Judgment for the defendants. The £10 paid into Court to be paid out to the plaintiffs. No costs of the reference.

Solicitors, for the plaintiffs, *Braham & Pirani.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN BOOT TRADE EMPLOYÉS' FEDERATION . . . . . } CLAIMANTS;

AND

WHYBROW & CO. AND OTHERS . . RESPONDENTS.

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MELBOURNE, *Sept.* 19, 20, 21; *Oct.* 10.

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

Constitutional law—Powers of the Commonwealth—"Conciliation and Arbitration for the prevention and settlement of industrial disputes"—Common rule—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*xxxv.*), (*xxxix.*)—*Commonwealth Conciliation and Arbitration Act* 1904-1910 (*No.* 13 *of* 1904, *No.* 7 *of* 1910), *secs.* 19, 38 (*f*), (*g*).

The provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1910, which purport to authorize the Commonwealth Court of Conciliation and Arbitration to declare a common rule in any particular industry, and direct that the common rule so declared shall be binding upon the persons engaged in that industry, are *ultra vires* the Parliament of the Commonwealth and invalid.

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

On a plaint brought in the Commonwealth Court of Conciliation and Arbitration by the Australian Boot Trade Employés

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Federation, the claimants, against Whybrow & Co. and others, employers in the boot trade in New South Wales, Victoria, Queensland and South Australia, respondents, the President, *Higgins* J., made an award. On 16th September 1910 the claimants applied to the Court under sec. 38 of the *Commonwealth Conciliation and Arbitration Act* 1904-1910, that the award should be declared to be a common rule of the boot, shoe and slipper industry within New South Wales, Victoria, South Australia, Queensland and Tasmania.

The application was objected to by the Marshall Shoe Co. and a large number of other employers in the bootmaking industry on the ground that the *Commonwealth Conciliation and Arbitration Act* 1904-1910 was unconstitutional and beyond the powers of the Parliament of the Commonwealth in so far as it purported to empower the Commonwealth Court of Conciliation and Arbitration to declare a common rule.

The President stated a case for the opinion of the High Court upon the question of law raised by this ground of objection.

The Commonwealth and the State of Victoria obtained leave to intervene.

Starke, for the Marshall Shoe Co., and thirty-four other objectors. The power given by sec. 38 of the *Commonwealth Conciliation and Arbitration Act* 1904-1910 to declare a common rule is a legislative power and not a judicial power, and sec. 51 (xxxv.) of the Constitution only gives the Parliament authority to confer a judicial power on the tribunal it creates: *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1). In sec. 51 (xxxv.) the word "conciliation" only applies to the prevention of disputes, and "arbitration" to the settlement of disputes. The making of a common rule cannot come under "conciliation." In the case of arbitration, the only power that can be conferred upon the Commonwealth Court of Conciliation and Arbitration is to settle a definite dispute between definite parties: *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (2); *Rex* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary*

(1) 11 C.L.R., 1. (2) 6 C.L.R., 309, at p, 332.

Co. Ltd. (1); *Federated Saw Mill &c. Employés Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (2). That Court has power only to award that which the parties can themselves agree to: *Australian Boot Trade Employés Federation* v. *Whybrow & Co.* (3). The parties to a dispute could not by agreement compel other persons not parties to the dispute to pay certain wages to their employés. The making of a common rule for the whole of an industry is not incidental to the settlement of a dispute between certain parties engaged in that industry. In *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (No. 2) (4) where a common rule was made the question of its constitutional solidity was not raised. From the propositions of law laid down in this Court in the cases referred to it necessarily follows that the power to make a common rule is *ultra vires*.

Irvine K.C. (with him *Lewers*), for the State of Victoria.

The making of a common rule is neither conciliation nor arbitration for the prevention or settlement of disputes. The essence of conciliation is a voluntary agreement of parties, so that the common rule must be justified, if at all, under the power to arbitrate. But arbitration is not applicable to a future dispute—a state of things out of which a dispute is likely to arise. For arbitration it is necessary that there should be definiteness of conflict and of parties. To extend arbitration to future disputes the tribunal would have to have all the control over the industry which is necessary to prevent future disputes, and that would be a legislative power. It cannot be a matter of dispute between certain parties whether other parties are to pay certain wages to their employés.

Arthur and *Hall*, for the Australian Boot Trade Employés Federation. The power to make a common rule is directly within sec. 51 (xxxv.) of the Constitution, at any rate where the dispute includes the whole industry. The intention of sec. 38 of the Act is that where there is a dispute in an industry it should

(1) 8 C.L.R., 419, at p. 429.
(2) 8 C.L.R., 465, at pp. 488, 505.
(3) 10 C.L.R., 266.
(4) 1 C.A.R., 53.

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be necessary to cite some only of the employés before the Court, and that when an award is made and that award is made a common rule, its effect is limited to the persons who were engaged in the dispute although they were not cited. The common rule is a method of extending the award from the parties to the plaint to the parties to the dispute. The provisions of sec. 38 are arbitral and their meaning will be restricted so as to come within the power: *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (1). A common rule may also be made where after an award is made a new dispute arises as to whether the award should be made a common rule. It is absolutely necessary to the effective settlement of many industrial disputes and to their effective prevention that there should be power to make a common rule. At the time of the adoption of the Constitution the common rule was regarded as incidental to industrial arbitration: *Lefroy's Legislative Power in Canada*, p. 451; *Conciliation Act* 1894 (S.A.); *Webb's Industrial Democracy*, p. 178.

Beeby, for Whybrow & Co. and two other employers. The common rule is necessary to the effectual settlement of existing disputes and to the effectual prevention of future disputes. At the time the Constitution was adopted the terms "industrial dispute" and "arbitration for the settlement of industrial disputes" had well defined meanings. It was a well known incident of industrial disputes that they involved the rights of other parties than the actual disputants, and arbitration for the settlement of disputes carried with it the interference with the rights of those other parties.

Duffy K.C. (with him *McArthur* and *Gregory*), for the Commonwealth. The words "conciliation and arbitration" in sec. 51 (xxxv.) of the Constitution must be read *reddendo singula singulis* or else both words apply both to "prevention" and to "settlement" of disputes. The former interpretation is admittedly not to be adopted, and the latter should be adopted, for "arbitration" is no more inappropriate to "prevention" than it is to

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

"settlement" of disputes. That being so, the power may be paraphrased thus "to pass laws, &c., for the prevention and settlement of industrial disputes by conciliation and arbitration." The object of the power is the prevention and settlement of industrial disputes, and the means to be adopted are conciliation and arbitration. The real mark of an industrial dispute is that it affects the industry. The Imperial Parliament approached the subject not from the side of those who were engaged in the dispute, but from the side of the industry and the public. Their view was that it was desirable from the point of view of the industry and the public to protect the industry. That being so, although in every industrial dispute there must be fixed disputants and a fixed subject matter of dispute, the Commonwealth Parliament is given power to settle industrial disputes in the interests of the public and of the industry. In every industrial dispute there are concerned not only the actual disputants but a large number of persons having various interests in the subject matter of the dispute but who are not disputants. All of these may be dealt with under the power as to arbitration. The *Commonwealth Conciliation and Arbitration Act* deals with the matter in two ways; it deals with the actual parties to the dispute by the award, and with the others engaged in the industry by the common rule. Every dispute in an industry is an industrial dispute, because it necessarily affects the whole industry. The whole industry therefore is interested in any such dispute, and is brought within the jurisdiction of the Statute although all of those engaged in the industry are not disputants. If arbitration is applicable to the prevention of disputes, then the common rule may be made use of in an arbitration to prevent disputes from arising.

Starke, in reply.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. This case raises for decision in a concrete form a question which was much debated in the argument upon the application in the present case for a prohibition against the

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President of the Commonwealth Court of Conciliation and Arbitration, but was left undecided (1).

The question is whether the provisions of sec. 38 (*f*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1910 are or are not within the powers conferred on the Parliament by sec. 51 pl. XXXV. of the Constitution to make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Sec. 38 (*f*) of the Act purports to authorize the Court "to declare by any award or order that any practice, regulation, rule, custom, term of agreement, condition of employment or dealing whatsoever determined by an award in relation to any industrial matter shall be a common rule of any industry in connection with which the dispute (*i.e.* the dispute which gives rise to the award) arises."

It is objected, and the objection is supported by express decisions of this Court, that pl. XXXV. of sec. 51 of the Constitution does not confer upon the Parliament a general power to regulate industries, but merely a power to make laws for dealing with certain phases of industrial matters by way of conciliation and arbitration, and it is contended that the provision now in question purports to confer a general regulative power which is in the nature of legislation and is certainly not arbitration.

It is plain, as I pointed out in the prohibition proceedings, *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1), that the Act was based upon the model of Acts which had shortly before been passed by the legislatures of New South Wales and New Zealand, both of which possessed plenary powers of legislation as to industrial matters within their territorial jurisdiction. Under these circumstances it was immaterial whether they exercised their powers in the form of direct legislation or by delegating them to a subordinate authority, or whether the powers delegated were legislative or judicial. It is equally plain, as I also pointed out, that the Commonwealth Act was framed and passed upon the assumption that the Parliament had power not only to make provision for the

(1) 11 C.L.R., 1.

settlement of disputes between the parties to them, but also, as incidental to the settlement of a dispute, to regulate the whole industry in connection with which it had arisen, whether the whole industry were involved in the dispute or not.

The validity of the provision was supported on various grounds. As to the contention of Mr. *Arthur* that it only applies to persons engaged in the industry who are already involved in the dispute, I dismiss it with the remark that it is impossible to construe sec. 38 (*f*) in any such limited sense. If it were so construed, it would be no more than idle verbiage.

The main contention was that urged by Mr. *Duffy*, namely, that the common rule provision may be fairly regarded as incidental to the prevention of disputes by arbitration. To this argument the objectors answer that the expression "arbitration for the prevention of a dispute" is a contradiction in terms, since the word "prevention" connotes an event which has not yet happened, while the word "arbitration" connotes the presence of parties to an existing dispute, and that pl. XXXV. must be read distributively as meaning conciliation for the prevention and settlement, and arbitration for the settlement, of disputes. I am disposed to think that, from a strict etymological point of view, this may be the more accurate construction, but I am not sure that that consideration is conclusive. Conciliation is not now in question. But the words "dispute" and "prevention" are both susceptible of different shades of meaning according to the point of view from which a particular state of facts is regarded. The same facts may in one aspect be regarded as showing a difference of opinion likely, if not composed, to develop into an industrial dispute which it is desirable to prevent, and from another aspect as showing a dispute already existing and fit to be settled by arbitration.

I adhere to the opinion which I expressed in the *Woodworkers' Case* (1) that the term "dispute" connotes the existence of parties taking opposite sides, to which I would add that the word "arbitration" connotes the same idea. In the nature of things an industrial dispute may be prevented from coming into existence by various means, but the only means which the Parliament

(1) 8 C.L.R., 465, at p. 488.

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is authorized to employ are conciliation and, perhaps, arbitration. If, therefore, the state of things is such that there are no ascertainable parties between whom an ascertainable difference capable of being composed exists the basis of arbitration is wanting. *A fortiori* if all the parties concerned are contented.

Under sec. 38 (*f*), however, it is quite immaterial whether any difference exists between the parties to be affected by the common rule. They may be working in perfect harmony, and even desirous that their existing relations should not be disturbed. Yet the common rule may come in and disturb them.

In my judgment it is impossible to regard such a proceeding as arbitration in any sense of that word. The only means by which the relations of persons lawfully associated in harmony can be lawfully affected are mutual agreement and legislative enactment. Where an authority is empowered to prescribe general rules for the governance of the community or any part of it the power so conferred is in its essence legislative. Sec. 38 (*f*) is then, as in my opinion it was intended to be, an attempted delegation of legislative authority to the Court to deal with matters over which, as has been pointed out by this Court on several occasions, the Parliament itself had no jurisdiction.

It follows that in my judgment the provisions in question are invalid, and the question submitted must be answered accordingly.

BARTON J. The question is whether the *Commonwealth Conciliation and Arbitration Act* 1904-1910, in so far as it purports to empower the Court which it creates to declare a common rule, is within the powers of the Parliament of the Commonwealth, or whether it is to that extent *ultra vires* and invalid.

The enactments attacked are contained in sec. 38, sub-secs. (*f*) and (*g*) of the Principal Act.

The question turns on the meaning of sub-sec. xxxv. of sec. 51 of the Constitution, a grant of legislative power which has been more often discussed in this Court than any other part of the Charter. The decisions which we have given are contained in several reported cases. I mention, by brief titles, *The Jumbunna*

Case (1); *The Broken Hill Case* (2); *The Woodworkers' Case* (3); *The Bootmakers' Case, No.* 1 (4); *The Bootmakers' Case, No.* 2 (5).

Thirty-five of the respondents below, who maintain that Parliament has no power under the Constitution to enact the common rule provisions, are firms of manufacturers of footwear carrying on business in various States—some of them in Queensland, some in Tasmania, the remainder in Victoria. None of them were parties to the dispute, as to which the learned President has made an award, laying down, *inter alia*, certain conditions for the employment of members of the claimant organization by the original respondents, which conditions the claimant organization have now moved him to extend to the whole industry (except in Western Australia) by way of common rule. In this application they are supported by three manufacturing firms who up to the time of the award had been respondents resisting the claim. The objectors are supported by the State of Victoria; the claimant organization by the Commonwealth; both are intervenants by leave.

No attempt was made before us to question directly the previous decisions of this Court on the meaning of the power. But while the firms objecting to the common rule based their argument against the validity of the provisions on what they contended to be the plain reading of the previous decisions, and on the inferences which they urged must be drawn directly from the judgments of the Bench or the majority of it, the claimant organization took up a position which, if correct, would necessarily largely limit the meaning of those decisions, and which questioned their applicability to the present case.

Whether the common rule is or is not a very fair and beneficial expedient in some cases for the extension of the provisions of an award to those who, though engaged in the industry, have not been engaged in the dispute on which the award is based, is a question on which this Court is not called on to express any opinion. If the extension cannot be ordered by the Arbitration Court without a violation of the Constitution, the High Court is

(1) 6 C.L.R., 309.
(2) 8 C.L.R., 419.
(3) 8 C.L.R., 465.
(4) 10 C.L.R., 266.
(5) 11 C.L.R., 1.

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bound to uphold the Constitution in disregard of the value of the expedient; but if the power to order a common rule has been given to the Arbitration Court in conformity with the terms of the Constitution, the High Court must so declare, in equal disregard of any injustice which may be ascribed to the exercise of the power in the particular case. I say this because it is evident there are many who misunderstand the functions of this Court, and who think that its decisions on questions of jurisdiction arising under the Constitution amount to pronouncements upon the merits of the controversies out of which such questions arise.

In the present case there is no contest as to the meaning of the expression "industrial disputes extending beyond the limits of any one State." The part of sec. 51, sub-sec. xxxv., to which the argument has been directed is contained in the words "Conciliation and Arbitration for the prevention and settlement" of such disputes.

In previous cases the Court, or at least a majority of its members, has tacitly if not expressly distributed these terms by taking conciliation to be applicable to the settlement as well as the prevention of industrial disputes, and arbitration, on the other hand, as applicable to their settlement alone.

In the *Jumbunna Case* (1), indeed, both by the Chief Justice and by myself an opinion to that effect was intimated, but our expressions on this point were not necessary to the purposes of the judgments in which they occurred, and may therefore be treated as *dicta*. In the present case it is argued that arbitration, as the term is used in the grant of power, is applicable to prevention as well as to settlement. I will deal with that contention at a later stage, and will in the first instance consider whether the common rule provisions are a valid exercise of the power to legislate in respect of arbitration for the settlement of industrial disputes. I proceed to apply to the purposes of the present opinion some passages in my own judgments in two previous cases. In *The Bootmakers' Case, No.* 1 (2), I said, speaking of the power in sub-sec. xxxv.: "It is not a general power to legislate for the prevention and settlement of industrial disputes. . . . . It is a power to legislate in respect of concil-

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

(2) 10 C.L.R., 266, at pp. 293-295.

iation and arbitration—not all conciliation and arbitration, but such only as may be employed for the prevention and settlement of the specified class of industrial disputes. The maxim *expressio unius est exclusio alterius* applies . . . . so as . . . to forbid any intrusion into the field of the domestic concerns of the States further than may be necessary for the plenary exercise of the power thus limited. . . . .

"'Arbitration' is a term which, taken by itself, connotes a process for the settlement of disputes by submitting them to the decision of a tribunal selected by the parties or accepted by them, and an agreement by both to be bound by the decision, which is commonly called the award. . . . Beyond all question the award is a judicial determination. . . . The tribunal, then, being judicial, its office is to decide questions of fact, and in respect of such conclusions to declare or apply existing laws, save so far as either party may voluntarily and lawfully renounce the benefit of them. It is resorted to simply and solely because the parties cannot come to an agreement on the questions submitted, and therefore desire that the tribunal should make an agreement for them, by which they mutually consent beforehand to be bound. . . . Whatever they can lawfully agree to, he may lawfully award. . . . The office of an arbitrator is like that of a Judge to the extent that it is for him to declare the law and not to make it. . . . But, assuming as we may, that the power in sub-sec. xxxv. extends to the establishment of compulsory arbitration, is the judicial character of the tribunal diminished or is any non-judicial or legislative character or function added to it if the compulsory power is given? Clearly, no. The arbitrator's authority is no less purely judicial than it would be if the compulsory power were absent, and nothing was advanced in support of any other conclusion.

"The same considerations necessarily apply where the arbitrator, instead of being chosen by the parties, is appointed by or under a Statute."

In the *Bootmakers' Case No.* 2 (1), I said: "'Conciliation and arbitration for the prevention and settlement of industrial disputes' mean plainly, to my mind, such conciliation and arbitra-

(1) 11 C.L.R., 1, at pp. 36-38.

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tion as at the time of the enactment of the Constitution had become applicable to the prevention and settlement of such disputes. . . . 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. . . . 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 decisions interests of others than the parties to the difference. It is not absolved from this duty by the fact that a Statute 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. . . . In ascertaining what kind of arbitration had at the time of the enactment of the Constitution become applicable for 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 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."

The common rule provisions contained in sec. 38 of the *Commonwealth Conciliation and Arbitration Act* 1904-1910 are similar to those last mentioned. But the Parliament of Australia has not the plenary power which the legislature of New South Wales exercised when it made these provisions. To be valid, they must be at least incidental to the attainment of the object of arbitration for the settlement of industrial disputes as that term is used in sub-sec. xxxv. I do not think they are so. To empower the Court to declare that any condition of employment, or the like, prescribed by its award shall be a common rule binding the whole industry and all engaged in it, is plainly to extend the authority of the Court beyond the ambit of the dispute and to bind persons other than the disputants by the decisions of the Court. This can by no means be considered as in its nature incidental to the settlement of a dispute which only the disputants brought or could bring before the Court. The award itself is the means prescribed for the settlement of the dispute as between the actual parties. If the award did more it would be an excess of jurisdiction to that extent, even if expressly confined in its operation to the immediate parties and their industrial affairs. If it not only included more than the subject matter of the dispute but involved others than the parties the case would be worse. How then can it be bettered, if the attempt is made to produce any such effect either as to parties or subject matter by nominally separating the operations and giving the name of a common rule to the excess? The process cannot possibly be merely incidental to that which depends for its validity upon the limitation of the adjudication to the subject matter of the dispute and the parties thereto. And the mere citing of persons not parties to the dispute, even by serving

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process on them instead of calling upon them, generally and not even by name, in an advertisement, would not make that lawful which previously lacked constitutional warrant.

I am of opinion, therefore, that the common rule provisions are not within the power given to Parliament to make laws in respect of arbitration for the settlement of the class of industrial disputes specified in sub-sec. xxxv.

But it is contended that the power is one to legislate as to arbitration for the prevention as well as for the settlement of such disputes.

In the first place I own myself unable to understand how there can be an arbitration to prevent a dispute. There must be something to arbitrate upon. There must be parties and a subject matter before a resort can be had to arbitration. If people are agreed and at peace, a request from one to the other that they should arbitrate would be, to put it mildly, an amiable eccentricity. There would be no subject matter, nor would there be parties, for there would be no cause of division between employers and employés to make them take sides, and without it how could they arbitrate ? But even if there could be arbitration for the prevention of a dispute, giving that name to any vague discontent with an indefinable cause, how can it be supposed that, with an eye to such preventive arbitration, the Constitution has authorized laws for citing, and for making regulations to bind, all the persons engaged in an industry, including those who have never even heard of the mere murmur that is made to pass for the subject matter of an arbitration. If I spoke more plainly of such a suggestion I could not speak of it respectfully. It is enough to express one's inability to follow it.

But it may be said that the meaning of the suggestion is that the thing intended by clause xxxv. is arbitration for the prevention, not of disputes as they arise, but of disputes in general, by citing all those engaged in an industry, and dealing with them in the first instance by way of common rule. The provision the validity of which is challenged is of a different character. It presupposes an award *inter partes* in the first instance, and a common rule as an extension of it or of part of it. There is the additional difficulty, that such a proceeding would not be in

substance an arbitration, as that term is known either at common law or in any Statute passed before July 1900. It cannot therefore be taken to have been within the contemplation of those who framed the Constitution.

To my mind it is clear that the power is one to authorize legislation with respect to conciliation for the prevention and settlement of disputes extending beyond the limits of any one State, and with respect to arbitration for the settlement of such disputes. In this view of the power, I come to the conclusion, which seems plainly to follow from previous decisions, that the Act, in so far as it purports to empower the Court of Conciliation and Arbitration to declare a common rule, is invalid.

O'CONNOR J. The question submitted for consideration by the learned President is, whether it was within the power of the Commonwealth Parliament to enact the provisions relating to the common rule, embodied in sec. 38, sub-secs. (*f*) and (*g*), of the *Commonwealth Conciliation and Arbitration Act.* The substance and effect of those provisions may be stated in a few words. The only condition essential for the exercise of the jurisdiction is the existence of an award in an industrial arbitration under the Act, whereby the Court has settled between the parties matters in dispute in an industry. At any time after the making of the award, the President may declare, by award or order, that any practice, regulation, rule, custom, term of agreement, condition of employment or dealing whatsoever determined by the award, shall be a common rule of the industry, binding upon all persons engaged in it, whether as employers or employés, and whether members of an organization or not. It is a necessary preliminary to the proceeding that the President should notify, in the Commonwealth *Gazette*, all persons and organizations interested, that he will hear those who desire to be heard, on a day named in the notification. He may, if he thinks fit, also publish the notification in any other publication. After consideration of the matter on the day named, and whether anyone appears in response to the notification or not, he may make the declaration or order with such exemptions and qualifications as to locality or otherwise as he may deem expedient. I am stating

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the power at its widest, because it is on the assumption of its being effectually exercised that its constitutionality must be tested. In practice, no doubt, the President would be put in motion ordinarily by an application from one or both parties to the award, and, before coming to a conclusion, he would probably take care that, as far as was practicable, the most important at least of the interests affected would be represented before him. He would also, no doubt, when necessary, exercise freely the discretion allowed him of attaching limits and conditions to the operations of the common rule. But, in answering the learned President's question, we are not dealing with the way in which the President will exercise the power in particular cases, but with the nature and extent of the power itself. It is obvious on the face of these provisions that their real effect is to confer a law-making power, and not an arbitral power, on the President of the Federal Arbitration Court. That becomes still more obvious when one considers the circumstances in which the jurisdiction may be brought into operation. A minority only of the persons engaged in the industry may have been parties to the original industrial dispute, the remainder of employers and employés may be not only not in dispute, but entirely satisfied with the existing conditions of employment. True it is that an arbitral tribunal makes the declaration, and makes it after inquiry, but the declaration has in it no quality of arbitral adjudication. It is not a judicial settlement of matters in difference between parties to a dispute, it need have no other basis than the determination of the learned President, that in order to secure the fair working of the award between the parties bound by its provisions, and the maintenance of industrial peace throughout the trade, it is necessary to impose, on all persons engaged in the industry, the conditions of employment settled by the award. Whether or not the Commonwealth Parliament had authority to invest the Federal Arbitration Court with such a power depends entirely upon what is the right interpretation of sub-sec. xxxv. of sec. 51 of the Constitution. The sub-section has, in several cases, been considered by this Court, but the precise question now submitted has never before been determined. It will be well to recall the language of the sub-section. Quoting only material words it is

as follows:—"Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." Before considering the words of the sub-section relied on, I shall dispose of Mr. *Arthur's* argument that the *Commonwealth Conciliation and Arbitration Act* must be read as enabling the common rule to be made only when the original dispute extends throughout the industry. He contends that, in that state of things, it may happen that some only of the disputants on each side may bring their difference before the Court, and that the authority to apply the award, made in settlement of their difference, to all persons engaged in the industry, is merely a procedure for the effective settlement of the whole dispute. The contention is of no value in the present controversy, for it does not give any substantial effect to the provisions we are testing. They are clearly unnecessary, if the end which they are designed to achieve may be equally well achieved without them, by making all the disputants parties to the arbitration. The power given by the Act, and sought to be exercised in the present case, goes far, as I have explained, beyond any procedure in an industrial arbitration. The objection to jurisdiction is fundamental and cannot be explained away by any such ineffective construction of the *Arbitration Act*. I shall now consider the sub-section of the Constitution within which the power, if it exists at all, is to be found. It must be conceded that the making of the common rule is not an exercise of the power to settle industrial disputes by arbitration. The making of the order or declaration is in no way a settlement of any industrial dispute. Nothing therefore can be found in the word "settlement" which will help the applicants. The only expression on which, when taken with its context, any reasonable argument can be founded, is the word "prevention" taken in connection with the words "industrial disputes." Mr. *Duffy's* very able argument in support of that contention may, as I apprehend it, be stated in substance as follows:—"The language under consideration ought to be liberally interpreted. The meaning of a sub-section of the Constitution cannot be determined merely by an appeal to technical grammatical rules. The construction which would appropriate the word 'conciliation' to 'prevention' and the word 'arbitration' to 'settlement' is too

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narrow. There may be arbitration for the prevention as well as for the settlement of industrial disputes, and prevention may be operative in two ways. The effective settlement of each dispute, as it arises, tends to prevent the recurrence of further disputes in the same trade. Again, prevention may be accomplished by the arbitral adjustment of conditions of employment which, if left unadjusted, would be likely to lead to industrial disputes. The authority to make a common rule, conferred by the Act, amounts to no more than authority to make that adjustment. An award regulating industrial conditions in a trade, and yet not binding on all persons engaged in it, is likely to produce discontent amongst persons not bound, and may operate harshly on employers obliged to fulfil new and onerous obligations, from which their competitors in the trade, not under the award, are free. If the Court sees that the conditions thus produced must, sooner or later, lead to industrial disputes, it is enabled by means of the provisions under consideration to intervene before any industrial dispute has developed, inquire into all the circumstances, ascertain how persons, not under the original award, are likely to be affected by the making of the common rule, and, if it thinks fit, make an order and declaration bringing industrial conditions throughout the trade into uniformity." That is, I think, a fair statement of Mr. *Duffy's* argument and I am prepared to assent to much of what he has advanced. The broad interpretation of the Constitution suggested has a great deal to commend it, and many good reasons have been urged by him in support of the view that the sub-section authorizes the use of arbitration for the purpose of preventing industrial disputes from arising, as well as for settling those that have arisen. That may all be granted, yet the applicants' contention must fail when the common rule provisions are brought to the test of even that interpretation. As this Court has already determined on several occasions, the sub-section carries on the face of it one hard and fast limit to the exercise of the authority it confers. The power, whether it is to settle, or to prevent, industrial disputes, must be exercised by way of conciliation or arbitration, and can be exercised in no other way. An essential condition of its application must therefore be the existence of conditions in which arbitration

can be applied. At the time when the Constitution was passed the term "arbitration" had expanded in meaning so as to include methods and principles of adjudication, differing in many respects from those connoted by the term as known to the common law. The tribunal was no longer necessarily constituted by act of the parties, nor for the adjustment of each dispute as it arose. It might be a permanent public tribunal, appointed by Government, for the arbitral adjustment of differences of a special kind. Parties between whom such differences existed were compelled to resort to it, and were bound by its awards. The legislation of Great Britain and of some Australian Colonies, and of New Zealand, in force before the passing of the Constitution, has been referred to by this Court, in several cases, to illustrate these changes in the meaning of the word, with relation to industrial disputes. But whatever incidents or attributes these various legislatures may, in framing their arbitral systems, have added to, or taken from, the system of adjudication previously known to the common law as arbitration, neither in that legislation nor elsewhere is there to be found any meaning of the term which would justify its being used to describe a method of adjusting industrial rights, which is wanting in certain elemental incidents and attributes which the word arbitration in itself must necessarily connote. One can have no mental conception of arbitration without parties in difference over some matter capable of judicial adjustment by an arbitrator. The exercise of an authority to impose conditions of employment upon employers and employés between whom there exist no such differences, even though it may be exercised by a standing arbitral tribunal, is not and cannot be an application of arbitral power. No fair reading of sub-sec. xxxv. of sec. 51 of the Constitution can justify the Parliament of the Commonwealth in conferring such an authority on the Federal Arbitration Court. For these reasons I am of opinion that the answer of this Court to the submission of the learned President must be that the common rule provisions are unconstitutional and void.

ISAACS J. The validity of the common rule provisions of the

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Commonwealth Conciliation and Arbitration Act 1904-1910 were attacked on two grounds.

One objection when closely examined amounts to this: "arbitration" as understood in English law, and therefore as it must be understood in sec. 51 (xxxv.) of the Constitution, always connotes the existence of a dispute which has reached a certain stage, namely, where the parties are personally, *i.e.* either as natural persons or as organizations, ascertained, and the issues are clear cut. According to this contention, before "arbitration," as distinguished from "conciliation," can ever be applied, there must be not only clearly defined and identified parties, but their differences must be so thoroughly sifted and brought to so precise a line of demarcation that concession by one of them gives the other exactly what that other requires. In this condition of things alone, it is said, can "settlement," and therefore "arbitration," be appropriate or possible.

I have stated the import of the contention which it appears to me necessarily to bear. Anything short of precision means indefiniteness, and indefiniteness is immeasurable back to the point of perception, beyond which the subject disappears.

This contention was advanced for the purpose of excluding from the process of arbitration all application for the purpose of prevention, and limiting that process to the cessation of "industrial disputes" as that expression is to be understood in the Constitution.

If the argument is sound it is of course a sufficient answer to the claim of validity for the common rule provisions as they now exist. But its real effect is much deeper and more serious; and in view of the whole enactment as it now stands, with, for instance, the phrase "for purposes of prevention and settlement" recently inserted in sec. 19,—whatever actual operation those words may have, as to which I say nothing—the argument needs to be carefully examined and dealt with.

To begin with, there is nothing in the arrangement of the words of the sub-section itself which indicates any want of connection between the words "arbitration" and "prevention." It is not suggested, and it would be absurd to suggest, that conciliation is not applicable and appropriate for the termination of

disputes however hostile the parties may be, if conciliation—that is reconciliation effected by some one not a party to the dispute—be possible. And where possible, it is not only appropriate, but by far the preferable way, because it exposes no private affairs, it leaves no irritation, and ends at once both struggle and hostility of feeling, the latter a most material consideration in industrial operations.

In the Oxford Dictionary we find under the word "conciliation" the following:—"Court (tribunal) of conciliation: a court for composing disputes by offering to the parties a voluntary *settlement*, the case proceeding to a judicial court if this is not accepted." The law of course might, and, as will be presently seen, the English law did permit a non-judicial tribunal to proceed to the compulsory settlement if the "voluntary settlement" first attempted proved impossible. But the quotation is evidence that "settlement" as ordinarily understood includes voluntary arrangement of differences, and therefore is naturally referable to "conciliation" in sub-sec. xxxv.

The two words are treated as mutually connected in the English Act, 30 and 31 Vict. c. 105, the "*Councils of Conciliation Act* 1867." That Act was expressed to provide for the "settlement" of disputes between masters and workmen, and for that purpose empowered the creation of the Councils of Conciliation and Arbitration. When a dispute came before the Council, a committee was appointed, denominated the Committee of Conciliation, who were to endeavour to "reconcile" (sec. 5) the parties in difference, and, said the Act, "when such reconciliation shall not be effected, the matter in dispute shall be remitted to the Council, to be disposed of as a contested matter in the regular course."

In face of such legislative language—not creating *pro hac vice*, but recognizing as part of the ordinary language, the signification of conciliation as including settlement of existing disputes—it would be hopeless to attempt to exclude it from the constitutional provision on the ground of general legal and popular understanding.

Then as the principle of *reddendo singula singulis* is impossible of application, it appears to me to follow inevitably that the composite phrase "for prevention and settlement" applies also to

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"arbitration," unless the inherent nature of that word is inconsistent with such application. I say that result has nothing but the inherent nature of the word to depend on, because every other circumstance is opposed to it. The verbal collocation and grammatical arrangement of the sub-sections are against it, as mere inspection demonstrates. Then it is equally obvious that the *raison d'etre* of the power is the maintenance of the peaceful and orderly conditions of industry so far as it affects the broader field which is brought within the cognizance of the national authority. In previous cases—as for instance in the *Bootmakers' Case, No.* 1 (1)—I have indicated my view that, from the standpoint of the Constitutional power, the immediate combatants in an industrial struggle are not the main objects of regard, but it is the undisturbed continuance of national industries, affecting the general population, that constitutes the substantial groundwork of the power. If that be a correct view of the situation "the prevention and settlement of industrial disputes" is the end marked out for attainment, and conciliation and arbitration are the designated means to that end. Reason therefore points to the utilization of either or both of these means, towards the attainment of either prevention alone or settlement alone, or whatever of these may be possible according to the discretion and will of Parliament. Unless that view is to prevail, persuasion only is permissible until hostilities have been declared, and perhaps some damage to all concerned—combatants and non-combatants alike; and then when the difficulty of settlement is naturally greater, and it may be loss which cannot be compensated for, has occurred, the Commonwealth may interpose its restraining authority and quell the disturbance. A construction which so restricts and fetters the discretion of Parliament, as it appears on the *primâ facie* interpretation of the enactment, and which leaves open such disastrous results, can only be admissible if, as I say, the inherent nature of what is termed "arbitration" imperatively demands it.

The strict meaning sought to be placed upon the word "arbitration" is not unnaturally urged. We are so accustomed to regard arbitration amid surroundings of ordinary legal procedure

(1) 10 C.L.R., 266, at p. 326.

to enforce rights already existing that there is a real danger of attributing to it as innate characteristics what are in truth nothing more than usual accompaniments, owing their presence to the surroundings, and not to the elemental nature of arbitration itself.

The recent case of *Stewart* v. *Williamson* (1) is authoritative proof that arbitration in its essence is not so restricted as under particular enactments or in particular surroundings it is sometimes held to be. Other instances of its variable connotation according to circumstances are referred to in my judgment in *The Bootmakers' Case, No. 1* (2) already mentioned. And in sub-sec. (xxxv.) we find the word "arbitration" associated with "conciliation," with "prevention," and with "industrial disputes," not with existing and unchallengable legal rights, and above all it is named as a means to be adopted and regulated by a national legislature.

It then becomes material to observe the way in which the word itself was used in a somewhat similar connection before 1900 both in England and in Australia.

I have already referred to the *Councils of Conciliation Act* 1867 which enabled the parties to an existing trade dispute to provide for its settlement by conciliation or failing that arbitration. But that Act said nothing about preventing disputes from arising.

In 1892, however, New South Wales by Act 55 Vict. No. 29 recognized and made some provision—though it proved to be inadequate—for the "*prevention* of strikes and other disputes."

It enacted that not only disputes but *claims* might be made the subject of conciliation or arbitration, and by sec. 23 defined "a claim or dispute" under the Act to be "any matter as to which there is a *disagreement* between any employer and his employés respecting" certain industrial matters enumerated.

In England, notwithstanding the Act of 1867, the four years 1891-95, say Mr. and Mrs. Webb in their *Industrial Democracy*, (1897) at p. 225, "saw in Great Britain, four great industrial disputes in as many leading industries." Then in 1896 the Imperial Parliament took the further step of dealing with the anticipatory phase of the industrial trouble. The Act 59 & 60

(1) (1910) A.C., 455. (2) 10 C.L.R., 266.

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Vict. c. 30, called the *Conciliation Act* 1896, was entituled "An Act to make better provision for the *Prevention and Settlement of Trade Disputes.*" Sec. 2 begins with words which govern the whole Act, namely, "Where a difference *exists* or is *apprehended*," &c., and then proceeds to say that in such case the Board of Trade may exercise all or any of the specified powers, which include the appointment of an arbitrator. The words "the difference" means all through, the difference referred to in the controlling words of the section, that is to say a difference which "exists or is apprehended." The word "settlement," it is to be noted, is used indifferently regarding both existing and apprehended differences, indicating a connotation even to the word "settlement," broad enough to cover what is called merely apprehended difference.

The next historical step is a rather remarkable one. By Act No. 2 of 1899, assented to 22nd April, the Parliament of New South Wales passed the *Australasian Federation Enabling Act* 1899 for submission to the electors of that Colony of the Federal Constitution containing sub-sec. xxxv. of sec. 51 now under consideration. By the immediately succeeding Act No. 3, assented to on the same day, the same legislature passed the *Conciliation and Arbitration Act* 1899, entituled as in the English Act of 1896, and employing as in the constitutional provision the words "prevention and settlement of trade (instead of 'industrial') disputes."

Sec. 2 followed in every material particular the verbiage of sec. 2 of the English Act, thus extending "prevention and settlement" to cases "where a difference exists or is apprehended," and applying thereto the remedy of "conciliation and arbitration."

No arbitrary definitions are set up in the Statute: its language, like that of the English Act, is addressed to the general understanding of the people, and when that is remembered, it seems to be impossible to escape the conclusion that the popular and the legally recognized meaning of "arbitration" was then wide enough to embrace a preventive determination, just as conciliation included preventive influence. There is therefore no collision but perfect accordance between the verbal structure, the gram-

matical force, and the true ordinary legal signification of the language of the sub-section. The first ground of objection to the common rule consequently fails.

The next contention is this: assuming that arbitration like conciliation applies even to cases of difference not yet matured into disputes where the issues are categorically stated, yet arbitration is not, any more than is conciliation, an intelligible conception except where some difference can be perceived, and expressed in terms, however general, between the parties who are to be affected by the decision. I agree with that. The Constitution leaves to Parliament the most absolute choice as to the form of tribunal and its procedure; the conciliating and arbitrating organ may be a Court, or a layman, a committee of strangers, or a combination of representatives of the parties concerned, its method of action may be voluntary, or compulsory; unanimity or majority of opinions may control its decisions, further there may be light or heavy sanctions for non-compliance, or there may be none at all; notice may be given personally or by advertisement: all this is for the will and discretion of Parliament, but a limit is fixed beyond legislative control—the process must be either conciliation or arbitration or both, and one prime essential both of reconcilement by persuasion or influence, and of authoritative settlement is that there must be some disagreement, some want of harmony calling for the exercise of those offices.

A want of agreement in respect of some industrial matter may be unmistakeably manifested, although in circumstances of time, manner and subject matter which evoke no present conflict nor any fear of immediate rupture.

Again, a request for an advance of wages six months hence, or an intimation to consider an increase of hours next year, might not present to any reasonable being the appearance of any probable controversy whatsoever. Men may suggest to each other, may discuss, may negotiate in terms which afford no trace of opposition. But though no arbitrary rule can be formulated to distinguish between that case and a real disagreement, it is evident that a real disagreement may at any moment supervene. The discussion may assume a form and a consistency which indicates some fixed desires on one side not acceded to by the other.

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The desires may be urged and pressed, and though not definitely refused by the other party, may not be conceded, where concession is asked for and expected, and so the rudimentary but recognizable features of a probable or possible future conflict may be discerned. When sufficient consistency has been attained to permit the mind of an observer to grasp the fact of real disagreement, and to lay hold of its subject matter, when the outlines of contention, however rough, are nevertheless perceptible, there is certainly room for conciliation, and if for conciliation then, as already shown, for arbitration, should the voluntary method fail. Prevention is always better than cure, whether effected by the milder or the stronger process.

The question is whether the common rule provisions as enacted answer either description of procedure.

Now what is called the device of the common rule was known in English industry long before there was any legislative enactment on the subject. In *Webb's Industrial Democracy*, p. 560, it is recognized as a regulation or rule establishing conditions of employment. In certain cases it is there said, p. 554, that the only available method of securing a common rule is legal enactment. That would of course be quite outside the sphere of conciliation and arbitration.

It is true as pointed out in the same work, p. 224, that an arbitration award is a general ordinance, which so far as it is accepted puts an end to individual bargaining between man and man, and thus excludes from influence on the terms of employment the exigencies of particular workmen, and usually also those of particular firms. "It establishes in short," say the authors, "like collective bargaining a common rule for the industry concerned."

Therefore it would not be accurate to affirm that under the powers of arbitration no common rule could be established. On the contrary, the arbitrator might find it the fairest course to adopt in certain circumstances for the settlement of the dispute, and covering its whole area, and either as applied to all conditions in difference or to some of them.

A common rule may be established by means of conciliation

and arbitration, or by some other means. If the first, it is within, and if not, it is beyond, the power.

It only remains to test the challenged provisions by the principles I have stated.

First, it was strenuously contended that on their true construction they meant no more than an authority to the Court to summon, by a short and convenient process of citation, the rest of the disputants, parties to a dispute already in part dealt with, and to apply to the residual area of the dispute the remedy already appropriate.

In aid of that there was urged the doctrine of interpretation *ut res magis valeat quam pereat*; laid down in *Macleod* v. *Attorney-General for New South Wales* (1) and other cases cited in *The Jumbunna Case* (2).

But the words of the enactment are not reasonably open to such construction. They were plainly intended to confer, and if validly enacted would confer, jurisdiction to establish by official pronouncement a binding rule of conduct extending over the whole industry, not merely over the whole area of the dispute in that industry, and applying to every person engaged in it, although he was in no way involved in any dispute either by personal activity, or as a member of an organization, or as a working unit of one of two opposing classes in actual contest though not formally organized.

Then it was sought to support the legislation on another ground, namely, that it was incidental to the settlement of the dispute in respect of which the award was made. The view presented was that the Court could act under the sub-sections, whenever it was found necessary for the effective settlement of the actual dispute. It is true that the grant of a power carries with it the grant of all proper means not expressly prohibited to effectuate the power itself. See the cases cited in *Baxter* v. *Commissioners of Taxation (N.S.W.)* (3). No instance of this principle could be stronger than the case of the *Attorney-General for Canada* v. *Cain* (4) where the Privy Council held that the legislative power to exclude aliens connoted the power to expel,

(1) (1891) A.C., 455.
(2) 6 C.L.R., 309, at pp. 369, 370.
(3) 4 C.L.R., 1087, at p. 1157.
(4) (1906) A.C., 542.

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as a necessary complement of the power of exclusion. But that was because the power of exclusion could not otherwise, even within its own admitted limits, be effectually exercised and enforced.

The case is quite different when it is found that a given power, though fully and completely exercised and enforced, is not effectual to attain all the results desired or expected. The matter is then one for the consideration of the authority in whom resides the right of granting a power more extensive. It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met.

Where an instrument of expressly limited length or nature is designated for use, but found in practice insufficient to reach the point intended, then, however just or desirable such a course may appear to those whose duty it is to employ that instrument, there is no legal principle which warrants its lengthening or transformation merely because the expected result has not been achieved. Where both end and means are strictly marked out, there is no right either to use other means to attain the specified end, or to use the specified means for unauthorized ends. See *per* Lord *Davey* in *Rossi* v. *Edinburgh Corporation* (1).

The authority must be taken as it is created, taken to the full, but not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power.

I therefore concur in the judgment of the court.

HIGGINS J. The Federal Parliament has power, under sec. 51 of the Constitution, to make laws for the peace, order and good government of the Commonwealth "with respect to" (*inter alia*) "(xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." It has also powers to make laws for the peace, &c. "with respect to . . . (xxxix.) Matters incidental to the execution of any power vested by this Constitution in the

(1) (1905) A.C., 21, at p. 29.

Parliament." The question is, can the Parliament under these powers enable the Court of Arbitration to make any regulation in one of its awards a common rule of the industry concerned, to be applied to persons between whom there is no dispute actual or in prospect. By sec. 38 (*f*) and (*g*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1910 Parliament purports to confer this power on the Court, and to enable the Court by its order to define the area within which the rule is to operate, to make the rule subject to any conditions or exceptions, and to make it binding upon "the persons engaged in the industry whether as employers or employés, and whether members of an organization or not."

The difficulty arises from the fact that the persons engaged in the industry, not parties to the award, whom it is sought to bring under the common rule, are not in need of any conciliation and arbitration, as they are not engaged in or threatened with any dispute; and sub-sec. xxxv. of sec. 51 is aimed only at conciliation and arbitration for the prevention or settlement of disputes. Now, the power is to make laws, not "*of*" or "*for*," but "*with respect to*" conciliation and arbitration, &c. To my mind, the words "with respect to" make the area for legislation wider than if the power were to make laws *for* or *of* conciliation and arbitration. As we are sitting in Full Court, I may say that I adhere to the view which I expressed at length in *Attorney-General for N.S.W.* v. *Brewery Employés Union of N.S.W.* (1). In my opinion, the British Parliament has conferred on the Federal Parliament as wide a power with regard to Australia as the British Parliament could itself have exercised, provided that the laws would come fairly under the description of laws *with respect to* the subject named, in ordinary parlance, if used by the British Parliament. The subject is "conciliation-and-arbitration-for-the-prevention-and-settlement-of-industrial-disputes-extending-beyond-the-limits-of-any-one-State," as if the phrase were one compound hyphenated word. Conciliation and arbitration are not to be treated as physical objects, whose class boundaries are fixed by external nature; they are artificial products of society, and dependent as to their area and character upon the will of society.

(1) 6 C.L.R., 469, at pp. 610-616.

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But the laws made by the Federal Parliament on the subject, to be valid, must relate to conciliation and arbitration. There is no cognate power in sec. 51—no power that can be invoked in aid of that in sub-sec. xxxv., except sub-sec. xxxix.

I do not take the view presented to us that the Federal Parliament cannot legislate under sub-sec. xxxv. except for defined existing disputes between identified or identifiable parties. Sub-sec. xxxv. is not technical; it is couched in vague and popular terms, and it leaves to the Federal Parliament the function of saying under what circumstances and in what manner the power of conciliation and arbitration is to be exercised. If the power were given to the Parliament to make laws with respect to sanitary precautions for the prevention of epidemics, a Federal Act could prescribe precautions and enforce them, although no person be in fact suffering from any epidemic disease. It seems to me that, in this argument on behalf of the opponents of the common rule, the needs of the Court in making an effective order are treated as if they were necessary limitations on the power of Parliament. An order or award cannot be made except as against identified or identifiable parties; but it by no means follows that there cannot be steps taken for conciliation, or even for arbitration, before the dispute has become definite, and before the persons concerned in the industry have taken definite stands or made definite claims. No one who is at all familiar with the genesis of great industrial disputes can be ignorant of the general uneasiness, unrest, the individual grumbling, the dissatisfaction, often indefinite, which precede the ultimate quarrel; and to this stage, before matters have come to a head, the power of conciliation or arbitration for *prevention* seems to be directly applicable (so far as the Constitution is concerned). No doubt, it would be difficult for a Court, under the Act as it stands, to bind persons by an order or award unless they come before it as claimants or respondents on a definite claim; but it is for Parliament to say how persons are to be notified of proceedings, and what persons are to be bound by an award. This is a mere matter of procedure, to be determined by the Act; it is not a matter affecting jurisdiction under the Constitution. The ordinary meaning of the word "prevention" involves the warding off of something

before it happens; and so long as that thing is an industrial dispute (extending, &c.) which is possible—or, at the least, probable—and so long as the law is directed to prevention of such a dispute by the only methods allowed—conciliation and arbitration—I see no reason why the law should not be valid.

I know that it is urged that there cannot be arbitration for a dispute that does not yet exist. This argument seems to me, as I have said, to confuse the needs of a Court with the powers of the Parliament. When the Court makes the award, fixing industrial conditions in order to settle or prevent a dispute, it has to be definite as to parties and as to the conditions to be observed. But there is no need for such definiteness for the purposes of the power given by the Constitution. It is admitted that the Court may "conciliate" to prevent an industrial dispute; it may equally "arbitrate" to prevent it. Each word—"conciliate" and "arbitrate"—implies some variance or enmity, or some question, or some difference of interest, growing or developed. The difference in the words lies in this, that in the case of conciliation the parties are induced to consent to certain terms, and in the case of arbitration the parties have to submit to the terms decided by the arbitrator. There is no difference in the facts to which the two processes respectively may be applied. The grammatical construction of sub-sec. xxxv. is clear. It makes "conciliation" refer to both "prevention and settlement"; and it makes "arbitration" refer to both "prevention and settlement." It is true that the grammatical construction is not conclusive if the words in their collocation would be nonsense. But we have no right to reject the grammatical construction if effect can by any means be given to it. As was said by *Grove* J. in *Richards* v. *McBride* (1):—"The onus of showing that the words do not mean what they say" (he was speaking of the "grammatical construction") "lies heavily on the party who alleges it." Lord *Wensleydale* put it in *Grey* v. *Pearson* (2), that "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the

(1) 8 Q.B.D., 119, at p. 123. (2) 6 H.L.C., 61, at p. 106.

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absurdity and inconsistency, but no farther." He expressed himself to the same effect in *Becke* v. *Smith* (1); and *Willes* J. agreed to the rule as stated except that, as he said, the word "absurdity" must be taken as meaning no more than "repugnance": *Christophersen* v. *Lotinga* (2). There would be no absurdity, no repugnance or inconsistency with the rest of the instrument, in speaking of an arbitration to prevent war between two nations, between whom enmity is growing, fed by every new occasion, but as between whom as yet there is no war and no definite claim; or in speaking of an arbitration to fix wages between an employer and his employés, even before a definite schedule of wages has been submitted by one side to the other.

Now, conciliation and arbitration are a means to an end—industrial peace; but they are the only means to that end provided by the Constitution; and any laws, to be valid under the power, must be directed to conciliation and arbitration. It is not enough for them to be directed to the prevention or settlement of industrial disputes; they must be directed to the particular method of prevention and settlement mentioned. Parliament cannot, under the Constitution as it stands, apply the method of Wages Boards as an aid to the prevention of disputes; nor can it fix wages and conditions by prescribing them in a Schedule to an Act. Then, looking at the sub-section of incidental powers—sub-sec. xxxix.—we find that the Parliament is enabled to make laws with respect to "Matters incidental to the execution of any power vested by this Constitution in the Parliament"; but this language forces us back to ascertain what are the specific powers so vested; and as regards sub-sec. xxxv. the power is a power as to conciliation and arbitration, not a power to dictate labour conditions apart from conciliation and arbitration.

But it has been urged by Mr. *Duffy* that the proceeding under sec. 38 (*f*) is in effect an arbitration—an arbitration between those who are under an award and those who are not under it; and that the question for arbitration is, should the same regulations be applied to both sets of persons. It is quite possible to conceive of such an arbitration; but it is not the kind of arbitration contemplated by the Constitution. If the words of sub-

(1) 2 M. & W., 191, at p. 195. (2) 33 L.J.C.P., 121, at p. 123.

sec. xxxv. were "conciliation and arbitration for the settling of conditions of labour," the argument might hold good. But the words are "conciliation and arbitration for the *prevention and settlement* of *industrial disputes* extending," &c; whereas the proceeding under sec. 38 (*f*) is a proceeding where there is no dispute to be settled, and no dispute in prospect that ought to be prevented. Whether a provision for a common rule, based on the fact or on the prospect of an industrial dispute, and framed on the method of arbitration, would be valid or not, must be left for further consideration should the occasion arise.

So far, it seems clear enough that the words of the Constitution do not warrant this provision in the Act for extending any regulation in an award to persons who are not in a dispute, and between whom a dispute is not threatened or probable. Such an extension is not within the connotation of conciliation or of arbitration. It even appears that nowhere—not even in New Zealand—was there any provision by legislation for a common rule in 1900, when the Constitution was made law by the British Parliament. A difficulty arises, however, from a consideration of certain decided cases in the United States, cases which have not been cited or discussed. In the famous case of *M'Culloch* v. *Maryland* (1) *Marshall* C.J. held that because Congress had power to levy and collect taxes, to borrow money, to regulate commerce (inter-State and foreign), to declare war, to raise and support armies and navies, Congress had an incidental power to incorporate a private banking company which the Government might use for the purposes of its business. It is hard to see in what respect this decision fails to cover the whole ground of contest in this case. The United States Constitution gave a series of specific powers to the Federal Congress: and it added a general power (Act I., sec. 8 (17)) "to make all laws which shall be necessary and proper for carrying into execution the *foregoing powers*." Of course, the foregoing powers were all directed to one common end—the efficiency of the new federal instrument; but the United States Constitution, as our Constitution, allows only, by its general power, the making of laws incidental to the specific powers granted. It gave Congress specific power to

(1) 4 Wheat., 316.

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establish post offices, to constitute tribunals, to provide a navy; but, according to the decision of *M'Culloch* v. *Maryland* (1), under the general power Congress could establish and incorporate a bank as incidental to the powers to levy and collect taxes, &c. There is no doubt that such a bank would be useful to the Government, would be better than ordinary banks for its purpose, would conduce to the efficiency of the new federal instrument. But how could it be "necessary and proper," or even "incidental," to the levying and collection of taxes or to any of the other specific powers granted? Many other powers, no doubt, would seem to be useful to the Federal Government of the United States, and would help it generally in carrying out its functions for the benefit of the people, *e.g.*, a power to make laws as to trade marks, or as to marriage and divorce; but the usefulness of a power may be a ground for the amendment of the Constitution —it is not proof that the power by implication exists. If the decision in *M'Culloch* v. *Maryland* (1) is sound—and it has been treated as law for several generations—it would seem that all that Mr. *Duffy* has to do is to show that the power to make a common rule would much assist the Court of Arbitration in preventing and settling disputes, and then the power is to be implied. But although no Court in the United States seems to have treated this eloquent and powerful judgment as being anything but infallible, they have used language which may help us to understand the limits of our sub-sec. xxxix. as to incidental powers. Incidental powers are such as are "required for the exercise of the powers expressly granted": *Hepburn* v. *Griswold* (2); they involve power to "employ freely every means . . . necessary . . . for the fulfilment of its" (the Government's) "acknowledged duties": *Knox* v. *Lee* (3); they must be conducive to the exercise of a power granted by the Constitution: *United States* v. *Fisher* (4); *Juilliard* v. *Greenman* (5). Even in the case of *M'Culloch* v. *Maryland* (6) the major premiss of *Marshall* C.J. seems to be unexceptionable, if indeed it is not a mere verbal proposition, importing nothing: "Let the end be legitimate, let it

(1) 4 Wheat., 316.
(2) 8 Wall., 603, at p. 613.
(3) 12 Wall., 457, at p. 534.
(4) 2 Cranch., 202.
(5) 110 U.S., 421.
(6) 4 Wheat., 316, at p. 421.

be *within the scope of the Constitution*, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but *consist with the letter and spirit of the Constitution*, are constitutional." It is quite true that if a provision is consistent with the letter and spirit of the Constitution, it is constitutional; but the truth does not aid us much. Looking, however, at sub-sec. xxxix. of our own Constitution, we find words which ought to be simple enough—power to make laws with respect to "matters incidental to the execution of *any power vested by this Constitution in the Parliament*." We are to examine first the express power; and the express power is not a power to prevent or settle industrial disputes, but a power to make laws with respect to conciliation and arbitration (for the prevention, &c.); and any power to be implied must be a power incidental to conciliation and arbitration. It is not enough that it should be incidental to, or appropriate to, or useful in aid of, the prevention or settlement of industrial disputes. The rule, as laid down by Lord *Selborne* L.C. in *Small* v. *Smith* (1), is as follows:—"When you have got a main purpose expressed, and ample authority given to effectuate that main purpose" [here the main purpose expressed is conciliation and arbitration, &c.], "things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, *primâ facie*, to follow from the authority for effectuating the main purpose by proper and general means." A sound provision for a minimum wage in an Act of Parliament might be a great aid to the prevention of disputes, and conducive to industrial peace; but it could hardly be contended that a power to enact a law for a minimum wage is reasonably incidental to the power to make laws with respect to conciliation and arbitration. Nothing is incidental to that power which is not directly aimed at the precise method of dealing with industrial disputes—conciliation and arbitration—which the Constitution contemplates.

For these reasons I am of opinion that the provision for a common rule is invalid. It is quite true, however, as urged by counsel for the Commonwealth, that without power to declare a

(1) 10 App. Cas., 119, at p. 129.

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common rule, or its equivalent, it will often be impossible for the Commonwealth Court to settle disputes, or, at all events, to settle disputes satisfactorily. When there is a dispute between A., B., and C. and their employés, and arbitration, and the Court finds that it cannot bind rival firms D., E., and F. to pay the rates of wages which would otherwise seem to be just, it will be placed in serious embarrassment. If such an award be made as would bring harmony between those employers and employés who are parties to the arbitration, it must often operate most unjustly in binding those employers who are under the award to give better wages and conditions than their competitors who are not under the award; and it may raise discontent and provoke disputes among those who would otherwise be at peace. But this means that the powers of conciliation and arbitration may need to be supplemented by other powers; it does not mean that conciliation and arbitration cover a provision for a common rule, or include anything but conciliation and arbitration. If municipalities were by Act empowered to provide medical attendance for the poor, and if it turned out that such attendance would be of little use without wholesome food and sanitary dwellings, there surely could not be inferred, as an incidental power, a power to provide such food and dwellings. That is just like the position here. It is not for the High Court to fill up gaps in the Constitution, or to amend what it thinks to be defects. But if in the exercise of our grave responsibility we find, as here, that an Act of the Federal Parliament clearly transcends the bounds of the Constitution, we have to declare it invalid, and leave the consequences to be dealt with by Parliament and people in accordance with the Constitution.

Question answered accordingly.

Solicitors, for the objectors, *Derham & Derham.*

Solicitor, for the claimant, *J. Woolf.*

Solicitors, for Whybrow & Co. and Others, *Beeby & Moffatt.*

Solicitor, for the State of Victoria, *Guinness,* Crown Solicitor for Victoria.

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

B. L.