[HIGH COURT OF AUSTRALIA.]

J. C. WILLIAMSON LIMITED . . . PLAINTIFFS;

AND

THE MUSICIANS' UNION OF AUSTRALIA DEFENDANTS.

H. C. OF A. 1912.

SYDNEY, *Dec.* 5, 6, 18, 20.

Griffith C.J., Barton and Isaacs JJ.

Industrial agreement—Invalid registration of organization subsequently validated—Validity of prior agreement—Meaning of "industrial agreement"—Agreement by organization of employés not to make further demands on employer—Institution of proceedings in Commonwealth Court of Conciliation and Arbitration—Injunction to restrain proceedings—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *secs.* 58, 66, 67, 73, 78—*Commonwealth Conciliation and Arbitration Act* 1911 (*No.* 6 *of* 1911), *sec.* 4.

An association of employés which was registered as an organization under the *Commonwealth Conciliation and Arbitration Act* at a time when it was not entitled to be so registered, but whose registration was subsequently validated by sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1911, prior to the passing of the latter Act made an agreement, purporting to be an industrial agreement, with an employer.

Held, by *Griffith* C.J. and *Barton* J., that the agreement was as valid as if it had been made after the passing of the latter Act.

Semble, by *Barton* J. and *Isaacs* J. (*contrâ* by *Griffith* C.J.), that an agreement made between an organization of employés and an employer embodying a code for the regulation of the industrial relations between them for a certain term and containing no provision for the settlement of either existing or future disputes by conciliation or arbitration, is not an "industrial agreement" within the *Commonwealth Conciliation and Arbitration Act* 1904-1911.

An agreement was made by an organization of employés with an employer that it would not make any further claims on the employer in relation to industrial matters for a period of three years. Within that time the organization commenced proceedings in the Commonwealth Court of Conciliation

and Arbitration in which further demands were made on the employer in relation to industrial matters.

H. C. OF A. 1912.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that the High Court had jurisdiction by injunction to restrain the organization from instituting such proceedings.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

SPECIAL CASE.

In an action brought in the High Court by J. C. Williamson Ltd. against the Musicians' Union of Australia, the following special case was stated by the parties:—

1. This is an action brought by the plaintiff company against the defendants, an organization composed of professional musicians throughout the Commonwealth formed and registered under and in accordance with the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1911.

2. The plaintiff company in this action claims: (1) That it may be declared—(*a*) that a certain industrial agreement made between the plaintiff company and the defendant organization and purporting to be made pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904-1911 is a valid and subsisting agreement; (*b*) that the defendant organization is bound by an undertaking contained in the said agreement that the defendant organization would not make any further request or demand on the plaintiff company in relation to industrial matters within the Commonwealth of Australia. (2) That the defendant organization may be restrained by the injunction of this Honourable Court from committing threatened breaches of the said undertaking and from instituting threatened proceedings in the Commonwealth Court of Conciliation and Arbitration in respect of further and other requests and demands in violation of the said undertaking.

3. The plaintiff company employs many orchestral musicians who are members of the defendant organization.

4. The said agreement was entered into on 24th June 1911, and it was therein agreed that in all industrial matters with orchestral musicians who were at the said date or might thereafter during the continuance of the said agreement be in the employment of the plaintiff company the terms and conditions should be as set out in the said agreement.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

5. By the said agreement it was provided that the agreement should come into force on 1st July 1911 and remain in force for three years from the making thereof. And the defendant organization further undertook therein not to make any further request or demand upon the plaintiff company in relation to industrial matters within the Commonwealth during the continuance of the said agreement.

6. The agreement was duly signed in accordance with the rules of the defendant organization, and was duly filed in accordance with the provisions of the *Commonwealth Conciliation and Arbitration Act.*

7. The defendant organization has threatened to commence and has taken steps to commence proceedings in the Commonwealth Court of Conciliation and Arbitration in which further requests and demands in relation to industrial matters are made upon the plaintiff company.

8. The defendant organization is a union which in accordance with the decision of this Honourable Court in the case of *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (1) was not entitled to be registered as an organization.

9. The registration of the defendant organization was validated by section 4 of the Act No. 6 of 1911.

10. The plaintiff company contends that the agreement of 24th June 1911 is a valid and subsisting agreement binding upon the defendant organization.

11. The defendant organization contends that the agreement having been made by the Musicians' Union at a time when the Musicians' Union was not legally entitled to be registered as an organization under the *Commonwealth Conciliation and Arbitration Act,* the said agreement can have no validity as an industrial agreement and is not binding upon the defendant organization.

12. The defendant organization further contends that the High Court of Australia has no jurisdiction to restrain the said organization by injunction from instituting proceedings in respect of industrial matters in the Commonwealth Court of Conciliation

(1) 12 C.L.R., 398.

and Arbitration even though the institution of the said proceedings is in violation of the said industrial agreement.

The questions for the opinion of the Court are :—

1. Whether the industrial agreement made by the defendant Musicians' Union while the said union was improperly registered as an organization is now valid and binding upon the defendant organization.
2. Whether the High Court of Australia has jurisdiction to restrain the said organization by injunction from instituting proceedings against the plaintiff company in respect of industrial matters in the Commonwealth Court of Conciliation and Arbitration even though the institution of the said proceedings is in violation of the said agreement.

Knox K.C. (with him *Pickburn*), for the plaintiffs. Whether the agreement between the plaintiffs and the defendants is an industrial agreement within the *Commonwealth Conciliation and Arbitration Act* or not, this Court, having equitable jurisdiction, has power to restrain the defendants from going to another Court to make their complaint. The jurisdiction arises out of the agreement between the parties: *Hill* v. *Turner* (1); *Sheffield* v. *Duchess of Buckinghamshire* (2); *Gascoyne* v. *Chandler* (3); *Stockton and Hartlepool Railway Co.* v. *Leeds and Thirsk and Clarence Railway Cos.* (4).

The Parliament has recognized the desirability of irrevocable industrial agreements which cannot be touched even in the Arbitration Court, and has created organizations for the express purpose of making binding agreements. An agreement not to do a thing is sufficient ground for a Court of Equity to restrain the doing of it: *Lancaster and Carlisle Railway Co.* v. *North Western Railway Co.* (5); *Besant* v. *Wood* (6); *Hart* v. *Hart* (7); *Hunter* v. *Gibbons* (8); *Hayward* v. *East London Waterworks Co.* (9); *Encyclopædia of the Laws of England*, 1st ed., vol. VI., p. 469. The agreement not to make a demand includes

(1) 1 Atk., 515.
(2) 1 Atk., 628.
(3) 3 Swans., 418 (*n*).
(4) 2 Ph., 666, at p. 670.
(5) 2 Kay & J., 293, at p. 303.
(6) 12 Ch. D., 605, at p. 630.
(7) 18 Ch. D., 670.
(8) 26 L.J. Ex., 1.
(9) 28 Ch. D., 138, at p. 146.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

an agreement not to go to the Arbitration Court. Whatever the Act says makes no difference. The object of seeking an injunction is to prevent an inequitable use of existing rights. Unless there is some outside circumstance independent of the agreement, there is no case in which the Court has refused to enforce the performance of a negative covenant merely because there is some other remedy.

[ISAACS J. referred to *In re Connolly Brothers, Ltd.*; *Wood* v. *Connolly Brothers, Ltd.* (1).]

In re Lart; *Wilkinson* v. *Blades* (2) shows the length to which the Court will go to prevent a person being harassed by unnecessary proceedings. The agreement is binding although the original registration of the defendants was invalid, because sec. 4 of Act No. 6 of 1911 was intended retrospectively to validate the constitution of organizations. This Court has jurisdiction to entertain this action under sec. 75 (iv.) of the Constitution, for the plaintiffs, who carry on business in Victoria and New South Wales, reside in those States, and they and the defendants therefore reside in different States. Organizations are, by sec. 58 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, given a general power to hold land, and by sec. 66 they are given a general power to sue and be sued. They are therefore intended by Parliament to be liable to be sued in this Court in respect of property. An action of this nature will therefore lie against them. Sec. 67 does not take away that liability, because it only refers to proceedings for penalties for matters in respect of which the Arbitration Court is given jurisdiction, and none is given in respect of matters of this kind.

[ISAACS J.—Is not sec. 73 of the *Commonwealth Conciliation and Arbitration Act* the only statutory authority for making an industrial agreement; and, if so, is not the only industrial agreement that can be made under that section one which provides for arbitration and conciliation?]

That section should be read as if the words "by conciliation and arbitration" qualified the words "may make an industrial agreement," and not the words "for the prevention and settle-

(1) (1911) 1 Ch., 731, at pp. 744, 748. (2) (1896) 2 Ch., 788.

ment of industrial disputes." The making of an industrial agreement would be incidental to the setting up a tribunal for conciliation and arbitration, and the Parliament would under the Constitution have full power to provide for the making of industrial agreements. If the Constitution gave the Parliament power to erect a tribunal for conciliation and arbitration, it gave them power to say on what terms that tribunal might be invoked, and the Parliament might very well say that, if an agreement was made with certain formalities, it would not allow the tribunal to interfere with that agreement. An agreement which is the result of arbitration or conciliation is within sec. 73. There may be conciliation without the intervention of a third party.

The Secretary of the defendants, for the defendants.

Knox K.C., in reply, referred to *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1).

Cur. adv. vult.

The following judgments were read :—

December 20.

GRIFFITH C.J. This action is brought for an injunction to restrain the defendant organization from instituting proceedings against the plaintiffs in the Commonwealth Court of Conciliation and Arbitration in violation of the terms of an express contract not to do so. That contract was embodied in a document dated 24th June 1911, which purported to be an industrial agreement made pursuant to the Commonwealth Conciliation and Arbitration Acts, and was duly filed as such. By that agreement, which embodied a code for the regulation of the relations between the plaintiffs and the defendants, and was to be in force for a term of three years, the latter agreed not to make any further demand in relation to industrial matters within the Commonwealth during its continuance.

Before dealing with the questions formally submitted by the case, I will refer to another point, which, though not raised on the case, was propounded during argument by my brother *Isaacs*,

(1) (1901) A.C., 426, at pp. 436, 439.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Griffith C.J.

namely, whether the agreement of 24th June 1911 is an "industrial agreement" within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1911.

Sec. 2 defines the "chief objects of this Act," which include (VII.) "to provide for the making and enforcement of industrial agreements between employers and employés in relation to industrial disputes."

By sec. 4 the term "Industrial Agreement" is defined as meaning "any industrial agreement made pursuant to this Act."

Part VI. of the Act, which comprises secs. 73 to 81, deals with industrial agreements.

Sec. 73 is as follows:—"Any organization may make an industrial agreement with any other organization or with any person for the prevention and settlement of industrial disputes existing or future by conciliation and arbitration."

The agreement in question, as already stated, contains a code for the regulation of the relations of the plaintiffs and defendants *inter se* for a period of three years. It does not contain any provision as to the prevention or settlement of either existing or future disputes by conciliation or arbitration. If, therefore, the provisions of section 73 are exhaustive, the agreement of 24th June is not an industrial agreement within the meaning of the Act. Secs. 75 and 76 prescribe the conditions to be observed in making an industrial agreement. *Primâ facie*, the words "pursuant to this Act" in the definition of industrial agreement refer to these provisions.

Sec. 78 provides that "(1) Any organization or person bound by an industrial agreement shall for any breach or non-observance of any term of the agreement be liable to a penalty not exceeding such amount as is fixed by the industrial agreement; and if no amount is so fixed, then to a penalty not exceeding in the case of an organization Five hundred pounds, in the case of an employer Two hundred and fifty pounds, and in the case of an employé Ten pounds."

These provisions seem inapt if they refer only to an agreement for future reference to conciliation and arbitration. The provisions of sec. 80, which enacts that "On the application of an organization in manner prescribed the Court may order that any

industrial agreement be varied so far as is necessary to bring it into conformity with any common rule declared by the Court," seem still more inapt as referring to such an agreement. A common rule, which it was then understood to be *intra vires* of the Parliament to authorize, could only affect the details of the conditions of employment, which the section assumes to be dealt with by the industrial agreement.

I go back for a moment to Part V. of the Act, which deals with organizations. Sec. 55 provides that certain associations may be registered as organizations on compliance with the prescribed conditions. The conditions, which are set out by Schedule B, include a condition that the rules of an association seeking registration as an organization must provide, *inter alia*, for the mode in which industrial agreements and other documents may be executed by or on behalf of the association, and may provide for any other matter not contrary to law. Amongst such matters is, I think, included a power to make a collective agreement on behalf of the members of the association. It does not appear whether the rules of the defendant association formally include such a power, but it is not suggested by the case stated that they do not.

Having regard to all these considerations, and remembering that the words of sec. 73 are in form enabling and not exhaustive, I am strongly disposed to think that it ought to be construed, not as limiting the *primâ facie* meaning of the term "industrial agreement," but as making clear that there should be included in that term an agreement for the prevention or settlement of future disputes by concilation or arbitration. Then it is said that, if this construction of the Act is adopted, legislation as to agreements for any other purpose than that mentioned in sec. 73 would not be within the federal power.

As at present advised, I am loth to think that the Federal Parliament may not, as ancillary to the prevention and settlement of industrial disputes by conciliation and arbitration, make provisions authorizing the parties to come together out of Court and agree to terms of settlement, and declaring that an agreement so made shall be binding upon them. The coming together of

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Griffith C.J.

delegates for such a purpose followed by such an agreement seems to me to be not inaptly described as "conciliation,"

I am therefore disposed to think that the agreement of 24th June is an industrial agreement within the meaning of the Act.

But, if it is not, I can see no reason for doubting that it may be a valid agreement at common law. An association of any number of persons is permitted by law, subject to certain statutory prohibitions, none of which are relevant to the present case. It is true that such an association cannot sue or be sued by its collective name without statutory authority, but that is a merely forensic difficulty, and is obviated by the incorporation of the association now in question for the purposes of the Arbitration Act. In my opinion, whatever it can do under that Act it can, in a proper case, be restrained from doing, and I think that becoming a defendant to a suit properly instituted for that purpose is a purpose of the Act, within the meaning of both sec. 58 and sec. 66.

I proceed to consider the questions raised by the special case.

After the making and filing of the agreement it was discovered that, under the decision of this Court in the *Federated Engine-Drivers' Case* (1), the defendant organization was not then entitled to be registered. The amending Act of 1911, however, altered the conditions of registration, and under the law as so amended the defendant organization would have been entitled to registration.

Sec. 4 of the Act provided that "The registration, as an organization under the Principal Act, of any association purporting to be registered before the commencement of this Act shall be deemed to be as valid to all intents and purposes, and to have constituted the association an organization as effectually as if this Act had been in force at the date of the registration."

The first question submitted by the special case is: "Whether the industrial agreement made by the defendant Musicians' Union while the said union was improperly registered as an organization is now valid and binding upon the defendant organization."

The words of the fourth section are clear and unambiguous. The registration of the defendant organization must, therefore,

(1) 12 C.L.R., 398.

be regarded as having been valid when made, and the industrial agreement made by it is as valid as if it had been made after the passing of the Act of 1911.

The second question submitted is whether the Court has jurisdiction to restrain the defendants by injunction from instituting proceedings in the Commonwealth Court of Conciliation and Arbitration in breach of the agreement of 24th June 1911.

It may be doubtful whether the stipulation not to make any further request or demand should be regarded as part of the industrial agreement itself, if it be one, or as collateral to it, though included in the same document. I incline to the latter view. The only express sanction of industrial agreements under the Act is that prescribed by sec. 78 already quoted, which provides that any breach shall be punished by penalties. It is, I think, obvious that that provision is not applicable to preferring a fresh claim contrary to a stipulation not to do so.

Sec. 67 of the Act provides that "Unless the contrary intention appears in this Act, no organization or member of an organization shall be liable to be sued, or to be proceeded against for a pecuniary penalty, except in the Court, for any act or omission in respect of which the Court has jurisdiction."

I cannot find in the Act any provision enabling the organization to be sued in the Arbitration Court for a breach of the stipulation now in question. I think, therefore, that the jurisdiction of this Court is not ousted by that section, if an injunction might otherwise be granted. And I think that the case of *In re Connolly Brothers, Ltd.*; *Wood* v. *Connolly Brothers, Ltd.* (1) establishes both the jurisdiction of the Court to grant an injunction for a breach of such a stipulation and the propriety of granting it unless some defence can be set up going to the validity of the agreement itself. Upon the pleadings, to which we were referred, a defence is set up to the effect that the agreement is invalid on grounds which, if established, are equally applicable to all agreements. We are not now concerned with the probability of this or any other defence being established. That question is left entirely open by the present decision.

(1) (1911) 1 Ch., 731.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Barton J.

In my opinion, both questions should be answered in the affirmative.

BARTON J. The defendant body is an organization of professional musicians formed and registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1911. The plaintiff company seeks, as against this organization, to have it declared that an agreement between the parties purporting to be an industrial agreement made under the Acts, is a valid and subsisting agreement, and that the defendants are bound by an undertaking contained therein that they would not make any further request or demand on the plaintiff company in relation to industrial matters within the Commonwealth during the continuance of the agreement, a space of three years. It is admitted that the defendants have threatened, and have taken steps to commence, proceedings in the Commonwealth Court of Conciliation and Arbitration in breach of their undertaking, and the plaintiff company seeks to have them restrained by injunction from committing such breach.

At the time of the agreement, 24th June 1911, the defendants were registered under the Act of 1904-1910 as an organization, but under the decision of this Court in the case of *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (1) their registration was invalid. Under these circumstances the defendants say that the agreement has no binding force as an industrial agreement. The plaintiff company maintains that the registration of the defendants as an organization was validated, as no doubt it was, by the amending Act of 1911, sec. 4. It must now be regarded, therefore, as having been a good registration from the first, and the initial defect cannot now be said to vitiate the agreement in any way.

The defendant organization further contends that, though the institution of proceedings in the Court of Conciliation and Arbitration is and would be confessedly in violation of its undertaking in the agreement, this Court has no jurisdiction to restrain the organization from instituting them.

(1) 12 C.L.R., 398.

The special case states two questions for our opinion:—

(1) Whether the industrial agreement, made by the defendant organization while it was improperly registered, is now valid and binding upon it.

(2) Whether this Court has jurisdiction to restrain the defendant organization from the proceedings it threatens to institute, even though the institution of them is in violation of the agreement.

On question (1) I have already indicated that the agreement is not vitiated by the improper registration, since validated by Statute. But other and more difficult questions arise as to its validity and effect.

It was suggested by my learned brother *Isaacs*, after the case had been argued, that the agreement might not be an industrial agreement within the meaning of the Principal Act, and that point has been the subject of a second argument.

The difficulty is as to the construction of Part VI. of the Act, and particularly sec. 73. That provision is enabling in form, but the question is whether the Act allows the making of any other valid industrial agreements than such as may be made, under that section, "for the prevention and settlement of industrial disputes existing or future by conciliation and arbitration." In the *Jumbunna Case* (1) I expressed the view that sec. 73 was the governing provision of Part VI., and my remarks certainly tended to the opinion that the industrial agreement to which the Act gave certain force and attributes was an agreement for the prevention and settlement of an industrial dispute by conciliation and arbitration, and that the remaining sections of the Part were ancillary to sec. 73. In the *Jumbunna Case* (2) this point, so far as I remember, was not very fully argued, and I have now had the opportunity of considering what my learned brother the Chief Justice has written on the subject. I admit the weight of the considerations which he has adduced, but I cannot say that they have altered the inclination of my opinion. In the view I take of this case it is not necessary to decide the point, and for this I am not sorry, as the more literal view to which I have been inclined is not one to be finally adopted with any

(1) 6 C.L.R., 309, at p. 346. (2) 6 C.L.R., 309.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Barton J.

alacrity, seeing that a construction which gives the assistance of the Act to comprehensive agreements between employer and employé is conducive to industrial peace. There is, however, in addition to other difficulties, an obstacle to the more liberal construction, if it is open, in the danger that legislation for industrial agreements not subject to the limitations of sec. 73 may be beyond the power to make laws for conciliation and arbitration granted by the Constitution. The agreement between the present parties deals very extensively with the terms and conditions of employment, but does not purport to provide for the prevention of industrial disputes by conciliation or by arbitration. So that if the observance of sec. 73 is a condition precedent to its validity as an industrial agreement, it will derive no force from the Statute. But that does not prevent it from being a valid and subsisting agreement at common law, and I see no legal obstacle to its being effective and binding in that way. It would be absurd to say that an agreement which does not so comply with the Act as to be entitled to the advantages thereby given to an industrial agreement, is necessarily deprived of all force and effect as a lawful compact. If it never came under the Act it has always been under the common law, since it does not lack any of the legal requisites of a good agreement. There is, indeed, a difficulty as to procedure. There is no Statute, apart from the *Conciliation and Arbitration Act*, under which the defendant body can sue or be sued. But I think Mr. *Knox* was right when he urged that secs. 58 and 66 of the Act dispelled the difficulty. If an organization can sue as such "for the purposes of the Act," it can be restrained as such from suing for such purposes. Indeed, I am inclined to think that the reasoning of the House of Lords in the case of *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1), and particularly that of *Lord Halsbury* L.C. (2), applies to the position of the defendant body in this case. "If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a Court of law for injuries purposely done by its authority and procurement."

(1) (1901) A.C., 426. (2) (1901) A.C., 426, at p. 436.

I am of opinion that question (1) should be answered in the affirmative.

Of course it will be seen from what I have said, that I mean that the agreement is, at the least, valid and binding upon the defendant organization as an agreement at common law.

Turning now to question (2), it is clause 4 of the agreement with which we are immediately concerned. It runs thus:— "During the continuance of this agreement the Musicians' Union of Australia undertakes not to make any further request or demand in relation to industrial matters within the Commonwealth of Australia."

If the whole agreement is an industrial agreement under the Act, secs. 78 and 67 must be considered. By sec. 78 an organization or person bound by an industrial agreement is liable to a penalty for any breach or non-observance of any term of the agreement, and by sec. 67 the penalty can only be recovered in the Arbitration Court. But if this is an industrial agreement I do not think its 4th clause can be considered otherwise than as a collateral provision, and it can scarcely be said to have been the intention of the parties that a resort to the Arbitration Court in violation of such a condition should be the subject of a penalty, and that there should be no preventive remedy. But if, as I am inclined to think, the agreement is not an industrial one, then neither sec. 78 nor sec. 67 appears to apply at all: sec. 78, because it is limited in terms to industrial agreements, and sec. 67, because it does not give any remedy in the Arbitration Court against an organization for a matter such as the breach of this undertaking. I do not see how the plaintiff company could proceed against the defendant organization in the Arbitration Court for a breach of clause 4, and I think the remedy for a threatened and impending breach of that clause is by resort to the ordinary Courts for an injunction. Their jurisdiction is put beyond doubt in the case of *In re Connolly Brothers, Ltd.*; *Wood* v. *Connolly Brothers, Ltd.* (1). It is only the question of jurisdiction that we are asked to decide, not the propriety of exercising it. But I should not think that upon these materials that question would be raised by the defendant organization.

(1) (1911) 1 Ch., 731.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Isaacs J.

I am of opinion that the second question, as well as the first, should be answered in the affirmative.

ISAACS J. The defendant union has an inter-State dispute with the plaintiff company, and intends, unless prevented by this Court, to submit that dispute to the Commonwealth Court of Conciliation and Arbitration. It is not disputed that that Court has jurisdiction to mediate, and, if necessary, to settle the dispute; indeed, the very groundwork of the plaintiffs' case is that it has such jurisdiction, and might find against the plaintiffs, that it might find that the present conditions under which the employés are working are unfair and ought to be remedied. But, say the employers to the employés:—"Fair or unfair as to present conditions you agreed on 24th June 1911 to those conditions, and you also agreed by a special clause, No. 4, that during the next three years you would not make any further request or demand in relation to industrial matters within the Commonwealth of Australia."

And that negative stipulation, it is urged, operates against the defendants for this purpose in two ways: first, as a common law agreement which—on the principle stated by *Cozens-Hardy* M.R. in *In re Connolly Brothers, Ltd.*; *Wood* v. *Connolly Brothers, Ltd.* (1)—enables the plaintiffs to restrain the defendants in ordinary cases of litigation in the regular Courts of law; next, as part of an industrial agreement under the Act, and said to be binding, and equally a subject matter for injunction.

As to the first, or common law aspect, it is, in my opinion, utterly untenable. It has been frequently laid down in most positive terms that no agreement of the parties can be allowed to stand in the way of the federal Court acting as a Court of Conciliation, or if conciliation fails, then as arbitrator to settle industrial disputes. It is obvious that, if private agreements between the parties could for a moment be allowed to obstruct the operations of that tribunal, the constitutional power would soon be reduced to a nullity. Employés pressed by urgent considerations of present necessity might have to agree to terms for three or thirty years—for at common law there is no time limit; and then, according to the contention of the plaintiffs, it is

(1) (1911) 1 Ch., 731, at p. 744.

intended by the legislature—Imperial and Commonwealth—that the Court is to have jurisdiction, as in ordinary cases of private agreements, to look to the strict words of the bond, and, notwithstanding any change of circumstances or the present injustice of the terms, the violence of the dispute, or the dislocation of industry, may hold the parties down to their textual promise, and prevent them approaching the tribunal specially erected under the authority of the Constitution to investigate the cause, and settle the dispute and maintain public industrial peace.

The specific question asked is whether the Court has jurisdiction to grant the injunction, not whether it ought to be or must be granted. But it is necessary to point out that the first step involves the last. The claim is rested on the ordinary principles of equity with reference to what are called negative covenants. Now the law is absolutely settled by the House of Lords that, in the case of negative covenants, there is no discretion. In *Doherty* v. *Allman* (1) Lord *Cairns* L.C. says:—"My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves." The Lord Chancellor goes on to state the difference as to discretion where there is only an affirmative covenant. The doctrine so expounded by Lord *Cairns* was approved and acted on by the Privy Council in *McEacharn* v. *Colton* (2). Now, the only doctrine invoked in this case is the "negative covenant" doctrine, and so it is clear and indisputable law that if the Court can grant the injunction on that principle, it must, for the principle

(1) 3 App. Cas., 709, at pp. 719, 720. (2) (1902) A.C., 104, at p. 107.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Isaacs J.

is indivisible. Of course, fraud would vitiate and be an answer to any agreement. But that is not material. We have to consider the case of a contract to which there is no defence in the ordinary Courts. Consequently, no matter what the public havoc may be in any industry, let there be only a negative covenant, and then, on the plaintiffs' argument, this Court must stand as a barrier between the parties and the Court of Conciliation and Arbitration. That is to say, this Court is required to prevent even the mediatory functions of the President from being exercised for reconciling the parties as required by sec. 23, and endeavouring to obtain a binding amicable agreement. To my mind, that is entirely wrong and inconsistent, not only with the whole scope of the Statute, but also with what has been said by learned Judges on prior occasions,

In *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1) the learned Chief Justice held that an award of a State Court of Arbitration, whether made a common rule or not, and though regarded as a judgment *inter partes* and standing, as his Honor said, "on the same footing as a solemn agreement of the most binding nature"—yet not so high as a State law—did not offer any objection to the Act in the Federal Arbitration Court. But if that is so on high public grounds, it seems to me inconsistent to prevent it. In the same case, *O'Connor* J., speaking of the characteristics of an industrial dispute, said (2):—"The questions at issue being, not as to the breach or observance of existing contracts, but as to the removal of grievances which had grown up under them, and as to the best means of securing by new agreement or understanding other and better conditions for the future." But if grievances have grown up under them now, can it be suggested that an injunction is possible to prevent redress?

In that case I observed (3) that industrial disputes and their pregnant consequences of strikes and lockouts are to satisfy immediate needs and present desires, and to correct existing injustice, and not to settle what is to happen years hence, when conditions may have altered and the present parties have, per-

(1) 8 C.L.R., 465, at p. 499. (2) 8 C.L.R., 465, at p. 503.
(3) 8 C.L.R., 465, at p. 522.

haps by stress of the very conditions they complain of, disappeared altogether. *Higgins* J. was of the opinion with myself that even a State law could not overrule the federal Statute, and, whether that be right or wrong, it *à fortiori* includes the case of an agreement.

In *Australian Boot Trade Employés Federation* v. *Whybrow & Co.* (1), *O'Connor* J. was even more explicit than before. He said:—"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."

What, then, are those reasons? The modern legislation on the subject really arose out of the English trade disturbances of 1865.

(1) 10 C.L.R., 266, at p. 303.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Isaacs J.

In *Webb's History of Trade Unionism* (1894), at pp. 239, 240, this passage appears:—"The industrial dislocation which the lock-outs, far more than the strikes, produced, occasioned widespread loss and public inconvenience. The quarrels of employer and employed came to be vaguely regarded as matters of more than private concern." In the next year, 1866, the Sheffield trade union conference passed resolutions for the establishment of Councils of Conciliation and general resort to arbitration in industrial disputes. In 1867, the Imperial Parliament passed the *Councils of Conciliation Act* 1867 (30 & 31 Vict. c. 105) for the establishment of Councils of Conciliation and Arbitration with limited powers. I need not trace for this purpose the further enactments, either in England or Australia, except to observe that in the New South Wales Act of 1892 (55 Vict. No. 29) it is recited that Councils of Conciliation and of Arbitration have been thought conducive to prevent strikes and other disputes by which industrial operations may be injured, "and the welfare and peaceful government of the country be imperilled." What I have said will show how the public interest was the animating impulse to which this class of legislation owes its origin, and without which that legislation sinks into a mere provision for settling private quarrels, and breaking private agreements, without reference to public necessities.

I have within the last few days (*R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1)) re-expressed the view which stands conspicuously on the face of the Constitution, that this power is "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 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, ... is to mistake the fundamental nature of sub-sec. xxxv." of sec. 51 of the Constitution.

(1) 15 C.L.R., 586, at pp. 609-610.

The present union is a comparatively inconspicuous one, though the importance of fair working conditions is as great to its members as if it occupied a front place in the industries of the Commonwealth. But, suppose a similar agreement in the coal or shipping or bread-making industries: if the masters could only secure an agreement with the unions that no further change would be made for twenty years, then, on the principle urged for the plaintiffs, this Court would be entitled, and even bound, on ordinary principles, to step in between the disputants and the Arbitration Court, and prevent their entrance to that tribunal. The argument necessarily goes to this extent that, as the public inconvenience is no factor in the matter, there might be a strike, or a lockout, the public deprived of coal, plunged in darkness, without means of transport, and without bread, and yet on the principle—excellent, indeed, in its proper place—that men ought to keep their contracts, the whole machinery contemplated by and provided under the Constitution, may be closed to the dispute by the application of principles adopted for the purpose of securing the observance of contractual stipulations between private individuals only.

I simply say I am unable to accept that argument. The inviolability of contractual promises is, no doubt, one great principle; but it is subject to the overriding requirements of public policy. An infant's contract is not inviolable; certain classes of the community such as miners, sailors, borrowers, and some special classes of workmen are protected against bargains that they make nominally as free men, but in reality, as Judges of the highest distinction have said, under the pressure of severe circumstances. In *Vernon* v. *Bethell* (1), Lord *Northington* L.C. said:—"Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose on them." I do not, of course, for a moment impute any craftiness to the present plaintiffs, but I am enunciating a principle. In *Bowes* v. *Heaps* (2), Sir *William Grant* M.R. said:—"It is not . . . every bargain, which distress may induce one man to offer, that another is at liberty to accept." Both those passages have been quoted with approval by Lord *Macnaghten*,

(1) 2 Eden, 100, at p. 113.

(2) 3 V. & B., 117, at p. 119.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Isaacs J.

the first in *Samuel* v. *Jarrah Timber and Wood Paving Corporation Ltd.* (1), and the other in *Samuel* v. *Newbold* (2). It will not be denied that there may be circumstances of public exigency where private stipulations have to stand aside in the public interest: contracts in restraint of trade, in prejudice of the revenue, in restraint of marriage, in interference with justice, for maintenance and champerty, or to engage in a fight as tending to create a breach of the peace.

The late Lord *Herschell*, one of the greatest jurists that have graced the English bench, once said:—"I maintain that there is no inherent right in any two people to make engagements and to compel the community to enforce those engagements being carried out. Therefore, I say that wherever the engagement is of a nature against the public interest, it is perfectly legitimate to forbid contracting out" (*Parliamentary Debates* (English), fourth series, vol. xix., col. 84, 30th November 1893).

That, though spoken in the capacity of legislator, is *à propos* of the present claim, because an industrial claim is for new conditions, not to enforce present ones. It is said, one party may ask the community of the Commonwealth by its judicial organ to enforce an engagement not to arbitrate notwithstanding it is against the public interest to leave a dispute to ripen into a strike or to impair the services rendered to the public, and although the Federal Parliament has virtually forbidden contracting out by taking the whole matter into its own hands, by forbidding a strike, and by providing a tribunal to take cognizance of every dispute that might otherwise lead to it, and by enforcing obedience to the award. If a contract in restraint of trade is *primâ facie* against public policy, and bad altogether when against the public interest, a contract which may lead to a dislocation of industry can be in no better situation; and if an agreement tending to a breach of the peace between two individuals is illegal, how much more must the law regard it as opposed to its declared public policy to treat by arbitration disputes that may involve entire sections of the community in industrial warfare.

In my opinion, the cases applicable to ordinary controversies

(1) (1904) A.C., 323, at p. 327. (2) (1906) A.C., 461, at p. 471.

that concern no one but the immediate parties rest upon a much narrower foundation than, and have no relevance to, such a matter as this, and the first point should be decided against the plaintiffs.

I would add that I have grave doubts whether such an organization as the defendant has any capacity to contract at common law, that is, apart from the agreements mentioned in the Statute, to bind its members present and future to fixed industrial conditions.

Then it is claimed that by virtue of what is called an "industrial agreement" the injunction may be granted to restrain the organization from submitting the dispute.

Now, apart from the whole general aspect of the Statute, which is to facilitate conciliation, and, failing that, then arbitration in all inter-State disputes, there is a specific group of sections dealing with organizations.

Sec. 65 says in the most explicit terms:—"Every organization shall be *entitled*—(*a*) to submit to the Court any industrial dispute in which it is interested."

It is not the mere creation of a capacity, but of a right. In the next sub-section it is entitled to be represented before the Court; again, that is not a mere capacity, but a right. Yet, say the plaintiffs, that right may be annulled by an order of this Court. In my opinion, that is a flat contradiction of the Act.

Then sec. 66 says:—"Any organization may sue or be sued for the purpose of this Act in its registered or other name," &c.

But, it will be observed, only "for the purpose of this Act"; and that limits the purposes of the litigation but not the Court in which the litigation may proceed.

That, however, is provided for in secs. 67 and 68. The first says:—"Unless the contrary intention appears in this Act, no organization or member of an organization shall be liable to be sued, or to be proceeded against for a pecuniary penalty, except in the Court, for any act or omission in respect of which the Court has jurisdiction."

Sec. 68 enables certain fines, fees, levies and dues, to be recovered in certain Courts of summary jurisdiction. In these circumstances, I see on the face of the Act both regarded in the

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Isaacs J.

large and by the light of these specific sections, an intention that the ordinary law Courts were never intended to step in between an industrial disputant and the Court specially created for the hearing of his dispute.

That supposes there is a valid industrial agreement within the meaning of the Act. But, in my opinion, the present is not one. There can be no doubt, in fact it has been emphasized over and over again by every member of this Court, that the only power of the Commonwealth Parliament under sub-sec. xxxv. of sec. 51 is to legislate for conciliation and arbitration in relation to industrial disputes. On this ground the common rule provisions were declared invalid.

First, I will consider whether the present agreement as a whole comes within the Act at all as an industrial agreement. It makes no provision for conciliation or arbitration; it was not the outcome of either. The parties negotiated in the ordinary way, and, at last, certain terms of payment, &c., were agreed to, and a clause was put in, of course at the instance of the employers, to make no further demand for three years. It is very evident that conditions and stipulations inserted in an agreement where the employers may refuse any terms they please, may be very different from those inserted in an agreement by resolution of one or more persons acting as arbitrators, or even under the mediating influence of some fair-minded third person or persons moderating opposite views. And it is the latter class of agreement which, in my opinion, is pointed to by Part VI. of the Act.

Sec. 73 is the governing section, and practically follows the words of the Constitution in relation to conciliation and arbitration. That section provides for an alternative mode of proceeding, by conciliation or arbitration, other than going to the Court. It is voluntary conciliation and arbitration, the forum selected by the parties.

Then sec. 74 says:—"No proceedings under any industrial agreement shall extend to affect any organization or persons who are not bound by the agreement."

In other words, where industrial conditions are fixed in accordance with the industrial agreement previously mentioned, they bind those who have agreed. That the industrial agreements

intended by the Act are those referred to in sec. 73, is supported by the words of the learned Chief Justice, of *Barton* J., and of *O'Connor* J., in the *Jumbunna Case* (1). There can, therefore, be little doubt as to that.

Then arises a novel contention that, where employers and employés discuss terms, first dispute about them, and then calmly debate them and agree, that is "conciliation" within the meaning of the Act, because the parties have become reconciled, and the final agreement made is an agreement made by means of conciliation.

There are many strong reasons for refusing to accept that. First, it is opposed to the general sense of the term. "Conciliation," in this sense, means, according to the *Oxford Dictionary*—"Court (tribunal) of conciliation: a court for composing disputes by offering to the parties a voluntary settlement, the case proceeding to a judicial court if this is not accepted." And a quotation from Sydney Smith is given referring to "The Tribunal of Conciliation." Therefore, its ordinary meaning in this connection is, some person or persons—they may be selected by the parties, even from among their own ranks—acting, however, not as disputants themselves, but as mediators, who may avert the necessity of a formal reference to some compulsory tribunal, by inducing the parties to come to some amicable agreement. An amicable agreement so made would, in my opinion, come under the head of industrial agreement.

Next, it is opposed to the intendment of the Act itself. For instance, sec. 16 charges the President with the duty of "reconciling" the parties by his "mediation." Similarly, in sec. 24. And then there are the pronounced opinions of learned Judges of this Court, as *per O'Connor* J. in the *Jumbunna Case* (2), and *Barton* J., myself and *Higgins* J. in *Whybrow's Case* (3), that conciliation has the special meaning which it had in 1900 in relation to industrial disputes, namely, some authority in the nature of a tribunal or mediator.

The sections of Part VI., such as 77, 78, do not militate against

(1) 6 C.L.R., 309, at pp. 339, 346-347, 361.
(2) 6 C.L.R., 309, at pp. 366-367.
(3) 11 C.L.R., 311, at pp. 321, 331, 339.

H. C. OF A. 1912.

J. C. WILLIAMSON LTD. v. MUSICIANS' UNION OF AUSTRALIA.

Isaacs J.

the governing effect of sec. 73, because "proceedings" under 74 may lead to an amicable agreement or an award, and in either case the terms are the result of agreement, direct in the first case; and in the second are within the rule that every agreement of submission to arbitration implies an obligation to perform the award (*Byles* J. in *Lievesley* v. *Gilmore* (1)). Consequently, the agreement sued on, made in the circumstances in which it arose, is not, in my opinion, an industrial agreement within the meaning of the Act.

It is needless to discuss whether, if by any inadvertence it were within the Act, it would be covered by the terms of the constitutional power. Strong expressions can be found by several Judges that it would not.

During the argument I inquired whether this Court had any jurisdiction at all to entertain the suit in original jurisdiction in view of the doubt as to divergent residence. This, however, is a special case, and the parties have asked two questions only, and the doubt referred to must go unresolved until the question is distinctly raised with all the relevant facts necessary for the decision of it.

In my opinion, the questions should be answered in the negative.

Questions answered in the affirmative. Costs to be costs in the action.

Solicitors, for the plaintiffs, *Minter, Simpson & Co.*

B. L.

(1) L.R. 1 C.P., 570, at pp. 573, 574.