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"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.

"2. An 'apprentice' means any male person under the age of 21 years who is duly apprenticed to an employer for any time not less than four years.

"He is deemed to be duly apprenticed if he is bound by indenture of apprenticeship in the form hereinafter prescribed, containing a covenant on the part of the employer to teach him one at least of the following seven functions or processes including the working of the machinery used by the employer in connection therewith respectively:—"

(Seven functions or processes were then set out.)

"Or any other function or functions, process or processes, that may at the time of the indenture be approved as a subject for apprenticeship by the Board of Reference hereinafter mentioned.

"Or any other function or functions, process or processes, that may be allowed by the Board of Reference (with such consents and on such terms as the Board may think fit) to be substituted for the subject of apprenticeship mentioned in any indenture.

"3. No lad not apprenticed shall be employed or retained in employment after he has attained the age of sixteen, or for a longer period than twelve months or on any work except such as is comprised under the following heads:—Errands, sweeping, last-carrying, sorting, heel nail feeding, drawing tacks.

"4. The minimum rate of wages to be paid to lads whether apprenticed or not shall be—"

(Then followed a scale of rates beginning at 7s. for lads up to 15 years of age, and ascending to 48s. for lads from 20½ to 21 years of age.)

"5. An indenture of apprenticeship must be substantially in the following form, or in any other form approved either generally, or in any particular case, by the Board of Reference:—

"This indenture of agreement made the day of 19 between of (hereinafter called the employer) of the 1st part, and of (here-

inafter called the apprentice) of the 2nd part, and of father of the apprentice (and hereinafter called the father) of the third part, witnesseth.

"(1) The apprentice of his own free will and with the consent of the father hereby binds himself to serve the employer as his apprentice as hereinafter mentioned for the term of years from this date.

"(2) The master covenants with the father and the apprentice, and with each of them separately—

"(*a*) That he will accept the apprentice as his apprentice for the said term of years, and during the term will instruct the apprentice or cause him to be instructed in the functions or processes of and will furnish the apprentice with all materials and facilities available for learning.

"(*b*) That he will pay to the apprentice weekly during the said term the wages prescribed by the award of the Commonwealth Court of Conciliation and Arbitration dated the 1910.

"(3) The father covenants with the employer—

"(*a*) That the apprentice shall truly and faithfully during the term serve the employer as his apprentice as aforesaid, and shall diligently attend to the business, and at all times willingly obey the lawful commands of the employer, and shall not absent himself from the employer's service without the leave of the employer, or in accordance with law.

"(*b*) That in case the apprentice be at any time during the term wilfully disobedient to the commands of the employer, or be habitually slothful or negligent, or otherwise grossly misbehave himself towards the employer, the employer may discharge the apprentice from his service.

"(*c*) That the employer may deduct from time to time of the wages to be paid to the apprentice such sums as may be reasonable for any loss of time occasioned by the absence of the apprentice from his employment for any cause other than the acts,

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defaults, or commands of the employer or as the result of statutory enactment.

"6. The number of apprentices who may be in the employment of any employer at any one time shall not exceed half of the minimum number of journeymen in the same employment at that time or within the preceding six months.

"'Journeyman' means a male employé on time-work receiving not less than the minimum rate of wages.

"AGED, SLOW AND INFIRM WORKERS.

"The expressions 'aged,' 'slow,' or 'infirm' workers mean persons to whom a licence or permit has been given for a period of not more than one year on account of age or slowness or infirmity by the Chief Inspector of Factories or other competent authority of the State of employment with the written consent of the General Secretary or of the State Secretary of the claimant organization, or with the approval of the Board of Reference, or (if the Board be equally divided) of the Registrar, or the Deputy Registrar in that State.

"The licence or permit must state the specific ground on which it has been granted, and the minimum wage permitted, and must relate to one employer only.

"A duplicate of the licence or permit must be filed with the Registrar or Deputy Registrar, and be available for inspection by such persons as he shall think fit.

"Fresh licences or permits may be given from time to time to the same person.

"THE BOARD OF REFERENCE.

"The Board of Reference includes either a Commonwealth Board or a Board of the State of employment.

"In either case, the Board shall consist of an equal number of employers (or their representatives) and of employés (or their representatives) chosen in a manner approved (before or after the choice) by the Registrar or the Deputy Registrar.

"The certificate of the Registrar or Deputy Registrar that the Board is properly constituted shall be conclusive for the purpose of this award.

"If the members present at any meeting of the Board are equally divided on any question, the decision of the Registrar or

Deputy Registrar may be taken, and his decision shall be taken to be the decision of the Board."

(Then followed provisions for transition and the proposed award concluded.)

"This award shall continue in force for five years from its date."

By virtue of the *Industrial Disputes Act* 1908 (N.S.W.), as amended by the *Industrial Disputes Amendment Act* 1908 (N.S.W.), an award was made by the Boot Trade Board on the 30th June 1909.

By virtue of the *Factories and Shops Act* 1905 (Vict.), as amended by the *Factories and Shops Act* 1905 (No. 2) (Vict.), a determination was given by the Special Board for the boot trade on 31st October 1907.

By virtue of the *Wages Board Act* 1908 (Qd.) and the *Factories and Shops Act* 1909 (Qd.) a determination was given by the Boot Trade Wages Board on 19th April 1909.

By virtue of the *Factories Act* 1907 (S.A.) a determination was given by the Boot Board on 31st May 1907.

The minimum rate of wages fixed by the proposed award was higher than any of the minimum rates of wages fixed by the State Wages Boards under the above Acts. The provisions in the proposed award as to apprentices and aged, slow, or infirm workers were different from those contained in the awards of the State Wages Boards. There was no provision in the proposed award for the class of workers called "improvers," to whom under the award of the State Wages Boards wages might be paid at a lower rate than the minimum rate of wages.

The President stated a special case for the determination by the High Court of the following questions:—

1. Is it competent for this Commonwealth Court under the Federal Constitution to make any award which is inconsistent with any and if so which of the said awards or determinations of the State Wages Boards?

2. Is there in the proposed award any provision or provisions and if so what provision or provisions inconsistent with any and if so which of the awards or determinations of the State Wages Boards, and in what respects?

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Mitchell K.C. and *Starke*, for the respondents who had filed answers. Assuming the view taken in *Federated Saw Mill, &c., Employés' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1), by *Griffith* C.J. and *O'Connor* J. to be correct, viz., that the Commonwealth Court of Conciliation and Arbitration has no power to make an enforceable award inconsistent with the award of a Wages Board empowered by a State Statute to regulate wages and conditions of employment, the question arises —What is the test of inconsistency? The determination of a Wages Board is to be regarded, in effect, as part of the Statute law of the State, and the test is—has the State legislature fully covered the ground of legislation as to the particular subject matter? Where a State Statute and a Federal Statute operate upon the same subject matter, and prescribe different rules concerning it, there is inconsistency: *Quick & Garran's Constitution of the Australian Commonwealth*, p. 939, citing *Gulf, Colorada and Santa Fé Railway Co.* v. *Hefley* (2); *Inter-State Commerce Commission* v. *Detroit, Grand Haven and Milwaukee Railway Co.* (3); *Davis* v. *Beason* (4).

[ISAACS J. referred to *Keller* v. *United States* (5); *Compagnie (La) Hydraulique de St. François* v. *Continental Heat and Light Co.* (6).]

There are three classes of cases in which, according to the American cases, there is inconsistency: (1) Where two conflicting duties are imposed by the two legislatures; (2) Where there is something in the nature of a right or privilege conferred by the paramount legislature, and the other legislature seeks to impose some additional restrictions on the exercise of that right or privilege; and (3) Where the Court forms the view from the language of the paramount legislature that they intended their law to be the only law upon the particular point. See *Houston* v. *Moore* (7); *Sinnot* v. *Davenport* (8); *Gibbons* v. *Ogden* (9); *Prigg* v. *Pennsylvania* (10); *Claflin* v. *Houseman* (11); *Gloucester Ferry Co.* v. *Pennsylvania* (12); *Covington and Cincinnati Bridge Co.*

(1) 8 C.L.R., 465.
(2) 158 U.S., 98.
(3) 167 U.S., 633, at p. 642.
(4) 133 U.S., 333, at p. 348.
(5) 213 U.S., 138.
(6) (1909) A.C., 194, at p. 198.
(7) 5 Wheat., 1.
(8) 22 How., 227, at p. 239.
(9) 9 Wheat., 1, at pp. 211, 233.
(10) 16 Pet., 539, at pp. 612, 617.
(11) 93 U.S., 130, at p. 140.
(12) 114 U.S., 196.

v. *Kentucky* (1); *Attorney-General of Ontario* v. *Attorney-General for Canada* (2).

So in this case there would be an inconsistency, not merely if the award cannot be obeyed without doing something prohibited by the State law, but if what the award prescribes is something which deprives some person of a right or privilege which he had under the State law, or if the Court sees that the State has indicated that in the particular trade the determination of the Wages Board is to be the only restriction imposed upon those engaged in it. The States have the same extent of power in regard to internal trade and commerce as the Commonwealth has in regard to external and inter-State trade and commerce, and the State can impose conditions and restrictions upon the former just as the Commonwealth can upon the latter. The arbitration power in the Constitution does not enable the Commonwealth Court of Conciliation and Arbitration to interfere to any extent with the industrial conditions of an industry within a State as to which the State has indicated its clear intention that the only conditions are to be those which it has enacted. Where a State purports to regulate the doing of acts which are lawful at common law there is an implied provison that the doing of the acts in compliance with those regulations is lawful. To impose further conditions raises an inconsistency. The *Factories and Shops Act* 1909 (No. 2) by sec. 39 expressly indicates the intention of the Victorian legislature to cover the whole field of that class of industrial legislation. That section read as a whole is an authority or licence to persons who comply with its provisions to lawfully carry on their business without being subject to any other conditions. It was the intention to include in the general words the award of the Federal Court. The evil which the Victorian Parliament thought it desirable to cure was that, having provided all the machinery for fixing a minimum wage, the Federal Court was being used as a Court of appeal from the determinations of the Wages Boards without any risk of a lower minimum wage being fixed. See *Federated Saw Mills &c. Employés' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (3).

(1) 154 U.S., 204, at p. 209. (2) (1894) A.C., 189, at p. 200.
(3) 8 C.L.R., 465, at p. 500.

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The Constitution never intended the Federal Court to have such a power. Even if the test of inconsistency be taken to be whether obedience to both laws is possible, the provision in the award as to the form of indentures of apprenticeship is inconsistent with the provisions of the South Australian *Factories Act* 1907, which by sec. 97 forbids any form of indenture except that prescribed by the State Wages Board, and with the form which has been prescribed under that Act.

As to the first question, if the decision in *Federated Saw Mills &c. Employés' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1) upon that point is not right then the Commonwealth Court of Conciliation and Arbitration can do what the Commonwealth Parliament itself cannot do.

[They also referred to *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (2); *Sands* v. *Manistee River Improvement Co.* (3); *Quinn* v. *Leatham* (4).]

Irvine K.C. and *Blacket* (with them *Harrison Moore*), for the States of New South Wales and Victoria. The legislative power of the States over State industries, by virtue of which they can determine the regulations under which that industry can be carried on, is not taken away by the provision in the Constitution enabling the Commonwealth Parliament to make laws as to conciliation and arbitration. Sec. 39 of the *Factories and Shops Act* 1909 (No. 2) operates on tribunals, and it is a clear indication that the Victorian Parliament intended that the regulations it refers to are to be the only mode of regulating the industries to which it applies. The object of giving this particular power to the Commonwealth Parliament is to enable disputes to be settled, but in no way to take away the power of the State Parliaments to prevent in any way they can disputes from arising. To constitute a dispute with which a tribunal appointed under sec. 51 (xxxv.) of the Constitution can deal there must be a demand which can legally be put forward by one side or the other. If by the law of Victoria certain conditions are imposed on the carrying on of an industry, it does not necessarily follow that a lawful dis-

(1) 8 C.L.R., 465.
(2) 6 C.L.R., 469.
(3) 123 U.S., 288.
(4) (1901) A.C., 495.

pute may not arise in which some other demand is made. But when by that law a minimum wage is fixed, a demand for a different minimum cannot lawfully be put forward as the basis of a dispute. Where an award is made by the Federal Court, the effect of which in conjunction with the Act which created it is to substitute a totally new set of conditions different altogether from those imposed by the State Parliament, there is at once a substantial and practical inconsistency. If the Federal Court can, in regard to a State industry, deal with the same matters as the State Parliament can, then it is not the award of the Federal Court which governs the industry, but in each State it is the most onerous conditions which have been imposed either by the Federal Court or the State Parliament.

[GRIFFITH C.J. referred to *Fortescue* v. *Vestry of St. Matthew, Bethnal Green* (1).]

In order to constitute an industrial dispute within the meaning of the Constitution there must be the element of an existing or impending industrial disturbance in addition to a bald demand and refusal. But the fact of such a disturbance existing or being impending does not give the Federal Court power to go beyond the settling of an actual dispute. There is no power given to remove the evil, but a power to settle a dispute which may have the effect of removing the evil. The Federal Court must look at the existing law, which includes in each State the law of that State, in order to see whether the claim is one which can be given effect to. Looking at this particular award, it prescribes in Victoria a new rule of conduct distinct from that prescribed by the State law. Under the *Industrial Disputes Act* 1908 (N.S.W.), as amended by sec. 24 of the *Industrial Disputes Amendment Act* 1908 (N.S.W.), the employers and employés are bound by the award of the Wages Boards, and there can be only one dispute in respect of their industrial relations, and that is whether the award shall be continued or shall be varied or rescinded. Discontent with the laws of one State cannot be added to discontent with the laws of another State in order to constitute one dispute extending beyond the limits of one State.

(1) (1891) 2 Q.B., 170.

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Duffy K.C., *Arthur* and *Holman*, for the claimants. The American cases relied on as to the meaning of "inconsistent" do not apply here. In the United States the powers of the States and of Congress are exclusive, but sometimes the same field of operation is dealt with by a State and Congress under different powers. When that occurs the question is does the Act of Congress over-ride that of the State? There is no attempt there to define boundaries, but both acting within their powers and an overlap occurring, the question is does the Constitution render the Act of Congress valid, and that of the State invalid? In that state of things it has been held that, where Congress has filled the whole area, legislation by a State within that area is invalid. Here, however, the question of inconsistency is one of the boundaries of the powers of the Commonwealth and the States.

The test of inconsistency is, does the award prohibit the doing of something which the State law permits to be done, or does it make lawful something, the doing of which the law of the State prohibits: *Federated Saw Mill &c. Employés' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1); *Edmonds* v. *Master and Senior Warden of the Company of Watermen and Lightermen* (2).

[ISAACS J. referred to *Gentel* v. *Rapps* (3); *Ferrier* v. *Wilson* (4).]

If the test of the validity of the award is, could the parties have by agreement bargained for those things which the award contains, then that test is complied with. Those who would be bound by a common rule, if this award were made a common rule, could have bargained for all the provisions of the award. The *Factories and Shops Act* 1910 does not affect the matter. It is to be construed as only directed to State authorities over which alone the State Parliament has control: *Macleod* v. *Attorney-General for New South Wales* (5); *Hardcastle* (*Craies*) *on Statutes*, 4th ed., p. 408.

As to the first question, the power given by sec. 51 (xxxv.) of the Constitution is a legislative power upon which there is no

(1) 8 C.L.R., 465, at p. 512.
(2) 24 L.J.M.C., 124, at p. 128.
(3) (1902) 1 K.B., 160.
(4) 4 C.L.R., 785, at p. 791.
(5) (1891) A.C., 455.

limitation except in the method by which it is to have operation. It is a power to settle industrial disputes not by direct legislation, but by means of conciliation and arbitration. The word "arbitration" has reference not to the subject matter of the arbitration, but to the sort of body which is to settle the dispute; it is used, not as suggesting a limitation on the power, but as suggesting a method by which to carry out the power. Nor does the word "arbitration" connote voluntary agreement or that the parties shall appoint the arbitrators. The arbitrator is bound to obey the law under which he is created, but the use of the word "arbitration" does not necessarily show that the arbitrator is to observe all legal obligations binding on the parties, or is to respect all existing laws. The Commonwealth Court of Conciliation and Arbitration, whose duty it is to settle disputes, must ignore the ordinary law as to agreements, for it must be able to say what agreements already existing must no longer be made and what agreements may for the future be made. The reason for this is that, looking at the nature of the power and its subject matter, it is necessary. It is in the same way also necessary that the Federal Court should be able to disregard State laws fixing wages or conditions of employment either directly or through Wages Boards. Once there is a dispute extending beyond one State which is brought before the Federal Court for settlement, then the matter is taken out of the ordinary control of the States, and the Federal Court can settle that dispute without regarding the laws of the States which would otherwise apply. Nothing that can be inferred from the use of the word "arbitration" interferes with this view. The power to settle disputes is an over-riding power, and in order to carry it out the State laws must give way, and whatever the President of the Federal Court thinks is necessary to be done to settle that dispute he may order to be done. If the Commonwealth power is limited to what may lawfully be done under the State laws, the Parliaments of the States may by subsequent legislation nullify the effect of an award of the Federal Court. The power given by the Constitution to the Parliament is to appoint an agent to complete the legislation which the Parliament has begun. The award made by the agent and the Act of the Commonwealth

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Parliament under which it is made together make up one legislative action, and the Commonwealth Parliament, having thus legislated on a particular topic, all State legislation on that topic must give way.

[They referred to 40 Geo. III. c. 90; 5 Geo. IV. c. 96; *Webb's Industrial Democracy*, vol. I., p. 245; *Federated Saw Mills &c. Employés' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1); *Missouri Pacific Railway Co.* v. *Larabee Flour Mills Co.* (2); *Missouri, Kansas and Texas Railway Co.* v. *Haber* (3).]

McArthur (with him *I. Macfarlan*), for the Commonwealth. It was held in *Federated Saw Mills &c. Employés' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (4) that the Federal Court may make an award inconsistent with an award of a State Arbitration Court settling a State dispute. But such an award is as much a law of the State as is a determination of a Wages Board, and the reasons which apply for saying that the Federal Court may disregard the one equally support the view that it may disregard the other.

Mitchell K.C. Assuming that the power given by sec. 51 (xxxv.) may include compulsory arbitration, the Federal Court is bound by State laws to the same extent as any other tribunal which exercises compulsory powers over contending parties.

Arthur, in reply, referred to *Gillman's Social American Spirit*, p. 257.

Cur. adv. vult.

The following judgments were read:—

March 30.

GRIFFITH C.J. Two questions of law are submitted for the determination of the Court:—

1. Whether under the Constitution it is competent for the Commonwealth Court of Conciliation and Arbitration to make any award which is inconsistent with certain awards or deter-

(1) 8 C.L.R., 465, at p. 510.
(2) 211 U.S., 612, at p. 623.
(3) 169 U.S., 613.
(4) 8 C.L.R., 465.

minations of State Wages Boards in the States of New South Wales, Queensland, South Australia, and Victoria (which I understand to mean awards or determinations which by Statutes of the State legislatures have the force of law within the respective States).

2. Whether in the draft award annexed to the special case there are any provisions inconsistent with such awards or determinations.

For the purposes of this case it must be assumed that there was in existence an industrial dispute extending beyond the limits of any one State. Whether there was or not is a question of fact, which, as I pointed out in the *Woodworkers' Case* (*Federated Saw Mills &c. Employés' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.*) (1), can only be determined in some proceeding taken to challenge the validity of the award when made.

It is not contested that the determinations in question, read with the Statutes under which they are made, have the force of positive legislative enactments in the respective States.

The contention set up by the claimants is that in making an award in an industrial dispute extending, &c., the President of the Arbitration Court is not bound by any State law regulating industry, but may ordain and prescribe whatever he thinks necessary in order to bring about what he thinks an effectual settlement of the dispute. The same contention was set up in the *Woodworkers' Case* (2), in which my brother *O'Connor* and I expressed our opinion that it was untenable. The point has now been re-argued before the Bench in a form which calls for actual decision.

The question turns upon the construction of pl. xxxv. of sec. 51 of the Constitution, which empowers the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of any one State.

It must now be taken to be the settled law of the Common-

(1) 8 C.L.R., 465, at p. 495. (2) 8 C.L.R., 465.

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wealth that, as I said in the *Woodworkers' Case* (1), "Pl. xxxv. is to be construed having regard to the rest of the Constitution, and particularly with reference to the doctrine repeatedly laid down by this Court that any invasion by the Commonwealth of the sphere of the domestic concerns of the States appertaining to trade and commerce is forbidden except so far as the invasion is authorized by some power conferred in express terms or by necessary implication." The same principle, of course, applies to the police powers of the States.

I decline to go again over the ground traversed in the cases in which that rule was established. The question, then, is, to what extent does the power under consideration authorize such an invasion? I answer the question by quoting my own language in the same case (2). "The answer is—so far as necessary for its effective exercise. What then is the power? We are not concerned with the political question, now hotly debated, whether it is desirable that the Federal Parliament should have paramount authority to determine all conditions of employment in the Commonwealth. Our duty is to interpret the Constitution as it stands, not according to any preconceived notions as to what it ought to be. Now, as already pointed out, the power is not a general power to make laws for the settlement of industrial disputes. A power conferred in such terms would *primâ facie* authorize an invasion of the whole field of the conditions of employment so far as might be necessary for their settlement. The power is limited to making laws for their settlement by arbitration. The term "arbitration" connotes a judicial tribunal, by whatever name it is called and however constituted, and, although the functions of the tribunal differ from those of ordinary tribunals in that they are not limited to determining existing causes of action, but extend to prescribing conditions to be observed in future contracts of employment, the tribunal is no less a tribunal. To my mind the obligation to decide in accordance with law is implied in the notion of the creation of a tribunal. Otherwise the members of the tribunal would not be judicial persons at all, but dictators or law-givers exercising the power of legislation, not of adjudication.

(1) 8 C.L.R., 465, at p. 492. (2) 8 C.L.R., 465, at p. 492.

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

"I find it difficult to treat such an argument with due gravity. It may be necessary, in order to allay political agitation, for the legislature to repeal or alter an existing law, but it cannot be said to be necessary that a tribunal appointed to settle disputes by arbitration should have a dispensing power authorizing it to supersede or abrogate a law or excuse obedience to it, unless, indeed, it is assumed that a dispute cannot be settled unless one (and of course only one) of the parties to the dispute gets all that he asks. This would be an entirely novel meaning of the word, and would put the tribunal above the law. *Sic volo, sic jubeo, mea sit pro lege voluntas.*"

I will add a few words on the point much debated before us, as to what is connoted by the word "arbitration." Primarily, that term meant determination by a tribunal which is not an

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ordinary Court of Justice bound to administer the strict rules of the common and Statute law, but a tribunal selected by the parties to the controversy, to which both submit themselves, and by whose determination they agree to be bound. The efficacy of the award was derived from the agreement of submission, although statutory provisions for its enforcement are now commonly adopted. The foundation of the authority of the arbitrators was the consensual agreement of the parties.

In the course of time the meaning of the word has been extended so as to include determination by arbitrators some of whom are not necessarily the free choice of the parties. But this difference in the mode of choice does not alter the fundamental notion of the function of the arbiter, which is to make a determination that the parties are bound to obey. If they will not choose for themselves, their right of choice may be exercised by some one else. That is all. In the *Commonwealth Conciliation and Arbitration Act* the Parliament has thought fit to provide for the appointment of a single Judge of very large powers, and to call his Court a Court of Arbitration. We are not concerned with the propriety or accuracy of such a designation, which is not now in controversy. But it is clear that the nature or authority of the tribunal authorized by the Constitution cannot be altered by giving it a particular name or prescribing a particular mode of appointment. If the Parliament had thought fit to prescribe that the tribunal of arbitration should be selected in part or wholly by the parties to the dispute, the authority of the tribunal would have been neither greater nor less on that account than that of the single arbiter.

In the case of industrial arbitration provision must necessarily be made for the representation of large bodies of men, and the determination must prescribe rules for the future. This, again, does not alter the substance of the matter. Such representation is a necessary provision of procedure. The *Commonwealth Conciliation and Arbitration Act* accordingly makes provision for representation of the disputants, and the members of the representative bodies for the time being are bound by the determination, just as individual members of a joint stock company are bound by obligations of the company, subject to any positive law

to the contrary. An association which invokes the aid of the tribunal submits itself to its arbitrament in precisely the same way as a private person who executes a deed of submission to arbitration submits himself to the authority of the arbitrators or umpire. The Commonwealth Act also contains provisions for the enforcement of awards. These are all in the nature of procedure, analogous to execution against the person or property of a litigant, and cannot affect the essential quality of the award. It appears to follow from these considerations that the extent and limits of the authority of a tribunal of arbitration, however constituted, are *ex vi termini* just as wide and just as narrow as the capacity of the parties themselves, except so far as some competent legislative body has further extended or limited that authority. It follows also that whatever the parties could lawfully agree to do they may be ordered to do, and whatever they could not lawfully agree to do they cannot be ordered to do, by the tribunal.

These conclusions are incontrovertible, and indeed are not controverted, so far as regards an arbitration tribunal lawfully established within an ordinary civilized State. But it is said that they do not apply to the Commonwealth Court of Conciliation and Arbitration.

I have tried to apprehend the arguments in support of this view, and they seem to me to be summed up in two: (1) that if the federal arbitrator must obey the law he may not be able to settle a dispute according to his own satisfaction; and (2) that the award of the Arbitration Court, being a federal law, is paramount over the State law. The notion of any one person or set of persons being set up in a civilized country with authority to supersede or abrogate any law of which he does not approve is to me so extraordinary that I can hardly conceive of any legislature in full possession of its faculties setting up such an institution. If they did, to call such a process arbitration would be an irony not to be expected in a charter of government. Still less can I conceive of a number of sovereign States agreeing to a federation in which such a dispensing power might be conferred, not even upon the federal legislature, but upon an individual or

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individuals. But it is gravely said that the Constitution has done so.

I think that very plain words would be necessary to bring about such a result. It certainly cannot be based upon the argument *ab inconvenienti*, which, indeed, tends wholly in the other direction. If the argument were accepted, the whole of the State laws regulating domestic industry, and a great part of the police laws, the need for which depends upon local circumstances of which the State legislatures are the natural and appointed judges, would be subject to the review of one or more individuals, who, unless endowed with more than human knowledge and wisdom, would be unable to discharge "the function of so mighty office." It is sufficient to say that the words of pl. xxxv., so far from clearly making such an extraordinary and admittedly unprecedented provision, do not, to my mind, even suggest it.

The second argument that, when the award of the Federal Arbitration Court is inconsistent with a State law, the former must prevail as a federal law, is based upon an obvious fallacy. The function of a tribunal, of whatever kind, is to declare and administer the law, not to make it—*dicere non dare leges.* Nothing could be more unfortunate than that an idea should arise that this Court, or any other Court, Federal or State, has a legislative authority. The legislative and judicial powers of a sovereign State are exercised by different agencies, whose operations are in different planes, and cannot come in conflict with one another. The judicial agency must obey the behests of the legislative, and that may make provisions for enforcing the judgments of the judiciary, but does not, by doing so, alter their intrinsic character. The suggested conflict is therefore impossible. In support of this view we were invited to accept the argument that, although the Commonweath Parliament has admittedly no power to interfere directly with the domestic industry or police power of a State, and cannot delegate a power which itself it does not possess, yet it may by appointing a Judge and calling him an arbitrator empower him to interfere. The statement of the argument is its own answer, and I waste no more words upon it.

I should, however, advert to the ingenious and plausible argument addressed to us by Mr. *Holman,* who propounded the

view that, although the industrials in the respective States are, as such, bound by the State law, yet, if a group of such industrials, being dissatisfied with a State law affecting an industry, associate themselves with a group of industrials who are dissatisfied with the law of another State affecting the same industry, the whole matter becomes potentially lifted out of the plane of State law, and can be dealt with as if there were no State law on the subject. The notion that any group of persons can, at their mere volition, free themselves from the obligations of a law with which they are dissatisfied without the aid of a competent legislature is inconsistent with the elemental concept of law. Even if it were not, the words of pl. xxxv. afford no colour for such an argument.

I adhere to the view which I expressed in the *Woodworkers' Case* (1):—"The term 'dispute' itself connotes the existence of disputants taking opposite sides. It also connotes that the difference between the parties to it is one that is capable of settlement by mutual agreement. If the desire of either party cannot be satisfied by reason of the existence of a law which forbids such satisfaction, the existence of that law does not constitute a dispute. If the desire (misprinted 'dispute') is widespread there may be a political agitation, but it is not a dispute." *A fortiori* the discontent of Victorian industrials with a Victorian industrial law, added to the discontent of New South Wales industrials with a New South Wales industrial law, cannot constitute a single dispute existing in, or extending beyond the limits of, either State.

No assistance is afforded by the false analogy of international arbitration, which originates in the agreement of the High Contracting Parties, the award deriving its sanction from the positive laws of the several States concerned in the treaty of submission; or by the instance of the arbitration between Quebec and Ontario, for in that case the *British North America Act* empowered the arbitrators to make an award which should be binding upon both Provinces, and which derived its sanction from the Imperial Statute itself.

For all these reasons I am of opinion that the first question must now be judicially answered in the negative.

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

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I pass to the second question, whether the proposed award would be inconsistent with the determinations of the State Boards. Before considering the particular points in which it is contended that it would be inconsistent, I will refer to a far-reaching argument addressed to us by Mr. *Mitchell* and Mr. *Irvine*, to the effect that, if upon a fair construction of the State Acts it appears that the State legislatures have indicated an intention to cover the whole ground, any award is necessarily inconsistent with the Acts except so far as it follows them. In one sense this contention may be sound—if, for instance, a State legislature laid down hard and fast rules of conduct, which might not be departed from on one side or the other, so that the persons subject to the law could not lawfully do anything which was not actually prescribed and defined by the Acts. But none of the Acts in question are of this kind. The determinations which they authorize are as to the minimum wage that may be paid in general, and as to the maximum number of persons receiving less than the minimum wage who may be employed under special circumstances. The whole field of voluntary agreement as to wages greater than the minimum, and as to the employment of a less number of persons receiving less wages than the minimum, is left open to the parties. It is not, therefore, necessary to pursue this argument.

The points in which the proposed award is alleged to be inconsistent with the determinations are substantially two: (1) that the minimum wage to be paid to journeymen is greater than that prescribed by the determinations; and (2) that the conditions on which persons receiving less than the prescribed minimum may be employed are different.

In the *Woodworkers' Case* (1), I expressed the opinion that the test of inconsistency is whether a proposed Act is consistent with obedience to both directions, but in view of the arguments which have been addressed to us I will say something further on the point.

What I have already said on the meaning of arbitration goes a long way to solve the difficulty. If, as I think, that term connotes a settlement of differences in any way in which the

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

parties themselves could settle them, it follows that whatever the parties could lawfully agree to do the arbitral tribunal may order them to do.

Whatever view is taken of the intention of the State legislatures, it is plain that they have not forbidden employers to pay more than the minimum wage prescribed by the Wages Boards, or to agree with each other or with their employés that they will not pay less than a sum which is greater than that minimum. It follows that the proposed award is not in this respect inconsistent with any of the determinations in question, or the Statutes which gave them the force of law.

The difference in the conditions on which persons may be permitted to work at less than the prescribed minimum raises somewhat different considerations. Under the law of Victoria, for instance, old, slow and infirm workers are allowed to earn their living at such wages as their work is worth on obtaining a licence to do so from the Chief Inspector of Factories. The proposed award imposes further conditions more difficult to be complied with. I do not, however, think it necessary to discuss the abstract question of the powers of the Arbitration Court to vary the conditions imposed by the State law, because it does not arise upon the proposed award as I construe it. The scheme of the award is, first, to prescribe a minimum wage, and then to allow exceptions from the rule on certain prescribed conditions. If the conditions are not observed the exceptions do not take effect. And, as parties might themselves agree to such a bargain, I think the Court can make it for them.

With regard to apprentices a further point was raised as to which it is desirable to say a few words. Under the proposed award an indenture of apprenticeship must be in substantial accordance with a form prescribed. It now appears, although the fact was not brought before the learned President at the hearing of the claim, that it is unlawful under the law of South Australia to enter into an indenture in that form. The practical result, if the award is made in the form proposed, will therefore be that the employment of apprentices will be unlawful in South Australia except at the full minimum wages of a journeyman, and without indenture, with the probable further consequence that

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the industry will come to an end in that State. The circumstances as to Victoria are potentially, if not actually, the same. I do not suppose that the learned President intended any such result. But that is not a matter for our consideration. It is sufficient to say that the parties could lawfully agree not to employ any apprentices at all, except at full journeyman's wages and not under indenture.

There is only one other point to which I think it necessary to advert. By an Act, No. 2241, which became law on 4th January 1910, after the special case had been stated, the legislature of Victoria enacted (sec. 39) that it shall be lawful "for any person to employ any person or classes of persons in any such process trade or business or for wholly or partly preparing or manufacturing any such articles if he duly comply with such provisions of the Factories Acts and such Determination either of a Special Board or of the Court of Industrial Appeal as may be applicable thereto, nor shall such person so complying as aforesaid (unless he has otherwise contracted) be compelled or compellable under any circumstances whatever, while such Determination remains in force, to pay a price or rate of payment other than that prescribed by it nor to employ a number of improvers or apprentices other than that prescribed by such Determination nor to comply with any conditions of employment of any kind whatsoever not contained in the said Acts or such Determination as aforesaid."

This enactment makes perfectly plain the desire of the Victorian legislature to cover the whole ground of industrial legislation so far as they can do so. But I do not think that the provision which they have made effects the purpose which they apparently had in view of excluding the jurisdiction of the Federal Court of Arbitration; and this for two reasons: (1) The words "compelled or compellable" must be construed as meaning compelled or compellable by any power over which the Victorian legislature has legislative authority; (2) the words "unless he has otherwise contracted" leave open the whole field of agreement, with which, in my opinion, the field of arbitration is coterminous. And, as that field is by the Constitution left open to the arbitrament of the Federal Court of Arbitration, no Statute of a State can effectually close it in the face of the Court.

For these reasons I think that the second question must be answered in the negative.

BARTON J. The first question is whether, under the Federal Constitution, it is competent for the Commonwealth Court of Conciliation and Arbitration to make an award inconsistent with the awards or determinations of certain Wages Boards, constituted under the legislation of several States, and copies of whose awards or determinations are annexed to the special case.

It is well to begin by clearing the ground of one or two matters. We have had before us the Statutes under which these Wages Boards have been appointed, and under which they have made their determinations. In New South Wales they are termed awards, but the substance of the thing done is the same under each State Statute. The Wages Boards are not tribunals of arbitration but subsidiary legislative bodies deriving their authority from the State legislatures. Their determinations are obligatory, not merely on parties or organizations at variance, but on all citizens within their range, whether the jurisdiction covers a whole State or a limited area merely. The rates of wages, when fixed by the Boards, are to all intents and purposes the law on the subject. They are as distinct from the judgment of a Court as they are from the award of an arbitrator. This position has practically been admitted in the argument.

Before answering this question we must also be clear as to the meaning of the term "inconsistent" as used in the question. We may assume that it is used in the sense in which we speak when we say that a new enactment, or rule of action, or stipulation, is inconsistent with something existing of the same kind: namely, that the two cannot stand together, so that the later overrides the earlier. In the case of inconsistencies between Federal and State provisions, it is not the order of time that matters, but the degree of authority and its source; the term, however, is used in the same sense of incompatibility, so that to obey the one provision is to disobey the other. The answer to the question thus understood, depends on sec. 51 (xxxv.) of the Constitution.

Where the question to be considered involves, as the present one does, the respective powers of the Commonwealth and the States,

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"it is essential to bear in mind," as this Court said in *D'Emden* v. *Pedder* (1), "that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied." The Constitution delimits the respective powers of the Commonwealth and of the States—the former by express declarations, and by consequent implications where necessary; the latter by comprehensive provisions such as are found in secs. 106 and 107. Sec. 106 confirms, subject to the Federal Constitution (which means, so far as that Constitution does not modify them expressly or by necessary implication from its language), the Constitutions of the component States; sec. 107 confirms the legislative powers of the several States, all of which powers are to continue as at the establishment of the Federal Constitution, except where that instrument exclusively vests a power in the Parliament of the Commonwealth or withdraws a power from the legislature of the State. Save to that extent, those legislatures retain their power to make laws for the peace, order and good government of their respective States in all cases whatsoever, though, where a State legislature validly exercises a power which it retains concurrently with a like power granted, but not exclusively, to the Commonwealth, its legislation is liable to be displaced by valid Commonwealth legislation on the same subject matter. That case is provided for by sec. 109. See also *Compagnie (La) Hydraulique de St. François* v. *Continental Heat and Light Co.* (2). In considering the extent of a power of the Federal Parliament we can never lose sight of a principle stated by Lord *Herschell* in the case of *Colquhoun* v. *Brooks* (3) in these words:—"It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a Statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act." The limits of the various powers granted to the Federal Parliament

(1) 1 C.L.R., 91, at p. 109.
(2) (1909) A.C., 194, at p. 198.
(3) 14 App. Cas., 493, at p. 506.

in sec. 51 of the Constitution cannot therefore be accurately ascertained without constant reference to the reservations in favour of the States made in Chapter V.

But there are other principles which assume cardinal importance in the exposition of the relative powers of Commonwealth and State. In the *Railway Employés Case* (1) we referred to the influence of two salient facts on the construction of the Constitution: first, that it is an Act of the Imperial legislature, next, that it embodies a compact entered into between the six Australian States which formed the Commonwealth. These facts, we thought, rendered especially applicable to the construction of such a Constitution the rules that, in interpreting a Statute, regard must be had to the existing laws which it modifies (which in the case of this charter include the Constitutions of the States), and that in interpreting a contract regard must be had to the facts and circumstances existing at the date of the contract. After pointing out that it must at the same time be remembered that the Constitution was intended to regulate the future relations of the Federal and State Governments, not only with regard to the existing circumstances, but also with regard to such changed conditions as the process of events might bring about, we went on to say:—"Another circumstance which, in our opinion, is to be regarded is that the Constitution as framed was to be, and was, submitted to the votes of the electors of the States. It ought, therefore, we think to be held, *primâ facie*, that, when a particular subject matter relating to the respective powers of the States and the Commonwealth was specifically dealt with, it was intended to invite the attention of the electors specifically to that subject matter and to the proposed manner of dealing with it. It follows, we think, from this consideration that the rules of construction expressed in the maxims *expressum facit cessare tacitum* and *expressio unius est exclusio alterius* are applicable in a greater, rather than in a less degree, than in the construction of ordinary contracts or ordinary Statutes." The very method and form of the constitutional delimitation involves this consequence, that, before a grant of power to the Commonwealth can be held to cut down any power included in the general

(1) 4 C.L.R., 488, at p. 534.

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reservation in favour of the States, it must be clear, either from the words of the grant itself, or by necessary implication from those words, that such an effect is intended. This doctrine has been repeatedly relied on in the decisions of this Court. There is often confounded with it another of far-reaching importance, but which is perfectly distinct, namely, that a legislative power once granted is plenary within its ambit, so that it carries with it the grant of every power, although not expressed, without which the power expressly granted could not be effectively exercised. There was a tendency during the argument to rely on the last-mentioned doctrine, in apparent forgetfulness of the fact that it cannot be applied until the limits of the granted power are first ascertained.

We have here, therefore, a question similar to the one with which we had to deal in the case of *Huddart Parker & Co. Proprietary Ltd.* v. *Moorhead* (1). There we were examining into the validity of some federal enactments which assumed to regulate not merely external and inter-State trade, but also that trade which is confined within the limits of a State, and is reserved to the States as a subject of legislation, and in that connection it was necessary to consider whether the power given by sub-sec. xx. of sec. 51 constituted an exception to this otherwise exclusive reservation to the States. Here the question is whether sub-sec. xxxv. constitutes, and if so to what extent it constitutes, an exception to the otherwise exclusive reservation to the States of a branch of their police power, namely, the power to deal by legislation with matters within the field of their industrial affairs. The majority of this Court held there, as it should be held here, that any power must, in order to constitute the exception contended for, be couched in clear and unambiguous terms; that it was not sufficient that it was capable of being read as an exception, if it was equally capable of being read as subject to the reservation of that field in favour of the States; and that to overcome, or to be read as an exception to, the reservation, it would, as its framers must have known, have had to be couched in language which admitted only of the former of these constructions. In taking this view we held to that expressed by the Chief Justice, with whom my brother *O'Connor* J. and I were in

(1) 8 C.L.R., 330.

agreement, in the *Union Label Case* (*Attorney-General for N.S.W.* v. *Brewery Employés Union of N.S.W.*) (1), as follows:—"In my opinion, it should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words. Otherwise the Constitution will be made to contradict itself, which upon a proper construction must be impossible."

It is unnecessary further to invoke the past decisions of this Court to establish the principles on which this power must be interpreted. If those principles are not to be abandoned, the interpretation does not admit of much doubt.

The power in question is limited by its terms. It is not a general power to legislate for the prevention and settlement of industrial disputes, or even of such disputes when of inter-State extension. It is a power to legislate in respect of conciliation 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 for the limitation of the kind of legislation authorized, so as to exclude any legislation for the regulation of industry, or for any purpose other than that of conciliation and arbitration; to confine the operation of the authority to be constituted to the purpose of the prevention and settlement of the class of disputes specified; and 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. How strong the implication is may be further realized by referring to the instances which the majority of this Court adduced in *R.* v. *Barger* (2), as showing how clear and express the words of sec. 51 are when it is really intended to empower the Commonwealth to regulate any of the domestic affairs of the States.

"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,

(1) 6 C.L.R., 469, at p. 503. (2) 6 C.L.R., 41.

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and an agreement by both to be bound by the decision, which is commonly called the award. The submission may include questions of pure law, of mixed law and fact, or of fact alone, according to the terms in which the dispute is submitted or referred to arbitration; and beyond all question the award is a judicial determination. That at least has never been the subject of doubt, whether in a Court or elsewhere. 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. The range, then, of an arbitrator's authority, if the submission is wide enough, is co-extensive with the powers of the parties to settle their dispute without him. Whatever they can lawfully agree to, he may lawfully award. If, however, they desire him to make for them an agreement in breach of the mandate of positive law, he is powerless to do so. As they can each surrender strict legal rights by agreement, so he can bind them to such surrenders by award, if they give him power to do so. But it is one thing for a party to waive a legal right, and another thing for the tribunal to impair the obligation of a law or to attempt to make a new one. That is out of the question, because it is not a conceivable function of a judicial tribunal in a civilized country. There may be legislatures which prefer to set up tribunals with despotic powers to wave aside legislation which does not please them, but the Imperial Parliament is not such a legislature, nor is the Parliament of the Commonwealth. 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.

Does the function then lose its judicial character when the arbitration is for the settlement of industrial disputes? Clearly the nature of the subject matter cannot destroy that character, and therefore the tribunal is as clearly bound to obey the legislature in an industrial arbitration as in one of the primary kind. The parties may be large organizations of employés on one side,

they may be individual employers or organizations of employers on the other. That does not affect the essential character of the tribunal. Nor is it affected by the fact that the matters for settlement include the future as well as the existing contractual relations of the parties. In this case, again, the tribunal is invoked because the parties cannot agree—are still in dispute; and here, too, the arbitrator can do for the parties that which they might lawfully do for themselves if they could agree; but he can do no more. If either or both of them wish him to decide in contravention of positive law, he remembers that the law binds both him and them, and the appeal is in vain.

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. A Statute can give him no valid authority to annul or dispense with existing legislation unless the legislature which created his office is plainly invested with constitutional power to place that weapon in his hands, and has done so. It would be a strange power to grant or to exercise. But by words in a Constitution too plain to be mistaken it could be given. It was not, indeed, disputed here, any more than it was in *R.* v. *Barger* (1), that legislative regulation of the conditions of labour is reserved to the States as a matter concerning their internal affairs, except so far as it can be brought within one or other of the thirty-nine powers enumerated in sec. 51. Nevertheless, it was argued that the Constitution has, by the sub-section in question, invested the Federal Parliament with such a power—this power of virtual annulment *pro tanto* or dispensation.

The argument that a legislature which has no authority to suspend, displace or abrogate a State industrial law can never-

(1) 6 C.L.R., 41, at p. 69.

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theless entrust such a power to a judicial body of its own creation is somewhat startling. But the Imperial Parliament is of sovereign power, and the argument would be intelligible if there were words in the Constitution clearly and unmistakeably enabling the federal legislature so to equip the tribunal. But that the terms of sub-sec. xxxv. have that effect is a suggestion which could only have been made because something of the sort had to be suggested. The reason advanced for it was that such a power existed in sub-sec. xxxv. because it was necessary to enable the Court to settle effectively the class of disputes committed to it. This argument, however, begs the question. It is not a reason for assuming more than the words of the power themselves leave to be inferred. Before we can say what is necessary to the exercise of a limited power so that the exercise of it may be plenary within its ambit, it is obviously necessary to ascertain the ambit, and the argument has the defect of placing the cart before the horse. We cannot prove the existence of a power co-extensive with our benevolent desires by saying that it would be extremely convenient to have certain results, and that therefore the authority to achieve these is necessarily inherent in the power to be construed. The power to settle disputes by arbitration *according to law* can be fully and effectively exercised without disregarding or dispensing with law. I may be pardoned for this serious statement of the self-evident when it is remembered how strenuously the proposition was contested in the argument. If, as has been shown, the tribunal has not power, in the absence of clear constitutional warrant, to thrust aside State legislation or relieve people of their obligation to obey it, possibly its power is not sufficient to enable the President to cover as much ground with his award as he conscientiously thinks desirable. And, like most powers, it is certain that it is not sufficient to satisfy many estimable citizens. Such considerations may be thought to give reason for a political movement for the enlargement of the tribunal's powers by an amendment of the Constitution. But they afford us no reason for departing from the ordinary rules for the interpretation of constitutional or other Statutes. If the disregard of State legislation were a necessary incident of the power *as a grant and not merely as an engine,*

the argument would be cogent. But one should not really be obliged to point out that a power to set aside a law cannot be implied as a necessary incident of a power founded on obedience to law. It is not by such reasoning as this that we should be inclined to a construction which is wide enough to apply to other federal powers and to other reserved fields of State legislation. If it were countenanced, guarantees solemnly enacted as part of the federal compact would be whittled away, gradually but all too rapidly, on the judgment seat.

But it was further argued that the award of the Commonwealth Court of Arbitration was in effect a federal law, and as such overrode a State law on the same subject matter. For the second part of this proposition, English and American cases were cited, unnecessarily to my thinking, because if the federal award is a valid law, it will prevail by force of sec. 109 of the Constitution. But is it a law ? Here, again, all that is connoted by arbitration is denied or forgotten. The use of that term as it occurs in this power is an assertion of the judicial, and therefore, without more, a denial of the legislative, capacity of the tribunal authorized. The Australian Constitution is no less careful than are other fundamental laws to clearly separate the judicial from the legislative authority and to define their respective functions, and it is too much to ask us to believe that, by the words used in this power, it has sanctioned their collocation in one and the same authority, and that primarily a judicial one.

There is one more argument to which I must advert, and which I thought Mr. *Holman* used with much ability. It rested on the idea of two planes of authority—federal and State. The extension of a dispute beyond the limits of one State, it was urged, lifted it into the federal plane, to which State legislation on the subject matter of the dispute could not ascend, and therefore lost its hold on the disputants. I believe the uninitiated mind experiences some difficulty at first in grasping the co-existence of the two separate spheres of citizenship in a federation; that of the citizen's own State, and that of the united community in which his own State is merged with others. But the new idea now presented is calculated to cause apprehension even to trained political thinkers, if differences in plane are to be added to

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separations of sphere. However that may be, I do not think the suggested elevation of plane will be sufficiently material to put any law-breaker beyond the reach of the law's long arm. There is a difficulty in the way of this argument which is, I think, insuperable. Let there be agitation against a State law—call it a dispute if you will, for present purposes—in State A., and agitation—I mean dispute—against another State law on the same subject matter in State B. The citizens of State A. are bound by the first law, those of State B. by the second. Who is to relieve any one of either set of citizens from his obligation? The fact of his joining an organization of what I may call even six-State dimensions will not do it, for that would be to make the binding effect of the law optional with him. Nor can the President do it, for having no power over any one State law, the existence of several such laws together, all objected to, gives him no greater power. Nor will the mere filing of a plaint by his organization alter the citizen's obligation. The fact is that he who is bound by a law must continue to be bound by it until it is repealed by the same authority which made it, or displaced by paramount authority. The repeal has not been effected, and in this case the Commonwealth has no authority by sub-sec. xxxv. to displace the law. It is to be hoped that well-meaning citizens will not be misled by the offered advantage of selecting their own plane into breaking valid laws, and relying on the award of the Commonwealth Court of Arbitration to save them from the consequences.

I have not referred to the *Woodworkers' Case* (1). By reason of illness I did not sit in that case, which was heard by four Judges, who were equally divided in opinion on this question, and the opinions expressed, full as they were, seem to have been not absolutely decisive as judgments, by reason of the manner in which the question came before the Court. I have therefore endeavoured to discuss the matter without reference to the opinions there expressed in either direction. But I have come to the same conclusion on Question No. 1 as the Chief Justice and my brother *O'Connor* then expressed, and I understand their

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

opinions have not been changed by the argument in the present case. That conclusion is in the negative.

The second question is whether the proposed award, annexed to the case stated by my learned brother the President, would in any of its parts be inconsistent with the determinations of the State Wages Boards. I have already stated the sense in which I understand the word "inconsistent." It may be of advantage to elucidate it further by a passage in the judgment of Lord *Blackburn* in the case of *Garnett* v. *Bradley* (1):—"There is one rule, a rule of common sense, which is found constantly laid down in these authorities to which I have referred, namely, that when the new enactment is couched in general affirmative language and the previous law, whether a law of custom or not, can well stand with it, for the language used is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together. There the general affirmative words of the new law would not of themselves repeal the old. But when the new affirmative words are, as was said in *Stradling* v. *Morgan* (2), such as by their necessity to import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together; the second repeals the first." The determinations of the Wages Boards and the proposed award are couched in the affirmative in respect of the material part of each, the provision as to the minimum wage. None of them prescribe an inflexible rate. The determinations name a minimum, and it is in each case lower than the minimum named by the proposed award. By paying the latter minimum an employer will be obeying both laws. The affirmative words of the award, therefore, do not "import a contradiction" between it and the determinations. It is impossible to say that the employer cannot obey the one without disobeying the other. Therefore, the former and the latter may stand together. Therefore, according to the proper test, they are not inconsistent.

I do not regard the other provisions of the determinations and of the proposed award respectively as affecting this conclusion—those, I mean, as to aged, slow and infirm workers, and those as

(1) 3 App. Cas., 944, at p. 966. (2) Plowd., 206.

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to apprentices. The proposed award introduces its provisions in this regard avowedly as exceptions, by way of prescribing cases in which it may be permitted to pay less than the general minimum. The exceptions may, I think, be more numerous or fewer in the award than they are in the determinations without converting the compatibility of the minimum wage clauses into an inconsistency or without raising such a position between the parallel sets of exceptions.

The Victorian Act, No. 2241, was passed after the hearing, but the special case was by agreement to be deemed to be altered, if that were necessary, so far as to enable us to express an opinion on the effect of sec. 39. I do not think that provision in any way affects the power or jurisdiction of the Commonwealth Court of Conciliation and Arbitration. The Victorian legislature can only release or exempt people from the control of such authorities as are under its own legislative control, as the Commonwealth Court is not. Besides, by the use of the words "unless he has otherwise contracted" the employer is made free to contract as he likes within the laws, and it is exactly this sphere of contractual obligations that is without question open to the Court in the case of such industrial disputes as are within sub-sec. xxxv. of sec. 51 of the Constitution.

In my opinion the second question must be answered in the negative as well as the first.

O'CONNOR J. The questions of the learned President mention "awards" as well as "determinations" of State Wages Boards. It is however with the latter only that we are concerned in this case. State Wages Boards may, as in New South Wales, be empowered to settle industrial disputes, and so make awards between parties. But their more important jurisdiction is to determine for a whole trade, irrespective of any existing dispute, conditions of employment binding on every member of the trade, enforceable by the sanctions and remedies which the several Statutes provide. It is with reference to a possible conflict between those determinations and the proposed award of the Federal Arbitration Court that the learned President has requested the opinion of this Court. In the *Federated Saw Mills*

Case (1) the principles involved in the answer to the first question were fully considered and the views of the members of the Court were stated. After giving every possible weight to the arguments advanced on the present occasion, I find myself unable to arrive at any other view than that which I then expressed (see pp. 510-511 of the report). That view will be the basis of this judgment. Having regard, however, to the importance of the matter and to the fact that additional arguments have now been addressed to us, I shall re-state my reasons.

In whatever aspect the case may be presented the real question for determination is, what are the limits of the power which has been conferred on the Commonwealth Parliament by sub-sec. xxxv., sec. 51, of the Constitution? Applying the well known rules which have on many occasions been expounded and followed by this Court in the interpretation of the Constitution, I shall endeavour first to ascertain the meaning of the language used in the sub-section taken in its ordinary signification. In view of the complainants' contention it is as well to begin by noting that the sub-section does not confer on the Commonwealth Parliament unlimited power to prevent and settle industrial disputes. The prevention and settlement is to be by conciliation and arbitration. There is no authority to apply any other methods. The power is limited to the enactment of laws which will bring those methods into effective operation for the prevention and settlement of industrial disputes extending beyond the limits of any one State. It is not suggested that the use of the expression "conciliation" can throw any light upon the present controversy. The outside boundary of the power is therefore to be found in the meaning of the word "arbitration" as applied to the prevention and settlement of industrial disputes. "Arbitration" in its ordinary sense is the system of determining disputes by a private tribunal constituted for that purpose by agreement of the disputants. Its three essentials are, a dispute, a private tribunal constituted by agreement of the disputants, and a judicial determination of the matter in difference by that tribunal. It follows that in arbitrations known to the common law, or ordinary arbitrations as I shall term them, the source and the limit of the arbitrator's

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

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jurisdiction are to be found in the agreement of the disputants. Very many years ago arbitration as a means of deciding differences between individuals was recognized and aided by British legislation and used for the determination of issues arising under Statutory provisions. A familiar illustration of the latter use is the ascertainment of compensation to owners of land taken under Statutory powers for public undertakings. Another is to be found in the Act 40 Geo. III. c. 90, referred to by Mr. *Duffy*, in which the method was applied to the settlement of disputes between masters and workmen. Most of these Statutes fix the issues and lay down the principles on which they must be determined. They also embody compulsion in this sense, that the party failing to appoint his share of the tribunal is liable to have it appointed for him by the processes of the Statute and, whether he consents or not, the hearing thereafter goes on and the determination binds him. It has never been questioned that the jurisdiction of all such tribunals is bounded by the limits of an ordinary arbitration except in so far as those limits may have been extended by Statute. The most obvious of these limitations is that arbitration tribunals equally with other tribunals are subject to the law, and they have no greater authority than the ordinary judicial tribunals have to relieve parties to controversies before them from obedience to the law. There is thus embedded in the word "arbitration" itself a meaning which fixes the limit of the jurisdiction that can be conferred by the Commonwealth Parliament on a tribunal created under the power to prevent and settle industrial disputes by arbitration. No form of words used in constituting the tribunal can put it above the law, or make it a law unto itself, or clothe it with wider powers than are necessary for the effective application of the arbitral method to the prevention and settlement of industrial disputes. But the application of the arbitral method to the prevention and settlement of industrial disputes in itself necessarily involves an extension of jurisdiction beyond that of an ordinary arbitration tribunal—an extension which as it seems to me has well defined limits. I have pointed out in the *Saw Mills Employés Case* (1) that sub-sec. 35 necessarily implies in a tribunal created in pursuance

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

of its provisions authority to disregard State laws in two respects. An industrial dispute in its nature involves a complaint against the operation of existing rights under existing conditions. The aim of the tribunal charged with its settlement is the establishment of a *modus vivendi* for the future, which in many cases can be achieved only by the modification of existing contracts and the creation of new rights and obligations between the parties. It would be a contradiction in terms to confer the power to settle industrial disputes upon a tribunal powerless to do more than give effect to existing contracts and enforce existing rights. There must therefore be implied from the very nature of the subject matter power in the Parliament to confer on the Federal Arbitration Court authority to enter upon the settlement of an industrial dispute unfettered by any obligation to preserve rights under existing contracts of employment between the parties or to give effect to the laws of the State, statutory or otherwise, by which those rights are recognized and enforced. For a similar reason it must be taken that power is implied to clothe the arbitral tribunal with authority to disregard the award of a State Industrial Arbitration Court which stands in the way of the effective settlement of an industrial dispute within the purview of the federal power. Rights conferred by contract entered into between the parties and rights created by award of a State industrial tribunal in settlement of an industrial dispute between them must stand in this respect on the same footing. The reasons which throw open to the Federal Court for reconsideration the rights of the parties arising out of their contracts must throw open for reconsideration the rights conferred upon them by the State award. It follows, in my opinion, that in respect of the rights of disputants under existing contracts of employment or under the awards of State Industrial Arbitration Courts the language of sub-sec. xxxv. empowers the Commonwealth legislature to clothe the Federal Arbitration Court with authority to disregard any State laws which may stand in the way of what the Court may determine to be the effective settlement of the dispute. Save in that respect Parliament is not empowered to vest in the federal tribunal any more authority to disregard State laws than an ordinary arbitral tribunal would have. As I have already pointed out, the source

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and limit of the jurisdiction of an ordinary arbitration tribunal is the agreement of the parties. The arbitrators may award anything to be done which the parties could agree to do. In so far, therefore, as the parties might by agreement release one another from rights, duties or obligations, arbitrators may disregard laws for securing and enforcing those rights, duties and obligations. Where, however, a Statute directs the doing or prohibits the doing of something, the parties cannot relieve themselves from obedience to its provisions. It follows that in such a case arbitrators could not, by their award, relieve the parties from the obligation to do the thing directed or to refrain from doing the thing prohibited. The same limits of jurisdiction have always been applied to statutory arbitration tribunals, and even to those which the law constitutes without the consent of the parties. It has been necessary thus to ascertain the limits of the authority which Parliament could confer on an arbitral tribunal under sub-sec. xxxv. because the Act constituting the Court empowers it in broad terms to settle the dispute, thus clothing it with all the authority which the Constitution enables Parliament to confer. For these reasons I am of opinion that the Federal Arbitration Court may make a valid award disregarding the rights of the disputants arising under existing contracts or under awards of the State Industrial Arbitration Court and, consequently, disregarding State laws, statutory or otherwise, giving sanction and force to such contracts and awards. In all other respects the award must be in accordance with State laws, except in so far as the disputants might themselves have lawfully agreed to the State law being disregarded.

So far I have based my view of the power which it was competent for the Parliament to confer on the Federal Arbitration Court entirely on the language of sub-sec. xxxv. taken in its ordinary signification. There is, in my opinion, no ambiguity in that language and, therefore, no need to invoke the aid of other portions of the Constitution for the purposes of interpretation. The claimants, however, seek to attach a meaning to the word "arbitration," as used in the sub-section, much wider than the ordinary meaning, and for the purpose of considering their contention I shall assume that the word is capable of the wider meaning.

The question still remains whether it has been used in the Constitution with that more extended meaning. In that aspect of the case it becomes necessary to consider other portions of the Constitution. But before doing that I shall deal with the contention on the language of the sub-section. The claimants' argument may, I think, be fairly summed up in this way. It must be taken that the framers of the Constitution intended the power to prevent and settle industrial disputes by the conciliation and arbitration of a federal arbitral tribunal to be effective, effective in accordance with the Commonwealth view, that is to say, in the view of the arbitral tribunal appointed to exercise the power. Unless, however, that tribunal is free to put into force its own view of what amounts to an effective settlement irrespective of the obligations or prohibitions of State Statutes, the power intended to be conferred cannot be effectively exercised. There arises, therefore, from the language of the sub-section a necessary implication of power to clothe the federal tribunal with authority to override all State laws which may stand in the way of such settlement of the dispute as the tribunal may in its discretion consider most effective. That construction is, in my opinion, untenable for many reasons. In the first place, it gives no effect to the limitations which I have pointed out are necessarily involved in the ordinary meaning of the word "arbitration." Secondly, there is no meaning of the word as used in English which could justify its being applied to a tribunal determining rights judicially, yet emancipated from every law which could stand in the way of imposing its absolute will upon the disputants. But assuming that the word is capable of the wider meaning, it is clear that the construction put forward by the claimants could not be adopted consistently with the partition of powers between State and Commonwealth which the Constitution, in plain terms, has marked out, inasmuch as it would be directly inconsistent with the exclusive right of each State to the control of the conditions of industry and labour within its boundaries. If the Constitution permits the Industrial Arbitration Court, created under sub-sec. xxxv., to be clothed with power to disregard all State Statutes regulating labour, in so far as they may stand in the way of any settlement of an industrial dispute which the Court may think fit to award, there cannot be with-

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in that sphere any limitation of that power. No Court, federal or other, can control the extent to which it may be exercised. Not only was that admitted by the claimants' counsel, but they urged that it would be a legitimate exercise of the power to substitute federal awards for State laws in the regulation of conditions of employment in every trade which became the subject of an inter-State dispute. The exclusive right to regulate its own industrial conditions, except in so far as the Constitution has otherwise provided, is as clearly vested in each State under the Constitution as if it had been expressly conferred. That is a proposition so well established by the decisions of this Court that it may now be taken as beyond controversy. Yet, if the claimants' interpretation of sub-sec. xxxv. is to be adopted, the Constitution has empowered Parliament to create a tribunal which can, whenever the conditions of a trade become a subject of inter-State dispute, disregard all State law regulating its conditions of employment and impose on all engaged in it whatever conditions of employment the tribunal may think fit to lay down in settlement of an inter-State industrial dispute. An interpretation which would lead in time to the complete emasculation of the State power to control its own industrial conditions could not be adopted except under the compulsion of language in the Constitution clearly indicating that such was the intention of its framers. But, as I have pointed out, not only does the Constitution contain no indications of such an intention, but the words relied on are not capable of bearing the meaning which the claimants would put upon them. On the other hand, if the construction is adopted which follows the plain meaning of the language used in its ordinary signification, full meaning is given to the words of the sub-section which confer on the Commonwealth jurisdiction over industrial disputes, yet the States are left in substantial possession of the power to regulate their own industrial affairs. Where the choice is between two such interpretations, it is in accordance with all sound principles of construction to adopt that which best preserves the intention and effect of the instrument as a whole.

I must now advert to a contention put forward by the respondents founded on the use of the word "inconsistent" in

the questions of the learned President. It was urged that, when once a State has by its statutory Wages Board entered upon the field of enacting conditions of employment in a trade, no award of the Commonwealth Court could impose other conditions of employment in that trade irrespective of whether its provisions were or were not in violation of express statutory directions or prohibitions. In support of that position a series of American decisions was quoted to show what amounts to "inconsistency" where State and congressional legislation make conflicting claims to occupy the same field of legislation. In my opinion those cases and the topics which they discuss have no relation whatever to the construction of the sub-section. The principles on which Statute is compared with Statute in that connection have no bearing upon the question whether an award can or cannot stand against a Statute. Within the field of Commonwealth power no State Statute can stand in the way of Commonwealth legislation. But outside that field the Commonwealth tribunal must obey the State law. The question of inconsistency, in the sense in which the words are used in the decisions to which I have referred, cannot arise in cases where the award is to be contrasted with the law to which it must conform. For these reasons the interpretation contended for by the respondents is in my opinion clearly untenable.

In answer, therefore, to the first question of the learned President, which I have already answered incidentally in the course of this judgment, I hold that it is not competent for the Commonwealth Arbitration Court to make an award in contravention of the determination of a State Wages Board except in so far as the persons to whom it applies might lawfully agree to dispense with its provisions. The extent to which the award may in any particular instance be invalid as contravening the Statute can be ascertained only by comparing its provisions with the relevant sections of the Statute. Speaking generally, parties bound by a Statute may lawfully agree to give up rights conferred by it, but in respect of its direct prohibitions or its express directions those to whom it applies cannot agree to relieve themselves of the duty which the Statute imposes on them. That is the only general test which can, in my opinion, be

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applied in determining whether a provision in an award which is not in accord with the determination of a Wages Board is or is not valid.

In answering the second question of the learned President, I would observe that the form of the proposed award makes it unnecessary to enter into much detail in comparing its provisions with those of the determinations of the several States Wages Boards. Its fundamental direction is the fixing of a minimum rate of wage to be paid to all male employés. Then follow conditions for the exception of apprentices, lads under twenty-one not apprenticed, and aged, slow and infirm workers from the general class of male employés. The minimum wage must be paid to all male employés, but certain persons may, by the fulfilment of special conditions, be brought within one of the excepted classes whose minimum wage is fixed at a lower rate than the general minimum wage. If a male worker cannot, by fulfilment of the special conditions, be brought within one of the excepted classes, he cannot be employed except at the general minimum wage. Two questions have been raised as to the validity of the proposed provisions, first, as to the general provisions for the minimum wage; secondly, as to the conditions under which employés may be excepted from the general provision. Turning to the relevant provisions of the Wages Boards determinations in the various States, they all fix a minimum wage below that of the proposed award. It is clear that the award could not fix a minimum less than that expressly directed to be paid by the State Wages Board. It would not be within the power of the parties within the State to so agree, but there is no reason why they should not agree that the minimum should be higher than that determined by any State Wages Boards. As the learned President may award what the disputants could lawfully agree to, his direction to pay a minimum wage higher than that provided by the State Wages Boards would therefore be valid. By reason of the form of the award it becomes unnecessary to enter into comparison between the special conditions enabling workers to come within the excepted classes under the proposed award and the portions of the Wages Boards determinations which relate to those classes. Where the Wages Board

provision expressly prohibits or directs the doing of something, the proposed award, in so far as it disobeys the provision or direction, cannot be valid. The disputants affected by the directions of a Wages Board determination would be bound to obey that determination. In such a case the exception could have no operation, and the employés could not be employed under the proposed award except on payment of the general minimum wage fixed by the award. As to the conditions relating to lads under twenty-one not apprenticed, generally described in the Wages Boards' determinations as improvers, I can see nothing in the conditions of the proposed award which the parties could not lawfully agree to, nothing which contravenes any express direction or prohibition of the Wages Boards' determinations. The same may be said of the conditions as to aged, infirm and slow workers. The position as to apprentices, however, is somewhat different. In all the States except South Australia the adoption of a particular form of apprentice deed is not obligatory. In most of the States certain benefits and advantages may be gained by the adoption of the form prescribed by the Statute, but the relation of master and apprentice may be validly created in any form known to the common law. In South Australia, however, that is not the case. Sec. 97 of the *Factories Act* 1907 prohibits an employer from taking an apprentice except under indentures in the form prescribed by the Act, and it is declared that indentures not in accord with that provision shall be void. The Federal Arbitration Court cannot relieve any South Australian master or apprentice from the obligation to obey that statutory direction which, although not in any Wages Board determination of that State, applies to every apprenticeship in South Australia. It is true that the proposed award recognizes all existing apprenticeships under State laws, but as to the future it proposes to recognize no apprenticeship unless in accordance with the form it has provided. Under these circumstances it is quite clear that under the proposed award, if it remained in its present form, no apprenticeship in the boot trade could for the future be created in South Australia. Fortunately, we are dealing only with the proposition for an award. It is not to be supposed that it was intended to inflict any such

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hardship or injustice on South Australian employers or employés. That is of course a matter for the learned President alone to consider. It is for him, if he so wishes, to find some way of so harmonizing his award with the express provisions of the South Australian Act as to avoid these consequences.

It remains only to refer to the provisions of sec. 39 of the Victorian *Factories and Shops Act* 1909 (No. 2), which was the subject of much argument. It is clear on the face of the section that it leaves the way to agreements between employers and employés as open as it would be at common law. The provision that no person complying with the Wages Board determinations shall be "compelled or compellable" to do other than follow the directions of the Wages Board determination in the matters there mentioned necessarily refers to compulsion by some State law or State authority. It cannot affect one way or the other an award of the Federal Arbitration Court. Taking the section as a whole, therefore, there is nothing in it to prevent in the case of the Victorian Wages Board the application of the test to which I have so often referred—could the provisions of the proposed award which is questioned be lawfully agreed to by the disputants? It would be impossible without following out each provision of the proposed award and comparing it with all the Wages Boards' determinations to answer the second question of the learned President more in detail. But the application to each provision of the proposed award of the principles laid down in this judgment will, I think, afford to the learned President the assistance in law which he has sought in asking the questions submitted. I therefore agree that both questions submitted must be answered in the negative.

ISAACS J. I agree in the result with the decision of the majority of the Court that the proposed award would not be invalid for inconsistency with State law, but not for the same reasons. As the reasons are of the utmost importance, I propose to state my own clearly.

Both the questions submitted assume the existence of an industrial dispute extending beyond the limits of one State, and necessary to attract federal jurisdiction. They also assume that the

proposed award covers only industrial conditions, and those only in actual dispute.

It is not denied that, in the absence of State Statutes enacting for the citizens of the respective States concerned regulations inconsistent with the proposed award, it would be valid and binding upon the disputants.

The first question assumes, for the purpose of argument, that in one or more of the States concerned there are such regulative enactments inconsistent with the award, and the problem it propounds is this:—Is the President in making his award bound to conform to those enactments, at the peril of making an award which the parties are not only not bound to obey, but which they are compelled by State law to disobey?

Being clothed with the jurisdiction and the duty of arbitrating, once he is seised of the dispute he cannot, unless both parties consent, decline jurisdiction altogether and abstain from making some award.

So far as the Federal Act itself is concerned, no question can possibly arise; the doubt raised is as to whether the Constitution warrants it. Admittedly, as appears from what I have already stated, the constitutional power extends over the whole field of the industrial dispute, and therefore, unless jurisdiction is improperly declined, the award must cover it. The President must then either award that existing conditions are to continue, or that some change is to be effected. In the event of the field being clear of State regulations, he would avowedly have no difficulty in any aspect, but in their presence, say the respondents, he must regard them as controlling the parties, and as the supreme existing law in relation to the matters in dispute, and with which he deals, and he must in effect act as an obedient and unquestioning registrar of the State regulations.

As a consistent and necessary corollary they contend further that, even if an award is made at a time when the field is yet unencumbered with inconsistent State regulation, so that it is the true result of the arbitrator's impartial consideration and is an effective binding award, still the States may immediately afterwards undo the whole work, nullify the award, re-create the dispute, renew the industrial dislocation, and again throw the

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people of the Commonwealth into the disorder from which the federal tribunal had rescued them. Queensland might, for instance, prescribe hours different from those which the award declares, and leave wages and other conditions unreferred to; New South Wales might prefer to regulate wages, leaving hours and other conditions unnoticed; Victoria might regulate wages and other conditions, leaving hours untouched. The award, originally binding and harmonious, would then either be nullified everywhere, because according to the primary argument of the respondents each State had taken into its own hands the regulation of the subject matter within its own territory and thereby occupied the legislative field, or else, according to the respondents' alternative argument based on the views expressed by the learned Chief Justice in a previous case, the award would remain in force in all the States, except as modified by the local enactment of each State law.

The first contention annihilates the federal power at a stroke, but is logical and consistent, and is in my opinion the only alternative of Commonwealth supremacy where the two sets of regulations meet; the second, after examining it with all the anxiety that the great authority of its source compels, appears to me to rest on no principle whatever, and when put in practice creates a patchwork and parti-coloured arrangement apparently so unjust in its incidence, and so completely at the mercy of the various States, that I am unable to recognize it as contemplated by the Constitution.

The Imperial Parliament might have empowered the Commonwealth Parliament in general terms to legislate for the settlement of inter-State industrial disputes. If it had, the Commonwealth Parliament could at its discretion adopt any one of the numerous methods which might from time to time suggest themselves. It might in that event have voluntarily selected arbitration. Could anyone then have doubted the supremacy of such a law? Sec. V. of the *Commonwealth of Australia Constitution Act* (covering clause) declares "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges and *people* of every State, and

of every part of the Commonwealth, *notwithstanding anything in the laws of any State.*"

In the case supposed there would have been a law of the Commonwealth, made under the authority of the *Constitution Act*, and its effect would be as set forth.

Can it make any difference, can it render the Commonwealth Act less potent, because the Imperial Parliament has not granted a general power, but has itself selected the one particular method —namely, arbitration—which the Commonwealth Parliament has faithfully followed? Is the Commonwealth Act less a law of the Commonwealth and is the arbitration which takes place by its authority and conformably to its direction less the execution of a Commonwealth law and the Constitution than in the first case supposed? If it is not, by what authority does such an award bind the parties in any case? There is no State law to support it; there is not and never can be any Commonwealth law regulating industrial conditions to support it, the Constitution makes no specific provisions on the subject, and there is therefore no direction or enactment of any Parliament whatever on which the rules prescribed by the arbitrator are founded, in other words, there is no Statute law which he is interpreting and applying, as an ordinary judicial tribunal would have to do; and the common law admittedly does not bind him. If then his determination is not in the nature of a law, just as is the determination of a Wages Board, by what authority is anyone bound by it? There is not in any other aspect a single syllable in the Constitution to give it the least force. The judicial power cannot prescribe rules of conduct, it merely interprets and enforces the specific will of Parliament or the rules of the common law, and has no power to abrogate the one or the other. There is nothing in the Constitution, therefore, which bestows any binding quality on the decree of the federal arbitrator, unless it be the fifth covering section already quoted. If, however, its provisions are for one single instant operative—if under any circumstances, such as the absence of an inconsistent State regulation, they are of commanding authority upon the people of the Commonwealth —it must be because of the fifth section, and solely because they are backed by, and regarded as the pronouncement of the rule

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authorized by, the Imperial Parliament, by means of an instrumentality created and organized by the Commonwealth Parliament under the legislative power granted for that purpose. The argument that, because the Commonwealth Parliament could not make any regulation, neither can the arbitrator, proves too much. If accurate, it destroys the power, because, as the Parliament is incompetent to settle a dispute by prescribing for the parties what wages shall be paid or what hours be observed, neither can the arbitrator. The true position is that the Imperial Parliament has permitted the Commonwealth Parliament merely to create and equip and limit the tribunal and enforce its decrees, leaving to it when created the substantive power of direction, that is, the framing and declaration of a suitable rule of industrial conditions to settle the dispute. The argument referred to is consequently a fallacious guide. And the declaration of the rule being referable to the Constitution alone, that is to the will of the Imperial Parliament, from whom the arbitrator draws his power, and the due organization of the instrumentality being referable directly to the will of the Commonwealth Parliament, which may limit, though it cannot grant or control the power, and neither organization nor adjudication depending in the least degree upon any State law, how in the face of sec. V. can the award be weakened, altered or abrogated, or its effect destroyed by any provision of a State law? I adhere to and reaffirm the opinion I have expressed in several previous cases on the general principle, and as to this question in particular in the *Woodworkers' Case* (1).

It is considered, however, by my learned brothers who have preceded me, that "arbitration" connotes a tribunal, and therefore a decision in conformity with law, and as there can be no Commonwealth direct regulative provision for industry, and there can be valid State regulations for purely internal concerns, it necessarily follows that the federal award is subject to State law. If, therefore, say my learned brothers, a particular rate of wage, or number of hours, be forbidden by State law, a federal award inconsistent therewith is to that extent inoperative; and

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

the test applied is shortly put: "Could the parties have voluntarily agreed to the terms?"

With the most unfeigned respect for the opinion so held, I find it impossible of acceptance. In one sense all arbitration must be in conformity with law, that is it cannot validly proceed in violation of the law that authorizes it, or any superior law. And if there were any federal authority competent to give the arbitrator binding directions as to his decisions he would be bound to conform.

Lawful capacity to agree to what is awarded is undoubtedly, under ordinary circumstances, a condition of validity of the award. But why?

No persons, by voluntarily referring their disputes to arbitration, can annul the law under which they live. They cannot voluntarily set up a domestic tribunal superior to Parliament, with power to absolve either or both from the mandates of the State law to which both are subject, and by virtue of which they assume to empower the arbitrator. That is clear. But what analogy exists between such a case and that where, under the express authority of the Imperial Parliament and independently altogether of State law, there is a tribunal created, duly organized and invested with jurisdiction to compel the attendance and submission of the parties and enforce their obedience? In that case a mandate comes from a source not only independent of but superior to the State itself. Even where the State law creates an arbitrator, it may free him from all other restraint than that imposed by the particular law which creates him.

There is a manifest difference between allowing parties to contract themselves out of an imperative provision considered salutary in the public interest, and permitting or compelling them to approach a public tribunal, which is invested with power to relax the stringency of the regulation if in the public interest it appears desirable. The State may confessedly empower its own arbitration tribunals to determine disputes, even though they concern rates of wages and hours of labour that are beyond the competency of the parties themselves to validly alter by agreement. And in the sense ordinarily attached to such a tribunal it could and would be appropriately called an arbitration tribunal, and its

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direction an award. And if the State may authoritatively do this, still more may the higher power. No limits are assigned in sub-sec. xxxv. unless by the inherent meaning of the word "arbitration." It therefore becomes important to ascertain whether federal "arbitration" under Imperial authority necessarily, from the mere use of that word unqualified, connotes subjection to State law. It is of course idle to predict, to begin with, that so much is reserved to the States. That method would not be interpreting the word "arbitration," it would be a method of prejudging, before approaching, this question, and every other question of federal power. The question is how much is granted by "arbitration," for inter-State disputes, and then the residue, whatever it is, and which is by the express words of the Constitution made subject to it, continues in the State.

Arbitration does not inherently connote a judicial determination in the sense that the determination is controlled by Statute or any law. It denotes simply that the arbitrator in his actual decision of the matter referred to him, whatever its nature may be, is to be guided by his own personal opinion of what is right and wrong, just and unjust; or as expressed in the Digest—"*boni viri arbitratu.*" "*Arbiter dicitur judex, quod totius rei habeat arbitrium et facultatem*"—quoted in *Hunter's Roman Law*, 4th ed., p. 49.

In *Spackman* v. *Plumstead District Board of Works* (1), Lord *Selborne* L.C., after quoting Lord *Campbell's* reference to *Brown* v. *Overbury* (2), in which that learned Lord said the stewards were "arbitrators," proceeded to say, in accordance with what has just been stated, how the decision should be arrived at. These were Lord *Selborne's* words (3):—"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. *He is not a Judge in the proper sense of the word*; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he

(1) 10 App. Cas., 229, at p. 236. (2) 11 Ex., 715.
(3) 10 App. Cas., 229, at p. 240.

must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the Statute if there were anything of that sort done contrary to the essence of justice." There doubtless may be accompanying circumstances which limit the power to determine according to his own opinion. The terms of submission, for instance, may direct him to proceed according to a stated rule, whether law or domestic regulation, or the general law to which he owes allegiance may forbid him or the parties from adopting a desired course. Still, all that is extraneous to the term " arbitration."

In the sense indicated by Lord *Selborne*, and in that sense only, is an award, in its inherent nature, a judicial act. It is because this mode of procedure is inherent in the subject, it is because this differentiates the method of arbitration from that of Parliamentary legislation, that arbitration was selected by the Imperial Parliament as the one and only means of exercising the Commonwealth power in this regard. It was not in order to defeat, or enable the States at will to defeat, the substance of the power and preclude its effectual and perfect exercise that the Commonwealth Parliament was limited to this precise mode of settlement.

Nevertheless, although the term " arbitration " of itself does not necessarily indicate that the decision is a judgment in the ordinary sense, there are some awards which do partake of that nature. And to ascertain them and differentiate them from awards of other character some guiding principle is essential. There is one clear and decisive principle which at once distinguishes between judicial and legislative action.

It cannot, as I have already shown, be sufficient to apply the test of the parties' capacity to agree to the terms in dispute. That, where it exists, is merely an accompanying circumstance, and due to other reasons than the mere fact of arbitration; and to erect it into a vital test is to mistake a concomitant circumstance arising from extraneous considerations into an indispensable and essential attribute. In my opinion the suggested test breaks down when the subject is closely examined and analysed.

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If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable to the case must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties—in other words, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for non-conformity—then the determination that so prescribes, call it an award, or arbitrament, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorizes it. If, again, there are neither present rights asserted, nor a future rule of conduct prescribed, but merely a fact ascertained necessary for the practical effectuation of admitted rights, the proceeding, though called an arbitration, is rather in the nature of an appraisement or ministerial act.

There are some authorities, if authorities were needed, of high character which exemplify the propositions I have stated. As recently as 1908, the Supreme Court of the United States, in a case to which on a former occasion I referred, had to consider the distinction between a judicial and a legislative act. In *Prentis* v. *Atlantic Coast Line Co.* (1), *Holmes* J. whose personal distinction as a lawyer no less than his official position entitles his opinions to the greatest respect, in delivering the decision of the Court, said:—"A *judicial* inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. *Legislation* on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind."

The learned Judge observes:—"That question depends *not upon the character of the body*, but upon *the character of the proceedings*." If this is sound reasoning it answers the conten-

(1) 211 U.S., 210, at p. 226.

tion that, because the body is a tribunal, its determinations cannot be of a legislative nature.

Again in a passage I quoted on a previous occasion he says (1):—"The nature of the final act determines the nature of the previous inquiry."

It is upon such considerations that I agree with the view that the decision of a Wages Board, made under the authority of a law, is of legislative character. It is part of the law of the land, just as is an Act fixing rates of taxation, though the compulsive and enforcement provisions are found elsewhere. As expressed in *Knoxville* v. *Knoxville Water Co.* (2), "the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. *The completed Act derives its authority from the legislature and must be regarded as an exercise of the legislative power.*" The Wages Board determination, precisely like a State industrial award, has just as much authority as, and no more than, the State Act itself.

That exactly fits the present case. The Imperial Parliament might have directly legislated or empowered the Commonwealth Parliament to directly legislate so as to fix future rates of wages, or number of hours, &c., for the prevention or settlement of disputes. It preferred not to do so directly, but to do so by the method of arbitration, when and in the manner selected and with any limitations imposed by the Commonwealth Parliament.

It evidently thought that industrial directions of that nature are more fittingly issued after due inquiry into particular facts depending upon evidence, an investigation for which Parliament is manifestly unfitted, and it therefore entrusted the power—if exercised at all—not to Parliament, but to a special organ for the purpose, one or more arbitrators. That has been said to savour of a dictatorship because the Commonwealth Parliament has chosen one arbitrator, whose position makes him necessarily independent of all contending disputants, and whose training specially fits him for the judicial method of procedure contemplated by the Constitution. But with equal validity the

(1) 211 U.S., 210, at p. 227. (2) 212 U.S., 1, at p. 8.

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Commonwealth Parliament might have chosen to have three arbitrators elected by each party, with another chosen by the six to act in case of equal division, and if all six agreed on the terms of settlement, that is, on terms which should constitute the rule of future conduct of both sides, could it be contended that was a dictatorship? The epithet would—so far as the constitutional argument is concerned—be as applicable in the one case as in the other. But how could it be said that the determination so arrived at was less of the nature of legislation than the determination of a State Wages Board?

Whether done directly by the Imperial legislature or through its immediate agent, the Commonwealth Parliament, if direct power had been given, or through a subordinate agent appointed by the Commonwealth Parliament under express authority, the act of fixing the future rates bears the same character, and none the less because the means selected to secure a fair hearing before the rates are fixed.

The existence of a dispute is immaterial to the eventual character of the result, whether that be styled decision, award or determination. The fact of an industrial dispute only creates the jurisdictional fact; the resulting governmental act is not thereby changed in character, its nature is the same whatever fact originates it. If a dispute is industrial, it is not an ordinary legal dispute, that is, it is not a dispute as to what *are* the rights and liabilities of the parties with respect to past or existing facts. It necessarily looks to the future, and therefore it is not, as I conceive, legally possible to say that all disputes lead to an ordinary judicial decree, and, therefore, that every settlement of every dispute is necessarily an ordinary judicial decree.

A judgment of this High Court declaring the law, and unreversed, is binding on the people of the State. If founded on State law, there is nothing to hinder the State legislature from altering the law so declared. But the State law does not and never can conflict with the judgment, which laid down no new rule of conduct, but simply expounded an old one. The new Act is inconsistent with and overrides the former Statute, but not the judgment interpreting it. A federal award prescribing industrial conditions on the contrary expounds nothing and inter-

prets nothing, but introduces new obligations. This is legislation by means of a subordinate body acting under the Imperial authority, and a State law laying down a different rule is necessarily antagonistic to the award itself. There is not, and never can be, any resemblance between an ordinary judgment and such an award, except in the procedure by which they are arrived at.

The truth is that it is impossible to predicate from the mere use of the word "arbitration" what the nature of the award must be. I have stated and illustrated the distinction between a legislative and a judicial award. There is another example within our reach of an arbitration exercised by a tribunal, under Parliamentary authority, creating new rights and altering old ones, and held judicially to be free from the ordinary restraints of law, and to be in effect legislation. In my opinion, it affords a vast amount of authoritative guidance in the presence case.

When the Imperial Parliament granted the Canadian Constitution by the *British North America Act* 1867 (30 Vict. c. 3), it provided by sec. 142 that the debts, credits, liabilities, properties and assets of Upper and Lower Canada should be referred to the "arbitrament of three arbitrators," one chosen by Ontario, one by Quebec, and one by Canada. In pursuance of these provisions, three arbitrators were duly appointed. After some time, in consequence of disagreements, the Quebec arbitrator resigned, and Quebec revoked his appointment. The other two went on and made their award. Quebec contended that as the Act contained no provision for an award by a majority, nor what was to happen in the case of resignation, nor altering the ordinary common law, the rule applied that the appointment of an arbitrator may be revoked, and thereby the arbitration stayed. Various questions were referred to the Privy Council. The Judicial Committee did not hold that the word "arbitration" in the Constitution connoted all that is usually included in an ordinary case of private arbitration. Their Lordships held, on the contrary, that in that case no party had a right to avoid the arbitration by withdrawal, and that without specific authority to that effect the majority could proceed to make, and did make, a valid award. No formal reasons accompanied the order, but during

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the course of the argument their Lordships made observations, some of which are important here.

Lord *Cairns* L.C. said:—"Is this not a *parliamentary power by which the Provinces surrender certain rights* the one to the other." That is to say, as it appeals to me, the very provision in the Imperial Act authorizing the arbitration was in itself a surrender by the Provinces of all that was necessary to effectually execute it. And so the Commonwealth argues in this case.

Again his Lordship said:—"The consequence of your (Mr. *Benjamin's*) argument is very startling—that it was the intention of Parliament after having provided this very careful organization of machinery, *to leave the whole thing to the caprice of the Provinces with regard to revocation.*" I read in that an observation remarkably apposite to the arguments for the States in the present case, if instead of "revocation" we read "nullification." His Lordship, as to the necessity for unanimity, said:—"You cannot deal with it upon what might happen in the case of a private arbitration, because, though these people are called arbitrators as was pointed out on a former occasion, it is merely because they must have some description. There is *a certain thing to be done* under a certain Act of Parliament by particular individuals named. If they do anything more than they are authorized to do it cannot have any possible effect."

Applying that to the present case, when the Imperial Parliament authorized the settlement of the inter-State dispute by arbitration, it used the term "arbitration" because that was the convenient term given to the process by which the controversies between contending disputants on industrial disputes were always settled. When it empowered the Parliament to pass legislation on the subject authorizing that process to be put in operation and to enforce it, the Imperial Parliament did not adopt the term arbitration merely because it exactly fitted the case of private arbitration, but had its mind set on the only thing that could be effectually done to settle the dispute, namely, determine within the area of the dispute what rates of wages and other conditions of industry should in future be obligatory between those concerned in the dispute. That, to use the phrase of the learned Lord Chancellor, was the "certain thing to be done," and, for the

reasons I have already given, that thing, which is not beyond what the federal arbitrator is to do, is practically and in effect legislation by means of the selected instrumentality.

Lord *Selborne* said "*The use of the word 'arbitration' may mislead.* Is it not a fallacy to say that the Governments of these three Provinces are the persons who refer the thing to arbitration? The Imperial legislature has referred it to arbitration, and surely only the Imperial legislature could revoke it."

Applying these observations here, we may say "the use of the word 'arbitration' as ordinarily applied under State law may mislead. The Imperial Parliament, although through the medium of the Commonwealth Parliament, has primarily authorized this 'arbitration,' and the States consequently are not competent to obstruct it. Only the Imperial Parliament or the Commonwealth Parliament acting by its authority could revoke or lessen the power."

As to whether unanimity was required, the same learned Lord said:—"Is not one reason for the distinction" (that is between ordinary private arbitrations and that under the Act) "*that in the public interest it is necessary the thing should be decided?* Your (Mr. *Bompas'*) *argument would bring it to a dead lock.*"

The same question and the same observation is entirely appropriate, and, as I think, decisive here. The inter-State dispute should in the public interest be settled—not partially settled, or wholly unsettled. And it is to be settled by the federal authority, not by State law. There is no State law applicable to such a dispute, and there never can be. That consideration is pivotal. The respondents' argument leads to a dead lock. These observations of the Privy Council which I have quoted, are to be found in the report in *Cartwright's Cases on the British North American Act*, vol. IV., p. 712, and following pages.

In 1897 and 1898 further litigation with reference to a second arbitration under sec. 142 took place between the Provinces of Ontario and Quebec on the one hand, and Canada on the other, the report of which is found in *Province of Ontario* v. *Dominion of Canada* (1). The question to be determined by the Supreme Court included whether the arbitrators had acted *ultrâ vires* by

(1) 28 Can. S.C.R., 609.

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treating funds as impressed by law with a trust when they were not; and also whether the former award was binding or could be questioned. I shall only refer to one argument of counsel and some of the observations of the Court. It was one of the contentions (1) that the award which was made under the 142nd section became as much a matter of law as the 142nd section itself, that it was binding, and therefore could not be interfered with or questioned afterwards.

The learned Chief Justice, *Sir Henry Strong*, said (2) there would have been a derogation from the Imperial Act if the original award were valid, and if, notwithstanding, the Canadian Parliament and the two Provincial legislatures had empowered the second set of arbitrators to award a certain improvement fund to Ontario, "for," said the learned Chief Justice, "in that case" (that is, in the case of the original award being valid) "the right of Ontario to that fund is to be considered to be established just as it would have been if the 142nd section of the *British North America Act* instead of delegating the apportionment and adjustment to arbitrators had embodied in terms the same distribution of these funds as that which was made by the award of 1870."

Then as to whether it was *ultrâ vires*, the learned Chief Justice says (2):—"The arbitration or (as it is called in the Statute itself) the 'arbitrament' of 1870 *was a statutory proceeding not subject to the general rules of law applicable to private arbitrations.* The persons to whom the authority to exercise the power conferred by sec. 142 was given were designated as arbitrators merely by way of convenience in expression." His Honor cites also the words of Lord *Cairns* L.C. (3):—"These gentlemen were executing a parliamentary power. It is not as if it was a private arbitration under a private instrument," and so on. Again the learned Chief Justice says (4):—"*The arbitrators were sovereign judges of all questions of law and fact in all matters within the scope of the authority given them by the Statute.*"

Then his Lordship observes (5):—"The arbitrators finding these assets which they had to deal with to be the joint property

(1) 28 Can. S.C.R., 609, at p. 760.
(2) 28 Can. S.C.R., 609, at p. 816.
(3) 28 Can. S.C.R., 609, at p. 817.
(4) 28 Can. S.C.R., 609, at p. 820.
(5) 28 Can. S.C.R., 609, at p. 821.

of the two new Provinces, treated them impliedly as impressed with a trust which *as the final judges both of law and fact* it was within their power to do," &c.

The foregoing opinions of the Privy Council and the Supreme Court of Canada, if accurate, and I respectfully agree with them, seem to me fatal to the contention that arbitration under the supreme authority of the Empire connotes obedience to the Statute law of a subordinate jurisdiction, and that the award of the arbitrator under the supreme law cannot rise higher than a judgment arrived at under the ordinary judicial power.

The two concluding extracts are also recognitions of the principle that arbitration in its inherent signification denotes merely the opinion of the arbitrator. An English case, in which an arbitration "tribunal," as *Turner* L.J. terms it, was held by reason of its public character and the nature of its functions to be unbound by legal rules or principles is *Newry and Enniskillen Railway Co.* v. *Ulster Railway Co.* (1). I do not refer more particularly to that case because it is precisely in line with the Privy Council reference from Canada, and the Canadian Supreme Court already quoted. These three precedents of the English Chancery Appellate Court, the Supreme Court of Canada, and the Privy Council, are not controlling—the latter because the Act is not the same—but they are, I apprehend, strongly confirmatory of the views I have ventured to express.

The notion of freedom to contract under State law with reference to the matters brought to the federal tribunal I have shown on principle to be foreign to the case of arbitration under sub-sec. xxxv. But there are additional considerations deducible from the Constitution which confirm this view. There is no use of the word "tribunal," or any expression indicating a body bound to interpret or follow existing law. There is nothing whatever in the Constitution to suggest ability to agree as a condition of binding power. If agreement, actual or implied, were a *sine quâ non* of a valid award, then legal incapacity to agree might be important. But the animating spirit, as well as the natural signification of the words of sub-sec. xxxv., is the preservation or restoration of industrial peace, and the sub-section

(1) 8 DeG. M. & G., 487.

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authorizes federal intervention, not simply to determine private differences between an employer and his employés and make a scale of rights and liabilities to operate merely for their exclusive benefit, but in the interest of the whole general population to avert or end disastrous industrial disorganization. From the standpoint of the Constitution the immediate combatants, numerous as they may be, are not necessarily even the chief objects of regard. Except to protect the general public dependent upon the peaceful and orderly continuance of industries which have an Australian operation and an effect upon that inter-State commerce placed directly under federal control, there could have been no moral, and there would have been no legal, warrant for federal control of any industrial quarrel. A coal strike in one State, for instance, entails severe loss to employers and employés while it lasts; yet each side sees or thinks it sees for itself eventual and compensating advantages. It is the non-combatants, the rest of the community, who after all suffer most. Nevertheless, so long as the dispute is in its existence or imminence confined to one State, that State alone has jurisdiction to deal with it, and the law of that State is the only law applicable to the disputants, the Commonwealth having no jurisdiction to interpose. But when the quarrel attains national proportions, when the laws of that State and other States—probably discordant—prove powerless either to still the strife or restrain its extension, when the other States are directly involved in the actual dispute itself, and the whole industrial and domestic system of the Continent is deranged, when internal trade is everywhere obstructed, and inter-State and foreign commerce impeded and imperilled, is it conceivable in such a crisis that the Commonwealth power, admittedly operative in those conditions, and conferred in such broad comprehensive and unrestricted terms, is, at the caprice of the States, possibly of one State against the will of all the rest, to stand in danger of paralysis and defeat? And is it to be liable to this capricious paralysis and defeat by the application of a doctrine which is unstated in the Constitution, unless silently included in the word "arbitration," which overlooks not merely the primary import, but the very soul of the enactment, which disregards everything and everybody except the individual disputants, and

regards even these from the standpoint of two ordinary private litigants seeking under State law a voluntary arbitration in order to determine some trivial matter in dispute affecting no one in the world but themselves?

For such a construction of the Australian Constitution, presenting the most attractive facilities to the several States to place insuperable obstacles in the path of national action when national interests are most in danger, I should require the plainest and most unequivocal, almost imperative, language. For nothing is easier than for a State to create statutory prohibitions which by the hypothesis are to prevail over and supersede the federal award.

But why, if the principle is sound, should this paramountcy of State law be limited to its Statutes?

If the federal arbitrator, like an ordinary tribunal enforcing the law, is bound by State enactments, he must in all reason be equally bound by its common law, which is a State domain of authority as sacred as any legislation. Common law, so long as it is in force, is "the law of the land," and has always been so regarded since that phrase found its historic place in the chief article in Magna Charta. Looking through but one volume of the reports of the highest authority (14 Appeal Cases) we can see repeated several recognitions of the fact. See, for instance, pp. 206, 267 and 291. Lord *Brougham*, in *Birtwhistle* v. *Vardill* (1), speaking of another question, but with equal applicability to the present one, said:—"The English rule being statutory can make no difference. A fixed and known principle of the common law has exactly the same force as a statutory provision." The common law of the State makes it unlawful to break a contract, and certainly forbids anyone else to prevent the parties from observing it. By what right does the federal arbitrator coerce the parties to an agreement to depart from it? Only by the right accorded by sub-sec. xxxv. But no ordinary tribunal can do that. If the federal arbitrator can do that, it demonstrates he is not bound by State law. And by what right does he further impose a new rule of conduct upon the parties, and award penalties for disobedience? Only by the same right. Still less can any ordinary

(1) 2 Cl. & F., 571, at p. 593.

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tribunal do that, and still more is his freedom from obedience to State law demonstrated. What becomes of the whole argument? It is nothing to the purpose to defend this on the plea that the parties *might* have agreed to break their own contract, and to form the new one. In fact they did not do either. In fact they did not agree to arbitrate at all. In fact one party, and perhaps both, may be found objecting to the new regulations. How can the recognition of the arbitrator's power to effect so much be reconciled with his status as a mere ordinary tribunal bound to observe the law already existing? The question is not what the parties can do, but what he under his parliamentary power can do. Can his admitted power be supported at all except on the basis of his decree being the completed enactment of a law passed, not by the Commonwealth Parliament, but by the Imperial Parliament? It occurs to me that, if ability to agree is an essential element, so is the actual fact of agreement, and therefore the only arbitration permitted by the Constitution is voluntary arbitration, and the whole of the present Act ought to be held invalid. If that is not so, why give controlling weight to ability to agree?

Further, if we may, for the sake of argument, possibly suppose the award to be an ordinary judgment only, by what process of reasoning can it even be held to be superior to or supersede the award of a State, or any ordinary judgment of a State? It would in such case—unless given predominance by sec. V.—stand merely as a co-ordinate judicial determination, no lower and no higher than any State decision. It is not appellate, and by the hypothesis it is not the interpretation of the Constitution, and it is not the interpretation or enforcement of any Commonwealth law. How then can it claim superiority even over a State award if that award is a judgment? Apart from some controlling provision, the Federal and State Courts stand merely on a basis of comity as if they were in entirely separate territories. So in America, see *Palmer* v. *Texas* (1). If therefore a State industrial tribunal has given an award of the same nature as the federal award, though in an inter-State dispute, then if the federal award be not a legislative, but a mere judicial act, I know of no reason for attributing to it any greater force

(1) 212 U.S., 118, at p. 125.

than to the State award. If, however, covering sec. V. gives to the rule declared by the award a binding force, notwithstanding the laws of any State, there is an end of the respondents' case.

Sec. 109 of the Constitution confers paramountcy on Commonwealth laws, but to apply that section you must assume the award has the force of law, that is the force of the law which authorizes it. Once that is conceded, again the respondents' case is at an end, for the reasons stated in *D'Emden* v. *Pedder* (1), commencing with the reference to the maxim *quando lex aliquid concedit*, &c. If the power is given to the Commonwealth it is immaterial by what selected functionary it is exercised—the power is the same. The same view is enforced in the recent case of *Keller* v. *United States* (2), where the American Supreme Court approved of the doctrine that the police power of the States, "*like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation*," and said:—"Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon *the powers of the General Government*, or rights granted or secured by the supreme law of the land." Observe, there is no distinction drawn between *powers* of the general Government whether they are judicial or legislative.

I ought to advert to a distinction suggested that a Statute is a positive law and therein differs from the common law. The distinction will not hold because the common law is positive law equally with an Act of Parliament (see *Austin's Jurisprudence*, vol. II., pp. 550 *et seq.*)

In truth, there is no resting place between the main view advanced by the respondents and the federal view presented by the claimants and the Commonwealth. It is altogether a question of competition, not of powers, but of predominance. Conceding to the Commonwealth the fullest power to operate on the field of inter-State industrial disputes so long as no State Statute expressly or impliedly inconsistent with the federal award comes into activity, they yet contend that the moment such a Statute appears, though subsequent to the award, the State enactment

(1) 1 C.L.R., 91, at pp. 109, 110.

(2) 213 U.S., 138, at p. 146.

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prevails. And regarding this claim, not as a delimitation of powers, but a plain open claim of paramountcy between two powers of which the limits are conceded, I conceive that to give effect to the contention of the respondents is to reverse the fundamental law of the Constitution and to pave the way for the total annihilation of the power conferred by sub-sec. xxxv. of sec. 51.

I therefore answer the first question in the affirmative regardless of any State law.

As to the second question, if I am wrong in my opinions already stated, I am disposed to agree with the main view presented for the respondents, namely, that supposing the State predominance to be established at all, any State Act which expressly or by necessary implication assumes to occupy the field, whether the regulations it affirmatively enacts be many or few, is inconsistent with any federal award whatsoever. If the State appropriates the ground, and expressly or impliedly declares it to be its sovereign will that on that area it desires only the specific rules it thinks fit to make, then the least entry upon that area by the federal arbitrator is an unwarranted intrusion, and inconsistent with the "law of the land." He has no right to come in the guise of arbitrator, and lay down a binding rule of conduct from which the State has protected its people by the legislative declaration of its supreme will.

If this be not inconsistency, I agree with learned counsel for the respondents, it would be difficult, and perhaps impossible, ever to hold a State law inconsistent with the federal law on the ground of complete occupation of the field, though the latter assumed to lay down exhaustively its code of regulation under any concurrent power. So long as the Commonwealth Act did not declare any given further act unlawful, the State law, if this principle be not sound, could supplement what was intended to complete.

But if the true test of inconsistency be whether the parties could, without actual breach of the prohibitions of the State law, voluntarily perform the act commanded by the federal award, then I agree there is no inconsistency between the proposed award and any State law up to the present moment. The latest Victorian Act on the subject, indeed, seems to be intended to

annihilate the federal power for the future, and to abolish existing awards, at least so far as concerns obligations of employers in that State.

The verbiage of sec. 39, however, falls short of that intention, but the way is still open, and not hard.

I concur in answering the second question in the negative.

Higgins J.

HIGGINS J. As for question 1, I have considered the whole subject afresh, and I find myself only confirmed in the opinion which I expressed in answer to questions 5 and 5A in the *Federated Saw Mill Employés Case* (1).

There is no doubt that the Federal Parliament intended the Federal Arbitration Court to have the power to make an award which should prevail over any State Wages Board determination, for the Act which creates the Court says so in express terms (sec. 30). The question, therefore, is merely, is sec. 30 of the Federal Act *ultra vires* of the Federal Parliament?

It is also clear that if the Arbitration Court has not this power, it cannot effectively settle disputes—disputes of the two-State character. There is an excellent concrete example in this very case of bootmakers. For the late Court of Arbitration of New South Wales, under the presidency of Judge *Heydon*, found that the employés were entitled to a minimum wage of 9s. per day (as I also have found), but said that 8s. must be awarded, inasmuch as Melbourne manufacturers were not obliged by the Victorian law to give more than 8s. The learned Judge pointed out that the Federal Court could do justice, but that the State Court could not. I have also had a case in which the employés were willing to have their dispute settled on the basis of ordinary pay for Sunday work, if 48 hours in the week were not exceeded, but it turned out that, under the Victorian Wages Board determination, all Sunday work had to be paid for at the rate of time and a half. The Wages Boards of the several States vary considerably in their determinations, and how can the Federal Court settle a two-State dispute in a manner just to the competing employers of the States concerned, or so as to induce

(1) 8 C.L.R., 465, at p. 544.

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contentment among the employés, if it is to be fettered by the varying State determinations within the several States?

The position under the Constitution seems to be simple enough. The Federal Parliament has had power conferred on it by the Imperial Parliament to make laws for the peace, order and good government of Australia with respect to arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. It is admitted that under this power the Federal Parliament can, if it think fit, create an Arbitration Court; and I do not understand it to be denied that the system of arbitration chosen may be the compulsory system—the system which was so keenly discussed at and before the enactment of the Constitution (see *e.g. Bliss's Encyclopædia of Social Reform*, 1897). Now, the Court has been created; and the Federal Parliament has given to it power to hear the dispute and to make an award, and has provided for the enforcement of obedience to the award by penalties. By covering clause V. of the *Commonwealth of Australia Constitution Act*, all laws made by the Federal Parliament under the Constitution are binding on the Courts and people of every State "notwithstanding anything in the laws of any State"; and by sec. 109 of the Constitution "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." The conclusion appears to be irresistible that the federal award must prevail over any State law.

But, it was urged, the award of the Arbitration Court is not a law of the Commonwealth. It is true that it is not an Act of the Federal Parliament; but it is a rule of conduct imposed on the parties to the dispute by virtue of a Federal Act. The Federal Act, *plus* the award made under it, together constitute a law (*Powell* v. *Apollo Candle Co.* (1)). As *Holt* C.J. said of the by-laws of the London Corporation:—"Every by-law is a law, and as obligatory to all persons bound by it, that is, within its jurisdiction, as any Act of Parliament" (*City of London* v. *Wood* (2)). The word law, in a concrete sense, means "any particular rule, having the nature of law in the abstract sense, which is especially prescribed by the supreme power in the State, or by

(1) 10 App. Cas., 282, at p. 291.

(2) 12 Mod., 669, at p. 678.

some person or body having authority for that purpose, though not generally supreme"; and law in the abstract is "the sum of rules of justice administered in a State and by its authority" (*Pollock, First Book of Jurisprudence*, 2nd ed., pp. 15-17).

Whenever a valid order is given,—whether by a judicial or by a legislative or by an executive authority—in pursuance of an Act, that order—at all events if it prescribe a rule of conduct for judicial enforcement—is a law to the persons to whom it is addressed, be they many or few. It is admitted that a Wages Board determination is a law of the State. The Wages Board can say "The minimum wage payable, &c., shall be 8s." The Arbitration Court's award may be in precisely the same terms. Neither the Wages Board nor the Court could exist without the Acts behind them; why call one order a law and the other not? It would probably be incorrect to say that the Wages Board makes laws, or that the Arbitration Court makes laws. It is the State Act that gives the character of a law to whatever the Wages Board prescribes, and it is the Federal Act that gives the character of a law to whatever the Arbitration Court prescribes. The command of an agency of the Federal Parliament, at all events if it prescribe a rule of conduct, is a federal law; and it can make no difference that the Federal Parliament cannot settle a dispute itself, but must settle it through some arbitration agency. There would be no meaning in the gift of supremacy to Federal Acts unless that which is done under the Federal Act is valid as against that which is done under the State Act. I am inclined to think, also, that the same result, the subordination of the provisions of the State Wages Board determination to the provisions of the federal award, would follow if we applied the provisions of sec. 2 of the *Colonial Laws Validity Act* (28 & 29 Vict. c. 63); for the Federal Parliament is the donee of a power to establish a Court of Arbitration, and the award is an "order or regulation made under the authority" of the *Commonwealth of Australia Constitution Act*—a British Act. But the point has not been argued.

It is said, however, that arbitration in itself connotes subjection to the existing laws. It is quite true that arbitrators are bound by the law which creates them, by the whole body of law

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from which they derive their powers. They cannot use that part of the law which enables them to act and ignore the directions of the rest of the law. But arbitrators are not bound by any other law than their own—the law which creates them. A British arbitrator is not controlled by French laws. A federal arbitrator is not controlled by State laws—he is bound by the Australian law only, the law which creates his office, appoints him, and defines his powers. This subjection to his appropriate law, however, is not owing to any connotation of the word "arbitration." So far as connotation is concerned, I find rather the opposite idea, of freedom from restraint of law, as in the word "arbitrary" from the same root, and as in the use of "arbitrator" in the civil law. The duty of an arbitrator to obey the law which creates him is to be attributed rather to the fact that in any scheme of law one part of the scheme is as binding as the other. Instances could easily be found of arbitrations where subjection to State laws is an impossible connotation. In the Alabama arbitration, the arbitrators overruled Lord Chief Justice *Cockburn's* plea that under British law the British Government had no power to take those steps which the United States urged ought to have been taken. Again, if there were a dispute between Greece and Turkey as to a boundary, and if the laws of each country differed as to the lines of boundary, and titles to land had been issued in accordance with these differing lines; the arbitrators would not be bound by the laws of either State. The ordinary officials of each State would have to obey the laws of their respective States, but the arbitrators would not be under any such obligation. Nor is it any answer to say that such arbitrations as these depend upon agreement, for the question is what the word "arbitration" *necessarily* implies or connotes. My view is that the Federal Arbitration Court, acting in its federal functions, must obey the federal law, and not any State law. In the *Commonwealth Conciliation and Arbitration Act* 1904 the powers of the Court are defined and limited, not only as to the mode of procedure, but as to the nature of the award that may be pronounced, and as to the penalties that may be imposed. The powers of the President are certainly great, and his responsibilities are even greater; but he is restrained in his action by the direc-

tions of this Act, and of any other relevant Federal Act. The Federal Parliament may even forbid him to act without assessors, or it may further limit or qualify his powers. But there is not, in my opinion, any ground for the statement that "arbitration" connotes subjection of the arbitrator to State as well as to federal laws, or that it involves a duty to serve two masters instead of one.

It has to be remembered that, though the Arbitration Court is a Court, and a Federal Court, it has a function which the ordinary Courts of law have not. It does not, as the High Court does, as the Supreme Courts do, declare and apply the existing laws; it prescribes rules of conduct between master and men; it prescribes what agreements may be made. The High Court, in dealing with a State appeal, decides according to the State law, whereas the Court of Arbitration, in dealing with a two-State dispute, practically lays down (by virtue of the Constitution and the *Arbitration Act*) a law for the guidance of the parties in their conduct. It is admitted, as I understand from the *Federated Saw Mill Employés Case* (1), that the Arbitration Court can even override existing agreements, and existing State arbitration awards (as distinct from Wages Board determinations). This power to override State law is not found in the law Courts, and, if there is power to override any State law, what right have we to fix a limit? Where is this limit found expressly stated? Where is it found by necessary implication? If the power to override agreements and awards is merely to be found in the nature of the case—because the power to settle disputes could not be effectually exercised without it—then it is easy to show that two-State disputes cannot be settled if the arbitrator has to obey the differing laws of two or more States. But the simple answer is the true answer—there is no limitation of the federal power of arbitration to be found in the State laws, but only in the federal laws.

As for the suggestion that the Federal Court can make a valid award to the extent only that the parties could bind themselves by agreement under the State laws, I can only say that it is ingenious, but that we have no right to import such a distinction

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

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into the Constitution. There is not a word to favour it in the oft-quoted phrase of sec. 51 (xxxv.), or anywhere else in the Constitution. Moreover, how is this distinction consistent with the admitted power of the Federal Court to override State awards? And if I may be allowed to use the "argument from inconvenience," which, we are told, *plurimum valet in lege*—if we are not, unless absolutely compelled, to attribute a nonsensical meaning to the Federal Convention and to the British Parliament—why should we adopt a construction which enables the Arbitration Court to award a greater minimum wage, but never a less minimum wage than that prescribed by the State Wages Boards? For, under the suggestion, the Court could give a greater minimum than the State determination, but it could not give a less minimum.

The key to the position, indeed, lies in this undoubted fact that no State laws apply, or can apply, to two-State disputes; and it was just because no State law could deal with the conditions of employment in other States that power was given to the Federal Parliament to do so by its agent. If the State laws do not apply to two-State disputes, the official, or officials (for the Federal Parliament might have created a Board) who have to deal with such disputes, need not obey the State laws.

This power as to two-State disputes is a special power that, as it were, cuts—like the inter-State commerce power—across all the reserved powers of the States. It can only be exercised when the disputes are so formidable and widespread as to extend to more than one State, when the Wages Boards and other devices of the States are incompetent to deal with the dispute. It is not primarily a power to fix conditions of labour—it is a power to settle disputes; but if, for the purpose of settling a dispute, the Federal Court finds it necessary to fix labour conditions, it can do so; and its award, by virtue of the provisions of the Constitution, prevails over any regulations of labour made by the State on the lower plane. In other words, as the laws of the several States concerned as to wages and other conditions of labour have failed to prevent the dispute and cannot settle it, the federal law steps in with its machinery created under the Constitution; and the federal machinery cannot be controlled in its action by any State

legislation framed for other circumstances. If the State of Victoria enacted that the Agricultural Show Day should be a public holiday, and expressly applied it to all Courts including this High Court, I venture to say that the High Court would not be bound by the Act. I accept, as being precisely applicable to this case, the propositions laid down by the learned Chief Justice in *D'Emden* v. *Pedder* (1). "The Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself. . . . . When a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative." These expressions were used with regard to the claim of a State that a federal officer should obey the State law as to putting a 2d. stamp on his receipt for salary —where the obstruction of federal action was only trifling and theoretical. Much more confidently may the doctrine be invoked in this case, where the Court of Arbitration cannot effectually settle a dispute without being free to prescribe a uniform system for employers and employés in States which have differing labour laws. What is the Arbitration Court to do if it find that the minimum wage in New South Wales is 9s., in Queensland 7s., and if it find that in order to effectually settle the two-State dispute it ought to prescribe (as part of a complete system of hours and wages), a minimum of 8s. for both States?

So far as I can find, the decisions in the United States are in favour of the view which I have taken. The President is the Chief Executive Officer, and he has command of all the forces. Under an Act of Congress he issues an order commanding the militia of a State to assemble at a rendezvous. If that order is disobeyed, it is treated as disobedience of a federal law. This was assumed by counsel and Judges in the keenly argued case of *Houston* v. *Moore* (2). Take the case of patents. An officer—executive or judicial—makes a grant of a patent under an Act of

(1) 1 C.L.R., 91, at pp. 110, 111. (2) 5 Wheat., 1.

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Congress. The grant in effect forbids other persons to make, use or vend the thing patented. This is, in effect, a law imposed by the United States on other persons; and, by virtue of the supremacy of the federal law, the patent is not subject to the anti-trust laws of the State of Illinois. The officer who grants the patent has not to consider the State laws at all: *Columbia Wire Co.* v. *Freeman Wire Co.* (1). Finally, an order of the Inter-State Commerce Commission, made under the Inter-State Commerce Acts, is treated as paramount to a law or regulation made by any State: *Gulf, Colorado and Santa Fé Railway Co.* v. *Hefley* (2); and the regulations made by this Commission are, whether rightly or wrongly, regarded as executive acts: *Prentice and Egan, Commerce Clause*, 289. A regulation made by our Federal Arbitration Court, under its power to settle inter-State disputes, must be treated similarly. As for the Canadian authorities, they are practically summed up in the recent case of *Compagnie (La) Hydraulique de St. François* v. *Continental Heat and Light Co.* (3). There, the appellant had, under an Act of Quebec, the exclusive right of selling electricity within thirty miles from a certain village. The respondent had under an Act of the Dominion a general right of selling electricity. The appellant contended that the legality of the respondent's action in any Province must be dependent on the law of that Province—just what is contended for here. But it was held by the Judicial Committee of the Privy Council that where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province, if the two are in conflict. This case, it is true, is not a case of a law operating through an official's order, but it cannot be doubted that the decision would be the same if the respondent's rights did not arise except on a proclamation by the Governor-General or on a *Gazette* notice published by a Minister.

My answer to the first question is therefore in the affirmative, and, if this answer be accepted, it is unnecessary to answer the

(1) 71 Fed. Rep., 302.
(2) 158 U.S., 98.
(3) (1909) A.C., 194.

second question. Perhaps the first question should rather be shaped thus:—"When an award of the Arbitration Court under its constitutional powers meets and collides with a State Wages Board determination made under the State powers, does the award prevail?" But I framed the questions in accordance with the language used in the *Federated Saw Mill Employés Case* (1).

Assuming, however, that question 1 is not answered in the affirmative by the majority of the Court, and that the Arbitration Court is to be confined to the area which each State chooses to leave open to argument, I concur in the opinion that there is nothing in the proposed award inconsistent with any of the State Wages Board awards or determinations. For the only substantive part of the proposed award is the direction as to the minimum wage, the other provisions are merely by way of exception to the minimum wage. The direction as to the minimum wage is not inconsistent with the directions of the State Wages Boards as to a lower minimum wage, for obedience to the former is consistent with obedience to the latter, and the enforcement of both laws does not expose a person to a conflict of duties. There is merely an additional duty, not an inconsistent duty. Then the other provisions—as to apprentices, as to lads under sixteen, as to aged, slow and infirm workers—are merely means by which an employer may get rid of the burden of having to pay the minimum wage; and if an employer do not choose to avail himself of these means, he is under no penalty, he merely falls back on his duty to pay the minimum wage.

Some difficulty has been caused by the peculiar provision of the South Australian *Factories Act* 1907, sec. 97 (3), which forbids any form of indenture of apprenticeship except that prescribed by the State Board; and this form of indenture, as set forth in the *Gazette* produced to us during the argument, is not the same as that set forth in the proposed award. There was no such form of indenture put in evidence before me; and, in my opinion, the Court of Arbitration is not, nor is this Court, bound to take judicial notice of every announcement that appears in every State *Gazette*, if not put in evidence. No question as to the effect of this section of the South Australian Act arose

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

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before me within sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904; and I did not ask any question as to inconsistency as between the State Acts themselves and the proposed award. I say this to avoid misunderstandings in the future; for I am glad that my learned colleagues are prepared to give me the benefit of their opinion even on a matter which does not strictly come within the terms of the special case. I concur in the view that there is no inconsistency, in the legal sense, between sec. 97 (3) and the proposed award.

But the greatest surprise of the argument was the production of an amending *Factories and Shops Act* of Victoria, No. 2241, passed 4th January 1910, after I announced my proposed award, passed while this special case was pending before this Court. Sec. 39 was admittedly drafted with the view of showing that the legislature of Victoria intended to monopolize the whole field of labour legislation affected by Wages Board determinations, and to prevent the application of the federal powers of arbitration. The provisions of this section, if successful in their object, would have utterly overthrown the claimants' case; and yet there is not even a saving of the rights of existing litigants. Of course, the legislature can interfere by law with existing litigation; but such a course is, to say the least, most unusual and unprecedented. However, we are bound to treat the Act as a valid Act of the State of Victoria, and to find its effect; and I much prefer to take the opinion of the Full Court now than to have to decide the matter when it comes before me in due course in the Arbitration Court. I take the simple view that no Act of any State can prejudice the rights of the Federal Parliament and of the Federal Arbitration Court under the Constitution; that whatever the Federal Court could do before the Victorian Act, it can do after it; that it can act freely in pursuance of the federal law "notwithstanding anything in the laws of any State" (*Commonwealth of Australia Constitution Act*, covering clause V.). In the face of the express provisions of the Constitution with regard to the supremacy of a federal law, this effort of the State Parliament to put a bound to the operation of the Federal Act is, to my mind, a *reductio ad absurdum* of the respondents' argument.

My answer to the first question is Yes; and to the second No.

Questions answered accordingly.

Solicitors, for the claimants, *C. S. Beeby & Moffatt.*

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

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

Solicitor, for New South Wales, *J. V. Tillett*, Crown Solicitor.

Solicitor, for Victoria, *Guinness*, Crown Solicitor.

B. L.

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AUSTRALIAN BOOT TRADE EMPLOYES FEDERATION *v.* WHYBROW & CO.

[HIGH COURT OF AUSTRALIA.]

JAMES LESLIE WILLIAMS . . . APPELLANT; DEFENDANT,

AND

WILLIAM BOOTH . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *March* 31; *April*, 1, 4, 14.

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

Crown grant—Construction—Intention of parties—Grant of land bounded by salt water lagoon—Inlet of sea—Right of riparian owner—Medius filus rule—Sea bottom—Accretion—Alluvium.

By Crown grants issued in 1819 and 1834 the Crown granted to the plaintiff's predecessors in title two adjoining parcels of land, which were separated by a salt water lagoon, situated near the sea. The boundaries of the land granted, so far as material, were described as, in the one case, "to a salt water lagoon and on all other sides by that lagoon and the sea," and in the other case, "to Dewy lagoon, on the north by that lagoon to the sea." The lagoon was separated from the sea by a sand-bar. At certain seasons and tides there was an open channel between the lagoon and the sea, through which the tide

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ebbed and flowed, while at other times the channel was closed by the sand-bar, until the waters of the lagoon, being swelled by rain, cut through the bar and restored communication with the sea. Prior to 1860 the channel was more often open than closed, but in recent years it had been more often closed than open.

Held, that having regard to the subject matter of the grant and the description of the boundaries, it was the intention of the parties that the land granted should not extend beyond the margin of the lagoon, and that this intention being clearly expressed, the then actual nature and condition of the lagoon was immaterial.

Held, also, that the *medius filus* rule is not applicable to marine lagoons, and that if it were so applicable, the fact that such lagoons are substantially part of the sea, and may be of public use for the purposes of fishing and navigation, would exclude the application of the rule in the present case.

Held, further, that even if the channel were now permanently closed to the sea, no case of accretion had been made out, and any addition to the soil of the grantee directly caused by each closure could not have been imperceptible.

Decision of *Street* J., *Booth* v. *Williams*, 9 S.R. (N.S.W.), 592; 26 W.N. (N.S.W.), 113, reversed.

APPEAL by the defendant from the decision of *Street* J., by which it was declared that the Crown had no right, title, or interest to the lands described in the statement of claim, and that as against the Crown the plaintiff was entitled to be registered under the provisions of the *Real Property Act* 1900 as proprietor of the said lands.

The facts are sufficiently stated in the judgments hereunder.

Knox K.C. and *Bethune*, for the appellant. At the date of the grants the bed of the lagoon was sea bottom, and no presumption applies as to the extension of the boundary of the grant beyond the edge of the lagoon. Where in a grant by the Crown the land is described as bounded by a salt water lagoon, the presumption is that the land under the salt water is not intended to be granted. Such a construction is consistent with the terms of the grant, and the evidence as to the conduct of the parties subsequently. Sea bottom is defined as where the tide flows and reflows when it is open to the tide. It does not exclude land which is intermittently beyond the reach of the tide: *Stuart Moore, Foreshore and Seashore*, 3rd ed., p. 791; *Hall*, p. 115. Prior to the grant the bed of

the lagoon was vested in the Crown. It still remains the property of the Crown unless the respondent shows that the Crown has granted it away. The grant does not expressly include the bed of the lagoon. The *medius filus* rule has never been held in England to apply even to fresh water lakes: *Laws of England*, vol. III., p. 120.

In America the decisions on this point are conflicting. Even if it had been held that the *medius filus* rule applies to fresh water lakes in England, there is good reason for holding that it does not extend to a salt water lagoon on the coast of Australia. There is no real analogy between the two cases. Primarily a salt water fishery would be a public fishery, and the salt water would be of no use to the adjoining owner. The rule is a purely arbitrary and artificial one, and there is no valid reason for extending it to the particular circumstances of this case. There is no judicial statement of the limits of the rule which compels the Court to so apply it. The fact that there is ample land to satisfy the terms of the grant without including the lagoon is also a material consideration which supports the appellant's view. Further, there is a practical difficulty in applying the *medius filus* rule to a lake or lagoon, and apportioning the bed of the lake upon any reasonable basis between the adjoining owners. Take, for instance, the case of a lake of irregular shape with a large promontory abutting into it. In the cases on which *Street* J. based his decision the Court was dealing with the rights of the Crown, and these cases have no application to the question to be decided in this case. The question is what was the intention of the parties to the grant. The grant refers to a salt water lagoon, and the rights of the parties must be determined on the assumption of the truth of this description. Its truth or falsity, in fact, is immaterial. The intention can only be gathered from the description which the parties themselves have chosen to apply. As to the suggested claim to the land by accretion, there is no evidence upon which this Court can decide in favour of the respondent upon this ground. If the Court is of opinion that this is a proper matter for inquiry, the appellant does not object to the pleadings being amended to allow this question to be decided on further evidence, for the purpose of saving expense to the parties.