to be, exhaustive, but was limited to pointing out the difference between an ordinary dispute between individuals and disputes between employers and employés acting collectively.

The word "industrial" as used in sec. 51 (xxxv.) points, I think, to the nature or quality of the disputes, and denotes two qualities which distinguish them from ordinary private disputes between individuals, namely (1) that the dispute relates to industrial matters, and (2) that on one side at least of the dispute the disputants are a body of men acting collectively and not individually.

(1) First, then, I say the term "dispute" itself connotes the existence of disputants taking opposite sides. It also connotes that the difference between the parties to it is one that is capable of settlement by mutual agreement. If the desires of either party cannot be satisfied by reason of the existence of a law which forbids such satisfaction, the existence of that law does not constitute a dispute. If the dispute is widespread there may be a political agitation, but it is not a dispute.

(2) The term "industrial dispute" connotes a real and substantial difference having some element of persistency, and likely, if not adjusted, to endanger the industrial peace of the community. It must be a real and genuine dispute, not fictitious or illusory. Such a dispute is not created by a mere formal demand and formal refusal without more. We have not to deal with technicalities, such as the meaning of the term "conversion" in the old action of trover, in which a demand and refusal were sufficient evidence of conversion. In considering industrial

disputes we are concerned with real facts, not words or word-spinning.

No doubt, the term "industrial dispute" might be used, and had been used, in a wider sense, but the words "extending, etc.," show that it is not so used in the Constitution. If it had been so intended, the power in question might have been expressed as a power to facilitate the creation of industrial disputes, and to promote the extension of such disputes beyond the limits of any one State with a view to their settlement by federal authority. If, therefore, there is in fact no real discontent existing, a mere claim or request made by an employer or on behalf of a body of employés, without any intention of pressing it, but for the mere purpose of making a case to be brought before the federal arbitration authority, does not constitute a real industrial dispute. It is, rather, an attempt to promote strife and a fraud upon the tribunal.

(3) A dispute between A. and B. as to their respective obligations under an admitted agreement is not an industrial dispute within the meaning of the Constitution. The term "industrial dispute" may be, and has been, used in that sense in Statutes which so defined it, but that fact is quite irrelevant. Such a dispute can be settled by the ordinary State tribunals.

(4) A refusal by A. or B. to perform an admitted agreement, the interpretation of which is not in question, is not an industrial dispute.

(5) For the reasons given in (1) a general refusal to obey a law relating to industrial matters is not and cannot be an element of an industrial dispute. Nor can discontent with such a law and a desire to be freed from its obligations be an element of an industrial dispute. If the term is capable of having such an extended meaning (which has never yet been given to it), it is inconceivable that, if the framers of the Constitution intended to authorize the Parliament to abrogate a State law or absolve persons discontented with the law from their statutory obligations, they should have done so by the words now under discussion.

I pass now to the words "extending beyond the limits of any State."

(6) An industrial dispute "extending &c." must be a single

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dispute, and must relate to matters in which all the disputants are interested as affecting themselves, in the sense in which persons are said to be interested in a litigation, not in the sense that they regard it with interest. It follows that mere discontent with an existing State law cannot, even if it were otherwise an industrial dispute, be said to extend beyond the limits of the State in which the law is in force.

(7) The dispute must be single in the sense that there must be a substantial community of interest amongst the demandants and amongst those who refuse the demand.

(8) There must be a substantial identity of subject-matter. For instance, a demand for a set of conditions in State A. relating to one matter and another set of conditions in State B. relating to another matter, although made by bodies of employés or employers in both States associated for the purpose of making the demand, constitutes not one dispute but two disputes.

(9) Mere identity of branch of industry is not sufficient of itself to prove substantial identity of subject-matter. The difference in one State may be as to hours of labour, in the other as to terms of remuneration, in the same industry. In this case there would not be a single dispute.

(10) On the other hand, there might be substantial identity of subject-matter although the branches of industry in connection with which it is made are not the same: For example, a demand for a reduction in the hours of labour in several distinct trades in which the employés are associated together for the purpose of enforcing that demand might be a single dispute.

Again: The identity as regards demands made as to different States may be partial only. In that case there may be a single dispute as to part of the subject-matter, and several disputes as to other parts.

(11) Mere verbal coincidence in demands made as regards two States does not prove identity of subject-matter. The varying conditions of climate and other physical conditions found in the Commonwealth may make a demand couched in particular language in respect of one State quite different in its essence from a demand couched in the same words in respect of another.

(12) The term "industrial dispute" connotes something in the

nature of industrial war, existing or threatened. Sporadic differences confined to small localities in two or more States, even if they possess all the other elements of substantial identity of subject-matter, cannot be said to extend beyond the limits of one State merely because the parties to the differences in the several States combine in making a request in identical terms to their respective employers.

(13) There must be real community of action on the part of the demandants, and some community of action on the part of the parties on whom the demand is made. Such community need not be formulated in any written document, nor need the parties who are acting together be bound by any formal agreement. If it is found that large bodies of men in two or more States are in fact acting with one accord, then, if the other elements of an industrial dispute are present, an occasion arises for the exercise of the federal power in question.

(14) The dispute must be actually existing and actually extending beyond the limits of one State before such an occasion can arise. Mere mischief-makers cannot, therefore, by the expenditure of a few shillings in paper, ink, and postage stamps create such an occasion.

It is almost—I should think quite—impossible that such a state of industrial war as amounts to a real industrial dispute extending beyond the limits of a State can exist without its existence being known to the persons engaged in the branch of industry affected. In such a case it is immaterial whether the parties on whom the demand is made do or do not combine for the purpose of resisting the attack. But in the case of a mere paper demand, where industrial operations go on as usual, evidence of some combination or preconcert in resisting it may be necessary. It would be a singular thing if a joint demand made by associated bodies of men employed, say, at Perth and Brisbane respectively on each of two employers who are engaged in the same branch of industry in those cities, but are unknown to one another and have nothing else in common, could be regarded as an industrial dispute extending beyond the State of Western Australia to Queensland or beyond Queensland to Western Australia.

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As I said at the outset, these propositions seem to me mere truisms. They do not profess to contain an exhaustive statement of what may or may not constitute an industrial dispute, or such a dispute extending, &c., but they express some of the elements of such a dispute, as I understand the plain English words under consideration.

Having thus arrived at some notion of the meaning of the words standing alone, I turn to the consideration of the extent of the power which is conferred upon the Parliament with respect to such disputes. For this purpose, pl. xxxv. is to be construed having regard to the rest of the Constitution, and particularly with reference to the doctrine repeatedly laid down by this Court that any invasion by the Commonwealth of the sphere of the domestic concerns of the States appertaining to trade and commerce is forbidden except so far as the invasion is authorized by some power conferred in express terms or by necessary implication.

The cases to which I refer, and which I need not mention by name, also establish that the regulation of the conditions of employment is within that sphere. The question, then, is, to what extent does the power under discussion authorize such an invasion? The answer is—so far as necessary for its effective exercise. What then is the power? We are not concerned with the political question, now hotly debated, whether it is desirable that the Federal Parliament should have paramount authority to determine all conditions of employment in the Commonwealth. Our duty is to interpret the Constitution as it stands, not according to any preconceived notions as to what it ought to be. Now, as already pointed out, the power is not a general power to make laws for the settlement of industrial disputes. A power conferred in such terms would *primâ facie* authorize an invasion of the whole field of the conditions of employment so far as might be necessary for their settlement. The power is limited to making laws for their settlement by arbitration. The term "arbitration" connotes a judicial tribunal, by whatever name it is called and however constituted, and, although the functions of the tribunal differ from those of ordinary tribunals in that they are not limited to determining existing causes of action, but extend to

prescribing conditions to be observed in future contracts of employment, the tribunal is no less a tribunal. To my mind the obligation to decide in accordance with law is implied in the notion of the creation of a tribunal. Otherwise the members of the tribunal would not be judicial persons at all, but dictators exercising the power of legislation, not of adjudication.

It is gravely maintained, however, that the tribunal which the Parliament may establish for the settlement of industrial disputes is not bound by any State laws relating to domestic trade, and that, although the Parliament itself could not make a law inconsistent with the State law, it can under the language of pl. xxxv. authorize its creature, the tribunal of arbitration, to disregard the State law, to free persons from any obligation to obey it, and even impose penalties upon persons who do obey it, because such power is necessary for the effective settlement of industrial disputes. I have already pointed out that discontent with a State law cannot be described as a dispute in any sense in which that word has hitherto been used, so that a power to authorize the settlement of disputes cannot be read as a power to set aside or suspend or abrogate an obnoxious law. But, even if it could, it seems to me that, applying the rules of construction of the Constitution so often laid down, at best the language would be ambiguous, and that, even if the words are capable of the meaning asserted, it is so inconsistent with the reservation to the States of the power to regulate their domestic trade that it should be rejected. For, if conceded, it practically annuls that reservation, and permits the federal tribunal to substitute its uncontrolled volition for the will of the Parliaments of the States, so soon as a political agitation for the repeal of an obnoxious law in any State is taken up by sympathizers in another State.

I find it difficult to treat such an argument with due gravity. It may be necessary, in order to allay political agitation, for the legislature to repeal or alter an existing law, but it cannot be said to be necessary that a tribunal appointed to settle disputes by arbitration should have a dispensing power authorizing it to supersede or abrogate a law or excuse obedience to it, unless, indeed, it is assumed that a dispute cannot be settled unless one (and of course only one) of the parties to the dispute gets all that

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he asks. This would be an entirely novel meaning of the word, and would put the tribunal above the law. *Sic volo, sic jubeo, mea sit pro lege voluntas.*

I now pass to the questions formally submitted to the Court, premising that, as this Court decided in the *Broken Hill Case* (1), the questions whether an industrial dispute actually exists and whether it extends beyond the limits of one State are questions of fact, which can only be finally decided by a Court before which the validity of an award is brought in controversy.

I. The Case first sets out that the claimants are a registered organization of employés, and that "the dispute" is with employers carrying on business in the several States employing members of the organisation, that the respondents in each State have no business or other connection with the respondents in other States and have refused the demand of the organization (which is for the adoption of a complete log or schedule of rates of wages and conditions of employment to be observed in all the States) independently and without preconcert with the employers in the other States, and submits the following question:—Does the dispute extend beyond the limits of any one State

(*a*) Within the meaning of sec. 51 (xxxv.) of the Constitution?

(*b*) Within the meaning of sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904?

On the part of the claimants it was contended that the fact of a single demand having been made by a single organization upon employers in several States was sufficient, and indeed conclusive, evidence of the existence of an industrial dispute extending beyond the limits of one State. It is true that this contention was from time to time disclaimed by Mr. *Arthur*, but it was as often revived in slightly different language, and its discussion occupied a considerable part of our time. On the other side it was contended that the absence of preconcert between employers in different States was conclusive to negative the existence of such a dispute. For the reasons already given I am unable to accede to either view. In order to ascertain whether such a dispute exists regard must be had to all the facts. The facts relied

(1) 8 C.L.R., 419.

on as conclusive are, both of them, very relevant facts, but neither of them is in my opinion necessarily conclusive. I am, therefore, unable to give a categorical answer to the first branch of this question. All I can say is that upon the facts as stated there may or may not be an industrial dispute, and that the dispute (if any), may or may not extend beyond the limits of any one State. The actual fact, as I have already said, can only be determined in some proceeding taken to challenge the validity of the award, if and when made.

The second branch of the question relates to the meaning of sec. 4 of the Act, which, so far as material, defines the term "industrial dispute" as meaning "a dispute in relation to industrial matters arising between an employer or an organization of employers on the one part and an organization of employés on the other part, and extending" &c. Sec. 19 provides that the Court shall have cognizance *inter alia* of all industrial disputes which are submitted to the Court by an organisation by plaint in the prescribed manner. The other provisions of the section are not material. It was contended by Mr. *Blacket*, who argued the case for the State of New South Wales, that under the Act as framed, and having regard to the definition, the only industrial disputes of which the Court has cognizance are disputes in which the party on the employers' side is a single employer or an organization of employers, so that a dispute between an organization of employés and several distinct employers not associated in an organization cannot be dealt with. I was at first impressed with this argument, and if the words of the definition had been inserted in sec. 19 I am disposed to think that they should have been read as words of limitation. But I think that in an interpretation clause they are not to be taken as words of limitation, but are used altogether *alio intuitu*. The object of the definition is, I think, to show what is the essential quality of disputes which are to be considered industrial disputes, that is, that they are disputes between employers and organizations of employés. Regarded in this light, the singular "an employer" may well be read as including the plural, although in a different context it should perhaps be read otherwise.

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If therefore all the other elements of a genuine dispute exist, I think that it is a dispute within sec. 4.

II. The Case next sets out that in the schedule of wages demanded by the claimant organization a claim is made for an additional 15 per cent. in Western Australia "to be added on above rates for extra cost of living," and the question is asked whether the Court has power to make any enforceable award so far as regards the Western Australian employés. The answer to this question depends upon the actual facts. If there is a dispute within the cognizance of the Court to which the Western Australian employers are parties, it can, of course, make an award with respect to them. If not, it cannot. I am unable, without affecting an ignorance of Australian geography and Australian conditions which I do not enjoy, to pretend to think that the employés, say, in Queensland can have any such community of interest with the employés in Western Australia as to make the demand for an extra 15 per cent. of wages in the latter State an identical subject-matter of dispute in both States. But if there is otherwise a dispute extending beyond a State, I do not think that the attachment to it of a special claim or claimant affecting only one State would necessarily deprive the Court of jurisdiction to deal with the dispute as far as it relates to matters in which the disputants have a real community of interest. The award cannot go beyond the limits of the dispute of which the Court has cognizance, but if there is really a dispute it can go as far as the dispute goes. Other weighty arguments were urged, based upon sec. 99 of the Constitution, which provides that "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof," and it was contended that an award in terms of the claim would amount to a regulation of trade and commerce giving preference to the other States as against Western Australia. But this would be an objection to the award, and does not determine the question of the jurisdiction of the Court to entertain the claim.

The only answer that I can give to the question is that, if all the other elements of a "dispute extending &c." exist, the fact of

this claim having been made in connection with it does not prevent the Court from making a valid award as to the Western Australian employés.

III. The facts relevant to the third question submitted may be summarized by saying that several of the trades and occupations referred to in the log or schedule demanded are, and some are not, carried on both in the lumber trade, described as the bush mills, and in the timber yards. No member of the claimant organization is employed in the timber yards in Western Australia or in bush mills in South Australia. One New South Wales respondent has a bush mill as well as a timber yard, and two Queensland respondents have both. The question asked is whether the Court had power to make a valid award with respect to wages and conditions of labour in Western Australia as to trades and occupations in which no member of the claimant organization is employed, and in South Australia as to trades and occupations which are not carried on by any South Australian respondent.

My answer is: It depends on the whole facts of the case. If the two branches of the timber trade are in fact so connected together throughout Australia, from the operation of felling of trees in, say, Queensland and Western Australia, and the hauling of the timber, to the making of doors and window sashes, that a question which affects one branch affects the other in every State concerned, so that the industrial dispute is really a single dispute, then the fact that a particular employer has not in his present employment any persons engaged in a particular occupation, such as glaziers, does not affect the jurisdiction of the Court to make an award operating over the sphere of the actual dispute. If the facts are not so, there would *in re verâ* be not one dispute but several disputes.

IV. The fourth question raises a similar but not identical point. One of the respondents, Millar's Karri and Jarrah Company, carry on both businesses in Western Australia, and the business of timber yards only in Victoria. They have members of the claimant organization employed in their timber yards in Victoria but not in Western Australia. Some of the products of their mills in Western Australia are sent to their yards in Victoria for sale.

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They also had, but have not now, members of the organization employed in timber yards in Queensland. Under these circumstances the question put is whether in the case of this company the assumed dispute extends beyond the limits of any one State within the meaning of the Constitution or within the meaning of sec. 4 of the Act, and whether the Court has power to make an award applicable to them and to what extent.

Again I say, it depends on the facts. If the business carried on by the company in Western Australia at its bush mills is *in re verâ* the same business as that carried on in Victoria at its timber yards, as on the facts this Court held to be the case with regard to the business of the Broken Hill Proprietary Company carried on at Broken Hill in New South Wales, and Port Pirie in South Australia, there may (if the other necessary facts exist) be an industrial dispute between the claimant organization and the company extending to Western Australia and Victoria both within the Constitution and the Act. Whether it extends to Queensland also must depend on the considerations applicable to question III.

V. The fifth question relates to the effect of an industrial award made in New South Wales by the Arbitration Court of that State between the New South Wales branch of the claimant organization and some of the respondents, which took effect from 16th June 1908 and operates for three years from that date. This award had been made a common rule governing all the New South Wales respondents, except one company who carry on their business at the Richmond River. We are asked to say whether the Court has power to make any enforceable award inconsistent with that award, either to operate immediately or at the expiration of the New South Wales award.

This question, in my opinion, raises two entirely different points, (1) whether as between the claimants and their employers bound by the award there is a genuine industrial dispute at all, and (2) how far the Court is bound by the terms of the award or adjudication of the State Arbitration Court. As to the first point, it was contended that parties who are discontented with a State award, can, at once, by associating themselves with employés in the same branch of industry in another State, and

making claims inconsistent with the State award, bring into existence a new industrial dispute extending beyond the limits of the State, that is, that they can, in effect, appeal from the State industrial Court to the federal arbitration tribunal. In such a state of things, and if that is all, I say without hesitation that there is no genuine industrial dispute as between the parties in the State who are bound by the award. I do not think that the Constitution intended to give any such appeal, which would, indeed, be quite inconsistent with the whole scheme of the Constitution as regards State Courts.

But, with regard to the second point, I think that an award of a State Court of Arbitration, whether made a common rule or not, should be regarded as a judgment *inter partes*, standing on the same footing as a solemn agreement of the most binding nature, but not on the footing of a State law. If in the case of a genuine dispute which the federal Court has jurisdiction to decide, the existing obligations of the parties come incidentally in question, and it is impracticable to settle the dispute without departing in some degree from the terms of the agreement or judgment, I think that the jurisdiction of the Court to do so is not excluded. But it is hard to imagine a case in which any tribunal would allow parties, who have invoked and obtained a judgment of a competent Court, to tear up the judgment merely because they are dissatisfied with it. With this qualification I answer the question in the affirmative.

VA. The Factories and Shops Acts of Victoria provide for the determination of the minimum rates of remuneration and maximum hours of work to be permitted in that State in certain branches of industry. This function is entrusted to elected Boards, and the determination when made has the force of law. There is in existence a determination of a Board, called the Woodworkers' Board, which determines for part of Victoria certain conditions of employment with respect to some of the occupations followed by members of the claimant organization within that part. We are asked to say whether the Court has power to make an enforceable award inconsistent with that determination.

In my opinion the Wages Boards are subordinate legislative

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bodies duly constituted by the law of Victoria, and for reasons already given, I think that the Court cannot supersede ordinances made by them. That is to say, the Court cannot fix a lower minimum of pay or a higher maximum of hours of labour than those prescribed by the determination, or make any other order inconsistent with the particular ordinance of the Board as to a matter within its jurisdiction. The test of inconsistency is, of course, whether a proposed act is consistent with obedience to both directions.

With these qualifications I answer this question in the negative.

VI. There is in existence an industrial agreement registered under the Western Australian *Industrial Conciliation and Arbitration Act* made between the Western Australian branch of the claimant organization and Miller's Karri and Jarrah Co. We are asked to say whether the Court can make an enforceable award inconsistent with this agreement. What I have said with regard to question V. is equally applicable to this question.

VII. This question relates to an industrial or collective agreement between a Victorian trade union, of which some members of the claimant organization are members, and one of the Victorian respondents. Such an agreement is not legally enforceable against any one, and the only effect that could be given to it until repudiated is as an obligation of honour. When repudiated it cannot stand in the way of an award.

VIII. Since the commencement of the proceedings Millar's Karri and Jarrah Co., which carried on operations in Queensland in both bush mills and timber yards, has sold its business to the Queensland Pine Company, and the Court has ordered that that company shall be joined as a party. We are asked whether it had power to do so. In one sense the Court has power to join as party any person or company alleged to be a party to the dispute before the Court. Whether an effective award could be made against a party so joined depends upon whether the person or company was in fact a party to the dispute. On this I have nothing to add to what I have already said.

I am conscious that this opinion partakes more of the character of an essay or treatise than of a judicial pronouncement, and I

entertain some doubts whether I am performing a judicial duty in delivering it. I should not like it to be regarded as a precedent, but on the whole I think I should let it go forth for what it is worth.

O'CONNOR J. The jurisdiction of the learned President to determine the matters in issue between these parties can arise only on the establishment of the fact that there exists between them "an industrial dispute extending beyond the limits of any one State." On the inquiry into that fact several important questions of law have arisen. Others relating more immediately to the scope of the Court's powers in the settlement of the dispute must obviously arise. As yet no fact has been determined, nor is the inquiry as to the nature of the dispute closed. Under these circumstances it has been difficult to state in concrete form the matters of law upon which the learned President seeks the opinion of this Court. In the course of the argument it has become apparent that some of the questions cannot, in the absence of further knowledge of the facts, be answered at all, that others cannot be answered categorically, and that as to the latter the opinion of the Court to be of any value as a guide must be more or less in the nature of an exposition of the principles involved in the determination of the question. I propose, therefore, before answering the questions separately, to consider generally some of the requirements of an industrial dispute essential under the Constitution to found jurisdiction and the extent of the powers which will necessarily be called into operation in the settlement of this particular dispute if jurisdiction is established.

Sub-sec. xxxv. of sec. 51 of the Constitution confers the power which Parliament has purported to exercise in enacting the *Commonwealth Conciliation and Arbitration Act* 1904. It is a power to make laws for the peace, order and good government of the Commonwealth with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." This Court has laid down on many occasions that the meaning of a provision of the Constitution is to be ascertained in precisely the same way as the meaning of a provision in any other Parliamentary enactment.

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My learned brother the Chief Justice, delivering judgment in the case of the *State of Tasmania* v. *The Commonwealth of Australia*, (1) in enunciating that rule quoted the following passage from the judgment of Lord Chief Justice *Tindal* in the *Sussex Peerage Case* (2):—"My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such a case best declare the intention of the law-giver." The words to be construed in this instance are in themselves precise and unambiguous. "Conciliation" and "arbitration" may be regarded as legal expressions, but the rest of the sub-section consists of words in common use in the English language, and as to these latter it must be taken that the legislature has used them in their natural and ordinary sense. For many years before the passing of the Constitution the expression "industrial dispute" was in common use in Australia and New Zealand as describing a dispute between bodies of workmen and their employers as to terms of employment. In the same sense the term was applied in England by well known writers on industrial matters, by public men, and by journalists. Sometimes, as in the English *Conciliation Act* 1896 and earlier Statutes, the expression used was "trade dispute." But whether called "industrial dispute" or "trade dispute" the characteristics of the thing so described were always the same, namely, a dispute between a considerable body of employés and their employer or employers as to wages, hours of labour, or other conditions of employment, the employés being combined for the purpose not necessarily in a union or other permanent form of organization. Whether the dispute were initiated by employer or by employés, whether at the stage of initiation, negotiation, or of conference, and whether likely, or not, to end in a strike, or lockout, it was invariably designated as an industrial, or trade dispute. It had one characteristic distinguishing it from controversies of individuals respecting civil rights. It could not be settled by the ordinary tribunals. It was not

(1) 1 C.L.R., 329, at p. 339. (2) 11 Cl. & F., 85, at p. 143.

within their cognizance, the questions at issue being, not as to the breach or observance of existing contracts, but as to the removal of grievances which had grown up under them, and as to the best means of securing by new agreement or understanding other and better conditions for the future.

Such being the nature and characteristics of the controversies between employers and employés recognized and described in England and Australia as "wages disputes" or "industrial disputes," it may be of advantage to the clearer understanding of the view I am discussing if I advert briefly to the terms "conciliation" and "arbitration" as used in connection with them. For many years the majority of people in England and Australia had realized that the settlement of industrial disputes in some more humane and reasonable way than by strike or lockout, with the disturbance of industrial conditions, the bitterness, the cruel consequences to the weak and helpless, the dislocation of trade, the monetary loss to the community which those crude methods involved, was more a matter of national than of private concern. The view steadily gained ground that public tribunals should be created for the settlement of these differences as they arose. In England cautious attempts in this direction were made as early as the year 1867. The Parliament of New South Wales in 1892 passed a Statute creating tribunals of conciliation and arbitration for the settlement of industrial disputes, which, however, by reason of defects in its method of dealing with the question, became inoperative. New Zealand in 1894 initiated a system for settling industrial disputes by conciliation and arbitration—a system which has been in active operation ever since. South Australia followed in the same year with similar legislation, and, in 1896 the British Parliament enacted a *Conciliation Act* bringing into operation a method of dealing with the subject, which differed in many respects from the Australian and New Zealand systems but aimed at the same object, described in its title as "The prevention and settlement of trade disputes." Most important, also, as throwing light on what must have been in the mind of the legislature, is the fact that some years before the Constitution was framed the people of Australia had seen an industrial dispute, originating in one State, grow into a serious

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industrial disturbance, spreading over many States, and had thus learned, from bitter experience the need of a tribunal with jurisdiction wide enough to settle industrial disputes extending throughout Australia.

Under these circumstances I can find no reason to doubt that the plain words used in sub-sec. XXXV. describe literally and exactly the power which the Federal Convention and the British legislature intended to confer on the Commonwealth Parliament, that is, the power to create tribunals invested with jurisdiction to prevent and settle by conciliation and arbitration industrial disputes of the kind to which the British, the New Zealand, the New South Wales, and the South Australian legislatures had applied the same remedy, limiting, for obvious reasons, the Commonwealth power to those disputes which, by reason of their extending beyond the State boundaries, could not be effectually settled by any State industrial tribunal. In the *Jumbunna Case* (1) it became necessary to consider what would constitute an industrial dispute extending beyond the limits of any one State. The particular aspects of the question which have become important here did not there arise. In delivering judgment in that case I stated generally, though I did not attempt to state exhaustively, the nature of an industrial dispute within the meaning of the Constitution. I quote the following passage as bearing on the question now under consideration (2):—"In examining this contention it becomes necessary to inquire into what amounts to an industrial dispute extending beyond the limits of any one State within the meaning of the Constitution. That the parties on either side should be organized in any permanent form of combination is not essential. If all the workmen of an employer in a particular trade take concerted action in demanding and endeavouring to enforce from him some alteration in their conditions of employment, there is an industrial dispute. 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

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

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

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." The other members of the Court expressed views substantially similar, and I gather from the arguments of counsel on both sides in this case that no question has been raised as to the accuracy of that general statement.

It is contended, however, that the facts now under consideration present an industrial dispute from quite another point of view, and that the proper construction of sub-sec. xxxv. necessitates an addition of further essentials to constitute an industrial dispute extending beyond the limits of any one State within the meaning of the Constitution. These additional essentials are referred to separately in the several questions submitted by the learned President, but in discussing the interpretation of the sub-section they may be taken together. In considering what is necessary to constitute an industrial dispute within the meaning of the Constitution it must always be remembered that the Convention and the British Parliament were dealing with the subject practically, that they had in mind actual differences between employers and employés, differences of the kind which the public interests demanded should be submitted to a federal tribunal. They were thinking of real industrial disputes, not of industrial disputes that existed only on paper, or were got up for the attainment of some other and ulterior object than the settlement of differences between employers and employés. They were thinking too of "industrial dispute" in its broad outlines as the public knew and recognized it, not of some carefully thought out legal conception which the expression, by the exercise of professional ingenuity, might be made to fit. Having regard to all these circumstances it is to my mind beyond question that the Federal Convention and the British legislature have used plain and apt words to describe an industrial dispute having a real existence. I therefore agree that the Commonwealth Arbitration Court can have no jurisdiction unless the dispute is real in the sense that I have explained. We are not called upon to express any opinion as to whether the dispute in this case is or is not

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real, nor indeed have we before us the material on which we could arrive at a conclusion on that issue. If it were to be assumed that a demand by the complainant organization on each employer and a refusal by each employer to comply with the demand were all the learned President would have before him, I should not hesitate to express the opinion that no tribunal would be justified in finding on such evidence the existence of a real industrial dispute. But as I understand the matter that is not the only evidence before the learned President, nor has he as yet closed his inquiry. It is for him to determine, after full inquiry into all the circumstances, whether the dispute is or is not a real dispute in the sense which I have described.

The respondents however contend that it is not enough that there should be a real and actually existing industrial dispute, in the ordinary sense of the word, extending beyond the limits of one State, and fulfilling all the requirements laid down in the passage quoted from my judgment in the *Jumbunna Case* (1), but that it is further essential that both parties to the dispute should be combined; that, in this case, it being assumed for the purposes of the questions submitted that the employers acted independently, and without preconcert of any kind, in refusing to comply with the demands of the claimant organization, there cannot be an industrial dispute within the meaning of the sub-section. The plain answer to that contention is that the words of the Constitution authorize no such limitation of the meaning of the term "industrial dispute." If an industrial dispute, such as I have described, has come into existence, the jurisdiction cannot fail because the employers, for reasons of their own, choose to act independently instead of in concert.

Again: it is said that the claim of the organization which is the foundation of the dispute must be for uniform rates of wages or conditions of employment throughout the whole area covered by the dispute, that the claim of the complainant organization for an additional 15 per cent. to its members in Western Australia will prevent the Court from having jurisdiction to entertain it. It is obvious that the Federal Convention and the British legislature must have been well aware that Australia was a country of

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

varying climates and conditions of life; that the cost of living, for instance, would give the same amount of wages different effective values in different parts of the Commonwealth. It is difficult to imagine any industrial dispute extending beyond the limits of one State in which the relations of employer and employé could be fairly adjusted without some regard to the differing economic and climatic conditions prevailing in different States. If, for example, the respondents' contention is right, the Federal Arbitration Court would have had no jurisdiction to settle the dispute between the shearers and the pastoralists—a dispute upon which it recently adjudicated. That dispute extended over four States and different rates were claimed for New South Wales, Victoria and South Australia and certain parts of Queensland. The award recognized and gave effect to these differences of rates, and no settlement could be workable which failed to give effect to them. It is obvious that a construction of the sub-section which would shut out an industrial dispute so clearly within the words and the intention of the Constitution demonstrates the impracticability of the contention.

An attempt was made to show that the power of awarding in settlement of the dispute different rates of wages or other differing conditions of employment would be in violation of sec. 99 of the Constitution. But the argument did not seem to me to be seriously pressed. It is plain that a direction as to such wages or conditions in an award is not a "law or regulation of trade" or "commerce" giving "preference to one State or any part thereof over another State or any part thereof," and cannot therefore be within the prohibition of that section.

There is yet another ground upon which the respondents urge that the jurisdiction of the Commonwealth Industrial Court in this case must be ousted. In New South Wales and Western Australia there are now in force awards of the State Industrial Courts binding the members of the complainant organization and their employers in those States in respect to the very matters which are the subject of the present dispute. In Victoria there is a determination of the Woodworkers' Board, duly authorized under the Victorian Factories and Shops Acts, which determines the conditions to be observed and the minimum rates of wages

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and prices to be paid by employers to employés in respect to the same kind of work as that performed by Victorian members of the organization in the employ of the Victorian respondents. The persons who are bound by these awards, or who come within the determination of the Victorian Wages Board, cannot, it is said, dispute with their employers the binding effect of the award of the State Court, or the determination of the State Wages Board, they are therefore, it is urged, incompetent to become parties to an industrial dispute in which the conditions so awarded and determined are brought into question, and it is argued that in such a case an industrial dispute within the meaning of sub-section xxxv. cannot come into existence. The Constitution, as I have pointed out, concerns itself with a real dispute actually existing. The contention of the complainants in any dispute may, when it is inquired into, be found to be absolutely untenable in a Court of law, their demands may even be inconsistent with the law, but it cannot be denied that the dispute exists in fact. It may be in such a case that on investigation the President would find himself powerless to settle it in the manner claimed without infringing laws which bind the Court as well as the parties. That does not render the existence of the dispute less a reality. The untenable nature of the complainants' reasons cannot deprive the tribunal of the jurisdiction which attaches whenever a real industrial dispute such as I have already described comes into existence. It may be that the awards themselves, or the provisions of State laws, which both parties are bound to obey, will make it plainly impossible that the Court can award the relief asked. That in itself may afford in some instances cogent evidence that the dispute is not real, that, though an industrial dispute in form, it is, in truth, nothing more than an agitation to get rid of the obligations of a State law. Those are circumstances for the President to consider in determining whether there is in the dispute the basic quality of reality. But if that is once determined in the complainants' favour the jurisdiction of the Court to hear the dispute is complete.

I shall next assume that the facts have established the existence of a dispute which will give jurisdiction, and I now proceed to consider the questions raised as to the power of the Federal

Arbitration Court to make an award inconsistent with State industrial awards or with State Statutes. It is a fundamental principle of our jurisprudence that every tribunal must act within the law. In a unitary form of government the principle is easy of application; every tribunal must obey and give effect to the law of the land. In the case of a federal tribunal the statement must be to a certain extent varied. A federal tribunal may be bound to administer the law of the State or the law of the Commonwealth according as it is subject to one law or the other in respect of the particular matter in hand. But it must administer one law or the other, it cannot be a law unto itself. The *Commonwealth Conciliation and Arbitration Act* constituting the Court has endowed it with authority to hear and determine industrial disputes as defined by the Act, and to make any award it deems fit in pursuance of its determination. Sec. 30 enacts that "when a State law or an award order or determination of a State Industrial Authority is inconsistent with an award or order lawfully made by the Court, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." It will be noted that an award or order of the Court invalidates State awards or laws inconsistent with it only when it is lawfully made. If the award is in excess of the powers conferred on the Court it is not lawfully made. As far as the present question is concerned the power conferred may be summed up in these words —"to determine the industrial dispute by conciliation and arbitration." Every provision of the Act is ancillary to that. Such, indeed, is the full extent of the power which Parliament is by sub-sec. xxxv. of the Constitution authorized to confer, and the Act will be interpretated, if possible, as conferring no larger powers than the Constitution authorizes. The extent and limit of the Court's power is therefore to be found in the words of sub-sec. xxxv. In considering the question from this point of view several principles of interpretation frequently acted upon by this Court must be borne in mind. It will be taken that there is involved in the grant of power every thing necessary to make it effective: *D'Emden* v. *Pedder* (1). Again: effect must be given to the principle enunciated by Chief Justice *Marshall* in *McCulloch*

(1) 1 C.L.R., 91.

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v. *The State of Maryland* (1), and followed by this Court in the *Jumbunna Case* (2) and other cases, namely, that, when the object aimed at is within the limits of the power, the legislature cannot be interfered with or controlled as to the mode in which it may deem fit to exercise the power, provided that it chooses means which are appropriate and fairly adapted to the object. Chief Justice *Marshall* says, in the passage referred to (1): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." On the other hand it must be remembered that the Constitution leaves to each State the exclusive control over all phases of industry operating solely within State limits. The State may make laws imposing any rights, duties, or obligations it deems fit on employers and employés engaged in its industries. That power is as definitely vested in the State as the power conferred by sub-sec. xxxv. is vested in the Commonwealth. It is in accordance with the principles laid down by this Court on many occasions that these two powers, that of the State to control its own industrial affairs, and that of the Commonwealth to empower its Courts to settle by arbitration industrial disputes extending beyond the limits of any one State, must be so construed as to be as little as possible inconsistent with each other.

The meaning, scope and purpose of arbitration are well known. An ordinary arbitrator's duty extends only to determining and giving effect to the rights of the parties, in accordance with his view of the facts and the laws. The duty of arbitrator in an industrial dispute is also confined to the judicial determination of the matters in dispute. But the scope of his jurisdiction is necessarily larger in one respect. Industrial arbitration may involve the abrogation of the existing contractual rights of either of the parties where the abrogation is necessary for the effective settlement of the industrial dispute. That proposition was questioned in the course of the argument. But it is to my mind one of the fundamental conditions on which the jurisdiction of Industrial Courts is exercised. The federal tribunal must there-

(1) 4 Wheat., 316, at p. 421. (2) 6 C.L.R., 309.

fore necessarily have authority when it deems fit to make an award in disregard of contract between employers and employés and of the State law which makes them binding. Again: it may happen that the award of a State Industrial Court settling a State dispute stands in the way of fair and effective adjudication by the federal industrial tribunal. In such a case, where the industrial relations of the same parties become the subject of inquiry in the wider area of the Inter-State dispute, the federal tribunal must, if its settlement is to be effective, have the power to disregard, as far as those parties are concerned, the award of the State tribunal, which has determined their future relations for a certain period. And although the State law makes the award binding on the parties, and makes its directions enforceable by penalties, that law must yield, as the State law as to contracts must yield, to the supremacy of the federal award, and for the same reason—necessity. For, as the federal power cannot be effectually exercised unless in these respects, State control over State industries is invaded, the power of the Commonwealth Parliament to clothe its tribunal with authority for that invasion is, therefore, necessarily included in the terms of sub-sec. xxxv.

When, however, we turn to the second branch of the same question, namely, to what extent, if at all, the federal Court may make an award inconsistent with State laws, entirely different considerations arise. The authority to settle the dispute by arbitration does not authorize the federal tribunal to disregard a State law merely because it may stand in the way of the method of settlement which the President may think most effectual. He may, for instance, deem it necessary for a satisfactory settlement that the weekly half-holiday in a certain trade throughout Australia should be Saturday, and that the men should work on Wednesday. But he would not, on that account, have power to disregard a State Statute forbidding work in that trade on Wednesday. In such a case the State Statute would prevail over the federal award. If it were not so, there is no State law relating to the industries of a State which might not, in that way, by the terms of a federal award be made inoperative. But there is nothing in sub-sec. xxxv. to justify the contention that the federal tribunal can be empowered to disregard State laws

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whenever they are inconsistent with the terms of its award, whatever those terms may be. Its authority is to act judicially in the settlement of the industrial dispute. It is empowered to do everything within the law necessary to accomplish that end effectually. But outside that it is, in respect of any matter beyond the ambit of federal power, as much bound by State laws as the tribunals of the State are bound. It is unnecessary to go more into detail on this question, because there is one set of Statutes only which it would appear to be necessary to consider in this connection, that is, the Victorian Factories and Shops Acts, from which the Victorian Wages Board derive their authority to determine the wages of operatives in particular trades. The determination of these Boards seem to me to stand in a different position from the award of a State tribunal made in settlement of a trade dispute. The fixing of the scale of wages is not the settlement of an industrial dispute, its operation extends far beyond the settlement of the rights *inter se* of parties to an industrial dispute; it is rather the making of a general law by a law-making authority constituted by Statute for that purpose; a law binding, not only on certain parties, but on the public generally. The scale of wages, when determined, is legally in the same position as if it had been embodied in a Statute, and made binding on every individual in the State. It could hardly be denied that a State Statute, fixing a scale of wages for employés in a particular trade, would be binding on the federal tribunal, and that any direction in an award inconsistent with its provisions would be invalid. Coming however to the facts of this case, it is difficult to see how any conflict can arise between the scale of minimum wages determined by the Board under the Acts and the award of the federal tribunal. If a conflict does arise the provisions of a Statute must in my opinion prevail.

I shall now give my answers seriatim to such of the questions propounded by the learned President as I am able to answer at the present stage of the case.

1. Assuming all the other conditions necessary to constitute an industrial dispute within the meaning of sub-sec. xxxv. to be existent, the want of preconcert or combination between individual employers under the circumstances stated would not

deprive the Court of jurisdiction under the Constitution. Nor would it under the Act. Giving every possible weight to Mr. *Blacket's* ingenious argument, it is impossible, in view of the terms of sec. 24 of the *Acts Interpretation Act* 1901, to read the word "employer" in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904 as not including the plural as well as the singular.

2. With regard to an industrial dispute of which the federal tribunal has cognizance, all State boundaries disappear and the President may adjust wages or other conditions of employment to fit special and local circumstances in any way he thinks fit. Such a power is, for the reason I have already given, necessarily vested in the tribunal.

As to 3 and 4 the Court, in my opinion, has not before it sufficient material to enable it to answer the questions.

5. Yes, as I have fully explained the Federal Arbitration Court has the power to make an award inconsistent with a State award to operate from any time the President chooses to fix.

5A. No, for the reasons I have stated.

6. Yes, same answer as to 5.

7. A registered industrial agreement may be disregarded by the Federal Court for the same reasons as the award of a State Industrial Arbitration Court may be disregarded. *A fortiori* the agreement mentioned in the question could not stand in the way of the award of a Federal Court inconsistent with its provisions.

8. There is not, in my opinion, sufficient material before the Court to enable me to answer this question, but I concur in the learned Chief Justice's observations in regard to it.

ISAACS J. I wish to observe at the outset that the decision of the Court appears to me to be a regular judicial determination.

The first question submitted is really whether in this case—assuming the existence of all other necessary circumstances—it is, either under the Constitution or the Act, legally essential to there being an industrial dispute extending beyond the limits of one State that there should be proved some combination or pre-concert on the part of the various employers to refuse the demands of the employés.

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The expression "industrial dispute" is not technical; it is the plain description of a thing, a state of affairs well known at the time the Constitution was framed, and in that sense for many years before. In the *Jumbunna Case* (1) I stated my views as to the meaning of the term "industrial dispute" and of the whole expression "industrial dispute extending beyond the limits of one State," and I see no reason to modify that statement.

No exhaustive enumeration of circumstances which form the *criteria* of an industrial dispute can possibly be made; nor would it stand good as a complete statement for any length of time, so multitudinous are the facts which may constitute a dispute. Any attempt to frame a series of identification marks can only be *obiter*; there is no practical difficulty in recognizing the thing itself when it arises because its main and substantial features are thoroughly well known. It must of course be a real dispute. A demand and a refusal may be made in terms and in circumstances which indicate that they are merely tentative or that they are an ultimatum. In the one case they would probably not constitute a dispute: in the second the President might think they did.

Three broad characteristics connected with trade disputes are involved in several if not all the questions, and for convenience sake may be mentioned now. They are what a trade dispute is; who may be disputants; and what are the subjects of such a dispute.

No statement can, as already observed, be taken as exhaustive, but there are three answers to those queries which come from sources of considerable authority in industrial matters, and materially assist to clear the ground in this case.

With respect to the first Mr. Geoffrey Drage M.P., who had been the Secretary to the English Commission, defined Trade Disputes in his book "The Labour Problem" published in 1896. He says (at p. 303):—"A trade dispute may be defined as *an actual or prospective interruption of work* due to the voluntary action of the employers, the employed, or both; such action being induced by a conflict between the interests or the opinions of the two parties to the dispute."

The disputants he described in the following way:—"Such

(1) 6 C.L.R., 309, at pp. 372 to 375.

disputes may arise (1) between one or more individual and unorganized employers and his or their individual and unorganized workmen; (2) between one or more individual and unorganized employers and an organized combination of workmen; (3) between an organized combination of employers and an organized combination of workmen; and (4) between two organized combinations of workmen."

As to the causes of disputes—and it is all important to remember the distinction between the *cause* of a dispute, which may be lawful or unlawful, and the *dispute* itself, which is a matter of fact—the majority report of the English Royal Commission on labour in paragraph 100 (Fifth and Final Report), Commons Papers 1894, vol. 35, p. 38, says:—"The essence of most of the disputes between employers and employed is, of course, the shares in which the receipts of their common undertaking shall be divided. By far the largest proportion of disputes, strikes, and lockouts, have direct reference to the increase or diminution of the standard of wages, or the introduction of fixed price lists. Many other disputes relate to the standard of hours, a question which in many cases forms part of a conflict with regard to wages. Other conflicts are undertaken by trade societies with a view to compel employers to recognize them, to strengthen and enlarge their organization, to limit the number of youths entering the trade, to prevent the employment of non-unionists, or sometimes that of women and children, to defend unionist colleagues, or assert unionist rules and customs, and, generally speaking, to protect the monopoly of workmen already in the organization. As has already been indicated, the ultimate object of all this policy is by increasing their strength and securing as far as possible a monopoly of employment to obtain as large a share as possible of the receipts of the industry, and to exercise a voice as to the general conditions under which it is carried on. Many disputes are connected with special customs or circumstances in particular works, with attempts to alter or prevent the alteration of various working arrangements, with questions of piece-work, overtime, holidays, meal times, and the introduction or abolition of systems of fines, deductions, and so forth. Some are of a merely personal nature, being connected, for instance, with the

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unpopularity of particular officials. 'Sympathy' or 'on principle' strikes, of which much has lately been heard in connection with less skilled industries, are those in which men engaged in one occupation strike, without alleging any special grievance of their own, expressly in order to support men engaged in some other occupation who are involved in a conflict with their employers. A common instance of this kind of strike, in recent times, has been the refusal of dock labourers to discharge or to coal ships manned by non-unionist crews. There are also instances of a number of employers closing their works for a time in order to support a particular employer against whom a strike is being directed. Finally, there are the 'demarcation disputes' in which organized bodies of workmen employed in some complex trade like shipbuilding, as, for instance, shipwrights and joiners, are at issue with regard to the province of work belonging to each section. In this last case employers, although not directly concerned in the disputes, yet have to bear the inconvenience and expense of the strikes and stoppages of work to which they lead."

Paragraph 101 adds:—"Industrial disputes vary infinitely in the manner of magnitude and duration, from stoppages of work in a particular mine or factory, only lasting for a day or two, up to disputes involving great districts and masses of workpeople, lasting sometimes for several weeks, or even months, and costing in wages, and in loss to the accumulated funds of trade unions and to capital, large sums of money, besides causing widespread disorganization among the allied and dependent trades."

The object of the federal grant of power being to preserve or restore industrial peace for the general welfare of the whole people, whether directly concerned as actual disputants or indirectly interested in other trades or as members of the general community, where the State laws for any reason are unable to secure it or limit the interruption to one State, it manifestly cannot affect the matter whether the disputants on either side do or do not agree beforehand to embark upon the struggle, or whether they fight singly or in combination. The industrial dispute is equally there, its effects are the same, its inconveniences and its dangers are identical.

It was, however, contended that Parliament had limited its enactment to cases where employers had in some way combined. This contention was rested on the fact that the word "employer" in paragraph (*a*) of the definition of "industrial dispute" in the fourth section, was couched in the singular. But the force of sec. 23 of the *Acts Interpretation Act* 1901 has not been displaced. No contrary intention has been indicated, and it would need to be a very clear indication to induce a Court to believe the whole machinery of the Statute was erected to provide only for the cases where the employer carried on business in two States, and where the employers chose to organize. Sec. 19 was pointed to, as enacting that no dispute is cognizable by the Court except it is submitted by an organization, unless upon either the Registrar's certificate or a request of State authority. That undoubtedly gives an advantage to an organization. But its purpose is clear when the history of industrial disputes is examined.

One of the problems of industrial arbitration has always been enforcement of awards. Even when there is a legal sanction, as well as where the whole arrangement is voluntary, there are practical difficulties in securing obedience to an award unless there is fairly perfect organization. The advantages of organization in this connection are often adverted to by writers, and it is sufficient here to make reference to paragraphs 142 and 145 of the fifth and final Report of the English Royal Commission on Labour 1894 (Commons Papers, vol. 35, pp. 52 and 53).

But offering inducements to employers organizing for the better administration of the Act, by not allowing them to be claimants unless organized, apart from special instances, is not only perfectly consistent with subjecting unassociated employers as respondents to the jurisdiction of the Court where an industrial dispute occurs, but is in reality opposed to the idea of leaving so serious a gap in the Statute, as would arise if jurisdiction depended upon the voluntary submission of either party. There are other sections, such as sec. 27, where reference is made to "all the parties," indicative of more than an employer or a union of employers as the only disputants on the one side, and an organization of employés as the only disputing party on

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the other, but whatever their force may be, they are rather in support of upholding the general rule of the *Acts Interpretation Act* 1901, and nowhere can I see any evidence of intention of contrary intention.

The second question involves to a great extent the principle of the first. State lines are disregarded except for the purpose of ascertaining whether the dispute extends beyond the limits of one State. If it does, then, in order to see whether any particular item is part of the dispute, it must be regarded as if it occurred in a country with a single Government, as, for instance, wholly in a State, or in England. If, for instance, an additional percentage were asked in a Queensland or Western Australian dispute for those employés who were situated in the less accessible and more expensive localities, no one would say the additional percentage was not part of the one dispute. For this reason I would answer the second question in the affirmative.

The third question turns entirely upon a question of fact. If bush mills and timber yards are really not distinct industries, but only different and well recognized branches or departments of the same industry, I cannot see why the award should not include both bush mills and timber yards, notwithstanding that in the particular timber yards in West Australia no member of the claimant organization was actually employed at the moment of the dispute, because some of them might at any time be employed there.

Nor is it material that at the moment of the dispute the South Australian employers have as yet erected no bush mills, or that a Victorian employer has so far no timber yard. If in fact these are mere adjuncts of the same trade—mere alternative or additional methods of carrying on the same industry to which any employer may resort at any instant without changing his vocation, the absence of a bush mill in a particular business or the non-employment of a member of the union in a bush mill or a timber yard is a mere temporary incident, and does not prevent unity of dispute as to the general terms of the employment in the industry taken as a whole and as understood by those engaged in it.

The third question I also answer in the affirmative.

The fourth question should *a fortiori* receive the same answer as the third.

The fifth question is whether the Court of Conciliation and Arbitration has power to make an enforceable award inconsistent with the New South Wales award. The respondents assert there is no such power—and for two reasons. They contend in the first place that the words "industrial disputes" in the Constitution do not mean disputes in fact, but such as would be disputes if the State laws permitted them to be so considered. If, say the respondents, a State law says that workmen in that State must work 12 hours a day, then though all the workmen in the State in defiance of its law strike work, and join other workmen in other States similarly circumstanced in demanding better hours refused by the employers, there is in the eye of the Federal Constitution, no dispute whatever.

According to this contention factories may be stopped, trade and commerce interrupted, men may be idle, women and children suffering, allied and dependent industries brought to a standstill, the public in want of ordinary supplies, animosity manifested between masters and men in every direction, in short, there may exist all the usual unfortunate appearances and all the disastrous effects of bitter industrial war, all of which the State law has been unable to prevent or cure, and yet, upon the true construction of sub-sec. xxxv. of sec. 51 of the Constitution, the Federal Arbitration Court is bound to declare, by virtue of a piece of paper called a State award or an industrial agreement, which has proved ineffectual to avert the conflict, that there is no conflict, that there is no industrial dispute; but there subsists a most perfect industrial peace, good will and harmony; that the national tribunal can discern nothing but the wheels of industry revolving with their accustomed steadiness and speed; and that all the business dislocation, all the public and private loss are in the eye of the law mere figments of the imagination. I cannot accept this argument on the part of the respondents.

Justice is proverbially said to be blind, but this contention carries the virtue to an excess that I cannot find warranted by the language of the Constitution. The words are "industrial dispute" without qualification, and I accept the observation of

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Jervis C.J. in *York and North Midland Railway Co.* v. *The Queen* (1), that "Courts of justice ought not to depart from the plain meaning of words used in Acts of Parliament: when they do so they make, but do not construe, the laws."

I heartily agree with the learned Chief Justice when he says in considering industrial disputes we are considering real facts and not technicalities. The Constitution was framed to meet the great facts of our national life, to deal with circumstances apparently beyond the control of the States, or their competency to regulate with advantage to the people of Australia. Domestic commerce as such was left to the States exclusively. Inter-State commerce, or, in other words, commerce that overflows the State, was taken from them, and handed to the central power for unlimited legislation. The only difference between the two species of commerce is the fact of the one passing beyond the limits of some one State. Domestic disputes, so long as they retain their purely internal character, are in like manner contained in the exclusive ambit of State authority: simply because, like internal commerce, they are not granted to the federal power. But, as in the case of commerce, the moment an industrial dispute passes the bounds of a State, and enters those of another, or, what is the same thing, the moment an industrial dispute arises in more States than one, a dispute comes into existence which may be treated as national. It comes within the terms of sub-sec. (xxxv.), and as a complete entity may be dealt with wholly and exclusively under the authority of the federal legislature, though, of course, only in manner directed by the sub-section. Once grasped by federal jurisdiction, once the Commonwealth arbitral authority is exerted over it, the dispute is indivisible; it is no longer to be regarded as a mere aggregation of two State disputes, each to be dealt with exclusively by the State authority, or in accordance with State law; for that gives no meaning to the clause in the Constitution from the federal standpoint.

Once the federal tribunal is seised of the dispute, no single portion of it is provincial, the whole entity of the subject matter, national because it answers to the Constitutional test of embracing

(1) 1 El. & Bl., 858, at p. 864.

in its area territory of at least two States, then comes, like Inter-State commerce always is, within the sole and supreme cognizance of the Commonwealth, to be settled by the Commonwealth tribunal according to federal law and constitutional direction, but, on the principles laid down in *D'Emden* v. *Pedder* (1), unhampered and unimpeded by State interference, whether legislative, judicial, or executive.

Therefore it is the patent fact of an actual dispute extending over more than one State which attracts the Commonwealth jurisdiction, and if it does, what is there which cuts down the necessity of the same tribunal settling it, and, if settling it, then effectively upon terms not necessarily dictated by the terms of any State award?

To this it was answered with perfect accuracy by learned counsel for the respondents, that the Commonwealth power of legislation in respect of these disputes is not a general power to regulate the whole subject of disputes as in the case of bills of exchange or trade marks, but only a limited power to enact laws with respect to conciliation and arbitration for the prevention and settlement of such disputes. And they contend that the word "arbitration" applies naturally to so much only of the ground in controversy as is not already occupied by existing obligations whether by award or agreement. But that was not the signification the word "arbitration" bore in 1900 when used with reference to the settlement of trade disputes, with respect to the terms upon which future industrial operations should be conducted. As far back as 1882 Professor Jevons in his book "The State in Relation to Labour" (at p. 150), in distinguishing this class of arbitration from arbitration relating to past contracts, which he says are proper subjects for compulsory process, states: —"It is a totally different question how far agreements relating to the future conduct of trade and industry can or ought to be decided by the judgment of a third party. Here the freedom of industry is at stake, for the arbitrator will now have to decide, *not what agreement was made, but what is to be made.* The voluntary nature of the arrangement cannot be affected by inquiries directed merely to ascertain *what the arrangement was*;

(1) 1 C.L.R., 91.

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but in regard to the future an arbitrator in assigning the terms on which the disputants are to agree necessarily restricts their liberty."

Now it is plain from these observations, as well as from the exigencies of the subject, that the future terms of employment do not mean the terms of agreements to be made in the indefinite future after all existing agreements have expired by effluxion of time. These disputes and their summary methods and enforcement by strike and lockout are to satisfy immediate needs and present desires, and to correct existing injustice, not as to what is to happen in the indefinite future, when agreements or awards already made have expired by effluxion of time—say years hence—when conditions may have altered, and present disputants have, by stress of the very conditions they complain of, disappeared altogether.

No arbitrator could make an intelligent award on such a basis—he must act on present conditions.

All the instances of arbitration available in English sources evidence the fact that it is resorted to for the instant correction of unfair terms; and it would be a novel procedure for one disputant to go to arbitration with the decision already registered against him for perhaps years ahead in the form of an agreement or award, which on the very issue raised is alleged to lay down stipulations rendering tolerable existence an impossibility.

I think the chapter on arbitration read by Mr. *Arthur* from *Webb's Industrial Democracy* strongly supports the same view.

Australia gets the term "arbitration" from Great Britain where it was and still is voluntary, and there can be no inherent presumption that in arbitration of this nature existing arrangements must continue. Whether they should stand or not must be part of the issue of actual future remuneration and conditions. In the New South Wales Report of the Commission on Strikes 1891 (p. 34, par. 28) it is said:—"It should be remembered that a Court of Arbitration is not like an ordinary Court of law. There is no fixed code of law which it interprets, and its decision is only a declaratory statement as to what it thinks just and expedient." Now starting with that, which is a most important and authoritative recognition in Australia of the meaning of

arbitration, it has long been debated in England whether the arbitration, that is the same class of arbitration, should or should not be compulsory by law. The English Report (p. 51) bears evidence to the desire in some industries for some form of State arbitration. That necessarily means that the State by some tribunal would discharge the same functions in the same unfettered way as arbitrators voluntarily chosen had always done, but would supply a legal sanction to the determination. Just as the industrial disputes contemplated by sub-sec. (xxxv.) are themselves hard matters of fact, not dependent on or susceptible of legislative creation, and not capable either of concealment behind a State award or an industrial agreement, so the arbitration which is to settle them, if there is to be any reality in the decision, must deal with existing and actual facts of life, irrespective of any artificial situation which the parties by agreement, or some other tribunal in a vain attempt to solve the difficulty, may have created.

Speaking of 1865, *Webb's History of Trade Unionism* (1894) at pp. 239, 240, says:—"The industrial dislocation which the lockouts, far more than the strikes, produced, occasioned wide spread loss and public inconvenience. The quarrels of employer and employed came to be vaguely regarded as matters of more than private concern." In June 1866 at a trade union conference at Sheffield it appears that there were resolutions for the establishment of Councils of Conciliation, and the general resort to arbitration in industrial disputes.

English legislation took form in 1867 by the *Council of Conciliation Act* 1867 (30 & 31 Vict. c. 105) whereby what were called equitable councils of conciliation or arbitration might be established on mutual petition, but without jurisdiction as to wages or remuneration for labour. In 1872 a further Act, the *Arbitration (Masters and Workmen) Act* 1872 (35 & 36 Vict. c. 46), was passed enabling parties who so agreed to arbitrate as to wages and hours, quantities, conditions, and regulations of work, and they then became bound by the award. But although trade disputes continued, and grew in magnitude and importance, both the Royal Commission of 1867 and that of 1894 reported against compulsory arbitration. In 1896 an Imperial Act was passed, the

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Conciliation Act 1896 (59 & 60 Vict. c. 30), the title of which is "An Act to make better provision for the prevention and settlement of trade disputes." By that Act the Board of Trade may mediate and on application appoint a board of conciliation or an arbitrator. No sanction is afforded to the decision; and no limitation is placed on the nature or cause of the difference or dispute. Dissatisfaction with an existing agreement or a prior award was as much within the Act as if there had not been any agreement or award. No legal consideration stood in the way—no standard existed but the sense of justice and fairness entertained by the arbitrator. Indeed this very fact is and always has been the main deterring consideration against the general adoption by the employés of compulsory arbitration in England. So stood the matter so far as England is concerned down to 1900 when the Constitution was adopted; the result being that "dispute" was a dispute in fact, and "arbitration" left the arbitrator at large. Whatever had taken place in the past was regarded as past, and he dealt with the future unfettered, though doubtless influenced, by the past.

In Australia the course of legislation was erratic and markedly diverse as well as ineffective. In 1891 the Victorian Parliament passed an Act to establish Councils of Conciliation, but only on the joint request of employers and workmen. Conciliation might be followed by arbitration. No limits were placed on the arbitrator's discretion, and as no lawyers were allowed to be present without consent of both parties, strictly legal considerations were clearly not to be the basis of the award. The Act has been a dead letter.

In 1892 New South Wales passed an Act (55 Vict. No. 29) for conciliation and arbitration for the settlement of industrial disputes, which is chiefly valuable as a legislative recognition of what, according to Mr. and Mrs. Webb, was in England in 1865 a mere vague regard. The Act recites:—"Whereas it is believed that the establishment of Councils of Conciliation and of Arbitration for the settlement of disputes between employers and employés would conduce to the cultivation and maintenance of better relations, and more active sympathies, between employers and their employés, and would be of great benefit, in the public

interest, by providing simple methods for the prevention of strikes, and other disputes, from the effects of which industrial operations may suffer a serious and lasting injury, and the welfare and peaceful government of the country be imperilled."

Now, although the Act itself was apparently not successful, the parliamentary recognition of the general public interest is highly important, because it indicates that the law began to look beyond the interests and the mere personal rights and wrongs of the parties immediately concerned, and to take into consideration the injuries sustained by those not engaged in the quarrels, but who suffered by them, and ought not in any sense, moral or legal, to be bound by any estoppel, agreement or award, or any other personal considerations generally affecting litigants themselves in the ordinary Courts of law. If the quarrel existed in fact, it ought on public grounds to be stopped; if it threatened, it ought to be averted—that was the principle of the Act as far as it went. I need not dwell upon the details of the measure because in the Governor's speech to Parliament on 28th August 1894 it was pointed out that the Act had failed; and these words occur:—"In view of the wide spread inconvenience, pecuniary loss and lamentable strife too often caused by industrial disputes, it is thought that the time has arrived for a fuller recognition of the public interest in such matters." But there the matter rested in New South Wales for some years.

In August 1894, a few months after the appearance of the English Report, New Zealand passed an Act on the subject "to facilitate the settlement of industrial disputes by conciliation and arbitration." The Court of Arbitration consisted of three persons (sec. 48), one representative of employers, one of employés, and a Supreme Court Judge, and a majority decided. Sec. 61 directs the Court to determine any matters referred to them "in such manner as they shall find to stand with equity and good conscience." That absolved them from any consideration of estoppel or prior agreement as a bar to jurisdiction, though, of course, these would naturally be powerful factors in determining the merits. (And see *Moses* v. *Parker*; *Ex parte Moses* (1)).

(1) (1896) A.C., 245.

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The Act with its subsequent amendments has been an active and potent instrument with regard to industrial disputes.

In December 1894 South Australia also passed "an Act to facilitate the settlement of industrial disputes," and in sec. 28 referred also to prevention. After conciliation failed, the Boards were directed to determine the question "by an award, ... according to the merits and substantial justice of the case" (sec. 43). The Local Board consists of persons elected by those engaged in the industry, and the State Board of appointed persons, but representative of the industry. By sec. 53 the award, unless otherwise expressed, is binding on all employers and employés in the particular locality and industry for which the Local Board is constituted, and whose names are entered as voters—which was on voluntary application. But the Act looks altogether against any reservation so far as jurisdiction is concerned in favour of preceding agreements or awards—I except, of course, the registered industrial agreements expressly provided for by the Act itself.

In 1899 New South Wales passed yet another Act "To make provision for the prevention and settlement of Trade Disputes." It was very much on the lines of the English Act of 1896 referring to differences existing or apprehended, but substantially substituting the Minister for the Board of Trade—adding some further procedure provisions which are not material now. I understand there have been three cases under the Act.

Now this was the condition of State legislation in Australia when the Constitution was framed. Some States were without any legislation whatever on the subject; no two States were uniform; all of the Acts were inadequate to cope with admitted evils, even domestic; and with the advent of intercolonial free trade and the enlargement of intercourse the mischief manifestly might be more extensive and more destructive in the Commonwealth about to be created. And although conciliation and arbitration—dealing with facts as they were, influencing and deciding issues on no ground whatever but moral and economic fair play and justice—had in many cases achieved considerable success, it was recognized that the want of efficient legal sanction was sometimes an element of failure. When therefore there was

entrusted to the Commonwealth Parliament the plenary power of legislating upon the familiar subjects of conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of any one State, it appears to me an irresistible inference that the grant with respect to such disputes was as full and unrestricted as a State already possessed over disputes confined to its own borders. It also appears to me not to be a sound position, in view of the facts I have narrated, that the word "arbitration" in connection with industrial disputes is to be taken in any strict legal sense as in the case of mercantile matters which concern individual interests only, and are to ascertain existing rights. The two things when applied to such vastly differing subject matter, are essentially distinct in their operation, and for the reasons given, as well as on the principles of constitutional construction laid down, by Lord *Selborne* in *The Queen* v. *Burah* (1), I am clearly of opinion that the federal power of legislation is not made subject to State awards or industrial or other agreements, and that the Federal Court of Conciliation and Arbitration may make an award inconsistent with any of these, and at once operative. I would add that as this is a question of legislative power it would in any case be extraordinary to apply, to so typical a trustee for the public welfare as the Australian Parliament, the doctrine of estoppel which really is a matter of evidence or at most a rule of law, and therefore commonly alterable by a legislature.

I come now to the question 5A which asks whether an award may be made inconsistent with a determination of a Victorian Wages Board. The Victorian *Factories and Shops Act* 1905 (No. 1975) by sec. 75 provides for the appointment of special Boards "in order to determine the *lowest* prices or rates which may be paid to any person," etc., employed in certain occupations. The question therefore includes this: whether the Federal Court can by its award fix a still lower price. It is obvious that to fix a higher price as the federal minimum would not be inconsistent, and that nothing but a reduction of the Victorian minimum would be, that is, nothing else would be contrary to or contradictory of the Wages Board determination. But still it might be thought

(1) 3 App. Cas., 889.

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fair and just in a dispute extending over other States beside Victoria to reduce that minimum; or the Victorian or any other State legislature might provide a maximum of pay or a minimum of hours, and then the matter might assume a wider practical import. The principle however is whether the Federal Court can be limited in its power by what the Victorian Wages Board does. I may observe that the Wages Board merely *fixes* a minimum wage for a maximum number of hours (sec. 90) and for overtime, but nothing more. It does not *enact* the wage; it creates no obligation to observe the prices and rates it arrives at, and it in no way enforces payment. The sanction is found in sec. 119 directly enacted in the Statute. The Wages Board does no more than the Governor-General in Council did in the *Opium Cases* when he proclaimed certain opium to be prohibited, and his proclamation was held not to be legislation. The *Customs Act* really contained the legislation, and on the authority of the *Opium Cases*, and *Powell* v. *Apollo Candle Co.* (1), the Victorian Wages Board exercises no legislative power. In substance its determinations are only one form of "compulsory arbitration" as pointed out in *Webb's Industrial Democracy* at p. 245; and whatever is sound law as to compulsory arbitration under the preceding question is equally sound as to Wages Board determinations under this. If the arbitrator can act contrary to a State law which says a personal agreement of employment shall bind the parties, or a State law which makes equally binding an industrial agreement or a compulsory award, it demonstrates the position that in those instances at least his determination is lawful even where it is in open opposition to a State enactment.

In effect and in strictness, an award and a Wages Board determination rest on the same foundation, namely, voluntary agreement where no compulsive law exists, or the Statute itself where there is one. There is no distinction between them, as to the source of their binding character. The difference between the two methods consists only in preliminaries, that is to say, in the case of arbitration some dispute precedes the award, in the case of a Wages Board determination no dispute is necessary.

(1) 10 App. Cas., 282.

Wages Boards were and are one of the many well recognized English voluntary methods of preventing industrial disputes. The English Commission's report (paragraphs 112 and following, Commons Papers, vol. 35, p. 43), contains a clear exposition of their functions. It is there said :—"The object of a true Wages Board is to prevent conflicts by means of periodical and organized meetings of representatives of employers and employed for the purpose of discussing and revising general wage rates in accordance with the changing circumstances of the time."

The adoption of this particular method by the Victorian Parliament is analogous to the adoption by the Parliament of South Australia of the alternative mode of arbitration and award. There is really no difference in principle or legal effect. Each is sustained by the State Statute which authorizes it, and by that only. A simple repeal of the Statute would neutralize both alike. I therefore cannot appreciate the distinction drawn by my learned brothers the Chief Justice and *O'Connor* J. in arriving at conclusions which differ with regard to awards and Wages Board determinations respectively. The question is therefore reduced to this: How far can a State Statute nullify a Federal Statute which would have full operation if the State Statute did not exist? The argument for the respondents did not deny that, if there were no State Statute, the Commonwealth Court acting under the Federal Act could prescribe wages and hours; the question assumes it could, and if the Federal Act has any force or vigor in it at all that must be so. That involves the clear position that the power under sub-sec. (xxxv.) admittedly extends so far unless the State legislature in fact occupies part of the ground covered by the Federal Act. If that be so, the contention necessarily refines itself to this: that a State Act validly passed under an admitted State power, can and does *pro tanto* oust a Federal Act, also validly passed under a federal legislative power. To my mind, such a contention is an absolute and hopeless contradiction to the plainest words of the Imperial Parliament, and, if it be correct, then there is practically no Federal Constitution at all. The Commonwealth in that case would only legislate upon sufferance. A few exclusive powers would remain, but even then only so far as the enactments did not cross State

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Statutes. Sect. V. of the *Commonwealth of Australia Constitution Act* 1900, a covering clause inalterable, declares that that Act and all Commonwealth laws under the Constitution shall be binding on the Courts, Judges and people of every State, and of every part of the Commonwealth *notwithstanding anything in the laws of any State.* Therefore if we went no further, once concede, as the question does and as the argument did, that in the absence of a contrary State law, a given award might be made by virtue of a federal law, then sec. V. declares that the federal law shall continue to authorize such an award "notwithstanding anything in the laws of any State."

But again sec. 109 of the Constitution itself is explicit. It is in these terms :—" When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The true way to test the argument in the present case is to ask whether the Federal Act would be valid supposing the State Act were non-existent. If it would, then in case of inconsistency the State law, whatever it may be, under whatsoever power it is enacted, on whatsoever subject, must to the extent of the inconsistency be invalid. This constitutional provision is essential to the very life of the Commonwealth : a decision in favour of the respondents on this point destroys the supremacy of federal law, which alone has held the American Union intact, has preserved the character of the Canadian Dominion, and can uphold the Australian Constitution. The supremacy of federal law in such a case has been steadily maintained by the American Courts from the time of *Marshall* C.J., in *Gibbons* v. *Ogden* (1), to the present day. That great Judge said in words which it is necessary to repeat now :—" Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an Act of Congress passed in pursuance of the Constitution, the Court will enter upon the inquiry, whether the laws of " (the State) " have, in their application to this case, come into collision with an Act of Congress, and deprived a

(1) 9 Wheat., 1, at p. 209.

citizen of a right to which that Act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or in virtue of a power to regulate their domestic trade and police. In one case and the other the Acts of " (the State) " must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law union, must be erroneous.

" This opinion has been frequently expressed in this Court, and is founded, as well on the nature of the government as on the words of the Constitution. In argument, however, it has been contended, that if the law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers.

" But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any Act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such Acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the Act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

This view has been sustained in various cases, among which may be mentioned *Western Union Telegraph Co.* v. *Pendleton* (1), where *Field* J. stated the same principle in equally distinct language; *Asbell* v. *Kansas* (2).

But there is for us even more authoritative opinion than that I have just quoted; and there are instances that appear to me to be almost on all fours with the present case. Under the Canadian Constitution, sec. 92, sub-sec. 13, the Provinces have exclusive

(1) 122 U.S., 347, at p. 359. (2) 209 U.S., 251, at p. 257.

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power to make laws in relation to property and civil rights in the Province. On the other hand, the Dominion Parliament, notwithstanding anything in the Act, has exclusive power to legislate *inter alia* as to banking. The Privy Council has substantially given to the words " notwithstanding anything in this Act " the force of sec. V. of the *Commonwealth of Australia Constitution Act* 1900, and, in accordance with that, has held that where there was a Dominion Statute on banking which enacted provisions inconsistent with a Provincial Statute on ordinary mercantile law, the Dominion Act prevailed, although it modified the civil rights within the Province. The provincial power was there express, which is certainly not less potent than sec. 107 of our own Constitution, however that may be construed : *Tennant* v. *Union Bank of Canada* (1).

In *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (2) the Privy Council had again to consider the question. The Dominion has, by reason of the exception in sub-sec. 10 of sec. 92, and the general residuary powers, exclusive authority to legislate in relation to " Railways, extending beyond the limits of a Province," just as the Commonwealth Parliament has exclusive power in respect of arbitration in disputes extending beyond the limits of one State. It enacted a prohibition against " contracting out " on the part of such railway companies. This was objected to on the ground that it affected " civil rights," which was exclusive to the Provinces, just as a purely domestic State dispute, or purely domestic State wages, are exclusive to the State. But the Privy Council laid down two propositions (3) :—" First, that there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear ; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

And accordingly the Privy Council merely inquired if the Dominion provision was ancillary to railway legislation, and having found it was, it necessarily prevailed over State law, whatever that law was.

(1) (1894) A.C., 31.
(2) (1907) A.C., 65,
(3) (1907) A.C., 65, at p. 68.

The latest case is *La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Co.* (1), where a Dominion Act and a Provincial Act both validly passed under the respective powers of the several legislatures came into conflict. The Dominion Parliament empowered the respondent company for Dominion objects to manufacture and sell gass and electricity. The Quebec Parliament then under its exclusive powers incorporated the appellant company and granted it the exclusive privilege of selling electricity within a certain radius in Quebec. The decisions previously quoted applied, and the Dominion Act was held to prevail.

Now, it is to be distinctly borne in mind that in each case the Dominion powers and legislature were in respect of things entirely distinct from those over which the Province legislated; but as to a portion of the two enactments, and a portion only, the Acts crossed—that is to the extent of the field on which they met—and with respect to the portion crossed the Dominion Act prevailed.

It cannot be, as I have said, and it was not in fact disputed, that apart from the presence of the State Act, the unqualified fixation of wages and hours is within the legitimate and necessary power of the arbitration tribunal acting under the authority of the Commonwealth Act. Therefore, if on that field it meets an inconsistent State law, otherwise valid, the Federal Act must dominate the field.

The contrary contention, as *Marshall* C.J. said in *Cohens* v. *Virginia* (2) "would prostrate . . . . the Government and its laws at the feet of every State in the Union."

For instance, if, as postulated by the learned Chief Justice, there can be no dispute where by the laws of the State it is not lawful for the person on whom the demand is made to agree to it, then nothing could be simpler than the destruction of all federal power of arbitration. The State may pass a law declaring that it shall not be lawful for any workman to demand higher wages or shorter hours than those specified by Act or a Wages Board, or for any employer to pay lower wages or require longer hours than those similarly specified, except after they have been allowed by

(1) (1909) A.C., 194.

(2) 6 Wheat., 264, at p. 385.

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a local Wages Board. This would satisfy the test laid down by my learned brother, and would leave the federal power in a condition of utter destitution. Is such a construction possible? And taking the second position that assuming there is a dispute the Federal Court can determine it only so far as is consistent with State laws on the same subject, it needs, as I conceive, but a moment's reflection to see how obviously impracticable and futile the power so interpreted must prove. For this purpose we must assume the dispute is one which exists not only in fact but in law; and if we suppose it to extend over six States, the position may easily be this:—Queensland fixes no wage limit but sets a maximum of seven hours; New South Wales fixes a minimum of 9s. a day and a maximum of nine hours; Victoria 7s. 6d. a day and eight hours; South Australia 8s. 6d. a day and seven hours; Western Australia 9s. a day and eight hours; Tasmania 6s. a day and no time limit. What is the Federal Court to do? Suppose the President comes to the conclusion that 8s. 6d. a day and eight hours all round is justice and necessary to settle the dispute.

If he can, as I have already said, consistently fix a higher minimum wage or a lower maximum number of hours, he can effect in regard to wages Queensland, Victoria and Tasmania, and bind South Australia, but employers in New South Wales and Western Australia are still bound to pay higher wages than those in the other four States, and the President must so declare; and in regard to hours he can affect New South Wales and Tasmania, and bind Victoria and Western Australia, but not Queensland or South Australia, in which States employés are bound to cease operations sooner than in the other four States. This patchwork result, departing from the lines of justice as found by the President, is bad enough, but if the States either fix a wage which is to be minimum and maximum until altered by a Wages Board, he would be bound simply to announce that he awarded what the State law declared, and any other award would be illegal. This reduces the Federal Court to a mere State functionary to say again what they have said already. And, similarly, after a valid award was made, if the State passed a law inconsistent with it, then if the argument of the respondents has any virtue at all, the subse-

quent State law must prevail. It cannot be that the governing maxim is to be *prior in tempore potior in jure.*

Suppose, again, the President were properly seised of an undoubted dispute extending over the whole of two States, evidence taken, arguments delivered, judgment reserved; before award made the State Wages Board of one of the States concerned then under some power in a State Act fixes wages or hours at or approaching the scale which one of the parties insisted on; the jurisdiction of the Federal Court is to be wholly or *pro tanto* ousted, and if wholly ousted, the whole proceedings are rendered abortive, and the dispute must continue because the State Statute is supreme over the national law.

The moment we depart from the clear terms of sec. 109 of the Constitution, there is nothing but chaos. That clause and covering clause V. form the keystone of the federal structure, and if they are once loosened, Australian union is but a name, and will reside chiefly in the pious aspirations for unity contained in the preamble to the Constitution.

Sec. 109 is not found in the American Constitution—where there exists only a provision analogous to covering clause V., and upon which alone the exposition quoted from the judgment of *Marshall* C.J. is founded. But its additional insertion emphasizes the supremacy of Commonwealth laws, and it is a counterpart of portion of sec. 2 of the *Colonial Laws Validity Act* 1865 (28 & 29 Vict. c. 63), and that induces the following query. If the Federal Act were an Imperial Statute would the State Act fall within the purview of sec. 2 of the Imperial Act or would it prevail? The question of paramountcy of the Imperial Parliament does not arise; because the prior assumption is that the Federal Act is a valid exercise of power but for the existence of the State Act, and the whole question is reduced to competition between the two valid Acts. If the Imperial Act under the section quoted would prevail, so must the Federal Act prevail under clause V. and sec. 109.

It is needless to say that to bring sec. 109 into operation the two competing laws must meet on the same field. Of course they must. If they are not on the same field they cannot collide; they cannot be inconsistent. They may be on the same field and

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yet not inconsistent, and in that case both are valid and operative; but if inconsistent, they must necessarily meet on the same field though enacted under widely differing powers, as shown by *Marshall* C.J. in *Gibbons* v. *Ogden* (1), and one must necessarily prevail, the only question being which. For answer there is only one source of direct authority, the Constitution clause V. and sec. 109, supported by the opinion of the Privy Council in Canadian cases and the Supreme Court of the United States in American cases.

Question 5A assumes inconsistency and consequently *pro tanto* assumes identity of field—the constitutional result therefore follows.

It was urged however that this is equivalent to enabling the federal Judge to repeal a State Act. But that is an error; he has nothing to say to the State Act. It is the Constitution which, by clause V. and sec. 109 to a certain extent and in certain circumstances, invalidates the State Act. Those provisions are self executing when the requisite events arise. The Constitution gives certain powers to the Parliament which, being validly exercised, may or may not in their operation call into activity those provisions of the Constitution with the effect of invalidating to the extent of repugnancy any existing State Act which may be for the Court to determine. The distinction between repealing and overriding an enactment is clearly and fully indicated by the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2), in a passage I read during the argument, and in the face of that decision and of the express words of our own Constitution, I do not see how it is possible to argue the two things are legally identical.

It was urged for the respondents that it could not have been the intention of the framers of the Constitution to include in the word "arbitration" a power to decide contrary to a State Act or a State award or an agreement, and apparently because that seemed to learned counsel an extraordinary or an unfair thing to do. Such an argument, in my opinion, is properly answered as it was in *Salomon* v. *Salomon & Co.* (3). Lord *Halsbury* L.C.,

(1) 9 Wheat., 1.

(2) (1896) A.C., 348, at p. 366.

(3) (1897) A.C., 22.

there said (1) :—"It is obvious to inquire where is that intention of the legislature manifested in the Statute." Lord *Watson* said (2):—"'Intention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." But where are the words in our Constitution which expressly or by necessary implication exclude from the Federal Statutes, which it has authorized in express terms, any interference with the rules of conduct enacted by State Acts? Then learned counsel called in aid, rather faintly I confess, the doctrine of implied prohibition based on *United States* v. *Dewitt* (3). Without repeating my recently expressed views on that point, and whatever be the accuracy of the doctrine as so far applied, I do not think the two simple words of *Chase* C.J., which seem to me to be used rather metaphorically by him, can reasonably bear the further strain which this new argument would place upon them—a strain to which they have never been subjected in their American home. It would amount to this: that federal powers can be defeated not only by State powers but also by State Acts. If this were accepted there would be, so far as I yet perceive, only one further possible stage to which the doctrine need be carried, and that is that all federal powers are subject in their exercise to the possibility of State Acts. Personally I reject the argument, and hold that the Commonwealth Parliament could validly empower industrial arbitration which in the opinion of the arbitrator would effect a settlement on just and equitable terms even though all the States together chose to pass Statutes to the contrary. The Constitution requires the opinion of the arbitrator and not of the Parliament, and that is the effect of the word "arbitration."

I refer to what I have already said about the nature of arbitra-

(1) (1897) A.C., 22, at p. 31. (2) (1897) A.C., 22, at p. 38.
(3) 9 Wall., 41, at p. 52.

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tion as known to the common law, and as practised without legislative authority or sanction, as I refer also to the wide terms of the Australasian Acts as to the duty of the arbitration tribunals to determine upon the merits and according to justice as they find it. Turning to the federal Court we find no express limitation which excepts from the alteration the conditions as to hours or wages as existing because required under State laws, and we do find sec. 25 in these terms:—"In the hearing and determination of every industrial dispute the Court shall act according to equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its mind on any matter in such manner as it thinks just." That is closely followed by sec. 30 which does not affirmatively empower an award to be made inconsistent with a State law or award, and determination of a State authority, but clearly recognizes that it may be so made, and so gives the interpretation of Parliament itself with respect to sec. 25. In so far as it purports to invalidate State laws or awards, it is inoperative for the reasons given by the Privy Council in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1).

Therefore if there is legislative *power* to authorize the Arbitration Court to make an award inconsistent with a State law, that authority has been given.

For these reasons I am also of opinion that question 5A should be answered in the affirmative, but that the award should operate immediately.

Questions 6 and 7 must follow the result of the views I have expressed with regard to questions 5 and 5A, and I answer them in the same way.

As to question 8 I think "parties" in sec. 38 (p) means parties to the plaint—because a party may be struck out as well as joined—and, if only those who were in fact parties to the dispute could be struck out, that course could not be taken where it was obvious a party to the plaint was not a party to the dispute. But it is clear that no party would be joined who was not alleged to be a party to the dispute, and so practically it is the same as

(1) (1896) A.C., 348, at p. 366.

if for the purpose of joinder "parties," meant "parties to the dispute"—the allegations of those desiring the joinder would in the meantime be accepted, and the issue of fact afterwards determined. With regard to this particular case, I can only say—it is all I have power to say or means of saying—that it is not impossible, in the circumstances set out in the question, that the Queensland Pine Co. Ltd. is now party to the dispute. The facts may show that it entered into the business and has since carried it on with full knowledge of the dispute, and so as to take part in it, by adopting the same attitude as its predecessor relative to the demand already made, and by acting in the same way and with like intentions.

Whether that is so depends entirely on the facts, and it is for the determination of the learned President.

I should not omit to notice one further contention based on sec. 99 of the Constitution, viz. that the Act was a regulation of trade and commerce which gives preference to one State over another. In my opinion it is not a regulation of trade and commerce, see *United States* v. *E. C. Knight Co.* (1). I also adhere to my opinion in *The King* v. *Barger* (2), that the Act does not give such preference.

HIGGINS J. These constitutional controversies resolve themselves ultimately into questions of mere statutory construction; and many of the difficulties would vanish if we keep steadily in view our function—merely to interpret and apply the will of the legislatures—British and federal. It is not for this Court to twist the expressions of the Parliaments to suit our own notions of economic or social expediency. The legislatures, not this Court, are responsible for the wisdom of the legislation. Our attitude should not be that of either approval or disapproval. Great social experiments are being tried; and they should get a fair trial—whatever we may think of their merits. It is just as bad to be influenced in our decisions by fear of the powers given to the Federal Parliament, or by fear of the power given to the Federal Court of Conciliation, as it is to be influenced by a desire to see these powers magnified. There is no doubt that a rash, extreme,

(1) 156 U.S., 1. (2) 6 C.L.R., 41, at p. 107 *et seq.*

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or unwise exercise of these powers may lead to great public disaster; but this danger does not justify us in curtailing the powers. "I utterly repudiate," said *Willes* J., "the notion that it is competent to a Judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable." (*Abel* v. *Lee* (1)). "We must take the law as we find it; and, if it be unjust or inconvenient, we must leave it to the constitutional authority to amend it." (*Garland* v. *Carlisle* (2)).

Now, the first question is, in substance, what my brother *O'Connor* has stated: Does the fact that the employers in the different States are not combined, have no business or other connection with one another, have acted independently in refusing the demands of the combined employés and without preconcert of any kind—does this fact in itself prevent the dispute from being a dispute "extending beyond the limits of any one State"? Is combination on both sides of the dispute essential for a two-State dispute?

This question was referred to, and left undecided, so far as the Chief Justice is concerned, in the *Jumbunna Case* (3). The question, as stated by me, assumes that there is a dispute, an industrial dispute. A dispute may be one dispute, in the sense that it involves one claimant organization, and the same claim on several employers; but it may not follow that the dispute "extends" from one employer to another, or from one State to another State, within the meaning of the Constitution. At the same page of the *Jumbunna Case*, the Chief Justice 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. The form of combination is immaterial, though it most commonly arises where there are organized associations of employés or employers. The degree of permanency of the combination is also immaterial, but there must be some continuity of action." But the question, is

(1) L.R. 6 C.P., 365, at p. 371. (2) 4 Cl. & F., 693, at p. 706.
(3) 6 C.L.R., 309, at p. 332.

there a dispute, will, it appears now, be more complex than these words would indicate. It is a question of fact, to be decided on all the circumstances of the case; and I should not have been justified in submitting the vast mass of evidence to this Court and asking "is there a dispute?" Nor should I have been justified in asking this Court the abstract question, "What is a dispute?" or "What is a dispute extending, &c?" I quite concur with the expressions of the learned Chief Justice to the effect that any opinion expressed by this Court on hypothetical or abstract questions of law, which may never arise for actual decision, would have no binding effect. But I cannot concur in the view that the questions submitted are either abstract or hypothetical. They actually arose in the course of the case, and they—and many other questions which arise—have to be determined by me if not by this Full Court. Counsel for the respondents desired that I should bring these, and several other questions, before the Full Court. I refused to submit the others, as I could not ask the Court to decide them without the perusal of bulky evidence; and, as I feared, some even of the few which I have submitted cannot be categorically answered, as they involve a consideration of the facts as well as the law. The difficulty is not that the questions are either abstract or hypothetical, but that they involve facts as well as law. I have not, in this my judgment, investigated the meaning of "industrial dispute." I refrained from including it, for the reasons which I have stated. But my silence must not be taken as consent to the doctrine that the short and every-day phrase "industrial disputes extending" connotes all the elaborate qualities which the Chief Justice has suggested in his judgment. I cannot find in the Constitution any evidence of intention on the part of the British Parliament to restrict the grant of the power to the Federal Parliament within so narrow an area as that judgment indicates.

In my opinion, combination on both sides is not essential; and it does not matter whether each of the independent employers knew, or knew not, that similar demands were being made on others than himself. From the form of the demand which is set out in the case, it is clear that they must have known; but I do not rely on knowledge. The test is, does the dispute extend

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in fact beyond one State—not does each employer know that it so extends. In my judgment in the *Jumbunna Case* (1) I said that sub-sec. xxxv. of sec. 51 of the Constitution treats an industrial dispute as if it were an epidemic disease or a fire. "Of course, each of the victims has a separate disease; and each blade of grass has its separate blaze. But there is such a connection between the various sufferers, or the various blades of grass, that it is not unusual or incorrect to speak of the disease, or of the fire, as 'extending' or as 'spreading.'" To pursue the simile, it seems to me that the fact of the bush fire being on both sides of the State boundary fence is enough. The fact of the epidemic being found on both sides is enough. No one State can deal with the whole evil; and so the federal power is allowed to step in. The object of all the powers granted to make laws, including the power to make laws with respect to "Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," is to secure "the peace, order, and good government of the Commonwealth," and the danger to these ideals is fully as formidable when there is widespread discontent and unrest in some industry, and the employers do not know the extent of the discontent and unrest, as when they do know it. The machinery of the Act is directed to arresting the disease—as it were, to deal with the effervescence, the commotion, before the water has boiled over—before the unrest and commotion have taken the usual deplorable form of a strike or a lockout, with all the attendant miseries. We have, in my opinion, no right to look for more than a real dispute in which many employés make common cause in at least two States, and relating to some industrial matter.

I have now given what, in my opinion, is the plain, ordinary, meaning of the words in sub-sec. xxxv. for the purpose of question 1. It is true that Mr. *Blacket* has urged on us that on the true construction of the Act the Court can deal with no dispute unless there be but one employer (or one organization of employers); and has argued that under sec. 4 the words "arising between an employer etc." cannot be read as "arising between employers etc." Assuming that this argument is open, sec. 23 of the *Acts*

(1) 6 C.L.R., 309, at pp. 313-4.

Interpretation Act 1901 seems to be a sufficient answer: "Unless the contrary intention appears . . . . words in the singular shall include the plural"; and the burden of showing the contrary intention lies on Mr. *Blacket*. Where is the contrary intention shown? It is not enough to show that possibly the plural might not have been intended; and such sections as secs. 29, 32, 35 (2), 38 *passim* tend rather in the contrary direction. It is, moreover, reassuring to find that under the New South Wales Act of 1901, which contains a similar definition of "industrial dispute," the words "an employer" have been treated as applying to "employers" in the plural (1).

Then it is said that to construe the power as I have construed it may lead to abuses. Employés in some State, dissatisfied with their conditions, may induce employés in some other State, otherwise contented, to make common cause with them, and to dispute with their employers; thus turning machinery for settling disputes into a means for extending disputes. There is certainly danger of such an abuse; but there is at least an equal danger on the other side if employers, by avoiding combination among themselves, can prevent the application of the federal power in promoting peace. But it is for the Commonwealth Parliament to provide safeguards against such abuses as suggested; and sec. 38 (*h*) already confers on the Court of Conciliation a valuable safeguard. For that Court can refuse to determine the dispute if it is being dealt with or is proper to be dealt with by a State industrial authority, or if it think "that further proceedings by the Court are not necessary or desirable in the public interest." (See also *Southern Realty Investment Co.* v. *Walker*, (2) and cases cited.)

Question 2. The workers' organization makes substantially the same claim for all its members in the several States; but it adds this:—"West Australia—15 per cent. to be added on above rates for extra cost of living." In my opinion, the mere fact that the demand, as expressed in money, is higher for Western Australia than for the other States does not prevent the Court from making its award apply to wages in Western Australia.

(1) 2 Ind. Arb. Rep. N.S.W., 450; 3 *ib.*, 82; 5 *ib.*, 44.

(2) 211 U.S., 603.

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Difference in the money payments does not at all show that the dispute is not the same dispute, substantially. Inequality in money payments may be the best means of producing equality in living conditions; and inequality in living conditions, as between workers doing the same kind of work, is one of the most fertile sources of industrial discontent and unrest. If the claim is for a wage of 8s. 4d. per day in the Eastern States, and for 9s. 7d. in the West, and if it should be found that 8s. 4d. in the East purchases the same commodities, produces the same standard of living as 9s. 7d. in the West, it is evident that the employés, East and West, are struggling for the same thing. As a rule, if the cost of living is greater, the returns of the product are also greater to the employer. But if timber merchants in the West should be handicapped in competition by the grant of the greater money wage, that fact could be shown to the Court of Conciliation, and it would be carefully weighed. As for the arguments founded on sec. 99 of the Constitution, there are two answers which, to my mind, are conclusive. An award under this Act is not a regulation of trade or commerce (as distinguished from industry); and if it fix varying rates it does not give preference to one State or any part thereof over another State or any part thereof (see my judgment in *R.* v. *Barger* (1).

Questions 3 and 4. I concur in the answers which have been formulated by my brother *Isaacs* as to these questions. I cannot look for anything more definite under the circumstances. But the long discussion to which I have listened has not been wasted; it has enabled me to learn on many subjects the trend of the minds of the members of this Court.

Question 5 asks, in substance, what is to happen if there is an existing State award fixing the conditions of labour as to the same worker? Can the Federal Court of Conciliation, for instance, prescribe a different rate of wages? Can it make an award inconsistent with the State award?

There are two kinds of inconsistencies to be considered: (1) The State award fixes a *minimum* wage for "saw doctors" at 1/3 per hour; and the Federal Court is asked to fix their *minimum* wage at 1/6 per hour. It does not necessarily follow that both

(1) 6 C.L.R., 41.

awards cannot stand together. Both can be obeyed by payment of a higher wage. (2) The State award, however, might, conceivably, fix a maximum wage, say at 1/3 per hour. Can the federal award fix a higher maximum, or make the minimum 1/4 per hour? It is to this latter class of inconsistencies that I propose to apply my remarks—the case of the State prescribing one thing, and of the Commonwealth prescribing the contrary—the case of its being impossible to obey both commands.

Now this question throws us back on the fundamental principles of the Constitution; and in particular on the often quoted words of sub-sec. xxxv. of sec. 51, on secs. 108, 109, and on covering clause V. "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, *notwithstanding anything in the laws of any State.*" The State laws continue in force; but always "subject to this Constitution" (sec. 108); and when a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid (sec. 109). Looking now to the power under which the federal award is made—power "to make laws for the peace, order, and good government of the Commonwealth with respect to:—(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State"—it is clear that any Act is valid which comes within the meaning of these words, and any award is valid which comes within the meaning of the Act; and both Act and award have supremacy over any State Act to the extent of any inconsistency.

"But," it is urged, "there is no dispute if the State law has settled it. It does not lie in the mouth of the employés in New South Wales to say that there is any longer a dispute." This argument leaves the door open to some humorous comment and illustrations—for it asks us to treat men as being at peace who are in fact fighting. But there are three fallacies, at the least, in the argument. In the first place, what the State has settled is not the dispute in question—the two-State dispute—as to which the Federal Parliament and Court have exclusive power. The two-State dispute is as distinct from the one-State dispute,

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as Inter-State commerce is distinct from the internal commerce of a State. In the second place, sub-sec. xxxv. refers to disputes *de facto*, not disputes *de jure*—not to controversies about any law, but to controversies about conditions of labour and of life. We have no right to cut down the meaning of the words of sub-sec. xxxv., or to read them as if they were "prevention and settlement of industrial disputes extending &c. *so far as they have not been settled by State laws*," or as if the words were inserted "*subject to State laws*" or as if the words were "*disputes recognized by State law.*" As soon as a dispute in fact extends to two States, it passes beyond the control of any State law; the federal power applies, and is absolute, plenary, unlimited—that is to say, unlimited except by the words of sub-sec. xxxv.; and that power has no reference to the legality or illegality of the demands, no reference to the provision of any State law. As *Marshall* C.J. said in *Gibbons* v. *Ogden* (1):—"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution . . . the sovereignty of Congress, though limited to certain specified objects, is plenary as to those objects." In the third place, it is a mistake to treat an industrial dispute as if it were an ordinary litigation as to private rights between private persons, or to treat the award as if it were a judgment as to existing rights. For the claim and the award are not based on any right known to the law. They are based on an assertion that such and such terms ought to be the law, and are not; and the foundation of the relief is not the mere interest of the workers, but the public interest in peace, order and good government. Even if the New South Wales Court has settled a dispute between A. and X., from the point of view of New South Wales, the dispute between A. B. and C. on one side and X. Y. and Z. on the other has never been settled from the point of view of the Australian public. There is no *res judicata* or estoppel as against the public of Australia. The federal power is conferred "for the peace, order, and good government of the Commonwealth," of the Commonwealth public, who suffer materially while the disputants are in fact contending, and who suffer as much if some

(1) 9 Wheat., 1, at pp. 196-7.

of the combatants are acting in defiance of a State award as if they were not. The interest of the greater public is treated as the dominant consideration, and the law of the greater public as the dominant law. The federal law applies and is paramount, as soon as it is shown that there is an industrial dispute in fact, and that it really extends to two States at least. Given these conditions, there is nothing to be found elsewhere in the Constitution to modify or whittle down the absolute power of the Federal Parliament to make any provision that it thinks fit for conciliation or arbitration for the prevention or settlement of the dispute; given the power, the federal law may be made, and must be interpreted as if there were no State law touching the subject; and given the federal law, any State law inconsistent therewith becomes invalid to the extent of the inconsistency. On this subject, and on the inference drawn from *United States* v. *Dewitt* (1), I agree with what has been fully stated by my brother *Isaacs*.

As for sec. 30 of the Act, I take it as showing, beyond cavil, that the Federal Parliament intended to confer on the awards of the Court of Conciliation that paramountcy which the Constitution enabled the Parliament to confer. It might otherwise have been urged, possibly, that whatever powers the Federal Parliament might have given to the Court, it has not given to it as yet any power to issue commands contrary to State awards. The language of sec. 30 is obviously copied from sec. 109 of the Constitution, and is meant to have a like effect, but in favour of federal awards instead of federal acts. I take it that secs. 23, 25 and 30 are complementary of one another. The Court of Arbitration is to investigate "all matters affecting the merits of the dispute" (including, no doubt, any State awards); is to "act according to equity, good conscience, and the substantial merits of the case"; is not to be "bound by any rules of evidence"; and, under sec. 30 is not to be bound by State law or State award or Wages Board determination. I see no reason for doubting that the Federal Parliament was as competent to enact sec. 30 as secs. 23 and 25.

I am, therefore, of opinion that question 5 should be answered in the affirmative, whether the award is to operate immediately

(1) 9 Wall., 41.

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or at some future time. But it is my duty to add that I cannot treat a State award as standing on the same footing as an agreement—solemn or not. It is not the New South Wales award that imposes the obligation to pay certain wages, or to observe certain conditions. It is the State law that imposes the obligations, in accordance with the findings of the Court. Nor is the award in any sense an agreement. The obligation is created from above by a superior authority—not by consent of the parties *inter se*. It is created by the State Act, which allows the award to be made. The award is made by a tribunal like the Inter-State Commerce Commission in the United States, which finds what ought to be done, and Congress gives effect to the finding as law. I base my opinion on the ground that, when a Federal Act within the scope of the federal power comes into collision with a State Act within the scope of the State power, the Federal Act prevails to the extent of the inconsistency.

Question 5A. For the reasons given under question 5, I am also of opinion that question 5A, as to the determination of Victorian Wages Boards, must be answered in the affirmative in the same way as question 5. I have not omitted to consider the distinction between Wages Boards which settle wages (minimum wages)—make a common rule as to wages—and Arbitration Courts which settle disputes. The Wages Board determinations may be treated as if they were contained in a Schedule to an Act, and as having all the binding force of a State Act regulating wages. But they have no greater force; and if a State Act, or any regulation made thereunder, conflict with a Federal Act or with the award of a Federal Court created by the Federal Parliament, it becomes invalid so far as it is inconsistent. If two railways cross, and if the trains on each—having different points of departure and of destination—come to the point of junction at the same moment, one must give precedence to the other. So it it is with federal and State powers. If, for instance, a State determination prescribes that the day of State elections should be a close holiday, whereas the federal award says that the day should be a day for work, it would be the duty of the employés to work on that day. On this subject—that of collision between a State law under State power A., and a federal law under the

federal power B., both laws being validly made under their appropriate powers—we have fortunately plenty of guidance in the rich experience of the Courts of the United States. The very recent case of *Asbell* v. *Kansas* (1) shows that an inspection law as to cattle entering a State, a law made under a State's undoubted powers—its "police powers" as they are termed—is invalid so far as it is inconsistent with a federal law made under the federal powers as to Inter-State commerce. The State has no power to regulate Inter-State commerce; the federal Congress has no power to legislate for the health of the cattle of a State; and if and so far as laws made by the appropriate legislatures, under their distinct power, collide in any way, the federal law prevails. In that case the State law was held valid as it allowed cattle to enter on the certificate of the federal officers as to health. The federal "bureau of animal industry," constituted under the Inter-State powers, may be fairly regarded as analogous to the Federal Court of Conciliation, constituted under the power as to two-State disputes. See also *Camfield* v. *United States* (2); *Employers' Liability Cases* (3); *Gulf, Colorado and Santa Fé Co.* v. *Hefley* (4); *Morgan's Steamship Co.* v. *Louisiana Board of Health* (5).

The Judicial Committee of the Privy Council have frequently applied the same principle to the Canadian Constitution, although there is no section so express in the Canadian Constitution as our sec. 109. The Dominion Parliament has power to make laws for "through" railways; and under that power it passed a law affecting the labour conditions of the railway servants—it prohibited railway companies having "through" railways from "contracting out" of the liability to pay damages for personal injury to their servants. The Provinces of Canada have exclusive power to enact laws as to "civil rights"; and it was urged that the Dominion Act was invalid, as trenching upon the Provincial powers. The Privy Council said that two propositions had been established: "First, that there can be a domain in which Provincial and Dominion legislation may overlap, in which

(1) 209 U.S., 251.
(2) 167 U.S., 518.
(3) 207 U.S., 463.
(4) 158 U.S., 98.
(5) 118 U.S., 455, at p. 464.

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case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." It was conceded that the law dealt with a civil right; but, as it was truly ancillary to railway legislation, the law was valid: *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (1). This case has been followed up recently by a case in which *both* Parliaments had actually legislated; and the same principle was applied. A Dominion Act incorporated A. company for the purpose *inter alia* of manufacturing and supplying electricity. A subsequent Provincial Act of Quebec incorporated B. company; and granted to it the *exclusive* right of producing and selling electricity within 30 miles from a certain village. Company A. began to establish works within the 30 miles; and company B. applied for an injunction. It was urged that the legality of company A.'s action in any Province must be subject to the law of that Province. But the Privy Council held that "where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province if the two are in conflict": *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.* (2).

No one is more fully sensible than I am of the gravity of this power of the Federal Court of Conciliation to impose labour conditions inconsistent with the labour conditions imposed by the State, or under a State's authority. But again I say that the gravity of the power is no ground for saying that it does not exist; and if it can be exercised as against a State award, as is held by all the members of this Court, there is no ground for denying the power as against a State Wages Board determination. The determination is made binding by the State Act alone, as the State award is made binding. Both award and determination have as high authority as a State law can give them, but no higher; and the supremacy of the federal law, made under a federal power, is beyond doubt. I admit that there is danger of abuse—danger, *e.g.*, that an organization beaten before a State tribunal may try

(1) (1907) A.C. 65, at p. 68.

(2) (1909) A.C., 194, at p. 198.

what seems virtually an appeal to the federal tribunal. It is not in truth an appeal; because there must be new parties disputing, and these parties must consent to concur in the dispute. But if we may look at the consequences of denying the power to the federal Court, the position is still graver. Deny the power, and if there be a shipping dispute, a bitter quarrel raging in fact in all the parts of the Commonwealth and throwing into confusion all industries, the federal Court would be powerless if each State has its separate laws as to wages, &c., of seamen, there would be no power which could settle the shipping dispute as a whole on one consistent scheme. Or if New South Wales had such laws, and the other States had not, the New South Wales laws, even if ineffective and unworkable, would prevent the effective application of the federal powers. For nothing is more prolific of industrial disturbance than inequalities among men doing the same work, even when the inequalities are found as between different cities. To say the least, the dangers of one interpretation may be set off against the dangers of the other interpretation; and, honours being easy, we may fitly recur to our humbler function of finding the meaning of the words of the Constitution.

Question 6. I have been rather puzzled with regard to State industrial agreements. I have not been troubled as to the power of the Federal Parliament to endow the Court of Conciliation with power to make an award inconsistent with such an agreement. My difficulty lay in sec. 30 of the Act (and cf. sec. 80). Parliament said, in sec. 30, that when a State law, or an award, order or determination of a State industrial authority is inconsistent with an award or order made by the Court, the latter shall prevail; but it has said nothing about State industrial agreements; and an argument may be based on the lines of *expressio unius exclusio alterius*. But the reason for the omission is probably that it was not thought necessary to assert the Court's powers as against mere agreements. Compulsory arbitration—and it is admitted that Parliament could make arbitration compulsory, enforceable as to its findings—necessarily interferes with agreements, interferes with what is called "freedom of contract." For instance, it compels an employer to pay more to a man whom he hires than he would agree to pay if he were free to make the

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best bargain that he can. You cannot have compulsory arbitration without invading agreements, or without dictating the terms of the agreements to be made. An agreement, whether industrial or not, is between parties; it is not a command of the State, or of those acting under the State's authority; whereas State laws, State awards, State Wages Boards' determinations are commands of the State, and might perhaps—but for sec. 30—have been treated as outside the power conferred by the Federal Parliament on the Court of Conciliation. I am therefore of opinion that this question also should be answered in the affirmative—in the same manner as question 5.

Question 7. Assuming this agreement—unregistered—to be enforceable (and I understand that it has been actually the subject of an action), I answer this question also in the affirmative, in the same manner as question 5.

Question 8. The difficult aspects of this question have not been presented to us by counsel for the Queensland Pine Co. so strenuously as before me in the Court below. The arguments have not been presented which I anticipated. But although I think that the matter may hereafter have to be more fully considered, I am not prepared to dissent from my learned colleagues, and I concur, doubtingly, in the affirmative answer.

Questions answered accordingly.

Solicitor, for the claimants, *Frank Brennan.*

Solicitors, for the respondents, *Derham & Derham*; *Blake & Riggall*; *C. Powers*, Crown Solicitor for the Commonwealth; *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.