[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE MERCHANT SERVICE GUILD OF AUSTRALASIA.

EX PARTE ALLEN TAYLOR & COMPANY LIMITED AND OTHERS.

EX PARTE THE GULF STEAMSHIP COMPANY LIMITED AND OTHERS.

EX PARTE WILLIAM HOLYMAN & SONS LIMITED AND OTHERS.

H. C. OF A. 1912.

SYDNEY, *Nov.* 25, 26, 27, 28, 29; *Dec.* 13.

Griffith C.J., Barton and Isaacs JJ.

Industrial Arbitration—"Industrial dispute," meaning of—Demand and refusal—Absence of prior discontent—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Single dispute—Inter-State and Intra-State shipping—Award—Conditions of employment—Leave of absence on full pay—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*xxxv.*).

The term "industrial dispute" in sec. 51 (xxxv.) of the Constitution connotes a real and substantial difference having some element of persistency, and likely, if not adjusted, to endanger the industrial peace of the community. Such a dispute is not created by a mere formal demand and a formal refusal.

A letter was sent by the secretary of an association consisting of masters and officers of ships employed by shipowners in the several States to each of those owners, 83 in number, stating that he was instructed to request that within 15 days certain specified terms and conditions of employment should be the subject of an industrial agreement between the particular employer and the association, which should be filed under the *Commonwealth Concilia-*

tion and Arbitration Act; that, to the extent that this demand was inconsistent with any award or industrial agreement, he demanded a variation of such award or agreement; that, failing the consent of all the employers to be bound in an industrial agreement in the terms aforesaid, at the expiration of 15 days the association had been requested to submit "the dispute" by plaint to the Commonwealth Court of Conciliation and Arbitration, and that, should it then be found that that Court was unable to make a settlement, "your employés will themselves take action to compel you and all other employers to observe" the specified conditions; and also stating that "should you feel that any good purpose would be served by your convening, within the period mentioned, a conference representative of the whole of the employers in the shipping industry, I am instructed to state that your employés ask for such conference and the representatives of your employés will be pleased to attend thereon." There was no prior knowledge by, or communication to, the employers of any discontent on the part of their masters or officers or any of them with the conditions of their employment. Some of the employers answered the letter, but none of the demands were acceded to by any of the employers. Six weeks afterwards a plaint was filed in the Commonwealth Court of Conciliation and Arbitration claiming the terms and conditions above mentioned, and an award was made by the Court.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that no "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution existed, and, therefore, that the Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make an award.

There may be a single industrial dispute embracing both inter-State shipping and intra-State shipping.

A direction that an employer shall allow leave of absence on full pay to his employés is not beyond the jurisdiction of the Commonwealth Court of Conciliation and Arbitration.

ORDERS *nisi* for prohibition.

A claim was on 10th October 1911 made by plaint in the Commonwealth Court of Conciliation and Arbitration by the Merchant Service Guild of Australasia, an organization consisting of masters and officers of ships, against the Commonwealth Steam-Ship Owners Association and a number of other respondents, some of whom were owners of ships engaged in inter-State trade and others were owners of ships engaged in intra-State trade. On 25th April 1912 the President (*Higgins* J.) made an award which (*inter alia*) prescribed the minimum rate of wages to be paid to masters and navigating officers of the respondents and provided by clause 3 as follows:—

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

3. Every master or officer who serves an employer continuously for nine months shall be allowed by the employer leave of absence in each year of his service on full pay—a master for a continuous period of twenty-one days (or for such longer period not exceeding twenty-eight days as may cover his usual voyage from home port to home port), and an officer for a continuous period of fourteen days.

The leave of absence shall begin and end at the home port of the employé. With the consent of the employer the leave of absence may be postponed in whole or in part and the unused leave accumulated so that it be not postponed beyond a third year.

The award then set out the names of the respondents whom it was to bind, including owners of ships engaged in inter-State trading and also owners of ships engaged in intra-State trading, and stated that it should come into operation as from the end of April 1912 and continue in force for five years.

Three orders *nisi* were obtained by owners of ships engaged in the coastal trade of New South Wales, South Australia and Tasmania respectively, directed to the President of the Commonwealth Court of Conciliation and Arbitration and the Merchant Service Guild of Australasia, calling upon them to show cause why a writ of prohibition should not be issued to prohibit them further proceeding in the plaint, the award or clause 3 of the award in so far as the plaint, award and clause related to the applicants, on similar grounds—those in the case of the applicants engaged in the coastal trade of New South Wales being as follow :—

1. That the matters claimed in the said plaint herein were not, nor were any of them, in dispute between the claimant and the applicants herein or any of them or between the applicants herein or any of them and their employés.

2. That no industrial dispute exists or existed between the applicants herein or any of them and their employés or between the claimant and the applicants herein or any of them and their employés.

3. That no industrial dispute extending beyond the limits of any one State exists or existed between the applicants herein or any of them and their employés or between the claimant and the applicants herein or any of them.

4. That the matters alleged and claimed in the said plaint consist of several disputes which, or some of which, do not extend beyond the limits of any one State, and which, or some of which, are not between the said parties.

5. That the subject matter of clause 3 of the said award is beyond the jurisdiction of the said Court under the *Commonwealth Conciliation and Arbitration Act* 1904-1911.

The Commonwealth obtained leave to intervene.

The other material facts appear in the judgments hereunder.

The three orders *nisi* were argued together.

Knox K.C. (with him *Kelynack*), for the applicants on the first order *nisi*. The coastal shipping trade of a State being conducted wholly within the territorial limits of the State is a distinct industry from the inter-State trade. The coastal trade of one State cannot come into competition with that of another. That being so, the dispute, if there is one, cannot be a single dispute which is necessary in order to give the Arbitration Court jurisdiction. There is here no common interest between the employers who are alleged to be parties to the dispute. The common interest must be a real direct interest in the claim made by the other party.

[He referred to *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1); *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Sons Proprietary Ltd.* (2); *Australian Boot Trade Employés Federation* v. *Whybrow & Co.* (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (4); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (5); *Owners of s.s. Kalibia* v. *Wilson* (6).]

[ISAACS J. referred to *Merchant Service Guild of Australasia* v. *Commonwealth Steam-Ship Owners' Association* (7).]

There was not an "industrial dispute" within sec. 51 (xxxv.) of the Constitution. A dispute connotes disputants, and a mere

(1) 6 C.L.R., 309, at pp. 332, 336, 340, 341, 350, 367, 370.
(2) 8 C.L.R., 465, at pp. 484, 504, 530, 541.
(3) 10 C.L.R., 266, at pp. 269, 283, 292, 336.
(4) 11 C.L.R., 1, at pp. 27, 45.
(5) 12 C.L.R., 398, at p. 412.
(6) 11 C.L.R., 689.
(7) 1 C.A.R., 1, at p. 35.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

demand by one party on another does not constitute a dispute even if there is an omission or a refusal to comply with the demand: *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1). There must be some antecedent dissatisfaction to the knowledge of the party on whom the demand is made. The direction in the award to allow absence on leave on full pay is beyond the jurisdiction of the Arbitration Court. Such allowance is not a condition of labour. [He referred to *In re Shop Assistants' Union* (2).]

Glynn, for the applicants on the second order *nisi*. In interpreting sec. 51 (xxxv.) of the Constitution one must inquire what was the presumed intention of the English Parliament: *Citizens Insurance Co. of Canada* v. *Parsons* (3); *Munro's Constitution of Canada*, p. 253.

[ISAACS J. referred to *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (4).]

The power conferred by that section must be interpreted in the light of the reserved powers of the States: *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Sons Proprietary Ltd.* (5); *Australian Boot Trade Employés Federation* v. *Whybrow & Co.* (6). There was no evidence of any prior discontent in South Australia nor that any alleged discontent was communicated to the employers there. A dispute extending beyond the limits of one State cannot be created by adding together a dispute existing in one State in one industry and a dispute existing in another State in another similar industry. [He also referred to *The C. S. Butler* (7).]

Curlewis, for the applicants in the third order *nisi*.

Beeby (with him *Crawford*), for the respondents, the Merchant Service Guild of Australasia. The definition of industry as used in the term " industrial dispute " in sec. 51 (xxxv.) of the Constitution

(1) 11 C.L.R., 1, at p. 28.
(2) (1910) A.R. (N.S.W.), 279, at p. 284.
(3) 7 App. Cas., 96.
(4) (1902) A.C., 73, at p. 77.
(5) 8 C.L.R., 465, at p. 486.
(6) 10 C.L.R., 266, at p. 306.
(7) L.R. 4 A. & E., 238.

should not be restricted. Shipping or seafaring is one industry throughout the Commonwealth whether some of those who engage in it limit their operations to one State or extend them to several States. Once a dispute is proved the Court should proceed as though there were no territorial boundaries between the States. While the fact of the existence of inter-State competition may be a strong feature in establishing that a dispute extends beyond one State, the existence of that competition is not necessary for that purpose. A demand on one side and a refusal to comply with it are evidence of a dispute, and, taken in connection with the circumstances surrounding the making of the demand, may be conclusive evidence of the existence of a dispute. There was other evidence of the existence of a dispute than the making of the award and the refusal to comply with it.

[ISAACS J. referred to *Conway* v. *Wade* (1).]

Wise K.C. (with him *Flannery*), for the Commonwealth intervening. In order to constitute an industrial dispute it is not necessary that dissatisfaction with the conditions of their employment should be communicated by the employés to their employers before the making of a demand. A common interest in resisting a demand is a sufficient community of interest to constitute the employers parties to an industrial dispute: *Cromwell and Bannockburn Colliery Co.* v. *Board of Conciliation for the Industrial District of Otago and Sutherland* (2). If, from the nature of the demand or the action of the employers in regard to it, it is probable that the dispute will extend beyond one State, it is immaterial whether the industry extends beyond a particular State. Ocean-going shipping is an industry within the meaning of the Constitution: *Amalgamated Society of Engineers* v. *Australasian Institute of Marine Engineers* (3), and it is one industry throughout Australia.

Knox K.C., in reply.

Cur. adv. vult.

(1) (1909) A.C., 506.

(2) 25 N.Z.L.R., 986, at p. 990.

(3) 9 C.L.R., 48.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Dec. 13.

The following judgments were read:—

GRIFFITH C.J. In this case the contention, often put forward, as often disclaimed, and as often renewed after disclaimer, that an industrial dispute extending beyond the limits of any one State may be constituted *ex mero motu* by any two groups of employés in different States combining to make a joint identical demand upon their respective employers, comes up for definite decision. The contention, in its naked form, is that the Commonwealth Court of Conciliation and Arbitration has authority to entertain and decide any industrial claim put forward by a combination of employés in two or more States, if the claim is not at once conceded.

The question for determination is entirely one of construction, and it seems necessary to say, once more, that the function of this Court is to interpret the Constitution as it finds it, and neither to strain its language to a construction which the Court may think more beneficial than that which the words express, nor to vary its construction from time to time to meet the supposed changing breezes of popular opinion.

The words to be construed are those of pl. xxxv. of sec. 51 of the Constitution, which authorizes the Parliament to make laws for the peace order and good government of the Commonwealth with respect to "Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State." These words have been the subject of discussion in several cases, to some of which I will briefly refer. But before doing so I will read two passages from the decision of the Judicial Committee in the case of *Citizens Insurance Co. of Canada* v. *Parsons* (1), which elucidate the principles to be applied in construing such an instrument as a Constitution. In that case the question for determination arose on the construction of the *British North America Act*. *Sir Montague Smith* said (2):—"It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in secs. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and

(1) 7 App. Cas., 96. (2) 7 App. Cas., 96, at p. 110.

limited. In looking at sec. 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., '(18) bills of exchange and promissory notes,' which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the dominion Parliament." And again (1):—"The words 'regulation of trade and commerce,' in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sec. 91 would have been unnecessary."

What I have read is sufficient to show that regard must be had to the whole scheme of the instrument in determining the precise meaning of the words of any particular phrase used in it. In construing the power now in question, regard must be had to the fact, so often pointed out from this Bench, that by the Constitution the control of domestic trade and industry is reserved to the States except so far as it is taken away by express words or necessary implication (2). It would be a strange result if the same section 51, which, by pl. 1., confers upon the Commonwealth Parliament the power to regulate "trade and commerce with other countries and among the States," and so by implication denies to the Commonwealth the power to interfere with domestic trade and commerce, should be found to have conferred by the apparently

(1) 7 App. Cas., 96, at p. 112.
(2) See 8 C.L.R., at p. 492; 10 C.L.R., at pp. 279, 280.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Griffith C.J.

colourless words of pl. xxxv. an unlimited power of such interference if only a small preliminary formality be observed by those desiring the interference.

In the *Broken Hill Case* (1), after quoting from my own judgment in the *Jumbunna Case* (2) as to the meaning of the term "industrial dispute," I said:—"The dispute must precede the submission to the Court. The Court can only have cognizance of an existing dispute. That being so, there appear to me to be two questions to be answered in this case, in order to determine whether there was jurisdiction or not. The first is: Did the Broken Hill and Port Pirie men make, before the institution of proceedings, common cause, or take concerted action in support of a common demand? Secondly: Did the company understand that they were parties to such a dispute?"

In the *Saw-Millers' Case* (3) I expressed the opinion, which I now repeat judicially, that "The term 'industrial dispute' connotes a real and substantial difference having some element of persistency, and likely, if not adjusted, to endanger the industrial peace of the community. It must be a real and genuine dispute, not fictitious or illusory. Such a dispute is not created by a mere formal demand and formal refusal without more. We have not to deal with technicalities, such as the meaning of the term 'conversion' in the old action of trover, in which a demand and refusal were sufficient evidence of conversion. In considering industrial disputes we are concerned with real facts, not words or word-spinning.

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

(1) 8 C.L.R., 419, at p. 432. (2) 6 C.L.R., 309, at p. 332.
(3) 8 C.L.R., 465, at pp. 488, 489.

purpose of making a case to be brought before the federal arbitration authority, does not constitute a real industrial dispute. It is, rather, an attempt to promote strife and a fraud upon the tribunal." And again (1) :—" (13) There must be real community of action on the part of the demandants, and some community of action on the part of the parties on whom the demand is made. Such community need not be formulated in any written document, nor need the parties who are acting together be bound by any formal agreement. If it is found that large bodies of men in two or more States are in fact acting with one accord, then, if the other elements of an industrial dispute are present, an occasion arises for the exercise of the federal power in question.

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

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

In the same case *O'Connor* J. said (2) :—" In considering what is necessary to constitute an industrial dispute within the meaning of the Constitution it must always be remembered that the

(1) 8 C.L.R., 465, at p. 491. (2) 8 C.L.R., 465, at p. 505.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Griffith C.J.

Convention and the British Parliament were dealing with the subject practically, that they had in mind actual differences between employers and employés, differences of the kind which the public interests demanded should be submitted to a federal tribunal. They were thinking of real industrial disputes, not of industrial disputes that existed only on paper, or were got up for the attainment of some other and ulterior object than the settlement of differences between employers and employés. They were thinking too of 'industrial dispute' in its broad outlines as the public knew and recognized it, not of some carefully thought out legal conception which the expression, by the exercise of professional ingenuity, might be made to fit. Having regard to all these circumstances it is to my mind beyond question that the Federal Convention and the British legislature have used plain and apt words to describe an industrial dispute having a real existence. I therefore agree that the Commonwealth Arbitration Court can have no jurisdiction unless the dispute is real in the sense that I have explained."

It was recently pointed out by the Court of Appeal in England that a mere anticipated dispute is not an actual dispute upon which jurisdiction may be founded under the *Workmen's Compensation Act* 1906.

I proceed to apply these principles to the facts of the present case.

The orders to show cause were obtained on several grounds, the first of which was, in each case, that the matters claimed in the plaint were not, at the time of filing the plaint, in dispute between the claimants and the applicants or between the applicants and any of their employés.

The applicants are ship-owners engaged in the intra-State shipping trade of New South Wales, South Australia, and Tasmania respectively. The plaint upon which the award is founded, and which was filed on 29th September 1911, joined as respondents 83 separate persons, firms and companies who represented the whole shipping industry in all the States of the Commonwealth, including the owners of tugs and lighters. The claim embodied what may be described as a Log or Code of Conditions (16 in number) regulating the relations of ship-owners on the one side and masters and officers

on the other with regard to almost every incident of employment, including wages and leave of absence on full pay.

In 1908 the Merchant Service Guild had made an application to the appropriate Wages Board appointed under the laws of New South Wales for an award regulating the conditions of employment of their members in New South Wales waters. An award was made accordingly, in terms of an arrangement which had previously been made by mutual agreement between the Guild and a representative body of New South Wales employers. This award applied to the whole of New South Wales, and was to expire on 4th December 1911. No application was ever made to amend or alter it.

On 30th August 1911 the Merchant Service Guild sent to each of the persons, firms and companies afterwards made respondents to the plaint a letter, signed by the Secretary, stating that as such Secretary he was instructed "by masters and officers in your employ and in the employ of other persons and companies owning or controlling ships in the shipping industry of Australia" to write requesting that "within 15 days of the date hereon the terms and conditions of employment set out in the annexed document marked with the letter "A" and containing a schedule of sixteen claims relating to the rates of pay, tenure of employment, leave of absence, equivalent time at home port, hours and overtime, determination of home port, conditions for relieving officers, victualling and quarters, travelling and transfer expenses, supply of uniform, and the operation and extent of the proposed agreement in reference to the future terms and conditions of employment of masters and other navigating officers in the shipping industry of Australia, shall be the subject of an Industrial Agreement between you and the above Guild and that such Agreement shall be filed with the Registrar under the *Commonwealth Conciliation and Arbitration Act.*"

The letter proceeded as follows :—

"Therefore, to the extent that this demand is inconsistent with any existing Award or Industrial Agreement, I now demand a variation of such Award or Agreement.

"Failing your consent and the consent of all other employers to be bound in an Industrial Agreement made in the terms aforesaid

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Griffith C.J.

I have to inform you that at the expiration of fifteen days from the date hereon, the Merchant Service Guild of Australasia has been requested to submit the dispute by plaint to the Commonwealth Court of Conciliation and Arbitration, when should it be found that this tribunal is unable to make a settlement, I am instructed to state your employés will themselves take action to compel you and all other employers to observe the conditions contained in the above schedule, and for the purpose of notifying all other employers regularly engaging or employing masters or officers in Australia, I am forwarding to them this day a letter containing similar demands and alternatives.

"Trusting that you may see your way to meet the Claimants and that you will at this juncture exercise your best efforts to restore throughout the industry that good feeling between employer and employé which is essentially necessary in the best interests of all concerned.

"Should you feel that any good purpose would be served by your convening, within the period mentioned, a conference representative of the whole of the employers in the shipping industry, I am instructed to state that your employés ask for such conference and the representatives of your employés will be pleased to attend thereon."

The time limited, fifteen days, during which the 83 addressees of the letter scattered throughout the Commonwealth were to enter into an industrial agreement or convene a conference was of course absurdly inadequate. The letter can only be regarded as an ultimatum, and the suggestion of a conference as illusory.

But the letter was also, upon the evidence, the first notification of any dissatisfaction on the part of the masters and officers employed by the applicants with the existing conditions of their service.

It is conceded that the demand was genuine, in the sense that it was made with the authority of the members of the Guild. The question is whether, on the expiration of fifteen days without assent to this peremptory demand, "an industrial dispute extending beyond the limits of any one State" came automatically into existence, of which the Commonwealth Court of Conciliation and Arbitration

had cognizance. If it did, pl. xxxv. may be read as synonymous with "arbitration for the settlement of industrial claims made in identical terms in two or more States," so that the whole field of regulation of domestic industrial affairs would be potentially transferred from the State legislatures to the Arbitration Court at the will of any body of employés or employers operating in two States who choose to go through the form of making a written demand by way of preliminary to the filing of a plaint.

The argument for the respondents, stripped of verbiage, is substantially this. Every industrial claim is an industrial dispute: When industrial claims in identical terms are made in two or more States by persons acting in concert there is an industrial dispute extending beyond the limits of one State.

I dealt with both propositions in the *Saw Millers' Case* (1), and adhere to what I then said. In my judgment they are both fallacies. The fallacy lies in confusing the probability, or even imminence, of an industrial dispute (in its true sense) with its actual existence. A claim, when made, may or may not be conceded. The state of mind of the claimants, until communicated to the other party, is relevant only to the probability, not to the existence, of a dispute.

I find upon the face of the Constitution an intention, not to foment industrial war, or to interfere with the domestic affairs of the States, but to prevent or compose disturbances of industrial peace likely to affect the whole Commonwealth, and for that purpose to create a tribunal which could settle differences not otherwise capable of settlement, but without subjecting the whole of the industrial affairs of the Commonwealth to a federal tribunal at the will of any one party. Holding this view, I am unable to accept a construction of pl. xxxv. which would frustrate this intention.

In my opinion some real opportunity of discussion of an industrial claim between the parties concerned must be afforded before it can develop into an industrial dispute within the meaning of that provision. If peace is desired, it is at least possible that friendly discussion may prevent either its creation or its extension.

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

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Griffith C.J.

I think that the construction contended for, so far from being suggested by the words themselves, is negatived, not only by the context of section 51, but by the whole scope of the Constitution so far as it relates to the domestic affairs of the States.

During the argument I referred to the analogy of a treaty between independent States agreeing to a reference—say, to the Hague tribunal—of industrial disputes extending beyond the territorial limits of any of the high contracting parties, and asked whether it was conceivable that in such a case a *casus fœderis* would be held to be created by a mere formal demand made in identical terms upon employers in two States and not acceded to. I think not. Nor, as I said in the *Broken Hill Case* (1), do I think that pl. xxxv., properly construed, authorizes the Court of Arbitration to act as a Board of Trade to regulate the internal conduct and management of industries. It may be that the existence of such a tribunal would be highly beneficial. With that question we have nothing to do.

Upon the facts, as I have stated them, the applicants were not, in my opinion, at the time of filing the plaint, parties to an industrial dispute extending beyond the limits of any one State within the meaning of pl. xxxv.

If it is said that the objection is merely technical, and that during the hearing of the plaint a dispute must have developed and become concrete, I find two answers : (1) That the Constitution only authorizes the submission to the Arbitration Court of disputes already existing and extending &c. ; and (2) that it is no light thing for an employer who, so far as he knows, is carrying on his business in perfect amity with his employés to find himself suddenly, and without any opportunity of redressing grievances of which he has never heard, involved in a suit before the Commonwealth Court of Arbitration which may (like one that is now said to be approaching, if it has not already reached, its hundredth day) last for an indefinite time, in which his interests are different from those of his co-defendants, with whom he has indeed nothing in common except that he is engaged in a similar trade in Australia, and in which he cannot under any circumstances recover anything for the expense to

(1) 12 C.L.R., 398, at p. 412.

which he is put, and that he may well insist upon any provision of the law which will relieve him from such serious liability and embarrassment.

In *Whybrow's Case* (1), the claimants had, as in this case, put forward a log or schedule of claims, 23 in all, demanding immediate compliance. It was contended for the claimants, as here, that this document, followed by non-acceptance of the terms demanded, was of itself sufficient to establish the existence of a dispute. This contention was rejected by all the members of this Court, including the learned President, who held that two only of the claims were as to matters really in dispute between the parties. As to those two matters this Court thought that the proper inference to be drawn from the evidence was that there was in existence a dispute extending over four States, which was single, in so far as it involved an increase of wages in each State and, as far as possible, the establishment of a uniform rate in all, and that the formal demand crystallized that dispute into a definite form. In the present case there is no evidence whatever of any unadjusted differences existing between the applicants and their employés at the date of the letter of 30th August. Evidence of a pious opinion, however strong, held by the members of the Guild but not brought to the knowledge of their employers is, in my opinion, irrelevant.

I am, therefore, of opinion that the first ground of objection taken to the award is a good one.

It is not necessary to deal with the other objections, but I will add a few words upon them.

The objection most strenously insisted upon was that intra-State shipping is a different industry from extra-State or inter-State shipping, so that there cannot be a single industrial dispute embracing both. I am unable to accept this contention. In the course of argument I instanced the case of two steamers belonging to the same owners lying in the port of Brisbane, one of which is about to sail for the Gulf of Carpentaria, a distance of nearly 2,000 miles wholly in Queensland waters, while the other is about to sail to Sydney and Melbourne, a distance of 1,000 miles through

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

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Griffith C.J.

New South Wales and Victorian waters. It seems to me obvious that if the masters and officers of such ships made common cause with respect to a matter affecting them in the same manner there might well be a single dispute extending beyond the limits of any one State.

But I express no opinion on the question whether, although a controversy between the claimants and the present applicants and one between them and the other respondents to the plaint might be a single dispute, the nature of the claims made would or would not have established that position, if the other necessary elements of a dispute were present.

I do not think that the direction to allow absence on leave on full pay is beyond the jurisdiction of the Court. Such leave is a matter relating to the terms of service, and whether the absence is of one day in a week or in a month, or of a month in a year, seems to be a question not of principle but of degree.

But for the reasons already given I think that the order for a prohibition to the extent asked for should be made absolute.

BARTON J. These applications are made for the purpose of questioning the jurisdiction of the Commonwealth Court of Conciliation and Arbitration to make an award upon a number of claims embodied in a plaint filed in that Court by the Merchant Service Guild of Australasia. The facts in relation to each application are in substance identical, and have already been stated.

A Court created under paragraph xxxv. of section 51 of the Constitution has no jurisdiction to arbitrate unless that which is brought before it for settlement is an industrial dispute extending beyond the limits of any one State. The applicants maintain that the evidence fails to establish that such a dispute existed in the present case. They deny that there was an industrial dispute, or, for the matter of that, a dispute at all; and if this Court thinks that the existence of an industrial dispute is to be inferred from the facts, then the applicants contend that it did not extend beyond the limits of any one State. They say that, if there was any industrial dispute, there were a number of separate and independent disputes, not so con-

nected that any of them can be said to have extended, &c., within the meaning of paragraph xxxv.

The first essential to the application of the power of arbitration conferred by a Statute passed in pursuance of the paragraph is that there should be an industrial dispute. If there was not one, it will be a waste of time to consider the question of extension beyond the limits of one State.

I have carefully examined all the evidence before this Court, and have entirely failed to find that any of the 83 employers afterwards proceeded against, received from any quarter up to the time of the letter of demand of 30th August 1911, any complaint as to the wages or any other of the conditions of service of the masters or officers in their employment. Nor is there any evidence that any employer learned from any quarter that there was even any dissatisfaction on the part of any master or officer with his wages or any other condition of his service. Of course, no such large body of men could pursue any calling without occasional dissatisfaction being felt by some of them, and the feeling would certainly find expression from time to time. But it is rather significant in this case that no such expressions are alleged to have reached the employers. The nearest approach in the affidavits to evidence of the existence of any discontent before the sending of the letter is that one master in the employment of the Huon Channel Company, whose boats ply between Hobart and the Huon River, was heard to say that he ought to have higher wages when in charge of a certain 52 ton boat than when in charge of a 33 ton boat. Of any open, wide-spread and continuing discontent as to wages or any other specific term of the employment; of meetings of employés, at which such complaints were ventilated and reported in the press; or of knowledge on the part of employers which could not but be inferred from such open discontent and ventilation of grievances; there is not a tittle of evidence here. Such facts, culminating in a demand upon the employer for betterment in respect of the matters agitated, go far, if they co-exist, to show that a real and substantial dispute exists, as we held in *Whybrow's Case* [*No.* 2] (1). A grumbling or an agitation will not suffice: see *Conway* v. *Wade* (2); and here there is not

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

(2) (1909) A.C., 506, at p. 510.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Barton J.

evidence even of these or either of them. It is further to be observed that there was here no discussion or controversy with the employers, or any representative of theirs. There was no correspondence in which the subjects of discontent were evolved. I do not say that these things are necessary ingredients in the proof; but they go far to show that there is something more than a mere claim. And something more there must be, unless we are to say that a sudden and peremptory claim must either be conceded or must amount of itself and by itself to a dispute. If that were so, paragraph xxxv. would be equivalent to this: "Conciliation and Arbitration upon industrial claims not restricted to the limits of any one State." Such a form of words expresses an absurdity in such a Constitution as this, but it fairly represents the proposition we are asked to affirm. The paragraph, construed in that sense, would mean the speedy handing over of all the industrial concerns of each State to be regulated by the Commonwealth Arbitration Court; for the requirement as to extension would be merely of nominal effect. Such a result would, no doubt, be highly satisfactory in some quarters. The difficulty is that instead of being what the Constitution intends, it is quite foreign to the whole scheme of that instrument. I said in *Whybrow's Case* [*No.* 1] (1), and I repeat, that "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 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." And I then pointed out that this doctrine had been repeatedly relied upon in the decisions of this Court. The line of decisions is now somewhat long, because of the frequency with which it has been found necessary to invite the Court to protect the Constitution from invasion, and to preserve its federal structure. This Court fulfils its highest obligations to the people, and truly keeps the trust which they handed to it to defend, when it ensures that no attempt at unification on the one hand, and on the other hand no straining of what are called State Rights, shall be allowed to sap the sound

(1) 10 C.L.R., 266, at p. 291.

foundations of the edifice. To hold that a mere claim unsatisfied is in fact and in law an industrial dispute, is to cut down the industrial powers of the States in violation of the federal principles on which the Constitution is built. And just as we have defended it against several undue assertions of State powers, so now we are under an equal duty, though the danger is from the opposite quarter.

That the jurisdiction must be founded on something more than a mere claim is, to my mind, quite apparent. That something is not easy to define. But it must be enough to take the whole position above or beyond mere naked demand and refusal. Before the federal power can be invoked there must, as the Court has repeatedly pointed out, be a dispute actually existing. It cannot be created by the mere paper demand. If, however, there is accompanying evidence that the demand, whether written or not, is the culmination of a sense of wrong or injustice, made known or become known to the other party, that it is the expression of "a real and substantial difference having some element of persistency" (see *per Griffith* C.J. in the *Saw Millers' Case* (1)), and is not the outcome of caprice or of a mere desire to extort, then whichever side is the promovent, there is an industrial dispute within the meaning of the Constitution.

I do not think it necessary to add to the quotations which have been made from the past judgments of the Court. It suffices to state their substance. Without departing from the principles of construction on which they stand, it is, in my view, impossible to hold on the evidence before us that there was an industrial dispute in existence when the plaint was filed.

That conclusion disposes of the whole case, and it is not necessary to deal with the other grounds argued. But I should not like to be considered as impressed with the contention that the subject matter of clause 3 of the award, relating to extended leave of absence, is beyond the jurisdiction. The opinion I indicated in the course of the argument is unchanged.

The several rules must, I think, be made absolute.

ISAACS J. The Commonwealth Parliament has unmistakably

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

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

expressed its will by sec. 14 of Act No. 6 of 1911, that there should be an end of these writs of prohibition. But in the *Tramway Case* recently before us this provision was held ineffectual, but no reasons were given, because it was preliminary, and the main case is still pending; and so I think it respectful to the legislature to state my reasons now, more especially as at first sight the ruling may seem inconsistent with *Baxter's Case* (1), which arose under a State Act.

Whybrow's Case (2) decided that the power of this Court to interpose by writ of prohibition where a Commonwealth Court is proceeding without jurisdiction is given direct by the Constitution as original jurisdiction of the High Court, and there being no authority to Parliament to annul that authority, any attempt to do so necessarily fails. By that decision this Court, unless constituted as a Full Bench, is bound, and so this case must be determined accordingly. Now the legal effect of an enactment must be judged of by its language fairly construed, and the object which the legislature has sought to attain cannot alter the plain meaning of words used. The object sought to be attained in this instance is obviously to put an end to continual wrangles as to mere questions of fact, as whether a dispute had arisen, and to leave that to the determination of the judicial tribunal which is engaged in settling the dispute itself, and which sees and hears the witnesses, views the localities, and the industrial premises and instruments, and is in every way better situated to determine it than this Court acting on paper testimony can possibly be. But, as I pointed out in *Whybrow's Case* (3), the Act then conferred no jurisdiction on that Court to determine whether an inter-State dispute existed. It conferred merely a jurisdiction to determine claims *contingently* upon there being a dispute which in fact existed and extended at the time the plaint was filed. *O'Connor* J. drew attention to the same thing in the *Broken Hill Case* (4). And this still remains unaltered. All that the legislature has done, on the inevitable construction of the words it has used in the amending Statute, is to declare that even if the Court does exceed the jurisdiction given by Parliament no prohibition shall go. It has not used any language

(1) 10 C.L.R., 114.
(2) 11 C.L.R., 1.
(3) 11 C.L.R., 1, at p. 56.
(4) 8 C.L.R., 419, at p. 449.

which, to quote the words of the learned Chief Justice in *Baxter's Case* (1), " enlarges the jurisdiction of the Court," and, to quote the expression of *Lindley* L.J. in *Chadwick* v. *Ball* (2), " extends the jurisdiction." Its enactment forbidding prohibition is therefore incompetent and ineffective. The distinction is illustrated by the case we have just decided: *R.* v. *Deputy Industrial Registrar*; *Ex parte J. C. Williamson Ltd.* (3).

Dealing then with the matters in controversy, the applicants have raised several questions of law, and one of fact.

1. *What is the Constitutional import of the expression " Industrial dispute " ?*

The *Trade Marks Case* (4) is a decision that the terms used in the Constitution have the signification which attached to them in 1900. The rule there applied to " trade marks," is equally applicable to " industrial disputes." No special or technical meaning having been affixed by the Constitution itself to those words, it follows that what we have to ascertain is how they were understood when that instrument was passed. It is plain that the very words of sub-sec. xxxv. of sec. 51 limiting the grant of power to " industrial disputes extending beyond the limits of any one State " indicate that, apart from the necessity of " extending," the industrial disputes referred to are identical with those which do not extend; in other words, such as were ordinarily understood by that term within State jurisdiction. See *per O'Connor* J. in *Federated Engine-Drivers Case* (5). This throws us back to the nature of a " trade dispute," as it is often called, or an " industrial dispute," as it is called in the Constitution to avoid confusion with the word " trade " therein used in a different sense.

With respect to the nature of such a dispute as ordinarily understood, I have in previous cases (*Jumbunna Case* (6); *Whybrow's Case* (7); *Federated Engine-Drivers Case* (8)) stated with some particularity my views and referred to the principal sources of authoritative information, and it is unnecessary to repeat what I there said.

The words of the Constitution—" industrial disputes "—stand in

(1) 10 C.L.R., 114, at p. 131.
(2) 14 Q.B.D., 855, at p. 858.
(3) 15 C.L.R., 576.
(4) 6 C.L.R., 469.
(5) 12 C.L.R., 398, at p. 437.
(6) 6 C.L.R., 309, at pp. 372 *et seq.*
(7) 11 C.L.R., 311, at pp. 335, 336.
(8) 12 C.L.R., 398, at p. 446.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

all their simplicity and fulness, in an instrument of government, intended to operate as long as the instrument itself shall live, with unabridged force, whatever changing incidents time may bring to the industries of the Commonwealth. See also *per O'Connor* J. in *Jumbunna Case* (1). The observations of the same learned Judge in *Merchant Service Guild of Australasia* v. *Commonwealth Steam-ship Owners' Association* (2), which I quoted during the argument, confirmed by his later words in the *Jumbunna Case* (3) and the *Saw Millers' Case* (4), are clear to show that this power is *in no way limited by the nature of the trade and commerce power*, but is entirely distinct, and must receive a broad interpretation. The matter is so important that I quote the passage in that learned Judge's judgment in the *Jumbunna Case* (3) :—" Where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose. There is no such indication in any part of the Constitution : on the contrary, I do not see how its object in this respect can be effectually attained unless the broader interpretation is adopted." I respectfully agree with every syllable of that opinion. I take it the words " industrial dispute " connote in the Constitution precisely what they connote outside of it, namely, a well known and recognized fact of life that may at any moment present itself. It is not a matter for recondite legal interpretation, but a part of the stock of common knowledge, that industrial disputes may and do arise between varying disputants, in different occupations, in circumstances of the most diverse character, respecting all kinds of industrial conditions.

The complexity of disputes must inevitably increase with the advancing complexities of industry.

For these and similar reasons I have on a previous occasion—*Saw Millers' Case* (5)—observed, and desire to repeat, that no ex-

(1) 6 C.L.R., 309, at pp. 366, 367, 368.
(2) 1 C.A.R., 1, at pp. 35, 36.
(3) 6 C.L.R., 309, at p. 368.
(4) 8 C.L.R., 465, at p. 504.
(5) 8 C.L.R., 465, at p. 514.

haustive and permanent *criteria* of an industrial dispute can possibly be laid down, which would satisfy even the conditions of the moment, and still less hold good for twenty-four hours.

The concept itself is simple. Whenever a demand is made by one party, single or numerous, engaged in industry, upon another party, single or numerous, so engaged, and persisted in as an industrial right, for some alteration in the existing conditions of their mutual working relations, and that demand is met with a refusal persisted in by the party on whom the demand is made, the right claimed being necessarily expressly or virtually denied, there then exists between them an industrial dispute. This as will be presently seen is supported by the language of *O'Connor* and *Higgins* JJ.

How the dispute originates is immaterial to the fact of its existence. Whether, on the one hand, the demanding party—for instance, the employés—leave their work for the moment and go *en masse* to the employer's office and demand the change with threats, and are met with an equally forceful and angry refusal and threats of reprisal; or whether, on the other hand, the same demand is conducted through the peaceful channel of correspondence, and is refused either by the same medium or the equally effective method of passive and silent resistance, seems to me perfectly immaterial as to whether the parties are actually in dispute.

The manner or motive of the demand is as irrelevant as the manner or motive of the resistance: the one jurisdictional fact, if it may be so termed, is the actual existence of the industrial dispute over the necessary area.

The burden—in this connection, as it appears to me, an impossible one—of limiting the generality of words in the Constitution rests upon those who assert the limitation. But not only is there nothing in the Constitution to support any such limitation, but the language of the instrument itself forbids it. The power, like all other powers of the Commonwealth Parliament is conferred, not for the special benefit of either or both of the disputing parties, but *primarily*, and by means of composing industrial differences, for the "peace, order and good government of the Commonwealth"—*that is, for the whole people of the Commonwealth.* It follows from this, that

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

to apply to the solution of this matter, considerations which solely affect either or both of the parties, and to ignore the interests and welfare of the community in relation to the differences which imperil the continuance of the industry in which they are engaged, and therefore to ignore the interest which the community has, to have an industrial dispute settled, however suddenly it arises, and the sooner the better, is to mistake the fundamental nature of sub-sec. xxxv. Such a method of approach leads us to regard the question as if it were an ordinary provision for individual litigation, say for trespass to land, or for goods sold and delivered, instead of that which the Constitution has made it, an occasion for public intervention to ensure and maintain the uninterrupted progress of industry. Disputes are of all degrees of intensity, and though the present importance of an inter-State dispute may be small in its inception, yet its immediate insignificance is no objection, because once it is manifested, it is a subject for jurisdiction, *prevention* being expressly included as a permissible object. The cloud no bigger than a man's hand, may or may not herald a cyclone, but we are not to await the cyclone before protective steps can be taken to avert the possible public peril. Obviously, therefore, as the possible danger of interruption always exists where an industrial demand is persisted in and refused, however friendly present relations may be, the length of time the demandants have endured what they assert is a grievance is no more material to the necessity of the occasion, than the knowledge or belief of the opposite party in the fairness or unfairness of the demand. "Does the dispute in fact exist?" is all the Constitution requires; the rest is left to the wisdom of Parliament and the justice of the tribunal it creates.

That brings us naturally to the next question—whether in this case a dispute had in fact arisen. There is necessarily some overlapping of the considerations applicable both to this and the first question, but some of them, and the quotations which bear upon them both, attach themselves more appropriately to the question of fact.

2. *Was there a dispute in fact?*

Having to determine this matter as best we may on mere

paper testimony, the first thing is to look at the facts apart from any technical or artificial rules as to what circumstances prior to the demand are essential to the existence of a dispute. I, of course, arrive at my conclusions quite independently of those formed by the learned President. He had by far the best and most reliable means of determining this question, and though not legally required to decide it as an issue, he manifestly did examine the question thoroughly. He says :—"In this case I have no doubt, having considered the documents and the evidence, the nature of the alleged grievances, the demeanour and character of the witnesses, and all the circumstances, that there is a dispute of the nature mentioned, and that it extends beyond the limits of any one State." Having so found, his Honor proceeded with the merits, and found that, in his opinion, the existing conditions of employment were unjust to the employés. The inquiry lasted a considerable time, and must have occasioned considerable expense; and I cannot disguise from myself the serious responsibility I incur in entering upon an inquiry which may cast all that to the winds, and replace the parties in mutual working relations that full inquiry has shown to be unfair, and to a consequent situation of unquestioned dispute that has lasted for at least fourteen months.

The uncontroverted facts demonstrate that the employés were determined to seek, and the employers were determined to refuse, the conditions embodied in the claim.

It is also beyond the possibility of contention that in the proceedings themselves the contest was strongly carried on.

There is also no doubt that these conditions were plainly and definitely demanded nearly a month before the plaint was filed, demanded, that is, by the masters and officers of the ships from their respective employers, and that in no single instance was any portion of the demand conceded. Some replied in writing, the replies being concerted—I mean the New South Wales employers—giving their reasons for non-compliance, offering to assist in bringing the claim before the State tribunal, but indicating that it would there be fought.

In other cases, the demand was treated with significant silence, the old conditions being meanwhile adhered to, notwithstanding

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

the intimation that the Court would be appealed to unless the demands were granted, and that if the Court failed of jurisdiction, then that a strike would be resorted to.

Silence and perseverance in continuing existing conditions are in such circumstances obviously equivalent to refusal. Nor does the stated period of fifteen days alter it. It was long enough to enable the New South Wales employers to consider the demand and expressly reply to it. Among the claims made was that of a consent to enter into an industrial agreement which would give some stability to the other terms. A period of fifteen days is by no means insignificant to those acquainted with every detail of their own business, and more particularly where, as every employer contends, he is free from the disturbing element of competition. But if time were the objection, nothing was easier than to say so; and it is most significant that amidst all the affidavits filed for the employers, not a line occurs which suggests shortness of time as a reason for non-compliance. The shipowners, if desirous of meeting and not evading the claim or refusing it, would have asked for any necessary extension. But, in fact, nearly double the period of fifteen days elapsed before any plaint was filed.

The affidavits filed on behalf of the employers do not in the least suggest that the demands were not in themselves an announcement of *present dissatisfaction* with existing conditions. What the deponents say is, that there was no *prior* expression of dissatisfaction. And, indeed, the New South Wales employers' letter says: "except for that demand" there was no communication of dissatisfaction. So that we may take it that the shipowners thoroughly understood when they got that demand that it was an expression of present dissatisfaction and a claim for better conditions. But, apart from that letter, the affidavits all round are clear enough in themselves on this point.

Notwithstanding this, all the previous conditions were maintained and no indication given of willingness on either side to yield. Subsequent conduct may be excellent evidence of prior attitude and intention, and the behaviour of the parties since the plaint was filed is material in determining their true relative situation before.

If, therefore, a definite demand on one side presented as an ultim-

atum and persisted in, and a perfect knowledge of that on the other side, as a declaration of then present dissatisfaction and a claim for better conditions accompanied with or followed by a determined and a persistent refusal, concerted certainly so far as individual States are concerned, and, in all likelihood, with full knowledge in every State of the attitude taken up elsewhere,—if this set of circumstances can in point of law constitute a dispute in fact, it existed beyond doubt in this case.

But, say the shipowners, that is not enough: in order to satisfy the law embodied in the Constitution there must have been in fact *pre-existing* dissatisfaction, and that pre-existing dissatisfaction must have been *communicated to or known by* the employers at some definite period anterior to the demand itself; and so that forms the next question.

3. *Must prior dissatisfaction be known or communicated before the demand?*

If this is not necessary as a matter of law, then the present objection must fail, because there is no shadow of doubt, the demand formally made and the dissatisfaction co-existent therewith were real enough. If it is not needed to complete the demand, it cannot be necessary to complete the employers' refusal; which is quite independent of any preliminary dissatisfaction of their employés.

If, however, it is necessary as a matter of law in this case, it is so always. And, if so, then if, instead of filing a plaint in this case, the men had actually struck, and thrown the whole Commonwealth into confusion, still on the applicants' argument there would be no dispute. This is an absurd result, but it is the inescapable outcome of the contention, because, as will be more clearly pointed out presently, the filing of the plaint is the substitute for the strike, and if preliminary dissatisfaction is necessary in the one case to constitute a dispute, so it is in the other. Besides, grievances sometimes arise suddenly, and are at once objected to, and a demand made for alteration. Either, then, prior dissatisfaction is not necessary, much less communication of it to the opposite party, or else in such case there can be no dispute unless the grievance is submitted to for some appreciable period and negotiations more or less prolonged are conducted.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

Now, that nothing of the kind is inherent in the nature of an industrial dispute was manifestly assumed by the House of Lords in *Conway* v. *Wade* (1), where the question turned on whether Wade's action was in connection with a trade dispute. Some evidence was given that Linney, who was a shop steward, said that if Conway, who was in arrears with his union, was kept on, the men would stop work. The jury did not believe that evidence, but if they had, it is clear from the judgments of the learned Lords, it would have been a finding as to a trade dispute, though there was no pretence of previously expressed discontent. It does not appear to have entered the minds of the learned Lords, that knowledge by the employers of dissatisfaction prior to the demand must exist, as an element in a " trade dispute " as known to the law.

But then it was urged that it has already been so held by this Court. No decision to that effect exists. This Court has never yet set aside an award merely on that ground. I am not aware even of a dictum to that effect, as I understand the words. There is a decision which seems to me at all events to assume the contrary. In the *Broken Hill Case* (2) the first part of the head-note correctly states the relevant point decided, in these terms :—" Where the employés engaged in different branches of one industry carried on in different States by a single employer take concerted action in making a common demand of their employer for certain conditions of employment, and the employer, understanding that the demand is so made on behalf of all the employés, refuses to accede to it, there arises an industrial dispute extending beyond the limits of one State within the meaning of sec. 51 (xxxv.) of the Constitution, cognizable by the Commonwealth Court of Conciliation and Arbitration." That assumes, of course, the demand is real, in the sense that the subject matter of the demand is really required.

In that case there was no formal demand, as there was in this case, and the whole circumstances had consequently to be examined in order to ascertain the proper answers to the two questions, which the learned Chief Justice formulated (3) in these words :—" The first is : Did the Broken Hill and Port Pirie men make, before the institu-

(1) (1909) A.C., 506.
(2) 8 C.L.R., 419.
(3) 8 C.L.R., 419, at pp. 432, 433.

tion of proceedings, common cause, or take concerted action in support of a common demand? Secondly: Did the company understand that they were parties to such a dispute?"

After examining the facts, the learned Chief Justice sums up the result in words which are important also on another phase of the question. His Honor says (1):—"On 29th December proceedings were instituted, and for some time after those proceedings were instituted both parties acted on the assumption of the existence of a dispute of which the Court could have cognizance, although that would not be sufficient to estop the company from afterwards taking the objection that the Court had no jurisdiction. Yet it is material evidence on the two questions of fact which I have already mentioned, whether there was concerted action before the institution of proceedings, and whether the company were aware there was such concerted action. I think that, although there is no express evidence of a formal demand having been made by one person on behalf of both, or by one organization on behalf of both, yet the proper inference to be drawn, the almost necessary inference, is that there was a 'dispute extending beyond the limits of any one State.'"

O'Connor J. says (2):—"In my opinion no more was necessary than that these demands should be made by one authority on behalf of both these groups of employés making common cause in that demand. *Irrespective of antecedent controversies*, it may be taken that the joint demand was made on 12th December."

The learned Justice then refers to the reply of the company's manager and says (3):—"In that reply it is clear that he recognizes the *letter of 12th December* as a demand for better conditions of wages and employment, not only on behalf of the Broken Hill men only, but on behalf of the Port Pirie men also. I see no escape from the conclusion that the *terms of that letter* are such as to indicate the existence of a dispute extending beyond the limits of one State, and" etc.

If, then, *O'Connor* J. dealt with the question as he said, "irrespective of antecedent controversies," he must have held the opinion

(1) 8 C.L.R., 419, at p. 437. (2) 8 C.L.R., 419, at p. 448.
(3) 8 C.L.R., 419, at p. 449.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

that a real demand and refusal so understood were all that the *law* required.

In the *Saw Millers' Case* (1) the learned Chief Justice said:—"The term 'industrial dispute' connotes something in the nature of industrial war, existing or threatened." It is really on these words the applicants' argument on this branch is based. Even that definition, which in my opinion carries the essential nature of an industrial dispute too far, would be satisfied by the demand and refusal in this case, because the *bona fides* of the demand is not challenged, and a strike is threatened as a last resort. But if the Commonwealth Parliament has any power at all to forbid strikes and lockouts, it has power to forbid industrial war, and so, at least as applied to industrial disputes in Australia, the definition appears to me—I say with all respect—to go too far.

Grievances may be submitted to, even though redress is point-blank refused, rather than incur further risks; they may be discussed and ventilated, and a real living dispute may take place as to the justice of granting them, without a word of threat. It is not, in my opinion, necessary to strike, or even threaten a strike, in order to convince the Court there is a dispute.

If, there being a Court which can give redress without the necessity of a strike, a demand is made by parties not satisfied with their working conditions, and with the avowed object of seeking redress through the Court in case of refusal, I am unable to see how that alters the nature of the Court, and makes it a mere Court of claims, except in the true sense of a Court of disputed claims, nor am I able to see how it lessens the reality of the dispute. A Court of claims in any other sense means a Court where the lodgment of the claim in Court is the first intimation of it to anyone. But that is quite different from a claim previously made on the opposite party and refused.

Industrial war is a method of attempted enforcement for which is now substituted the Court of Conciliation and Arbitration, and it seems to me whatever dispute reaches such a stage of demand and refusal as, under the old law, to be enforceable by strike or lock-out, is a dispute now, substituting the filing of the plaint for the

(1) 8 C.L.R., 465, at pp. 490, 491.

personal compulsion. And this view is fully borne out by *O'Connor* J. in the *Saw Millers' Case* (1). He there reiterates his formula—not exhaustive but clear and distinct as to the present point, and of the greatest importance, and so I quote the passage :—" If all the workmen of an employer in a particular trade take concerted action in demanding and endeavouring to enforce from him some alteration in their conditions of employment, there is an industrial dispute."

Nothing about prior dissatisfaction—or prior communication or knowledge of dissatisfaction. But the expression " endeavouring to enforce " connotes resistance to and persistence in the demand, and is the only addition to the demand the learned Judge thought necessary.

Then his Honor proceeds to apply that to a whole State in these words (1) :—" If all the workers throughout the State in the same trade unite in the making and endeavouring to enforce the same demand from their respective employers, there is an industrial dispute involving the whole trade throughout the State."

And then the same view is applied to the Commonwealth dispute (1) :—" If the workers so united obtain the co-operation of their fellow-workers in the same trade in another State in such a way that the combined workers in the trade in both States take concerted action against their respective employers in both States for the making and enforcing of the same demands, there is an industrial dispute extending beyond the limits of one State."

The same learned Judge uses language which is relied on to attach a limited meaning to the term dispute. He said that the differences must be actual differences, and that the framers of the Constitution and the British Parliament were dealing with the subject practically, and adds (2) :—" They were thinking of real industrial disputes, not of industrial disputes that existed only on paper, or were got up for the attainment of some other and ulterior object than the settlement of differences between employers and employés. They were thinking too of ' industrial dispute ' in its broad outlines as the public knew and recognized it, not of some carefully thought out legal conception which the expression, by the exercise of professional ingenuity, might be made to fit . . . I therefore agree that the Common-

(1) 8 C.L.R., 465, at p. 504. (2) 8 C.L.R., 465, at p. 505.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

wealth Arbitration Court can have no jurisdiction unless the dispute is real in the sense that I have explained."

Now, the sense that he explained is the formula I have already quoted, that is assuming the demand is real, and made not for an ulterior purpose such as a merely sympathetic strike, or to maliciously injure an employer, and so on, but to correct alleged injustice in the conditions between the demandants and their employers. He deprecated, as I do and have done, the unreal semblance of a dispute, even though outwardly clothed with all the paper formality of a real demand, and backed only by the legal conception of constructive agency. It might, nevertheless, be the unauthorized action of the central committee, or the claims might be already in enjoyment in all States but one, and the demand made jointly in sympathy, and, thought that learned Judge, no tribunal would be justified in finding on such evidence the existence of a real inter-State industrial dispute. And so the learned President in the present case said that the written demand before the plaint is not *usually* sufficient of itself to prove a dispute. But, once establish in addition, that the real parties were behind it, had authorized it, and in truth claimed the conditions as new industrial conditions for themselves and persisted in that claim, and establish on the other hand an equally firm resistance on the part of the employers, there is nothing in what *O'Connor* J. said, to raise any doubt in my mind that he would think it sufficient for the formula he stated, or to require what he terms some "antecedent controversy," and so the learned President has in the present case, in effect, held.

In *Whybrow's Case* (1), the learned Chief Justice certainly turned to the facts to ascertain whether discontent prevailed and was known to the employers before the formal demand was made. But his Honor's ultimate finding that there was a cognizable dispute as to certain items, was accompanied with the words "without laying down any rule of general application," and if that only means that in some cases prior discontent may be looked at to determine whether there is real present discontent, I agree. *O'Connor* J. says (2):— "I entirely agree with the learned President, and *for the reasons which he has given*, that an industrial dispute within the meaning

(1) 11 C.L.R., 1, at p. 29.

(2) 11 C.L.R., 1, at p. 45.

of the Act and of the Constitution existed between the parties to the arbitration."

Now, the reasons of the learned President are stated in 4 C.A.R., at p. 5. He reviewed all the antecedent history including a definite settlement by a Wages Board determination. After that, though there was general discontent, he said it was not proved to have been formally and definitely communicated to the employers until about June 1909, by the circular letters. By this, as I understand, he means the employers were entitled to disregard it. (See also 11 C.L.R., at p. 30). Nowhere does the learned President refer to antecedent discontent as a necessary factor in a dispute. He examines the facts to test the objection that the apparent, and *primâ facie* intention of the written demand was not its true one. His reasons for holding there was a dispute are in the following words:—"Each letter was, on its face, an ultimatum; and to save time and trouble to the employers the letter stated that, if no answer were sent, the request would be treated as refused, and application made to this Court. It has been urged that the demand was prepared merely for the purpose of approaching this Court, not in order to get the demand conceded. But I have no doubt that the organization and its members would have been glad to get the demand conceded, even partially, without application to this Court; and, in my opinion, the mere fact that the claimant combined with the demand a statement that application to the Court would be made does not prevent the letter from being treated as a definite communication of the men's grievances to the employers. What else could the men do? This Court, under the Act, is meant to be a peaceful means for the redress of certain widespread industrial grievances; resort to this Court is meant to be a substitute for strikes or violence or other extreme courses. What more can the men do, if they think they have a substantial grievance, than carry their claims definitely to their employers, and say that the Court will be invoked if the claims be refused?" These were the reasons which, as I understand, led the learned President to regard the claim as *primâ facie* evidence of a real demand and real dispute, but on examining the facts fully he found that as to some items the *primâ facie* view was displaced, and as to them there was no real demand, and therefore no real dispute; and those are the reasons which

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

O'Connor J. endorsed, and which I have already endorsed in this and previous judgments. For instance, I expressed my views in these terms (1) :—" Now there was a clear demand given, not as a step in negotiation, but as a definite and irreducible minimum of what was insisted on. Still that demand, however insistent, could not of itself make a dispute." And I proceeded to say that the refusal added to the demand *primâ facie* raises a dispute, and that silence where there is a duty to speak may be, and was in that case, equivalent to refusal. And in the same case (2) I referred to the recognized way in which the matter is regarded in the New South Wales Industrial Court. I quoted the case of *United Labourers' Protective Society* v. *Commonwealth Portland Cement Co.* (3), where *Heydon* J. said that a dispute raised in a formal and complete way is to be taken *primâ facie* as genuine and real. The suggestion, therefore, that there has been in this Court any course of dicta favourable to the applicants' view is, in my opinion, erroneous.

In the *Lithgow District Smelters and Workers* v. *Great Cobar Copper-Mining Syndicate* (4), *Heydon* J. expressed the same view as in the case already cited ; also in the *Electrical Trades Union* v. *Railway Commissioners* (5) and the *Sydney and Manly Ferry Employés Union* v. *Port Jackson Co-operative Steamship Co.* (6). At the page last cited occur these observations :—" It " (the demand) " was perfectly clear and intelligible. Their " (the respondents') " long delay, and their unreasonable and, as it seems to us, captious refusal to answer the petition in the form in which it was sent to them, seem to us to constitute a refusal to entertain the demands." And lower down he says, " a refusal to entertain is practically a refusal to grant." That, his Honor held, was sufficient because there was a demand and refusal.

Then in New Zealand the same view is taken. In *Cromwell and Bannockburn Colliery Co.* v. *Board of Conciliation for the Industrial District of Otago and Sutherland* (7), *Cooper* J. dealt with an application for prohibition in which it was alleged there was no dispute.

(1) 11 C.L.R., 1, at p. 56.
(2) 11 C.L.R., 1, at p. 57.
(3) (1906) A.R. (N.S.W.), 302.
(4) (1906) A.R. (N.S.W.), 170, at pp. 171, 172.
(5) (1906) A.R. (N.S.W.), 289, at p. 292.
(6) (1906) A.R. (N.S.W.), 360, at p. 364.
(7) 25 N.Z.L.R., 986.

Counsel cited the case of the *Colliery Employés Federation of the Northern District, New South Wales (Industrial Union of Employés)* v. *Brown* (1) to support his contention that the union must have the concurrence of the employés, and he also raised the contention that to constitute an industrial dispute there must be a condition approximating to industrial warfare and which may result in a strike, and said that the use of the term "dispute" connoted strife (2). This was promptly rejected by the Court, which said that "dispute" had a very much wider meaning, and, said the learned Judge (3), "is not limited to a dispute having as one of its essentials the condition of actual or probable strife."

His Honor investigated the facts and found that there was dissatisfaction among the miners in the defendant's employ, that these miners communicated their desired conditions to their own union, not to the employers, all, as I read the judgment, for the purpose of answering the objection that the union had acted without the authority of the men in the respondent's employ.

Then he referred to the union's communications to the company and the replies, and he thought they amounted to a demand and refusal. And the learned Judge sums it all up thus (4) :—"There was therefore a *demand* by the union for a higher rate of remuneration and more advantageous conditions than those existing in the plaintiff company's mines, a demand which was made at the instance of members of the union working in the plaintiff company's mines; *the communication of the demand* to the plaintiff company; *sufficient time given* to the plaintiff company to consider the demand; and *a refusal* by the plaintiff company to agree to the proposals. Clearly, therefore, there was a dispute or difference between the union and the company in reference to the industrial conditions prevailing in the mines, and, although it may be that there are no indications that that dispute, if unsettled, is likely to result in a strike, it cannot, in my opinion, be said that it is not an industrial dispute within the meaning of the Act." A little lower down the learned Judge says (5) :—"Conditions have been pro-

(1) 3 C.L.R., 255.
(2) See 25 N.Z.L.R., 986, at p. 988.
(3) 25 N.Z.L.R., 986, at p. 989.
(4) 25 N.Z.L.R., 986, at p. 990.
(5) 25 N.Z.L.R., 986, at p. 991.

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

posed by one side and rejected by the other." Not a word appears in the judgment of the learned Judge that the demand actually made by or on behalf of a party must be preceded by dissatisfaction which prior to the demand was communicated to or known by the other side.

Agreeing, therefore, with the law as assumed by the House of Lords and as laid down by *O'Connor* J., *Higgins* J., *Heydon* J., and *Cooper* J., I am of opinion the facts here completely establish a dispute, even if there were no more than the demand and refusal.

There is, in my opinion, a great deal more. The evidence read to us shows that for months previous to the letter of 30th August, 1911—the formal demand—there were interviews and meetings between representatives of the guild and the masters and officers relative to making demands for better conditions of employment, and men do not, as a rule, bestir themselves to get improved conditions unless they are dissatisfied with what they have. These interviews took place in several States, including New South Wales, Queensland, Victoria and Tasmania, and, I think, South Australia. And so, if a background of prior dissatisfaction were necessary, it existed in the present case.

4. As to the condition of leave, I am clearly of opinion it is an industrial condition.

That leaves but one further question to consider.

5. *Did the dispute extend beyond the limits of any one State?*

Any ordinary citizen, viewing the matter from a business-like standpoint, and seeing a simultaneous demand of identical conditions by one class of workers upon one class of employers distributed over several States, and a total refusal by those employers to concede the least portion of any condition demanded, would say, unhesitatingly, the dispute did so extend.

But the argument is that again there should be inserted an artificial element—namely, that where the employers have as between themselves no "community of interest," in the sense that they are not actual or potential competitors in the particular section or class of the trade to which they respectively choose to restrict their operations, the dispute cannot possibly be said to extend. If so, a bootmaker in Brisbane could not be party to the same

dispute as a bootmaker in Perth; a local carrier in Sydney, with one in Hobart; and so on *ad infinitum*. As the same principles must apply to a State, you could not have one industrial dispute in which both a shipping company trading only between Newcastle and Sydney and a shipping company trading only between Sydney and Twofold Bay were concerned. If as regards a State, there is nothing in the inherent nature of an industrial dispute to prevent such a combination in the same dispute, then the imaginary geographical line that the law has assumed from the head of the Murray to Cape Howe, or the much contested location of the 141st meridian, will not alter the solid incidents of business facts. I see no valid reason for giving so restricted a meaning to the term "industrial dispute." Localization of enterprise is immaterial. That may arise from the nature of the enterprise, as gold mining or coal mining, or private tramway operation; or from the terms of incorporation voluntarily selected, as by a memorandum of association limiting operations to the State or one section of the State; or from mere personal choice, as in the multitudinous instances of private enterprise confined to a single State. The question is not whether the industrial operations of the employer extend, but whether the "industrial dispute" extends.

It is said that community of interest is necessary between employers. But, if so, in what must there be community of interest? It cannot be in the particular transactions entered into by each, nor in the specific localities, nor in the special branches of the business to which each respectively chooses to devote itself.

It must, if at all, be community of interest considered, not from the *commercial* aspect, which is the *outward* aspect, and, as decided in *Clancy* v. *Butchers' Shop Employés Union* (1), does not concern the employés, but from the *industrial* aspect, which is *internal* and does concern the employés, because in this aspect the interests are mutual and rights reciprocal and therefore susceptible of dispute.

If, then, the same industrial demand, say by all the electrical engineers in Australia for some condition specially attributive of their vocation, is made upon all employers in Australia—whether gas companies, mining companies, hotels, boot manufacturers, and

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

H. C. OF A. 1912.

REX v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND MERCHANT SERVICE GUILD.

Isaacs J.

so on—all these employers would have in a sufficient sense a community of interest in granting or refusing it. Even in the narrower parliamentary sense of " industry " which is given by section 55 (1) (*a*) of the Act, *O'Connor* J. found that the common interest of employers in the same class of industrial enterprise, had then consisted, not in the similarity of their trade operations, or their mutual competition, but in the fact of " their employing labour in carrying on the same class of industrial enterprise " (1). And it follows that if that is their " common interest " from an industrial standpoint, the terms of such employment must fall within the limits of their community of interest.

The existence of the dispute in Victoria and Queensland is not challenged. Consequently, if the existence of the same dispute in any one of the States of New South Wales or South Australia or Tasmania be established, there was as to that State coupled with Victoria and Queensland an inter-State dispute, and the applicants from that State must fail.

For all these reasons, which, having regard to the immense importance of the subject, I have stated at length, I am of opinion that there is no reason for disturbing the award of the learned President, and that this application should be dismissed with costs.

Order absolute for prohibition.

Solicitors, for the applicants, *E. S. Dunhill*; *H. de Y. Scroggie*; *G. McEwin*; *Abbott & Allen*, for *Ewing, Hodgman & Seager*, Hobart.

Solicitors, for the respondents, *Sullivan Bros.*

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

B. L.

(1) 12 C.L.R., 398, at p. 435.