REPORTS OF CASES

DETERMINED BY THE

HIGH COURT OF AUSTRALIA

1910-1911.

[HIGH COURT OF AUSTRALIA.]

THE KING

AND

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE PRESIDENT THEREOF AND THE BOOT TRADE EMPLOYES FEDERATION.

EX PARTE WHYBROW & CO. AND OTHERS.

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SYDNEY, *June* 20, 21, 22, 23, 24, 27, 28, 29, 30; *July* 1, 4, 5, 6, 7, 8, 10.

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

Commonwealth Conciliation and Arbitration—Power of Parliament—Validity of legislation—"Arbitration," meaning of—Jurisdiction of High Court—Severability—Prohibition—Award bad in part—Industrial dispute extending beyond the limits of any one State—Evidence—Severability of claim—Validity of award—Award in respect of matter not claimed in plaint—Wages of apprentices—Delegation of powers by Commonwealth Court of Conciliation and Arbitration to board of reference—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxv.), 71, 73, 75—*Commonwealth Conciliation and Arbitration Act* 1904 (*No.* 13 *of* 1904), *secs.* 30, 31, 38 (*f*), (*g*)—*Judiciary Act* 1903 (*No.* 6 *of* 1903), *secs.* 31, 33.

The *Commonwealth Conciliation and Arbitration Act* is not *ultra vires* the Constitution, either on the ground that under that Act the reference to the Court of Industrial Disputes is compulsory, or on the ground that the tribunal for the determination of such disputes is not chosen by the disputants.

Under the Constitution the only arbitral power which can be conferred upon the Commonwealth Court of Conciliation and Arbitration is a power of judicial determination between the parties to a dispute.

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Per Griffith C.J., *Barton* and *O'Connor* JJ.—The test to be applied in determining whether the invalid part of an Act is severable is whether the Act with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by the portion which remains from the law as it would be with the omitted portions forming part of it.

Per Isaacs J.—The test of invalidity is this. If good and bad provisions are included in the same word or expression the whole must fall. Where they are contained in separate words or expressions, then, if the good and the bad parts are so mutually connected with and dependent upon each other as to lead the Court, upon applying the language to the subject matter, to believe that Parliament intended them as a whole, and did not pass the good parts as independent provisions, all the provisions so connected and dependent must fall together.

Held, therefore, that the provisions in the *Commonwealth Conciliation and Arbitration Act* dealing with the regulation of industries generally, if invalid, are severable.

Per Griffith C.J., *Barton* and *O'Connor* JJ.—The High Court has jurisdiction to issue prohibition to the Commonwealth Court of Conciliation and Arbitration either under sec. 75 of the Constitution, the President of the latter Court being an officer within the meaning of that section, or under sec. 33 of the *Judiciary Act* 1903, and whether an appeal lies or does not lie to the High Court.

Per Isaacs J.—Prohibition to revise or correct the proceedings instituted in another Court is appellate, not original jurisdiction, and is therefore not within sec. 75 of the Constitution. But the High Court has jurisdiction to issue prohibition to the Commonwealth Court of Conciliation and Arbitration because sec. 31 of the *Commonwealth Conciliation and Arbitration Act* has not taken away that part of the appellate power granted by the Constitution.

A rule *nisi* for prohibition having been granted to set aside an award of the Commonwealth Court of Conciliation and Arbitration, the invalid portion of the award being severable, the rule *nisi* was enlarged so as to enable the award to be amended.

A letter signed by the Secretary of the Australian Boot Trade Employés Federation was sent to employers in four States, alleging that the persons employed by the respective employers were dissatisfied with their conditions of employment, and demanding that the conditions mentioned in a log annexed to the letter should be granted by the employer. These conditions had been previously adopted by the branches of the Federation in all the four States, and constituted a complete code for the regulation of the industry. Various dates were given for replying to the demand. The conditions demanded not having been conceded within the time limited, the applicant union filed a plaint, alleging the pendency of a dispute extending beyond the limits of any one State as to various matters, and claiming in the terms of the log. The President found that only two of the twenty-three claims were

really in dispute between the parties. *Held*, that the claim was severable, and that the Court of Conciliation and Arbitration had jurisdiction to deal with matters found to be in dispute.

Upon motion for a prohibition the High Court is not bound by the finding of the President that there was a dispute.

A demand and refusal is not of itself neceessarily sufficient to establish the existence of a dispute.

Per Isaacs J.—A dispute raised in a formal and complete way is to be taken *primâ facie* as genuine and real.

What constitutes evidence of an industrial dispute extending beyond the limits of any one State considered.

The claimants demanded a rate of wages for apprentices fixed upon the basis of experience:

Held, that the President had no jurisdiction to award a higher rate than was asked for.

Held, also, by *Griffith* C.J., *Barton* and *O'Connor* JJ., that the payment of apprentices could not be fixed upon an age basis.

Per Isaacs J.—In fixing the wage for apprentices the President had regarded both the age and experience of the apprentice, and the award in this respect was valid.

The award further provided that "persons bound under a deed of apprenticeship shall, if the subject of the apprenticeship is approved by the board of reference, be deemed to have been duly apprenticed." *Held*, that the President could not delegate to the board of reference the question of the validity of the deeds of apprenticeship.

Per Isaacs J.—The President could not delegate to the board the final decision as to the classification of the trade, which was one of the issues to be tried by the Court.

APPLICATION on behalf of certain employers, carrying on business as boot manufacturers in Victoria, New South Wales, South Australia and Queensland respectively, to make absolute a rule *nisi* for a prohibition to restrain the Commonwealth Court of Conciliation and Arbitration, and the President thereof, and the Australian Boot Trade Employés Federation, from further proceedings upon an order and award made by the said Court upon the hearing of an industrial dispute between the Australian Boot Trade Employés Federation and the applicants, upon the grounds:—1. That the *Commonwealth Conciliation and Arbi-*

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tration Act 1904 is unconstitutional and beyond the powers of the Parliament of the Commonwealth. 2. That there was in fact no dispute between the applicants and their respective employés. 3. That there was no dispute extending beyond the limits of any one State. 4. That the dispute (if any) did not extend to Queensland or South Australia. 5. That the dispute (if any) between the parties to the said plaint, and submitted to the Court by the said plaint, was a concerted whole regulating industrial conditions in the boot trade generally, and the said order and award is not in substance an order or award in respect of—(*a*) the dispute (if any) between the parties to the said plaint; (*b*) the dispute submitted to the Court by the said plaint. 6. That the provision of the said order and award as to payment of lads, whether apprenticed or not, according to age, and not according to experience, are bad, inasmuch as—(*a*) the subject matter was not in dispute between the several applicants and their respective employés: (*b*) the subject matter was not submitted to the Court by the said plaint; (*c*) the subject matter was not claimed by the said plaint. 7. That the provisions of the said order and award as to persons bound under indentures of apprenticeship made before 22nd July 1909 are bad, inasmuch as—(*a*) the subject matter was not in dispute between the several applicants and their respective employés; (*b*) the subject matter was not submitted to the Court by the said plaint; (*c*) the subject matter was not claimed by the said plaint; (*d*) the Court has no jurisdiction to make the validity of the said indentures depend upon the approval of a board of reference.

On 15th June 1909 a circular letter was sent to the applicants in the different States in the following terms:—

Australian Boot Trade Employés Federation Federal Council.

To Melbourne, June 15th 1909.

Gentlemen,—

I, as Secretary of the Australian Boot Trade Employés Federation, have been instructed by a number of persons employed by you in the industry of boot, shoe, and slipper manufacturing to inform you that they are dissatisfied with the wages paid to them and the conditions of labour under which they are working for you, and to ask whether or not you will

agree as from day of July 1909 to pay the wages and observe the conditions of labour set out in the document hereunto annexed.

I am further instructed to inform you that unless I receive a notification from you on or before day of July 1909 that you will pay the wages and observe the conditions set out in the said document hereunto annexed, I will regard the non-receipt of such notification from you as a refusal of the demand herein made, and will request the Boot Federation to take the matter up and refer it to the Commonwealth Court of Conciliation and Arbitration for hearing and determination.

Yours truly,

Arthur Long, Secretary.

A log containing 23 claims, making provision for the whole of the working conditions in the industry, and which the evidence showed had been submitted to and adopted by the various branches of the claimant union in the four States, was annexed to the circular letter. The time allowed for replying to this letter varied in the different States. The letter was not replied to, except in the case of two of the applicants, who refused to concede the claims. On 22nd July a claim was filed in the Commonwealth Court of Conciliation and Arbitration against the present applicants, alleging that the Australian Boot Trade Employés Federation was in dispute with them as to various matters, that the dispute extended beyond the limits of any one State, and demanding the conditions of employment specified in the log. The letter of demand asked for payment of wages to apprentices at a rate which was fixed according to their experience. By his award the learned President fixed the minimum wage for adult workers and for lads whether apprenticed or not, the wage in the latter case being fixed on an age basis. The award also provided that persons bound under an indenture of apprenticeship made before 22nd July 1909 should, if the subject of apprenticeship was approved by the board of reference, be deemed to have been duly apprenticed, and entitled to the wages prescribed in the indenture.

No objection was taken before the learned President that the

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Commonwealth Conciliation and Arbitration Act was unconstitutional.

The other facts are sufficiently stated in the judgment of *Griffith* C.J.

Mitchell K.C. and *Starke*, for the applicants.

Arthur, *Holman* and *Hall*, for the Australian Boot Trade Employés Federation, took the preliminary objection that prohibition does not lie to the Commonwealth Court of Conciliation and Arbitration. The High Court has no original corrective jurisdiction over inferior tribunals, such as is exercised by the Supreme Court of a State, or the High Court in England. It can only grant prohibition in the exercise of its appellate jurisdiction, except where prohibition is sought against an officer of the Commonwealth, in which case original jurisdiction is conferred upon the High Court by sec. 75 (v.) of the Constitution. But the President of the Commonwealth Court of Conciliation and Arbitration is not an officer of the Commonwealth, and sec. 75 (v.) has, therefore, no application to the present case. The appellate jurisdiction of the High Court is defined by sec. 73 of the Constitution. Sec. 33 of the *Judiciary Act* 1903 is simply a declaration of the manner in which such jurisdiction may be exercised, but cannot extend the jurisdiction previously conferred. Prohibition may be granted by the Court in the exercise of its appellate power, but the legislature has expressly provided, by sec. 31 of the *Commonwealth Conciliation and Arbitration Act*, that no appeal will lie from an award of the Court constituted under that Act. If, therefore, this Court has no original jurisdiction to grant prohibition, and is precluded by the provisions of the Act from exercising its appellate jurisdiction, the present application fails. The case of *Clancy* v. *Butchers' Shop Employés Union* (1) is distinguishable, because in that case an appeal lay from the Supreme Court of a State, and this Court had power to make any order which could have been made by the Supreme Court.

Mitchell K.C. and *Starke*, for the applicants. "Award of the

(1) 1 C.L.R., 181.

Court" in sec. 31 means an award which the Court of Arbitration has power to make. It merely limits the appellate power of this Court so as to prevent the merits of the case from being reconsidered, but does not take away the power to restrain further proceedings under an invalid award. The High Court has also jurisdiction in this case under secs. 75 (v.) and 76 of the Constitution and Part IV. of the *Judiciary Act*. Under both these Acts the Court is given original jurisdiction. Under sec. 71 of the Constitution the whole of the judicial power of the Commonwealth is vested in the High Court, that is the power of the King so far as this power is exercised by Courts of law. This involves, as an essential element, jurisdiction to inquire into the validity of all judicial power purporting to be exercised under the Constitution.

Irvine K.C., *Harrison Moore* and *Piddington*, for the State of Victoria. The exercise of this power of prohibition is included in the words "judicial power of the Commonwealth" in sec. 71 of the Constitution. That has inherent in it everything necessary for carrying out the judicial power, and is not limited by the description subsequently given. If the respondents' contention is upheld there is a large area of constitutional questions which cannot come before this Court, but can only be determined by the Privy Council, which is opposed to the whole scheme of the federation. There must obviously be power in some Court to determine what are the powers of subordinate Courts. It was never intended that the legislature should itself decide the limits of its powers.

Blacket, for the State of New South Wales, adopted this argument.

Arthur, in reply. It is not contended that the questions submitted cannot be determined by this Court, but only that the Court cannot grant prohibition to the Court of Arbitration. There is a clear distinction between the grant of prohibition, and the exercise of appellate power: *Mackonochie* v. *Lord Penzance* (1). Sec. 75 (v.) applies only to cases in which mandamus or

(1) 6 App. Cas., 424, at p. 443.

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prohibition is sought against a non-judicial officer: *Ah Yick* v. *Lehmert* (1).

[ISAACS J. referred to sec. 51 (xxxix.) of the Constitution.]

Per Curiam: The objection will be overruled upon grounds which will be stated in the judgment of the Court.

Mitchell K.C. and *Starke*, in support of the rule. There was no evidence of any dispute between the parties. The Court is not bound by the findings of the President on this point, but will form an independent judgment upon the facts: *Rex* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.* (2). Assuming there was evidence of discontent existing in the industry, this was not communicated to the employers until the despatch of the circular letter in June 1909. The mere sending of a letter of demand, annexed to a log drawn up by the employés federation, cannot create a dispute. There must be evidence of a real controversy between the parties, and of claims made for the redress of existing grievances, the nature of which have been brought to the knowledge of the respondents, with an intimation that if the demands are not presently conceded a rupture of existing conditions of employment is imminent. This was in fact a bogus demand, as it is obvious that more was asked for than the employés expected to get, or would insist on receiving. There is evidence of dissatisfaction with the wages paid and with the conditions existing in the industry as to the employment of apprentices and improvers, but not as to the other matters claimed in the log. The question is whether the adoption of a common log as a basis of demand created a dispute, and if it did what is the real nature of the dispute?: *Conway* v. *Wade* (3); *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (4); *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Son Proprietary Ltd.* (5); *Australian Boot Trade Employés Federation* v. *Whybrow* (6). If there is a dispute at all it must be as to the whole subject matter contained in the demand.

(1) 2 C.L.R., 593, at p. 609.
(2) 8 C.L.R., 419.
(3) (1909) A.C., 506.
(4) 6 C.L.R., 309.
(5) 8 C.L.R., 465.
(6) 10 C.L.R., 266.

The dispute must be shown to be coterminous with the demand. It must be connected and indivisible. The demand was formulated merely as a basis for an application to the Court. It was not the statement of a claim which the employés had shown they were prepared to insist upon, and which, if not granted, would probably cause a cessation of work in the industry. The employés did not authorize the secretary of the federation to present an ultimatum to their employers, but simply to formulate certain demands. He was not authorized to enter into negotiations, and there was industrial peace throughout the whole of the industry. A demand was made upon certain employers without any intimation that a similar demand was being made upon other employers, and different dates were fixed for replying to the demand in the different States. In some of the States the conditions of employment in the industry had been already prescribed under an award by a Wages Board. The circular letter specified 23 demands. Of these only two were dealt with by the President, and as to the others he held there was no dispute, but on what principle they are differentiated is not stated.

If there was a dispute it was not a dispute extending beyond one State, because there was no evidence of the existence of the same dispute in different States, unless the letter of demand, without anything more, is held to create a dispute. The demand on each employer was made only in respect of his own employés, and the receipt of the circular letter is the first intimation of discontent with existing conditions communicated to the employers. A mere request for better terms, not previously asked for, and a refusal to concede those terms, does not make a dispute. The fact that this was a combined claim, the settlement of which depended on a settlement being arrived at in the other States, was never communicated to the employers.

Assuming that the Court had jurisdiction to entertain the dispute the award is invalid as it concedes more than is asked for in the plaint, and the scale of wages for apprentices is fixed on a different basis than is asked for. Further, there was no claim that existing deeds of apprenticeship should be revised by the Court, and the provision for the appointment of a board of reference was a delegation of the powers of the President which is

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not authorized by the terms of the Act. The only powers of delegation are those conferred by secs. 34 and 36 of the Act.

[Upon the question whether the *Commonwealth Conciliation and Arbitration Act* was *ultra vires* the Constitution, they adopted the arguments of *Irvine* K.C.]

Irvine K.C. As to the first ground taken in the rule, the question turns upon the meaning of the words "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," in sec. 51 (xxxv.) of the Constitution. The words "conciliation and arbitration" are words of limitation, and qualify the succeeding words in the sub-section. In passing the Act in its present form the legislature has not appreciated the effect of this limitation. This is apparent from the general scheme of the Act. It confers upon the Court legislative powers, power to annul local laws, and power to impose general rules of conduct, which are all interrelated as part of one scheme, and is an extension of the State Acts of New South Wales and New Zealand which are its models. First, as to the meaning of the word "arbitration." If a word used in the Constitution in a certain connection has a definite and well ascertained meaning of its own, this cannot be extended by showing that it has been used elsewhere with a wider meaning: *Peterswald* v. *Bartley* (1). Three alternative meanings may be suggested: 1. A voluntary submission to tribunals appointed or selected by the parties, as in the English Act of 1896 (59 & 60 Vict. c. 30), which appears to be the only Act in which the words "prevention and settlement" of trade disputes occur in the title. 2. It may include a compulsory submission of questions to arbitration, but the tribunal must be selected or appointed, directly or indirectly, by the parties to the dispute. This characteristic is common to all the English Acts, and to the New South Wales and South Australian Acts, and to the New Zealand Act of 1894, 3. However the tribunal is appointed, and whether the reference is compulsory or optional, the functions of the tribunal are limited to those which the parties could by agreement have vested in it. Such powers are quite distinguishable from those which a legis-

(1) 1 C.L.R., 497.

lature might confer upon a Court of judicature. Even if the reference be compulsory, the tribunal can only deal with matters which the parties could have submitted to it for decision. It cannot, for instance, make orders binding upon third parties. The use of the word conciliation cannot extend the meaning of arbitration in this respect: *The Bootmakers' Case* (1). If any provision of the Act is shown to be *ultra vires*, that raises a presumption against the validity of the whole of the Act: *Cooley on Constitutional Limitations*, 7th ed., at p. 248. Where part of an Act is invalidated, and the aim of the legislature was to enact the Act as a whole, it is to be presumed that the remaining portion of the Act which is valid does not represent the will of the legislature. By making the reference compulsory you cannot alter the nature of the functions of the arbitrator.

[Reference was made to 39 & 40 Geo. III. c. 90; 39 & 40 Geo. III. c. 106; 5 Geo. IV. c. 96; 30 & 31 Vict. c. 105; 35 & 36 Vict. c. 46; 59 & 60 Vict. c. 30; 17 & 18 Vict. c. 125; the *Arbitration Act* (N.S.W.) 1892 (55 Vict. No. 32); *Conciliation and Arbitration Act* 1899 (N.S.W.) No. 3; the South Australian Act of 1894 (57 & 58 Vict. c. 598); the New Zealand Act of 1894 (58 Vict. No. 14).]

The mere inclusion in some of these Acts of slightly additional powers does not indicate any change in the general meaning of the word "arbitration." Starting with the definition of "arbitration" given in *The Bootmakers' Case* (1), none of these Acts are inconsistent with the use of that word in the sense contended for. It is not sufficient in a long series of Acts to show an occasional use of the word in connection with larger powers. Whatever degree of compulsion may be permissible in the reference or composition of the tribunal, the arbitrator can do no more than the parties could do by agreement. This Act is based on the assumption that where there is an industrial dispute, the Court can control the industry apart from the settlement of the dispute. The evidence of the existence of such a general scheme and purpose throughout the Act is very material on the question of severability. In sec. 6 there is a general prohibition against strikes and lock-outs. This power may be exer-

(1) 10 C.L.R., 266.

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cised as incidental to the settlement of a dispute, or the enforcement of an award. It is assumed that when there is a dispute the legislature is empowered to deal with the industry as a whole. A tribunal which is really arbitral has only a limited and not a general jurisdiction. Assuming that sec. 20 is limited to disputes properly before the Court for decision, it would not be valid. It assumes that the Court can override the decisions of Wages Boards, and the term State industrial authority is so defined. The whole scheme of the Act is a consistent one, and depends for its fulfilment on the exercise of legislative powers in various directions. [He referred to secs. 29, 38 (*f*), 39, 80.] If the common rule provisions are eliminated the Act is unworkable. The legislature has coupled the two powers, first, to make an award between the parties to the dispute, secondly, to make the award apply to the industry. The second power is given to rectify the injustice which may arise from the exercise of the first. It must be inferred that the legislature would not have granted one without the other. The arbitration is compulsory. If the common rule power cannot be granted, the legislature might have chosen to adopt voluntary arbitration. The Court will not conjecture what alternative the legislature would have selected. What has to be shown is that the various provisions are connected in subject matter, meaning, or purpose. The common rule provisions are so connected with the rest of the Act as to be inseparable from it. To say that, lopping off the invalid provisions, the legislature would have passed the Act in its mutilated form is to ask the Court to make a new Act. The legislature must have recognized that the President would be influenced in framing his award by the knowledge that he has power to grant a common rule. This alters the character of the power exercised. It is assumed for the purpose of this argument that industrial dispute includes an isolated dispute between individuals. If it means a dispute involving all persons engaged in the industry, the necessity for a common rule would not arise. But its meaning has never been put as wide as that. It may not be possible to effectually settle a dispute without the common rule. There are no common rule provisions in any Act passed prior to the date of the Constitution. Sec. 38 (*h*), when read

with secs. 20 and 30, provides for a scheme which will be ineffectual without what is equivalent to legislation by the Court. Sec. 30 shows that paramountcy is an essential part of an award, which binds the parties, not as a judgment, but as law. Sec. 40 involves power of continuous supervision. Matters may be incorporated subsequently to the award which were never originally in dispute at all. If at any time while the award is current it is shown to be desirable, preference may be awarded not only as between the original parties to the dispute, but as between other persons. Sec. 41 also gives a general power of inquisition after the award is settled. Once an industrial dispute exists the powers of the State authorities in dealing with the dispute are superseded. The legislature has assumed that it has plenary powers, and framed the Act accordingly. Secs. 77 to 80 give power to the Court to override agreements which have been formally entered into by the parties, and whether they were or were not parties to the dispute. Omitting the provisions that are invalid, what remains is a power different in its exercise and effect, and in the considerations upon which its exercise can be based. If the Court cannot say what the legislature would have done if the objectionable matter were omitted, if the rejection of these sections would produce results not contemplated by the legislature, and the valid portion would not operate in accordance with its original intention, the Act must fail. [He referred to *Cooley on Constitutional Limitation*, 7th ed., p. 246; *Pollock* v. *Farmers' Loan and Trust Co.* (1); *Berea College* v. *Kentucky* (2); *El Paso and North-Eastern Railway Co.* v. *Gutierrerz* (3).]

[ISAACS J. referred to *New York Central and Hudson River Railroad Co.* v. *United States* (4); *Field* v. *Clark* (5); *Connolly* v. *Union Sewer Pipe Co.* (6); *Loeb* v. *Trustees of Columbia Township* (7).]

Blacket, for the State of New South Wales.

Duffy K.C., *McArthur* and *Gregory*, for the Commonwealth Court of Conciliation and Arbitration. There was evidence of an

(1) 158 U.S., 601.
(2) 211 U.S., 45.
(3) 215 U.S., 87, at p. 96.
(4) 212 U.S., 481, at p. 497.
(5) 143 U.S., 649, at p. 696.
(6) 184 U.S., 540, at p. 556.
(7) 179 U.S., 472, at p. 490.

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industrial dispute. It has been contended that the evidence shows only that there were several quarrels, but not a common dispute. If there is some element of solidarity, that constitutes a dispute as distinct from a *congeries* of differences. If the employés in a factory all go out on strike against their employer, though for different reasons, that would be one dispute. The element in common would be their discontent with their conditions. If they all agree to join together and make common cause on the basis that none will be satisfied until all get redress of their grievances that would be an element of solidarity. Though their grounds of dispute be different, it is sufficient if some *nexus* exists between them. The element of persistency, or violence, or resolution to strike if their demands are not granted is not essential. Having found a dispute in the ordinary meaning of the word, it is then necessary to show that it relates to an industry, that is, that there is a dissidence of opinion affecting the industrial relations of the parties. Here the claim distinctly points out the nature of the dispute and asks for a remedy. A dispute can be established without a formal demand and refusal, though a demand is evidence that a dispute exists: *Re Cromwell Colliery Co. and Otago Miners' Union* (1). If there is in fact a difference of opinion, the quarrel need not have reached an acute stage, and the relations of the parties may be perfectly amicable. The only question is, is there a real dispute: *Conway* v. *Wade* (2); *Clemson* v. *Hubbard* (3); *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (4). The facts show there were originally several disputes which finally constituted one dispute. The decision of Wages Boards in some of the States did not terminate the dispute, unless it completely satisfied the men's demands. This could not be effected by reason of the inter-State competition, and the powers of each State to regulate its own industrial difficulties. If there is an existing discontent which is followed by a common demand and refused, that constitutes a dispute. The claim need not be treated as an indivisible whole. The log is the claimants' suggestion of the proper remedy to be adopted for the difference as to wages,

(1) 25 N.Z. L.R., 986.
(2) (1909) A.C., 506.
(3) L.R. 1 Ex. D., 179.
(4) 1 C.A.R., 1.

and the employment of apprentices. The whole question as to the basis of payment for apprentices having been raised in the plaint, it was competent to the President to assess the payment on any basis he thought proper, whether suggested in the log or not. The question of the method of regulation was left at large to the Court. It is immaterial that the particular remedy adopted was not suggested in the log. Even if the provision in the award for the regulation of apprentices was a wrong decision, it cannot be objected to on the ground of want of jurisdiction. The quarrel was not so limited that this remedy could not have been asked for by the employers as an alternative to the remedy suggested by the men. It was a matter the President had jurisdiction to investigate. It is a permissible modification or variation of what was claimed, and not something altogether outside the claim. Even if this portion of the award is rejected it will not vitiate the award as a whole. If the matter has been dealt with improperly it can be brought before the President again, and the award amended: *Hoey* v. *Macfarlane* (1). As to the board of reference, the President has not delegated the exercise of his discretion to the board. He has simply defined the area within which his decision is to operate. It was practically impossible for the President personally to examine all the existing indentures of apprenticeship himself. If he can allow all or none he can leave the question of admissibility to the board.

As to the first ground, that the Act is unconstitutional, this was not raised at the hearing, and the President has authorized counsel to state that if it had been raised he would have referred the question to the Full Court, and also that he does not desire that counsel's arguments on this point should be regarded as expressing his own personal views on the question, as he wishes to keep his mind open on the point, and has refused to consult with counsel upon it. The fact that the employers have chosen to raise this question in a proceeding to which the President is a party, so that he is excluded from assisting in the discussion as to the validity of a federal Statute, is a reason why this application should not be granted. The writ is a discretionary one, and the same objection may be raised hereafter by case stated.

(1) 4 C.B. N.S., 718.

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The word "arbitration" does not necessarily connote a right of choice of the tribunal by the parties, though it was at one stage used in this sense. It never was of the essence of the idea of arbitration that the tribunal should be approached in a particular way. Originally a voluntary submission and the right to choose the arbiter were associated with the idea of arbitration, but these rights have both been done away with, and the meaning of arbitration has changed. Arbitration really meant a decision out of Court, and there was no way of obtaining such a decision except by a process of voluntary submission, and by allowing the parties to choose the arbiter: *Webb's Industrial Democracy*, vol. 1, p. 222; *Russell on Arbitration*, 6th ed., p. 7; *Pontifex* v. *Severn* (1). [They also referred to the Acts cited in the judgment of *Isaacs* J.]

The provisions of the Act objected to are not invalid. Assuming that they are, they are severable, and do not invalidate the Act as a whole. The additional powers conferred do not interfere with the exercise of the power to settle disputes. The common rule is no part of the ordinary procedure of the Court. The Court will not reverse the finding of the President that there was a dispute if there is evidence to support it. [They also referred to *Brown* v. *Cocking* (2); *R.* v. *Yaldwyn* (3); *Holburd* v. *Burwood Extended Coal Mining Co.* (4); *Elston* v. *Rose* (5); *Colonial Bank of Australasia* v. *Willan* (6).]

Arthur, *Holman* and *Hall*, for the Australian Boot Trade Employés Federation. All the elements necessary to constitute an industrial dispute were present in this case. A large body of men in different States make common cause and demand better conditions. In 1902 they take steps to form a combined union, urged on by the necessity of combating inter-State competition, and a constitution is drawn up, though the permanent body was not formed until 1905. From 1902 onwards there is continuity of action to bring about better conditions. There is evidence of continued grievances, and continuous efforts to remedy them, and that the differences were real and substantial.

(1) 3 C.P.D., 142, at p. 152.
(2) L.R. 3 Q.B., 672.
(3) 9 Q.L.J., 242.
(4) 11 N.S.W.L.R., 365.
(5) L.R. 4 Q.B., 4.
(6) L.R. 5 P.C., 417, at p. 444.

In the early stages groups of workmen are found making demands upon their employer through their officials. Then the local unions become united. They are the skilled negotiators who conduct the bargaining with their employers. By sectionally approaching the various industrial authorities the men cannot obtain the improvement in their conditions which they are reasonably entitled to in consequence of the inter-State competition. The Federation is found to be the only body that can satisfactorily enforce their demands. Negotiations are conducted in the way that a union ordinarily makes demands. It is not necessary to show that the men were on the point of going out on strike. This would be evidence that there was a dispute, but is not necessarily involved in the conception of an industrial dispute. It became associated with the idea of a dispute because it was originally the only effective means of obtaining redress. After a peaceful method of deciding disputes was provided by the legislature it was rendered illegal. There being a number of disputes in existence, a log was drawn up, and the demand made upon the employers for observance of the conditions stated in the log initiated this dispute. Mere demand and refusal is *primâ facie* evidence of a dispute. If its reality is challenged the previous conduct of the parties may be looked at: *Re Cromwell Colliery Co. and Otago Miners Union* (1); *United Labourers' Protective Society* v. *Portland Commonwealth Cement Co.* (2). These cases show that the imminence of industrial warfare is not necessary. It was known to the employers that the men were not satisfied with what the State Courts could give them, and that demands for uniform conditions had been made upon the employers in different States: *Ex parte Broken Hill Proprietary Co. Ltd.* (3). Matters antecedent and subsequent to the claim can be looked at to show what was really in dispute. With regard to apprentices, the particular remedy awarded is merely a modification of the remedy asked for in the claim. It was contended by the employers that apprentices should not be regulated at all. The question of payment by experience was put in issue by the employers. The provision for the appointment of a board of refer-

(1) 25 N.Z.L.R., 986. (2) (1906) A.R. (N.S.W.), 302.
(3) 8 C.L.R., 419, at p. 435.

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ence was within the powers of the Court. It was not a delegation of the judicial functions of the President: *Cooley on Constitutional Limitations*, 7th ed., p. 589. On both these points the award, if bad, is severable.

The *Commonwealth Conciliation and Arbitration Act* is valid. [As to the meaning of arbitration and the power of compulsory reference they referred to *Laws of England*, vol. I., p. 298; *Powell* v. *Main Colliery Co. Ltd.* (1); the Queensland Act of 1872 (36 Vict. No. 21.)].

Power to grant a common rule is necessarily incident to the exercise of the power conferred by the Constitution: *Master Retailers Association of New South Wales* v. *Shop Assistants Union of New South Wales* (2); *Federated Saw Mill &c. Employés' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (3); *Veazie Bank* v. *Fenno* (4); *National Bank* v. *United States* (5); *Juilliard* v. *Greenman* (6). The object aimed at is the permanent settlement of disputes, and there is by necessary implication power to do what is necessary for this purpose. If persons not parties to the dispute cannot be bound by the award an employer against whom an award is made may transfer his business to his wife, and she would not be bound by the award. If the power is rigidly limited to the actual disputants, it is difficult to see how an award could bind persons who, after an award, join an organization which was a party to a dispute. Power is given to follow up and render effectual an award which could otherwise be evaded. The common rule provisions are mere machinery, and not an essential part of the settlement itself. The definition of industrial dispute in the Act does not exhaust the meaning of these words as used in the Constitution, and the common rule provisions are a good exercise of the power there conferred on the legislature. If they are outside the definition of industrial dispute, they are inside the Constitution. If there is a dispute affecting an industry, all the persons engaged in the industry are involved in the dispute. Even on the contention of the applicants the Court has power to bind employers who are

(1) (1900) A.C., 366, at p. 371.
(2) 2 C.L.R., 94, at p. 110.
(3) 8 C.L.R., 465.
(4) 8 Wall., 533, at p. 548.
(5) 101 U.S., 1.
(6) 110 U.S., 421.

members of an organization which is a party to a dispute, though some of these employers may never have been in dispute with their employés, and may have previously conceded the conditions asked for in the claim.

Irvine K.C., in reply. Arbitration is a word of limitation as used in the Constitution, and must be given its everyday meaning if it has one. The fact that in a number of English Statutes it is used in relation to a tribunal of a compulsory character cannot be said necessarily to alter the meaning of the word as used in the Constitution. The respondents first contended that the essence of arbitration was a settlement outside a Court of law. They now say it enables the legislature to create a Court of justice. The logical effect of their argument is that arbitration is not a word of limitation, but of extension. Once its limited meaning is departed from it can be extended to sanction the appointment of an untrammeled dictator. The Act, in effect, legislates for the industry at large. The common rule and the powers connected with it are not severable. The Act is based on the State Acts of New Zealand and New South Wales. In all this legislation the common rule has been found to be essential to justice in dealing with an industry. If these provisions are omitted it is a mere matter of speculation what the legislature intended. Without them the mandate from the legislature to the Court is an entirely different one. In dealing with such questions as wages and hours a fair award cannot be made without the common rule, and its power to disregard competition. [He referred to *Employers' Liability Cases*; *Howard* v. *Illinois Central Railroad Co.* (1).] Arbitration for the prevention of an industrial dispute is a contradiction in terms. Arbitration *per se* connotes the existence of a dispute: *Collins* v. *Collins* (2); *Boss* v. *Helsham* (3); *Vickers* v. *Vickers* (4); *Redmond on Arbitration and Awards*, p. 3.

Mitchell K.C., and *Starke*, in reply. At the date of the Constitution "industrial dispute" represented a concrete idea, that is,

(1) 207 U.S., 463, at p. 499.
(2) 28 L.J. Ch., 184.
(3) 36 L.J. Ex., 20.
(4) 36 L.J. Ch., 946.

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a dispute which if not settled would lead to a cessation of work. That meaning is emphasized by the use of the word "prevention." In this case there were mere paper demands. What the employers object to is the limitation of subject matter in apprenticeship deeds, payment by age instead of experience and the high rates payable to apprentices, and the interference with existing deeds of apprenticeship. In all other disputes the men have authorized their union to make demands on their behalf in connection with a then existing dispute. Here the log is first adopted by the union and then submitted to the men. It was never intended by the log that existing deeds of apprenticeship should be interfered with.

On July 4th, during the course of the argument,

Wise K.C., and *Clive Teece*, for the Attorney-General of the Commonwealth, moved for leave to intervene on behalf of the Commonwealth Government. The Court as constituted is not competent on this motion to deal with the constitutionality of a Commonwealth Act, and if legally competent, in the exercise of its judicial discretion, it should refuse to exercise its power. If the objection now taken as to the validity of the Act had been raised in the Court below, and had come before this Court upon a case stated, the President could have been a member of the Court. The question is whether the applicants, by taking the course they have adopted, and making the President a party to the proceedings, can give the go-by to sec. 23 of the *Judiciary Act*. A question of this kind should be determined by the Full Bench of Judges. The questions I propose to argue cannot be properly raised by counsel for the President upon the hearing of this motion.

[*Per Curiam*:—The question how the Court should be constituted is one entirely for the discretion of the Court. The point proposed to be argued has already been raised by one of the parties to the litigation. The application is, therefore, refused.]

Cur. adv. vult.

July 10

GRIFFITH C.J. Before dealing with the important questions of law raised in this case I will dispose of the preliminary objection

taken by Mr. *Arthur* that prohibition does not lie to the Commonwealth Court of Conciliation and Arbitration. The objection is based on two grounds. First, it is said that a prohibition is within the language of sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904, which enacts that "No award of the Court shall be challenged, appealed against, reviewed, quashed, or called in question in any other Court on any account whatsoever." In *Clancy's Case* (1) this Court had to deal with the same point raised upon identical words in the New South Wales *Industrial Arbitration Act* of 1901, and we held, in accordance with a uniform line of English decisions, that such an enactment does not extend to cases in which a Court of limited jurisdiction has exceeded its jurisdiction. Then the point is put in another way, thus:—under the Constitution (sec. 73) an appeal lies to the High Court from every other Federal Court unless otherwise enacted by Parliament. Therefore an appeal would lie from the Arbitration Court unless it had been denied by sec. 31. If it had not been denied, and an appeal were brought, this Court could on the appeal entertain the question of jurisdiction. Therefore, it is said, that the jurisdiction of this Court is denied as to every point that could be raised on appeal. But the answer to this argument is obvious. Where an appeal lies from one Court to another the Court of Appeal can set aside the judgment appealed from on any ground on which it appears that the judgment appealed from is erroneous. Want of jurisdiction to pronounce it is such a ground. But it does not follow that enforcement of the judgment may not be prohibited by a Court having jurisdiction to make such an order, although no appeal lies to the prohibiting Court. In the great majority of cases of prohibition the prohibiting Court is not a Court of Appeal from the Court prohibited. If any further proof were needed it is afforded by the consideration that a prohibition may be asked for by a person not a party to the proceedings in which the judgment has been given. Whether, therefore, an appeal lies or does not lie is wholly immaterial.

The other ground on which the objection is supported is that

(1) 1 C.L.R., 181.

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this Court has no original jurisdiction to grant prohibition to an inferior Federal Court.

Sec. 75 of the Constitution confers original jurisdiction upon the High Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

A prohibition is a writ directed to the Judge and parties in an inferior Court, and does not lie except to persons or bodies exercising judicial or *quasi*-judicial functions. It lies to a pretended Court as well as to a real one: *Chambers* v. *Jennings* (1). When, therefore, the Constitution speaks of a prohibition against an officer of the Commonwealth it means an officer whose functions are judicial or *quasi*-judicial. It cannot be denied that the Judge of the Arbitration Court is an officer of the Commonwealth, or that his functions are judicial. In my opinion, therefore, this Court has original jurisdiction under the Constitution itself to grant prohibition against him. If the meaning of the words of sec. 75 were even ambiguous, the necessity of such a controlling power existing somewhere is so apparent that I should think that the ambiguity should be resolved in favour of the power. Even if this construction of the Constitution were not accepted, the Court clearly has jurisdiction under the express words of sec. 76, which authorizes Parliament to confer original jurisdiction on the High Court in any matter arising under the Constitution, or involving its interpretation, or arising under any law made by the Parliament, and sec. 33 of the *Judiciary Act*, which authorizes the Court to make orders or direct the issue of writs "requiring any Court to abstain from the exercise of any federal jurisdiction which it does not possess."

For all these reasons I am of opinion that the objection must be overruled.

I proceed to deal with the points taken by the order *nisi*.

The first is that the *Commonwealth Conciliation and Arbitration Act* is beyond the power of the Parliament. This objection is put in two ways: (1) That the constitution of the Court is not such as is authorized by the power to make laws with respect to conciliation and arbitration for the prevention and settlement of

(1) 2 Salk., 553.

industrial disputes extending, &c. (2) That several of the provisions of the Act, notably that relating to the "common rule," are not within the power, that those provisions are so intimately bound up with the rest of the Act that, if they are eliminated, the rest of the Act will have a substantially different character, and that the whole Act is therefore invalid. I will deal with these objections in order.

The first is founded upon the meaning of the word "arbitration," which, it is contended, had in 1900, when the Constitution was enacted, a well known meaning in the English language, as well with regard to industrial matters as others.

It is argued that the concept of arbitration and of an arbitrator included *inter alia* the following elements:—(1) that the submission to the authority of the tribunal was voluntary; (2) that at least some part of the tribunal was chosen by the disputants themselves, either by direct or indirect choice; (3) that the tribunal was not fettered by the ordinary formalities of legal procedure, and its functions were not limited to determining existing rights, but might extend to prescribing rules of conduct for the future, provided that the award did not direct the doing of any act forbidden by law, or, in other words, that it could order to be done anything that the parties themselves might have agreed to do, but no more; (4) that the function of an arbitrator was a judicial function, which could only be exercised between the parties to the dispute, and only after giving them an opportunity to be heard.

It will be perceived that the first two of these propositions relate to the constitution of the tribunal, the two latter to its functions when constituted. These are entirely distinct questions.

As to the first question there is no doubt that according to the common law there could not be arbitration without voluntary submission, which was the basis of the award, and the award was enforced by proceedings founded upon the submission. In effect, therefore, the term "arbitration," as originally used in England, applied to a procedure which in fact depended upon the voluntary submission of the parties to the decision of arbitrators whom they had themselves chosen.

But it does not follow that these incidents, which were *de facto*

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inseparable from the procedure of arbitration, thereby became essential elements of the concept. By a series of Statutes, of which the *Common Law Procedure Act* 1854 may be taken as an instance, the element of voluntary submission was eliminated, and compulsory arbitration has long since become a familiar term, meaning that the parties are required by law to submit the matter in question to arbitrators instead of to a regular Court of justice. The right of a voice in the choosing of the arbitrators was, however, generally left to them. Up to 1900 no English Statute had made any provision for arbitration in industrial disputes except on these conditions. Nor had any of the few experimental enactments that had been passed in Australasia excluded the right of direct or indirect choice.

These considerations are, in my opinion, of great weight, but they do not determine the question, whether the elements of voluntary submission and choice were part of the original concept of arbitration which should be treated as having only been modified so far as expressly declared by some law, or whether they are incidental attributes which had been temporarily added to that concept by reason of the operation of the common law. To solve this question recourse may be had to other instances of the use of the word, and the series of Statutes mentioned by my brother *Isaacs* indicate to my mind conclusively that for a long time before 1900 the words " arbitrator " and " arbitration " had been used by the English Parliament to denote a tribunal with respect to which the essential element of the concept was absolute discretionary power, only fettered by the limits of the dispute submitted to arbitration and the law of the land. The word arbitrator had been used in the same sense in the Queensland *Railway Act* 1872, which left the assessment of compensation for land taken for railway purposes to the determination of a single person called the Railway Arbitrator.

I think, therefore, that the elements of voluntariness and choice must be regarded as accidents and not essentials, and that the constitution of the Commonwealth Court cannot be objected to on this ground.

I turn now to the second objection to the validity of the Act. I remark, at the outset, that the Act is obviously based upon the

model of Acts which had before 1904 been passed by the legislatures of New South Wales and New Zealand. Those legislatures had plenary authority to deal with and regulate all industrial matters within their territories, and it was immaterial whether they so dealt with them directly or by means of a delegated authority, or whether the powers delegated to a subordinate authority were judicial or legislative. But under the Constitution of the Commonwealth the Parliament has no plenary power of legislation as to such matters. The power is limited to making laws with respect to "arbitration for the settlement," &c.

In my opinion the argument that the word "arbitration" connotes that the function of an arbitrator is a judicial function which can only be exercised between the parties to a dispute, and after hearing them, is incontestably right.

It follows that the only power which the Parliament can confer upon the arbitrator is a judicial or arbitral power, to be exercised on these principles, and that it cannot confer upon him any legislative functions. In the decision upon the case stated between the present parties (1) this Court denied to the Commonwealth Court of Arbitration any legislative authority.

The objection taken to the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904 as to the common rule is that they purport either to confer a legislative authority properly so called, or at least to authorize the arbitrator to make an award binding upon persons not parties to the dispute before him, which, it is said, is in substance, if not in form, an act of legislation, and not an act of a judicial nature. Sec. 38 (*f*) purports to authorize the Court to declare that any condition of employment, &c., determined by an award shall be a common rule of an industry (*scil.* throughout the States to which the dispute extends and in connection with which the dispute arises). This, it is said, is a legislative and not a judicial function.

Sec. 30 provides 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."

(1) 10 C.L.R., 266.

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This section is obviously based upon the notion that the award is a legislative act, or at least has the same effect as legislation. It has been pointed out in previous cases that this section is either *ultra vires* or superfluous. Other sections were also referred to.

It is plain that the Act was framed and passed upon the assumption that the Parliament had power not only to make provision for the settlement of disputes between the parties to them, but, as an incident to such settlement, to regulate the whole industry concerned. If the whole industry is involved in the dispute the regulation of it is, of course, an incident to the settlement of the dispute. This consideration may afford some ground for thinking that the power conferred by the Constitution was only intended to apply to disputes of such a nature, but as the case has not been argued on this basis I will say no more on that point. It is contended, on the other hand, that the power to regulate the whole of an industry is a necessary incident of a power to settle a dispute between some parties engaged in the industry. It may be that by reason of extrinsic causes the settlement will not prove effective. The argument that a judicial power to settle disputes should be supplemented by legislation to make the award binding upon non-disputants may be a good political argument to be addressed to a legislature having power to make such a supplementary enactment, but it has nothing to say to the question of the extent of the power to settle. The question is one of great importance, but in the view which I take of the question of severability it is not necessary to determine it in this case. I will assume, therefore, that the provisions objected to are *ultra vires*.

Thus regarded, the Act consists of two parts, one providing for the settlement of disputes *inter partes*, the other for the regulation of industry in general. Are they severable ? It is contended, on the authority of decisions of the Supreme Court of the United States, which are entitled to the greatest respect, that the test is this, that if the Court, on a consideration of the whole Statute, and rejecting the parts held to be *ultra vires*, is unable to say that the legislature would have adopted the rest without them, the whole Statute must be held invalid. With profound deference I venture to doubt the accuracy of this test. What a

man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the Statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it.

It is contended that the arbitrator in making an award must necessarily take into account his power to extend its operations to the whole industry, and so obviate the very apparent difficulties which might arise from unequal competition between persons fettered by the award and those left free, and that the awards which he would be likely to make in view of that power and in view of its absence might be very different. I agree. But by sec. 38 (*o*) the Court is authorized to vary its awards and to reopen any question. This, in effect, means that an award is to be regarded as being in the first instance tentative and provisional only. The objection does not, therefore, I think, show a difference between the substantial effect of the Act with the invalid provisions and without them, but a difference in the probable form of an award which the Court is authorized to modify from time to time.

It is quite conceivable that the Parliament, if it had been present to their minds that it was doubtful whether they had power to authorize the regulation of industry in general as well as to settle disputes in an industry, would have determined to exercise the latter power at any rate. And, on the whole, I am unable to say that the Act with the allegedly invalid provisions omitted is so substantially different a law as to what is left from what it would be with those provisions included that the Court would, by sustaining the validity of what is left, be making a law which the Parliament did not make.

I think, therefore, that the award cannot be impeached on the ground of the invalidity of the Act itself.

The questions remaining to be considered arise upon the facts of the particular case. The first question is whether there was any dispute at all of which the Court had cognizance. The relevant facts on this point lie in a comparatively small compass.

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On 15th June 1909 a circular letter, written on paper headed with the name of the claimant organization and signed by their secretary, was sent to the several respondents, who are employers in the States of New South Wales, Queensland, South Australia and Victoria, as follows:—"I, as Secretary of the Australian Boot Trade Employés Federation, have been instructed by a number of persons employed by you in the industry of boot, shoe, and slipper manufacturing to inform you that they are dissatisfied with the wages paid to them and the conditions of labour under which they are working for you, and to ask whether or not you will agree as from the —— day of July One thousand nine hundred and nine to pay the wages and observe the conditions of labour set out in the document hereunto annexed. I am further instructed to inform you that unless I receive a notification from you on or before —— day of July One thousand nine hundred and nine that you will pay the wages and observe the conditions set out in the said document hereunto annexed, I will regard the non-receipt of such notification from you as a refusal of the demand herein made, and will request the Boot Federation to take the matter up and refer it to the Commonwealth Court of Conciliation and Arbitration for hearing and determination." To this letter was appended a log or schedule, comprising 23 separate claims, and constituting a complete code for the regulation of the industry. Various dates were given for a reply. The addressees, with two exceptions, did not make any reply, and on 22nd July the plaint was filed, which alleged the pendency of a dispute extending beyond the limits of a single State as to various matters, and claiming in the terms of the log appended to the circular letter of 15th June.

The terms of this log had been previously adopted by the branches of the claimant Union in all the four States.

It was contended for the claimants that the demand of 15th June followed by non-acceptance of the terms demanded was of itself sufficient to establish the existence of a dispute. I cannot accept this view, nor was it accepted by the learned President, for of the 23 claims he held that only two were matters really in dispute between the parties.

Mr. *Mitchell's* clients contend that under these circumstances

the claim is not severable, that the demand, taken all together, did not represent the real dispute (if any) at all, and that therefore the foundation of the jurisdiction of the Court fails. I am unable to accept this contention. If a separable part of the demand represented a real dispute then existing, I do not think that the addition of other demands affected that fact. *Utile per inutile non vitiatur.* I will therefore proceed to deal with the two points which the learned President thought were really in dispute between the parties, which may be summarized for the moment as a demand for an increase of wages and a demand for the regulation of boy labour in certain respects.

First, as to increase of wages. He thought, and I agree, that it was established by the evidence that there was a general discontent of long standing amongst the employés on that point, and that the employers were aware of it. It appeared, however, that the increase of wages demanded in the several States was not identical, and that both parties were conscious of the fact that, so long as the minimum wages payable in the different States were regulated by different State authorities having legislative power, it was practically impossible to establish a uniform rate of wages. It also appeared that the rate of wages asked in the log, 1s. 4½d. per hour for adult workmen, was larger than had been asked in any State. The only formal claim that had been made had been in the form of claims put forward before the Wages Boards of the several States, which had not been granted in full, and no formal claim for an increase had been made after the determinations of the Wages Boards. But that the general discontent existed, and that it could not be alleviated except by an award of the Commonwealth Court applicable to all the States, were recognized facts. Under the circumstances of this particular case which I have stated, and without laying down any rule of general application, I think that it is a fair inference that there was a dispute extending over the four States, which was single in so far as it involved an increase of wages in each State, and as far as possible the establishment of a uniform rate in all. I do not think that the naming of a particular rate, 1s. 4½d. per hour, was an essential part of this dispute. I think, to use the metaphor which I suggested in the course of the argument, that the

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differences may be regarded as having been up to that time in a state of solution, and as having been crystallized by the demand into a definite dispute. I think, therefore, that so far as the award deals with the rate of wages for adult workmen it was within the jurisdiction of the Court.

The question as to boy labour raises somewhat different considerations. So far as it relates to the number of boys to be employed as compared with the number of journeymen the facts are substantially the same as with respect to wages, and the same conclusions follow. But when we get beyond the question of number the facts are very different. They are as follows:— In New South Wales the employés had put before the Industrial Authority in December 1907 a claim that the number of lads should be limited in the proportion of one to four, that they should be legally indentured for five years, and that their wages should be fixed at rates corresponding with those in the log. The Industrial Authority had made an award not conceding these claims, and this award had in June 1909 been extended by consent of all parties for a year from the end of that month. In Queensland the only claim brought to the notice of the employers was one put forward to the Wages Board in April 1909, that "all apprentices should be legally bound, one apprentice or improver to five journeymen in any branch of the trade." In South Australia the employés had complained that "we have not got limitation of apprentices." In Victoria at a conference between employers and employés held in January 1907 both parties had agreed that it was desirable that the matter of apprentices should be regulated by Parliament on a basis to which general approval was given. From these times to 15th June 1909 no communication on the subject had been made to the employers. Under these circumstances it seems to me impossible to hold that there was any dispute as to apprentices or boy labour common to the four States except as regards number in proportion to journeymen, and such matters as are necessarily incident to that subject, such, for instance, as provisions to secure the genuineness of contracts of apprenticeship.

The scheme of the award is shown by the first clause, which is as follows:—"The minimum rate of wages to be paid to male

employés on time work shall (with the exceptions hereinafter mentioned and subject to the provisions for transition) be 1s. 1½d. per hour.

"The exceptions are:—(*a*) Apprentices as hereinafter defined. (*b*) Lads under 21 not apprenticed, but under the conditions hereinafter stated. (*c*) Aged, slow and infirm workers as hereinafter defined."

The words "as hereinafter defined" in pl. (*a*) incorporate clause 2, which declares that an "apprentice" means a male person under 21 who is "duly apprenticed" for a term not less than four years. He is deemed to be "duly apprenticed" if he is bound by indenture in a form prescribed containing a covenant "to pay him the wages as hereunder mentioned," and to teach him one at least of seven enumerated functions or processes. Clause 4 prescribes a minimum rate of wages to be paid to lads whether apprenticed or not, which is fixed upon a purely age basis. The letter of 15th June contained a demand as to apprentices by which the rate of wages asked for them was specified, but was fixed upon the basis of experience, the rate being in many cases considerably less than that fixed by the award. It is objected that the Court had no jurisdiction to go, of its own motion, beyond the demand made by the other party to the alleged dispute, or to substitute a basis of payment different from that which the parties had been and were content to accept.

I do not see any answer to this argument.

It would appear to follow that, since the several provisions of the award so far as it relates to apprentices are so interwoven that the rate of wages to be paid controls the existence of the status, the whole of that part must fall. If it is rejected the meaning of the first clause of the award is entirely altered, for its effect will be that if apprentices are employed they must receive the full minimum wage for adults, there being no exception with regard to them. It is true that in a different context the words "male employés" might be read as not including apprentices, but, as the award stands, they are treated as included in that term, although made the subject of a special exception. It would appear to follow that the whole award must go if the error cannot be corrected.

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A further objection is taken to the concluding paragraph of the award, which is as follows:—"Notwithstanding clause 2 of this award, all persons bound under an indenture of apprenticeship made before the 22nd day of July 1909, shall (if the subject of apprenticeship is approved by the board of reference) be deemed to have been duly apprenticed, and be entitled only to such wages as are prescribed in the indenture and shall be counted as apprentices for the purposes of clause 6."

It is objected that no question as to existing apprenticeship deeds and lads bound under them was raised either by the log or by the claim, that, even if it was, the Court had no jurisdiction to deal with it, and, if it had, could not delegate its judicial or discretionary power to a board of reference The first point is a matter of construction. Clause 6 of the claim is "that the number of apprentices who may be employed . . . . . shall be . . . . . Apprentices shall be paid at the following rate of wages," followed by a scale up to the concluding year (4th or 5th) of apprenticeship. It then proposes that the trade for this purpose shall be divided into five specified sections, that indentures shall be in a specified form, and that every employer shall lodge a copy of every indenture with the Registrar of the Court within 14 days after execution. I find it impossible, as a matter of construction, to read this claim otherwise than as having application to future indentures only. Nor was any other construction put forward at the hearing of the case. I agree also with the contention that the learned President cannot delegate to a board of reference the power, (even if he has it himself), to annul an existing deed of apprenticeship. I do not think it necessary to express any opinion on the point whether he could do so himself. It is, however, admitted that this part of the award is severable.

What then is to be done? It would be a misfortune if the award were to fail altogether merely by reason of the first clause incorporating by reference other clauses which, if invalid, can easily be made severable, or if the part relating to apprentices were regarded as severable and held invalid. Under these circumstances I think that the Court should adopt the course followed by the Court of Common Pleas in the case of *Hoey* v.

Macfarlane (1), in which a rule *nisi* for a prohibition was enlarged in order to afford an opportunity to apply to the Judge to strike out a judgment made *per incuriam*, and proceed to a rehearing of the matter. A somewhat similar practice prevailed with regard to the writ of *certiorari*, where, even after a conviction had been formally drawn up which was bad on its face, a fresh conviction was sometimes allowed to be drawn up, provided that the former one had not already been quashed: *R.* v. *Justices of Huntingdonshire* (2).

I therefore think that the order *nisi* should be enlarged to the first day of the next sittings of the Full Court at Melbourne, with a declaration that its pendency shall not impair the exercise by the Court of any power of rehearing the matter, or varying the award, which it would possess if the order *nisi* had not been granted.

BARTON J. On the preliminary point I agree with the reasons and conclusions of the Chief Justice. I will only add that the terms of the 75th section of the Constitution, sub-sec. (v.), seem to afford a good reason why the phrase "an officer of the Commonwealth" should have been used to include judicial and *quasi*-judicial as well as other officers. That reason is that the sub-section covers cases of mandamus and injunction as well as prohibition. As both these writs will lie in cases of officers who are not exercising judicial functions at all, while prohibition is applicable only to persons who do exercise them, the draftsman has apparently sought and found a phrase which would extend to every class of officer to whom any one of the three writs might properly be directed. We were not furnished with any reason why this phrase should not include the class of persons to whom a writ of prohibition is ordinarily directed, and there is no restrictive context. I agree therefore that prohibition, as distinct from ordinary appeal, lies to this Court in respect to decisions in excess of jurisdiction pronounced by any inferior Federal Court, including the Arbitration Court. It would have been strange indeed had the framers of the Constitution provided no means whereby other Federal Courts might be kept within the bounds of the jurisdiction assigned them by law.

(1) 4 C.B. N.S., 718. (2) 5 D. & Ry., 588.

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Now as to the application itself. The first ground of the rule *nisi* is as follows:—"(1) That the *Commonwealth Conciliation and Arbitration Act* 1904 is unconstitutional and beyond the powers of the Parliament of the Commonwealth of Australia, particularly the constitution and jurisdiction of the Commonwealth Court of Conciliation and Arbitration."

This ground, though taken and insisted on by the applicants has been in effect argued wholly by counsel for the intervenants in support of the rule. Their contention is that the Act goes beyond the powers granted by sec. 51 (xxxv.), that in its provisions as to arbitration it is not confined to the settlement of industrial disputes extending, &c., and that the parts of it which are in transgression of the power are intimate parts of the whole scheme of legislation embodied in the Act, so that the scheme of legislation would be materially altered if these provisions, being *ultra vires*, were treated as non-existent, and that it is impossible to say that the legislature would have passed the remainder if it had known the limits placed on its powers by the Constitution. Many decisions of the Supreme Court of the United States were cited to elucidate the rule adopted by that great tribunal. It is sufficient to mention two of them.

In *The Employers' Liability Cases* (1) the Court, by *White* J., said:—"Of course, if it can be lawfully done, our duty is to construe the Statute so as to render it constitutional. But this does not imply, if the text of an Act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a Statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated."

In the case of *El Paso and Northeastern Railway Co.* v.

(1) 207 U.S., 463, at p. 501.

Gutierrez (1), *Day* J., for the Court, said :—"It remains to inquire whether it is plain that Congress would have enacted the legislation had the Act been limited to the regulation of the liability to employés engaged in commerce within the District of Columbia and the Territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the Statute must fall."

These principles being, in the language of the judgment first mentioned, "so clearly settled as not to be open to controversy" in the United States, are we to apply them here? Great as is the authority of the Court which has pronounced them, its decisions are in no wise binding on us as statements of law. So far as their reasoning commands our assent, we may well apply them in the absence of other authorities which do bind us. But I confess myself unable—I say it with great diffidence—to adopt the rule laid down as one of reason. It seems to me to put to a too severe test enactments, the constitutionality of which it is our duty to maintain, where we can do so consistently with their own terms. How is the Court to be satisfied, where a part of a Statute is beyond the power granted by the Constitution, that Parliament would have passed the law had the invalid provision been excised? How is it to know that Parliament would *not* have passed the law in that shape? It is the first rule of construction in British Courts that the intentions of the legislature must be gathered from the terms it has used, and not from any conjecture we may harbour as to the course it would have taken had it been unable or unwilling to use certain of those terms. The true principle seems to me to be this, that when one leaves out of consideration any provision held invalid, there must remain a scheme of legislation, not radically different, equally consistent with itself and retaining its workable character so far as it had one, dealing effectively, even if not comprehensively, with so much of the subject matter as is within the legislative power. Let us take as an example an Act in terms embracing two subjects of legislation, one of them within the power and the other beyond it. Such is the case where a Commerce Act deals with external

(1) 215 U.S., 87, at p. 96.

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and inter-State trade, and also with the domestic trade of a State. There, as indeed we have held, if and so far as the invalid provisions are severable in sense from the valid ones, the Act may be held good irrespective of the domestic trade provisions, if the severance leaves intact a consistent, workable, and effective body of provisions dealing with that external and inter-State trade, which is the authorized part of the whole subject matter. And I take it that the validity of so much of the Act would depend, not on any view we might hold as to what Parliament would have done in an event which did not happen, but on the fact that within the compass of the whole Statute and apart from the provisions challenged, there lies a set of enactments forming an intelligible and efficient exercise of the real power.

Before applying this test we must ascertain the limits of the power in sec. 51, clause (xxxv.) of the Constitution. I re-affirm, without any lengthy citation, what was said by the majority of the Court in the *Woodworkers' Case* (1) as to the principles on which clause (xxxv.) must be construed, and as to the primary meaning of "arbitration." "Conciliation and arbitration for the prevention and settlement of industrial disputes" mean plainly, to my mind, such conciliation and arbitration as at the time of the enactment of the Constitution had become applicable to the prevention and settlement of such disputes. That is, I think, the "everyday" or ordinary meaning of the terms. Leaving aside conciliation, with which we are not now concerned, and which does not affect the present question of construction, what was at that time connoted by arbitration to settle industrial disputes, or, to call it by its synonym, industrial arbitration? Clearly it did not include a power to the arbitrator to regulate the particular trade. That would be giving the tribunal a power to legislate, which no torture of words can twist into arbitration. The arbitral tribunal must at any rate be judicial and not legislative. It must, therefore, act on the ordinary principles of justice involved in the necessity of allowing a hearing to all parties to the difference on which it must decide, and of abstaining from involving in its decision interests of others than the parties to the difference. It is not absolved from this duty by the fact that a Statute

(1) 8 C.L.R., 465.

has imposed it on the parties as their tribunal, or has compelled them to submit their differences to it. As the parties cannot agree, it is for this tribunal to make an agreement for them, and if the law binds them to accept that agreement, it is binding as a settlement of their dispute, and cannot overpass the area of the dispute as to subject matter or as to disputants, nor can the settlement be something to which they could not, if they would, agree. If that which purports to be a settlement affects to bind others than the disputants, the function there performed by the tribunal is not arbitration, any more than such a decision by a Court would be a judgment.

The third position taken up by Mr. *Irvine* in his admirable argument seems to me, then, to be sound. Whether the arbitral tribunal, he urged, be selected by or under a Statute or chosen by the parties, whether the reference be voluntary or enforced, the functions of arbitration are necessarily limited to matters which the parties might or could lawfully give the tribunal power to settle, and under the Constitution the tribunal must be one of arbitration. Unfettered as its discretion is, or may be made, extensive as the subject matter may be, the power must be wielded within those limits. Outside them there is no power at all. As I said in the *Australian Boot Trade Employés Federation* v. *Whybrow & Co.* (1), "The range . . . of an arbitrator's authority, if the submission be wide enough, is co-extensive with the powers of the parties to settle their disputes without him. Whatever they can lawfully agree to, he may lawfully award."

In ascertaining what kind of arbitration had at the time of the enactment of the Constitution become applicable to the settlement of industrial disputes, we must have regard to such enactments dealing with industrial arbitration as the framers of that instrument may be taken to have known to exist either in the United Kingdom, where the Constitution was enacted, or in Australia, where it was to prevail. Several such enactments have been cited, but it is unnecessary to refer to them at length. Even where the tribunal has been appointed by the law instead of the parties, and even if the submission has been compulsory instead of voluntary, these industrial Courts have been tribunals to settle

(1) 10 C.L.R., 266, at p. 294.

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trade disputes by way of arbitration, and by no other method. If I mistake not, there was not cited any Act of the kind passed before July 1900 in which the industrial tribunal was empowered to operate on matters beyond the range of the dispute, or on parties not engaged therein. In this respect, then, no industrial tribunal was given functions wider than those of arbitration, as the term was known irrespective of Statute. It could decide only between the disputants, and only as to the subject of dispute. For instance, there was no Act up to the time mentioned which made any provision analogous to that for the common rule, which for the first time in Australia became law by the plenary authority of the legislature of New South Wales in 1901.

I have come now to the point at which it is necessary to apply the test of severability. For as to the several sections of the *Commonwealth Conciliation and Arbitration Act* which are the subject of challenge, no opinion as to their validity need be pronounced if the Act itself, leaving aside any particular section impeached, stands good under the test which I have ventured to offer as sound. I do not propose to discuss the sections referred to. As to some of them, the attack on their validity has perhaps not been successful so far, if we had to decide that question. But that attack really centred on sec. 38 (*f*) and (*g*) of the Act, authorizing the declaration of a common rule in addition to the making of an award, and on certain subsidiary provisions. It was forcibly argued that, whatever opinion we might hold as to the other sections challenged, there was here a provision inseparable from the general scheme of the Act, giving the Court powers quite beyond the settlement of the actual dispute, and allowing the extension of a decision or part of it to persons not parties to that dispute, perhaps at entire peace with their employés. I will, of course only for the purposes of this opinion, take it that all the provisions challenged are invalid, including this one. If the common rule provision is severable, it is scarcely contended with seriousness that any of the others are not. It is put as the shocking example. Assuming then its invalidity, is it severable?

On this assumption I think the Act may fairly be treated as dealing with two subjects—(1) Arbitration for the settlement between the parties of a dispute between them, of which this

Court has cognizance, and (2) the regulation of industries, under which head the impeached sections will fall. The provisions on the first subject are valid, the others (let us take it so for the moment) invalid, as really amounting to a grant to the President of the power to regulate industries by legislation. I have considered the whole Act from this point of view, which I think is the true one, and I have come to the conclusion that if the sections challenged be left out of consideration, there remains a law which is not radically different, for the settlement of disputes by conciliation and arbitration, using the word arbitration in the sense I have attributed to it in relation to trade disputes. That law, so remaining apart, is armed with machinery adapted to its purpose, and not maimed as to that purpose by the severance. In that sense it is a workable measure, consistent in its parts and adapted to the end it has in view, without the necessity of expanding or restricting its sense with regard to its proper subject matter. Under these circumstances I am of opinion that the powers to legislate for the regulation of industries, given to the President, are severable so as to leave standing a Statute for industrial conciliation and arbitration for the prevention and settlement of the disputes which come within sec. 51, clause (xxxv.), of the Constitution.

I therefore think the provisions questioned by the intervenants, even on the assumption of their invalidity, do not infect the valid part of this Act, which therefore has due force.

I regret that the time which has elapsed since the conclusion of arguments has been so short that I have not been able to prepare a judgment as comprehensive as that which I could have delivered on a later day. The urgency of the matter to the parties constitutes however a strong reason for giving judgment before the beginning of vacation. In the result I have had to confine myself practically to a discussion of the constitutional question.

For the rest I must be content to express my concurrence with the views expressed by the Chief Justice. I ought to say that it is only after much hesitation and with doubt that I come to the conclusion that there was here an industrial dispute of which the Arbitration Court had jurisdiction. But on the whole I think there were two grievances among the employés as a whole, which

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are found to have caused deep-seated discontent, and which the respondent organization (claimants below) formulated first in a demand upon their employers. That demand, which embodied at any rate two real grievances, with proposals as to the method of settling them, was so ignored that it could only be taken to have been refused. Under the whole of the circumstances stated in the evidence I am not prepared to dissent from the view that on failing to obtain any redress, the organization was justified in bringing these matters before the Court as subjects of dispute. But I wish to restrict the effect of this opinion to the particular facts of the present case. That other matters, not subjects of genuine dispute, were joined in the demand on the plaint does not appear to me of itself to deprive the Court of jurisdiction to deal with that residuum which, if taken by itself, would have been within its cognizance.

If there was a dispute at all, I think it clearly extended beyond the limits of a single State, and included Queensland and South Australia. I therefore think that grounds (2), (3) and (4) in the rule are not sustained, and what I have already said will indicate that I do not think ground (5) succeeds. Passing over grounds (6) and (9), for reasons given by the applicants for the rule, I agree that grounds (7) and (8) are sustainable for the causes stated by the Chief Justice, which are, I think, conclusive without more.

Finally, I entirely agree in the proposal to enlarge the rule—a course for which the case of *Hoey* v. *Macfarlane* (1) appears to furnish sufficient warrant, and which gives the President the opportunity of exercising his power under sec 38 (*o*) of the Act, a provision clearly constitutional as ancillary to the valid powers of the Court. By taking that course we shall, I am convinced, exercise our discretion in a manner highly desirable for the preservation of all interests concerned from confusion and avoidable expense. The learned President, we may be assured, will so mould his award as to bring the real dispute to a final and we may hope a lasting settlement.

O'CONNOR J. At the outset of these proceedings Mr. *Arthur* raised by way of preliminary objection the important question

(1) 4 C.B.N.S., 718.

whether this Court can entertain a motion for prohibition against the Commonwealth Court of Conciliation and Arbitration. His contention was that the High Court has no general supervising jurisdiction over the decisions of inferior Federal Courts, as the superior Courts in England have over inferior Courts under the English judicial system, but that its sole corrective power is that which the Constitution has expressly conferred on it, namely, by way of appeal, and that in respect to awards of the Commonwealth Arbitration Court Parliament has expressly taken that right away. The cases cited in the course of the argument throw very little light on the question. The matter must be determined by construing the relevant sections of the Constitution and of the *Judiciary Act*. Sec. 71 of the Constitution declares that the judicial power of the Commonwealth shall be vested in the High Court of Australia, or in such other Federal Courts as the Commonwealth may create or invest with federal jurisdiction. The Constitution itself creates the High Court, and by sec. 73 expressly invests it with certain appellate jurisdiction. But all the judicial power of the Commonwealth is not disposed of by that section. The judicial power which sec. 71 declares shall be vested in the High Court is the supreme judicial power of the Commonwealth, and it must necessarily include the power to keep inferior Courts of the federal judicial system from exceeding their jurisdiction. That power is in its nature original, not appellate, but it may be conferred in either form, and it has, in my opinion, been conferred as original jurisdiction in sub-sec. (v.) of sec. 75. It was expressly inserted in the Constitution by its framers, no doubt for more abundant caution, to prevent the question arising which was decided by the Supreme Court of the United States in *Marbury* v. *Madison* (1). It has been objected that the words "officer of the Commonwealth" in sub-sec. (v.) were not intended to include the holder of a judicial office. The use of the word "prohibition" in itself implies that the officer referred to may be an officer exercising judicial or *quasi*-judicial functions. Giving the words their ordinary meaning, they would include all officers of the Commonwealth, judicial as well as non-judicial, and neither in the group of sections dealing with the judiciary, nor in

(1) 1 Cranch., 49.

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any part of the Constitution, is there an indication that its framers used the words with a meaning narrower than their ordinary meaning. So far from that being the case, there is every indication that the words were used in their widest sense. Secs. 71 to 75, inclusive, were clearly intended to equip the High Court completely with all the fundamental powers necessary for the discharge of its duty under the Constitution, a duty in the effective discharge of which the States and the Commonwealth are equally concerned. If that power is not vested in the High Court by the Constitution, and can be conferred on it only by an Act of the Commonwealth legislature under sec. 76, it will depend upon the will of the Commonwealth Parliament whether there shall be any power in the High Court, by appeal or otherwise, to control excessive jurisdiction by the inferior Courts of the federal judicial system, for Parliament can always, as it has done in the case of the Commonwealth Arbitration Court, create a Federal Court, whose decisions are not subject to question by the High Court on appeal. These considerations would seem to furnish strong reasons for holding that the word "officer" must be read as including judicial as well as non-judicial officers of the Commonwealth, and on that ground alone I am of opinion that the jurisdiction which has been questioned in this case exists by virtue of sub-sec. (v.) of sec. 75 of the Constitution. That, however, is not the only answer to Mr. *Arthur's* contention, because it is quite clear that Parliament has used its powers under sec. 76 of the Constitution, and has conferred on the High Court a power to keep inferior Commonwealth Courts within their jurisdiction. Sec. 33 (*b*) of the *Judiciary Act* authorizes the Court to direct the issue of a writ requiring any Court to abstain from the exercise of any federal jurisdiction which it does not possess. Sec. 38 enacts that the jurisdiction of the High Court shall be exclusive of the jurisdiction of the State Court in matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a Federal Court. These sections, clearly, to my mind, authorize this Court to interfere by way of prohibition whenever it is satisfied that the Commonwealth Arbitration Court has made an award in excess of jurisdiction.

Turning now to the subject matter of the appeal, I have been

much assisted by the very able and well-considered arguments of counsel representing the parties and the intervenants. I do not intend to follow them over the wide field which they have found it necessary to cover, because in my view the real questions to be determined can now after so full an argument be brought within a comparatively small compass. The principles underlying most of the grounds taken in the rule have been already considered by this Court in the *Jumbunna Case* (1); *The Broken Hill Case* (2); *The Woodworkers' Case* (3); and the *Bootmakers' Case* (4). I shall not discuss anew any of the propositions of law enunciated in those cases. The principles there laid down must now, I think, be taken as established in this Court. From that starting point I shall deal both with the grounds which relate to the constitutionality of the *Commonwealth Arbitration Act*, and with those which, assuming the Act to be valid, assail the validity of the award. The Commonwealth Parliament, Mr. *Irvine* contends, is not empowered under sec. 51, sub-sec. (xxxv.) of the Constitution to establish the system for the settlement of industrial disputes by arbitration which is enacted in the *Commonwealth Arbitration Act*, that is to say, the system which compels the submission of industrial disputes to the decision of a standing arbitral tribunal, consisting of an arbitrator whom the disputants have neither appointed, nor had the opportunity of appointing. He based his argument on what he contends is the ordinary meaning of the word arbitration, namely, a method of determining a dispute by a private tribunal appointed by the disputants for that purpose, and he argues that it is in that sense that the words of sub-sec. (xxxv.) of sec. 51 of the Constitution must be read. He admits that the meaning of the word had so far extended beyond its original meaning as to include various forms of statutory arbitration in which the law compelled parties to have recourse to special arbitral tribunals. But he contended that even in those instances the choice of the arbitrator was left to the parties except only in those cases where by default in the exercise of his choice a disputant may have forfeited his right of having a voice in the appointment of the tribunal. When the

(1) 6 C.L.R., 309.
(2) 8 C.L.R., 419.
(3) 8 C.L.R., 465.
(4) 10 C.L.R., 266.

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contention is examined it amounts to this: The word "arbitration" may be properly used to describe a statutory arbitral tribunal to which a party may be compelled to resort, or to describe a tribunal constituted without his choice if he make default in exercising his right of choice, but that it has never been, and cannot properly be, used to describe a method of determination by an arbitral tribunal in the constitution of which the disputants have not a right of choice if they chose to exercise it. The legislative history of arbitral tribunals under British law completely disposes of that contention. Taking the word arbitration generally, apart from its relation to industrial disputes, it is abundantly clear that it has been used in English legislation for the last sixty years to describe a method of deciding issues by arbitral tribunals, resort to which was compulsory, and in the constitution of which the disputants had no choice. The list of English Statutes to which attention was called by my learned brother *Isaacs* in the course of the argument, together with those referred to by Mr. *Duffy*, completely establish that position. But when we have regard to the use of the word "arbitration" in connection with the settlement of industrial disputes, it becomes still plainer that at the time when the Constitution was being framed by the Convention there was in Australia and New Zealand a well recognized use of the word as describing permanent public arbitral tribunals for settlement of industrial disputes, constituted not by choice of the parties, but by public authority. In my opinion, therefore, the Parliament of the Commonwealth, in creating a standing Court of Arbitration for the prevention and settlement of industrial disputes, constituted by an arbitrator appointed by the Government, were acting within the powers conferred by the Constitution. Mr. *Irvine's* other objection raises an exceedingly important question. He contends that the authority which the Act vests in the Commonwealth Arbitration Court, to make an award a common rule in an industry, is beyond the power conferred by the Constitution. The argument is based on the position that the foundation of the power conferred by subsec. (xxxv.) of sec. 51 is the existence of an industrial dispute, that no authority is thereby given to regulate trade generally, and that it confers no authority to deal with the relation of

employer and employé except as incidental to the settlement of an industrial dispute. In the view that I take of the separability of the common rule provisions from the rest of the Act, it is unnecessary at present to determine whether this objection, so important and far-reaching in its consequences, is in itself sustainable, but I shall assume for the purposes of this appeal that it is sustainable. The common rule does not directly come into question in the jurisdiction actually exercised in this case, but the objection is taken for the purpose of disputing the constitutionality of the Act generally. Mr. *Irvine* cited many American decisions on the question of the separability of constitutional from unconstitutional provisions in a Statute. In my opinion the principles laid down in all of them are somewhat difficult to apply in any satisfactory way, chiefly because their application involves very largely investigations in what may be termed a region of conjecture. A more certain ground of decision in such cases is that formulated by my learned brother the Chief Justice, and I entirely concur in the test which he has suggested for determining whether constitutional are separable from unconstitutional provisions in any particular Statute. Applying that test to the present case, I see no reason for holding that in cases where the common rule would not be applicable the *Commonwealth Arbitration Act*, with the common rule provisions left out, differs in any substantial way from what it would be if those provisions were retained. I therefore agree that, assuming Mr. *Irvine's* objection is good, the portions of the Statute objected to are separable in the sense which I have explained from its other provisions, thus leaving the rest of the Statute valid and constitutional.

Coming now to the actual dispute which it is the object of the award to settle, I entirely agree with the learned President, and for the reasons which he has given, that an industrial dispute within the meaning of the Act and of the Constitution existed between the parties to the arbitration, and that it was duly submitted to him by the plaint. The fact that matters which he found not to be in dispute were brought forward for settlement could not affect his jurisdiction to deal with those which he properly held to be in dispute. In my opinion, however, there were some matters which his Honor dealt with

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as being in dispute, which were not in dispute before the presentation of the claim to his Court. In regard to the employment of boy labour, it was never in controversy between the parties that experience combined with age was the basis on which the pay of apprentices should be regulated. In making age alone the basis of the amount of wages payable, the learned President in my opinion exceeded his jurisdiction. Similarly the validity of apprenticeships entered into before 22nd July 1909 was not, in my opinion intended to be questioned by either employers or employés. In awarding that the validity of those apprenticeships should be left to the determination of the board of reference, his Honor in my opinion exceeded his jurisdiction in two respects, first, in dealing with a matter not in dispute, and secondly, in delegating to the board of reference a power which it was for him alone to exercise. As to those portions of the award which I hold to be in excess of jurisdiction, I am of opinion that they are separable from the rest of the award, and if it were not for the view which some of my learned brothers take on this question of separability, I should be prepared to hold at once that the award is in excess of jurisdiction as to those matters, but is in all other respects valid. But under the circumstances I agree that the course taken in *Hoey* v. *Macfarlane* (1) should be followed, and that the rule should be enlarged, accompanied by the declaration suggested by my learned brother the Chief Justice, so as to enable the award to be brought before the learned President for further consideration before this Court is called upon to make its final order.

ISAACS J. This case has lasted some weeks, and evoked able arguments on many questions of great importance. An objection was taken at the threshold of this case that prohibition does not lie to the Commonwealth Arbitration Court by reason of sec. 31 of the Act. The argument was that prohibition is a part of the appellate jurisdiction of this Court, and all appeals from the Arbitration Court are forbidden by the section referred to. To this it was answered that sec. 31 does not apply to a case where the Arbitration Court has acted without jurisdiction, and that

(1) 4 C.B. N.S., 718.

there must exist some power of controlling excess of jurisdiction, otherwise the most capricious action of that tribunal might go unchecked. It was further contended that, independently of appellate jurisdiction, sec. 75 (v.) of the Constitution conferred inalienable original jurisdiction upon this Court to control by prohibition the action of all Commonwealth officers, including the President of the Arbitration Court. I am of opinion that the objection fails, but for one reason only, namely, that the power of control by means of a writ of prohibition is a part of the appellate power, and has not been taken away by Parliament.

Sec. 73 of the Constitution contains at once the grant of appellate power to this Court, and the grant of power to the Parliament to prescribe exceptions. I entertain no doubt that by appropriate language Parliament could, if it were so minded, completely except the decisions of the Arbitration Court from all appellate control of this Court. But sec. 31 does not do so. The words "appealed from" in that section are used in a collocation which shows that it was not the intention of the legislature to make them cover the entire field of appellate jurisdiction as used in sec. 73 of the Constitution: see *Virginia* v. *Rives* (1). If it were, there would be no necessity for the presence of the accompanying words. And particularly is that so in view of the decision in *Clancy's Case* (2) on precisely similar words in the New South Wales Act some months before the Commonwealth Act was passed: see *per* Lord *Coleridge* C.J. in *Barlow* v. *Teal* (3). The expression "appealed from" in sec. 31 is used in the sense of the correction of error in the course of adjudication, and not as including a denial of jurisdiction to adjudicate. Where the legislature intends to take away entirely the power of the superior Courts to keep subordinate tribunals within the limits assigned, clear words are invariably used, as in the New South Wales *Industrial Disputes Act* 1908, sec. 52 (see *Baxter* v. *New South Wales Clickers' Association* (4)), and the English Act 51 & 52 Vict. 25, sec. 17, the *Railway and Canal Traffic Act* 1888. And see *per* Lord *Campbell* in *Balfour* v. *Malcolm* (5).

(1) 100 U.S., 313, at p. 327.
(2) 1 C.L.R., 181.
(3) 15 Q.B.D., 403, at p. 405.
(4) 10 C.L.R., 114.
(5) 8 Cl. & F., 485, at p. 500.

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No such distinct provision has been made in this case, and the form of words employed does not indicate that the parliamentary exception is intended to be as wide as the constitutional grant, and consequently the power to prohibit for want or excess of jurisdiction remains.

I do not agree that sec. 75 (v.) has the effect contended for. Prohibition to another Court is, in my opinion, not original, but appellate jurisdiction. All judicial jurisdiction is either original or appellate: see *Lord Halsbury's Laws of England*, vol. 9, p. 14. Proceedings on the Crown side of the King's Bench Division in England, which include applications for prohibition, are part of the appellate jurisdiction: see the same volume, p. 59. This is such an application. Mr. Justice *Story*, in his Commentaries, sec. 1761 says:—"The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies, that the subject matter has been already instituted in and acted upon by some other Court, whose judgment or proceedings are to be revised." That precisely describes such a case as the present. Original jurisdiction in which the cause is created, cannot, I conceive, include a proceeding which has for its sole object the prohibition to another tribunal against the further proceeding with the very cause of which it has already assumed cognizance. It is to me inconceivable that the Constitution would have expressly permitted this proceeding to be excepted from the appellate power to which it belongs, and yet have irrevocably conferred it as original jurisdiction to which it is really foreign, and not as controlling a Court, but merely an officer. How far such a power might be exercised as incidental to a cause otherwise properly arising in original jurisdiction I offer no opinion. There may possibly be such a power, and if the question should ever arise, such a case as *Great Western Railway Co.* v. *Waterford and Limerick Railway Co.* (1), will merit consideration in that connection. I would add with reference to sub-sec. (*b*) of sec. 33 of the *Judiciary Act* 1903 that the power there given must be exercised within the range of the original jurisdiction conferred

(1) 17 Ch. D., 493.

and to which it is expressly restricted, and the only original jurisdiction possessed by the Court is that contained in sec. 75 of the Constitution, and sec. 30 of the *Judiciary Act*.

The next question in logical order is the validity of the *Conciliation and Arbitration Act*. That is challenged on two grounds. It is said in the first place that it is radically unconstitutional and illegal, because the tribunal is altogether compulsory, leaving no possible choice of arbitrator or arbitrators to the parties. It is urged that the word "arbitration" connotes such a possible choice. I do not agree with that. In the *Bootmakers' Case* (1) I have fully indicated my view of the import of the word "arbitration" so far as was material in that case. The present phase did not then arise. But I apply the same line of reasoning to this aspect also. Arbitration is I conceive correctly defined by Lord *Trayner* in *McMillan & Son Ltd.* v. *Rowan & Co.* (2) in these words:—"An agreement to submit to arbitration simply means that the parties have agreed to have their differences determined otherwise than by a Court of law, but does not even suggest whether the Court they have chosen for themselves shall consist of one member or many or how many members."

The essence of the matter then is that *the differences are to be decided otherwise than by a Court of law.*

So long as that essential feature is preserved, Parliament is free to provide the constitution of the tribunal, and to say whether or not the parties to the difference may or may not have a voice in its selection. This appears really incontrovertible when it is remembered that the chief object of the constitutional power was to maintain industrial peace for the benefit of the community at large, and was, therefore, not introduced for the sole purpose of determining or averting a private quarrel concerning only the immediate parties. The trouble or possible trouble being public, and probably urgent, Parliament acting for the public is entrusted with the power to appoint a tribunal, and at once, which it thinks will act fairly between all parties concerned. It is, however, contended that this view is barred by what is called the every-day conception of the term arbitration. But where is there found any definite every-day import other than that I have indicated?

(1) 10 C.L.R., 266.

(2) 40 Sc. L.R., 265, at p. 267.

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Doubtless, every reference to arbitration at common law out of Court was by agreement as to the matters to be referred, as to the persons to whom they were to be referred, and as to the powers of those persons to decide. No agreement to submit to arbitration was complete at common law as a submission until an arbitrator was appointed. The result at common law was that, among other things, a person wholly or partially incapable of entering into a contract was to that extent incapable of submitting a dispute to arbitration. Infants and married women (see, for instance, *Strachan* v. *Dougall* (1)) were instances of total or restricted capacity to submit to arbitration. The whole position, therefore, necessarily rested on agreement.

If, therefore, I thought the test of arbitration were the capacity or power to agree, I would at once accede to the present argument. But to apply that test appears to me to mistake surrounding and temporary circumstances for inherent permanent attributes. Learned counsel have not asserted that because an infant possesses only a limited capacity to contract the *Arbitration Act* is therefore inapplicable to affect him except so far as his contractual power extends. And if the suggested test fails there, it fails in my opinion altogether. It is impossible, in the face of the numerous Acts passed by the British Parliament on the subject of arbitration, to maintain that arbitration ceases to be arbitration unless it retains its voluntary character. The first introduction of compulsion with regard to arbitration appears to have been the inherent judicial power to make a rule of Court for the reference to arbitration of differences where the parties to a pending action agreed to refer them. This gave rise to the earliest Statute with regard to arbitrations by submission out of Court (9 & 10 Will. III. c. 15); see *Lord Halsbury's Laws of England*, vol. I., p. 482. And as pointed out by the Lord Chancellor, speaking for the Privy Council in the New South Wales case of *Zelma Gold Mining Co.* v. *Hoskins* (2), although the consent of the parties is a necessary condition in certain cases to an order being made by the Court when referring a cause to arbitration, yet once it is made, it is the order which is the foundation of the arbitration proceedings, and not the submission of the parties.

(1) 7 Moo. P.C.C., 365.

(2) (1895) A.C., 100, at p. 104.

Without referring to numerous enactments which, while still maintaining the method of arbitration, have made partial and successive inroads into the principle of voluntariness, and which appear to me to exclude that principle as the test, I come at once to a class of enactments which are altogether decisive of the position that the term "arbitration" when used by the Imperial legislature in an Act of Parliament does not connote a possible choice of arbitrators. Of course, if it connotes a choice of personnel, it also includes a choice of number, which would confessedly make the whole scheme unworkable. The Acts referred to are as follows:—

1840 ...	3 & 4 Vict. c. 97 ...	Regulation of Railways.
1842 ...	5 & 6 Vict. c. 55 ...	Better Regulation of Railways, &c.
1863 ...	26 & 27 Vict. c. 112 ...	The Telegraph Act 1863.
1868 ..	31 & 32 Vict. c. 119 ...	The Regulation of Railways Act.
1874 ...	37 & 38 Vict. c. 40 ...	Board of Trade Arbitration Act 1874.
1882 ...	45 & 46 Vict. c. 56 ...	Electric Lighting Act.
1888 ..	51 & 52 Vict. c. 41 ...	Local Government Act 1888.
1890 ...	53 & 54 Vict. c. 70 ...	Housing of Working Classes Act 1890.
1900 ... (Aug. 8).	63 & 64 Vict. c. 59 ...	Housing of Working Classes Act 1.

To those Mr. *Duffy* added two intermediate Statutes of the same character, namely:—

1874 ...	38 & 39 Vict. c. 36 ...	Artisans and Labourers Dwelling Act.
1879 ...	42 & 43 Vict. c. 64 ..	Amendment of A. and L. Dwelling Act secs. 6 and 7.

The *Canadian Act* 1886, No. 40 Revised Statutes, is useful as showing that in another portion of the British Dominions the word arbitration was regarded as not necessarily importing any opportunity to choose the personnel of the tribunal.

The first objection therefore fails.

Then the Act is impeached on another ground. Various provisions are said to be in themselves *ultra vires*, and to be so intimately connected with the rest of the enactment as to be inextricable without entirely destroying the scheme of the legislature, and so deforming the Statute as to entirely alter its character.

The substantial argument on this point of the case was by arrangement left to Mr. *Irvine*, who selected the following portions of the Act as vitiating the whole in the way described:

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Secs. 6, 20, 30, 38 (*f*) and (*g*), 40, 41 and 73. As to all these challenged provisions, with the exception of sec. 38 (*f*) and (*g*), I entertain no doubt whatever.

Sec. 6 applies to the case of an industrial dispute extending beyond the limits of any one State, and is a provision incidental to the effective operation of the method of arbitration to settle such a dispute and prevent its extension.

Sec. 20 is equally incidental, and even necessary in the strict sense to the complete and effectual determination of the dispute as a whole by the federal tribunal.

Sec. 30 has in itself no effect as a repeal or amendment of any State law or award. Any supersession or paramount operation by federal decision over State laws or awards must arise by virtue of the power that enables it to be made, and its own repugnancy to those laws and awards, and cannot be effected by means of their attempted direct repeal by the Federal Parliament: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1). Bnt in the case just quoted, the Privy Council, while holding that the section of the *Canada Temperance* (*Dominion*) *Act* of 1886, expressly professing to repeal a Provincial Act of 1864, was *ultra vires*, did not on that account consider the Dominion Act as invalid. The provision was simply void.

Sec. 30 may have some limiting effect upon the federal award, but I place no reliance upon that for this purpose.

Sec. 40 cannot be said to be *ultra vires* of the Parliament. The method prescribed is still arbitration, and the settlement of a particular dispute may be gradual. It may be tentative in the first instance, and if effectually settled by the means first thought necessary, there will be an end to it. But if, despite the disinclination of the tribunal at first to adopt stricter measures, they afterwards appear requisite, the dispute still remaining unsettled, I see no more reason for refusing the power to subsequently adopt them than to deny to a physician the right to reserve his more drastic remedies until the condition of his patient positively demands them.

Sec. 41 is manifestly a machinery clause to enable the Court to discharge its acknowledged functions.

(1) (1896) A.C., 348.

Sec. 73 is nothing more than the equipment of federal organizations with powers conducive to the end for which they may be created, namely, the effective exercise of the power conferred by the Constitution. The right to create the organizations: *Jumbunna Case* (1), and the right to so invest them are parts of the same implication.

There is left for consideration in this connection sec. 38 (*f*) and (*g*). Ultimately the whole weight of the constitutional objection to the Act was rested upon these two sub-sections. Their own direct invalidity, and also their indirect effect as improperly enlarging the meaning of sub-sec. (*o*) of sec. 38, were both relied on as vitiating circumstances.

There can be no doubt the question raised as to the common rule gives rise to some difficulty. Were it necessary to determine the validity of these provisions I should require further time for consideration. On the one hand they have the appearance at first sight of regulation not necessarily dependent upon actual or threatened dispute; and on the other they seem absolutely necessary to the effective application of the remedy of conciliation and arbitration for the prevention and settlement of disputes in an industry. The preventive jurisdiction was certainly intended to be a real and substantial power of preserving the peaceful course of industry, and in its operation might prove more beneficial than the settlement of disputes after they have broken out. I am not satisfied that sufficient weight has during the present argument been given to this phase of the granted power, and the effect of the word "prevention," or the word "arbitration," or the expression "industrial dispute" in its ampler constitutional signification. But I am satisfied that the subject needs much deeper consideration, and perhaps fuller discussion from the standpoint of prevention than it has so far received before I could be prepared to pronounce any definite opinion upon it.

Very powerful arguments have been addressed to the Court on both sides on the relation of the common rule to the settlement of a dispute between definite parties, and unless the question as to the validity of these provisions is necessary to the determina-

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

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tion of this case, there are very strong reasons why no opinions should now be expressed with reference to it. The constitutionality of the Act was not raised before the learned President. If it had been, he would, as we have been informed on his authority, have stated a case for the opinion of this Court, on which we should have had the advantage of his presence, and all the practical considerations which must have occurred to him during his administration of the Act, and which might throw much light on the import of the words used. And there is, in my opinion, the greatest possible objection to denying to Parliament any powers it believes it has, and considers necessary to be applied for the public welfare, unless we are compelled to do so as a necessary step in maintaining the legal rights of those who claim them at our hands, and then only after the fullest consideration which this tribunal can bring to the occasion. Further we are told that an application to make a common rule is pending; the opportunity, therefore, may soon be afforded and availed of for the determining the question with the full strength of the Court.

The present award does not depend upon the provisions for a common rule. If those provisions are properly separable from the rest of the enactment it is immaterial, so far as this case is concerned, whether they are within sub-sec. (xxxv.) of sec. 51 of the Constitution or not. If good and bad provisions are wrapped up in the same word or expression, the whole must fall. Separation is there from the nature of the case impossible, and as it is imperative to eject the bad—and this can only be done by condemning the word or phrase which contains it—the good must share the same fate. But where the two sets of provisions are not, so to speak, physically blended, but are contained in separate words, phrases, sentences, clauses, or even parts of an Act, further considerations are necessary to determine whether, though physically separate, they have been made legally inseparable. In other words, whether Parliament intended them all as necessary parts of the one machine, always assisting and modifying or controlling each other in every operation; or whether they were enacted as independent instruments for possible use, either separately or in conjunction, according to the exigencies of the task.

What is needed, if possible, is a working test of separability

which will be applicable not merely to an Act imposing judicial functions, but to all classes of enactments. I do not see any reason to differ from the mode of approach suggested by the learned Chief Justice, so far as this case is concerned, but I think the test may be universally stated in the words of *Shaw* C.J. in *Warren* v. *Mayor of Charlestown* (1). Speaking of different parts of the same Act, respectively constitutional and unconstitutional, that very learned Judge says:—"If they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them." It is quite evident that the power to make a common rule is dependent on the power to make an award, but does it equally follow that the power to make an award is dependent in any degree upon the power to make a common rule? Clearly not, in my opinion. An award is made on the basis of what is fair between the disputants. The fact of competition is, of course, a factor in determining the matter in dispute. But adopting the line of reasoning laid down by *Shaw* C.J., and applying the language of the Act to the subject matter, I cannot believe that the Federal Parliament intended the provisions of sub-secs. (*f*) and (*g*) to be so indissolubly a part of the one design that the Arbitration Court is bound to regard them as essential elements in making every award—in other words, that unless they are present the necessary factors are incomplete, and therefore no award at all should be made. Then as to sub-sec. (*o*)—I agree that it has the larger meaning attributed to it by Mr. *Irvine*, namely, that it enables the Court to vary an award in substance, and not merely in form. But I give it that larger aspect not by reason, but altogether independently, of the common rule provision; nevertheless I see no invalidity in it. The Parliament, having power to settle disputes by arbitration, may confer the necessary power in any manner it pleases; and the same considerations as are applied to sec. 40 are applicable to sec. 38 (*o*).

(1) 2 Gray, 84, at p. 99.

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We are then brought to the particular matter which the learned President had to consider. As to this, the first question is the meaning of an industrial dispute. The inherent nature of such a dispute I have more than once stated and have no need to repeat. Was there a dispute in this case? As to the duty of this Court in determining that question I adhere to my views in the *Broken Hill Case* (1). It has been pressed upon us that we should not disregard the finding of the learned President that there was a dispute in fact, unless we are satisfied it was manifestly wrong. There can be no such rule applicable. If this were an ordinary appeal the rule laid down in *Dearman* v. *Dearman* (2) and other cases answers the contention. As this is not an ordinary appeal, still less can it apply. It all depends on what jurisdiction has been given by Parliament to the Court of Arbitration. The argument for the respondents was presented as if Parliament had said that the Court should have jurisdiction when any claim is made to ascertain whether any and what dispute existed, and if so then to proceed to determine it. That might have supported the argument within the doctrine of the *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (3), because the existence and extent of the dispute would then have been made *res judicanda*. But while supporting the argument, such a provision would render it unnecessary, because if the Court had the jurisdiction to determine that very question, an erroneous decision would not be a subject for prohibition at all. Parliament has, however, not said that; it has said that conditionally on there being such a dispute the Court may proceed —which is an altogether different thing—and so this case comes within the *Broken Hill Case* (1).

Now there was a clear demand given, not as a step in negotiation, but as a definite and irreducible minimum of what was insisted on. Still that demand, however insistent, could not of itself make a dispute. Had the employers, for instance, replied with an expression of willingness to meet and discuss the matter, something more would have been necessary before it could be asserted the parties were in dispute. They however were silent when the circumstances called upon them to speak. They

(1) 8 C.L.R., 419. (2) 7 C.L.R., 549. (3) 5 C.L.R., 33.

refused every claim in the most emphatic way they could, by silently and designedly ignoring the whole demand, and abstaining from altering a single existing industrial condition. They, of course, had the most perfect right to do so, but they cannot avoid the necessary consequence, which is that their refusal added to the demand put them *primâ facie* into dispute with the employés. It is said that the latter were bound to do something more. If by that a conference is meant, I do not agree with the argument. Doubtless a friendly conference where there is a hope of some beneficial result is most desirable. But the duty of making some reply to the demand lay upon the employers. A reply might, according to its nature, have necessitated some further step by the employés; but the resolute silence that was preserved was not for the purpose of consideration, but of embarrassment (see folio 1199 of the transcript), and could lay no foundation for a further approach.

If, on the other hand, the suggestion is that a strike should have taken place or have been threatened, I again disagree; because that would mean an open breach of the law and a disorganization of industrial affairs to the prejudice of the general community. And what the law forbids cannot be urged as conduct which the law requires. So far as I can see, no further step on the part of the employés was necessary to bring matters to a head, or in the circumstances even practicable. The affidavit of Arthur Long of 10th May 1910, which is not controverted, discloses a very deep and serious condition of discontent.

We have been referred to the judgment of the learned President of the New South Wales Industrial Court of Arbitration, in the case of the *United Labourers' Protective Society* v. *Commonwealth Portland Cement Co.* (1), as to what is *primâ facie* evidence of a dispute. I agree with what *Heydon* J. there said, that a dispute raised in a formal and complete way is to be taken *primâ facie* as genuine and real. That is the case here. It lies on the prosecution here to show the contrary. Not only is there no evidence which would warrant us in saying there was no dispute as to any of the items dealt with in the award, but there is

(1) (1906) A.R. (N.S.W.), 302.

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positive evidence in support of the opposite view in the affidavit of Long already referred to.

Summarizing that and other evidence, it may be stated thus:—A considerable amount of discontent prevailed in the various States, partly formulated in specific claims, some of which had been locally adjudicated upon and in part refused, others of which had not taken definite shape, being merely statements of evils felt, without any precise remedy suggested. The claims, which were definite, were at first moulded solely with reference to the local situation. By degrees the effect of inter-State competition became more pressing, intensifying ,and in some respect changing the elements of dissatisfaction, and it became recognized that State authorities either could not, or, for reasons just or unjust, would not remove the sources of complaint. Then the workers, who were already for State purposes regimented in their unions, formed one united army by creating a national federation; they appointed their representatives as a kind of trade Parliament or Congress, and these representatives, acting for their constituents after discussion, reduced to concrete shape the grievances of the employés, and formulated a number of demands constituting their desired requirements. Each State union for itself subsequently considered the log so framed, and separately adopted it. In turn the individuals who were the ultimate principals personally authorized the central secretary to claim these requirements, and he did so uniformly in all the States concerned. It was an ultimatum. The demand met with an equally uniform and determined though silent opposition. This statement applies as much to every phase of the apprentice question as to anything else. In my opinion, then, not only have the prosecutors failed to satisfy the onus of establishing lack of jurisdiction for want of dispute, but the evidence is strongly opposed to their case. The subsidiary contention that the items adjudicated upon constitute an altogether different claim from the bunch of claims included in the log is, I think, untenable. The claims are distinct though mutually helpful, and there is nothing that I can see which compels a Court to view them as a blended mass, in which each claim loses its individual existence.

There remain to be considered the provisions of the award

relating to apprentices. These are attacked on two grounds, first, because they go beyond the claim made, and next, because they unlawfully delegate the exercise of judicial power. The excess of claim is asserted to arise in three ways—(1) as including existing apprentices; (2) as fixing remuneration as the basis of age and not experience; and (3) as awarding to some apprentices more than the highest amount claimed for any.

As to the first of these branches, I do not think the objection well grounded. The letter of 15th June 1909 demanded that, as from 10th July, the employer should pay the wages and observe the conditions of labour set out in the log attached. Beyond all question the weekly wage of 1s. 4½d. an hour was demanded as from the day named; with equal certainty clause 6 insisted, rightly or wrongly, that the number of apprentices employed should be limited as stated, and as from the day named. That meant regulation of apprentices according to journeymen, and not the regulation of journeymen according to apprentices. So too, all the boys were required as from the same date to be "legally indentured." And it went on to say how the boy just referred to should be indentured. That did not refer to a different starting point: and if therefore a boy were found employed in a factory indentured for 6 or 12 months, it cannot, I think, be said to have been the intention of the log to allow him to remain as a legally indentured apprentice. Then it goes on to say "apprentices shall be paid at the following rate of wages," &c. Again, that obviously meant to secure to all apprentices fair wages from the same date as adults were to be fairly paid. A proposal so unfair as to leave apprentices admittedly underpaid for several years, merely because, being infants and unable to take care of their own interests, some adults had in fact bound them to serve under certain conditions, is not conceivable as a proposal standing side by side with other provisions of the log. And if that is so it really concludes the question, because it at once affects the relations of masters and existing apprentices, by disregarding the then present deeds of apprenticeship. They cannot be both within and without the scope of the claim, and, therefore, as they admittedly are for some purposes within it they appear to be wholly within it. I need hardly say the inclusion

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of these deeds within the claim is an entirely different question from the justice of an award which disregards them; but that depends wholly upon the circumstances. And not only do I think, on the bare construction of the document, that existing deeds were intended to be within it, so as to have one consistent system of remuneration, and other conditions for all the industrial co-operators, but the evidence discloses the fact of strong suspicion on the part of the employés, well or ill-founded I do not of course say, that in a large number of cases at all events apprenticeship deeds were not fair either to ordinary employés or the apprentices themselves, and were mere cloaks for evading State provisions for reasonable conditions of industry. Then as to the second branch—age and experience—I thoroughly agree with what Judge *Heydon* said in *Shop Assistants' Union* v. *Master Retailers' Association and Mark Foy* (1), that the scales of payment to apprentices cannot be based on either age or experience alone, but that these must be combined. His Honor says:—"A scale based on experience alone is therefore out of the question. But so is one based on age alone, for a sufficient amount of knowledge and experience is also absolutely necessary." Needless to say, I do not make these observations with any view to the merits, but to show the recognized inherent nature of the subject. This throws great light on both the claim and the award. The claim (clause 6) obviously combines age and experience; so does the award, because it is plain you could not under the award have a lad enter the service at 18 for the first time—that is as a lad, and at lad's wages. So far as that objection is concerned I also reject it, and hold that it was competent to the learned President to regard, as he has done, both age and experience. It is quite immaterial how these elements are relatively placed, or which one is expressly named so long as both have the necessary operation.

Then comes the question of amount awarded. Here I confess it seems to me the limits of the dispute are passed. The attention of the learned President does not appear to have been in any way called to the fact that is now complained of.

Neither as to this nor the immediately preceding branch of the

(1) (1907) A.R. (N.S.W.), 139, at p. 148.

objection was any argument addressed to his Honor, that he was overstepping the actual dispute. True it is that he was asked if he were prepared to reconsider the question of substituting age for experience; and he said no. But that question was only a suggestion from the standpoint of fairness and not of jurisdiction. No blame is attachable to learned counsel for not then directing the attention of the learned President to this point, but the fact is clear that no one at that time dreamt of such a term of the proposed award being beyond the dispute, and it is but fair to the learned President that this should be pointed out. The amounts stand just as they were when the case was previously before this Court last March, and until after the award was pronounced, and apparently until this application was made, no jurisdictional objection was advanced on the ground of excess. I think it extremely probable that, had any suggestion of this point been made, there would have been no necessity whatever for correcting the award. As it is, I cannot escape the judicial conclusion that as to some apprentices more has been awarded than was asked for and refused, and therefore more than was in dispute. And in my opinion the Court had no greater jurisdiction to award a higher wage than was asked, than it had to reduce wages below what were actually in dispute. It is the *dispute* that has to be regarded and adjudicated upon. In deciding the dispute, it must always be remembered that as stated by Lord *Macnaghten* in *Midland Railway Co.* v. *Loseby and Carnley* (1):—"In coming to his determination it must be open to the arbitrator to investigate and to determine any question *incidental* to that referred to him—any question which must be determined in order to determine finally the point in difference." There is nothing in the world to prevent employers or employés from making their respective demands as wide as they please; but when they choose to select one particular limited demand as the subject or point of dispute, and refer that to the Court, then that is what the Court has to decide. It may give anything between the maximum and the minimum limits of the dispute, but it can pass neither further forward than the maximum, nor further back than the minimum. As unfortunately the maximum has

(1) (1899) A.C., 133, at p. 137.

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been passed, the award is in respect of that branch invalid. Even a technicality going to the root of jurisdiction imposes on the Court the duty of administering the law: *per* Lord *Cockburn* C.J. in *Hudson* v. *Tooth* (1). With respect to the delegation to the board of reference, I see no objection to the reference to such a board of the ascertainment in particular instances of a selected fact—such as illness, or age, or infirmity—the rule being first laid down by the Court.

But the reference to the board, to select a subject of apprenticeship as being a fair subject as between master and apprentice, is in my opinion the delegation of discretion, and a delegation of discretion unless authorized, as for instance by sec. 40 of the Act, is invalid. This precise reference is not within sec. 40. If the function of the board had been merely to report to the President, who in each case would himself thereupon consider it, and exercise his own discretion, I would see no objection. The practical advantages and the absence of any unfairness in the scheme adopted are undeniable. But apparently it is not provided for, and the final decision as to the classification of the trade, which is one of the issues to be tried, remains a part of the function of the Court. I think that here also, if the technical objection had been urged to the learned President, he would probably have dealt with it so as to obviate the necessity of the present proceedings.

In the result, the application in all but the two particulars lastly referred to fails in my opinion, and for these reasons I agree to the order proposed.

Rule nisi enlarged, with a declaration that the award may be varied.

Solicitors, for applicants, *Derham & Derham.*

Solicitors, for the respondents, *C. Powers,* Crown Solicitor for the Commonwealth; *E. J. D. Guinness,* Crown Solicitor for Victoria; *J. V. Tillett,* Crown Solicitor for New South Wales; *Brown & Beeby.*

C. E. W.

(1) 3 Q.B.D., 46, at p. 55.