[HIGH COURT OF AUSTRALIA.]

MERCHANT SERVICE GUILD OF AUSTRALASIA . . . . . } CLAIMANTS;

AND

NEWCASTLE AND HUNTER RIVER STEAMSHIP CO. LTD. AND OTHERS } RESPONDENTS.

[No. 2.]

H. C. OF A. 1913.

SYDNEY, *Aug.* 29; *Sept.* 1, 4.

Barton A.C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Industrial arbitration—Special case—Question "arising in the proceeding"—Industrial dispute—Demand made by employés—Necessity for pre-existing dissatisfaction known to employers—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *sec.* 31 (2).

In a special case stated by the President of the Commonwealth Court of Conciliation and Arbitration under sec. 31 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, the only facts stated were that the proceeding came before that Court upon an order of the President made under sec. 19 (*d*) of the Act, the claimants being an organization of masters and officers employed by the respondents, who carried on business as shipowners on the coast of Australia; and that objection was taken, in their answers and at the hearing, on the part of many of the respondents, that there was no industrial dispute within the meaning of the Constitution or the Act.

Held, by *Barton* A.C.J. and *Gavan Duffy*, *Powers* and *Rich* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that the question "what are the necessary *indicia* of an industrial dispute within the meaning of the Constitution and of the Act" was not a question "arising in the proceeding," within the meaning of sec. 31 (2) of the Act, and therefore, although stated by the President to have arisen in the proceeding and to be in his opinion a question of law, was not one which the High Court should answer.

Held, by the whole Court, that, in the case of a demand made by or on behalf of employés on their employers and refused or not conceded, pre-

H. C. OF A. 1913.

MERCHANT SERVICE GUILD OF AUSTRALASIA v. NEWCASTLE AND HUNTER RIVER STEAMSHIP CO. LTD. [No. 2.]

existing dissatisfaction communicated to or known by the employers before the demand is not always a necessary element to constitute an industrial dispute or to make the demand real and genuine.

R. v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild*, 15 C.L.R., 586, explained.

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

The case was as follows:—

1. This proceeding came before this Court on 29th March 1913 in pursuance of an order of the President made on 24th February 1913 under sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1911.

2. The claimants are an organization of masters and officers who are employed by the respondents. The respondents (128 in number) are shipowners carrying on business on the coast of Australia.

3. Objection was taken (in answers and at the hearing) on the part of many of the respondents who appeared or were represented before the Court, that there is no "industrial dispute" within the meaning of the Constitution or of the Act.

4. The following questions arise in the proceeding—questions which, in my opinion, are questions of law,—and I submit them to the High Court for its opinion:—

1. What are the necessary *indicia* of an (actual) "industrial dispute" within the meaning of the Constitution and of the Act?
2. In the case of a demand made by or on behalf of employés on their employers and refused or not conceded, is pre-existing dissatisfaction, communicated to or known by the employers before the demand, always a necessary element to constitute an industrial dispute or to make the demand real and genuine?

The word "always" in the second question was inserted by an amendment of the case made during argument.

Bavin, for the claimants.

Knox K.C. (with him *Curlewis*), for certain of the respondents. The first question does not arise in the proceeding, and cannot be

asked under sec. 31 (2) of the *Commonwealth Conciliation and Arbitration Act.*

[ISAACS J. Is not the section intended to enable the President to obtain a direction as to the law?]

[*Bavin.* Yes. In *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (1) *Isaacs* J. said that "the President may take steps to assure himself of the law before proceeding further."]

The President is not justified in asking this Court what is a dispute: *Federated Saw Mill &c. Employés Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (2), *per Higgins* J. Whether a particular question arises in the particular case depends on whether the question is one the determination of which is relevant to the particular case: *Hoddinott* v. *Newton, Chambers & Co. Ltd.* (3), and that matter is for this Court to decide. A question arises in a proceeding only if it arises out of the facts of the proceeding: *M'Naghten's Case* (4); *Federated Saw Mill &c. Employés Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (5), *per Griffith* C.J.

[ISAACS J. referred to *Attorney-General for Ontario* v. *Attorney-General for Canada* (6).]

The question what are the necessary *indicia* of an industrial dispute is one that it is impossible to answer: *Federated Saw Mill &c. Employés Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (7), *per Isaacs* J.; *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (8), *per Isaacs* J.; *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.* (9), *per O'Connor* J. This Court should not answer a question unless the case sets forth the facts out of which the question arises. The expression "state a case" is well known, and means that the facts should be stated.

Bavin. The first question means what is involved in the legal

(1) 16 C.L.R., 245, at p. 274.
(2) 8 C.L.R., 465, at p. 540.
(3) (1901) A.C., 49, at p. 68.
(4) 10 Cl. & F., 200, at pp. 204, 212.
(5) 8 C.L.R., 465, at p. 485.
(6) (1912) A.C., 571, at p. 585.
(7) 8 C.L.R., 465, at p. 514.
(8) 15 C.L.R., 586, at p. 608.
(9) 8 C.L.R., 419, at p. 446.

H. C. OF A. 1913.

MERCHANT SERVICE GUILD OF AUSTRALASIA v. NEWCASTLE AND HUNTER RIVER STEAMSHIP CO. LTD. [No. 2.]

concept of an industrial dispute. That is a question that must arise in every case in the Arbitration Court, just as in a criminal trial the Judge, before directing the jury, must know the legal concept of the crime with which the prisoner is charged.

BARTON A.C.J. The Court is of opinion by a majority that the first question ought not to be answered. If necessary, the reasons will be given later.

Bavin. The second question should be answered in the negative. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1).]

Knox K.C. The second question does not arise in the proceeding. The answer to it depends on the circumstances of the particular case.

Bavin, in reply.

Cur. adv. vult.

Sept. 4.

BARTON A.C.J. read the following judgment :—

In this matter the learned President of the Commonwealth Court of Conciliation and Arbitration has stated a case for this Court under sec. 31, sub-secs. 2 and 3, of the Act.

The facts stated are that the proceeding is before the Arbitration Court upon an order of the learned President made under sec. 19 (*d*) of the Act, the claimants being an organization of masters and officers employed by the 128 respondents, who carry on business as shipowners on the coast of Australia.

In their answers, and at the hearing, many of the respondents objected that there is no " industrial dispute " within the meaning of the Constitution and of the Act.

These are the only facts stated as to the dispute or its nature.

The learned President informs us that two questions arise in the proceeding which, being in his opinion questions of law, he submits to this Court for its opinion. [His Honor read the questions in the case stated.]

(1) 15 C.L.R., 586.

The matter was discussed before us on 29th August and 1st September instant by counsel for the claimant Guild and by counsel on behalf of those of the respondents who are members of the New South Wales Coastal Steamship Owners' Association.

At the outset, Mr. *Knox*, for these respondents, took the objection that the Court was not empowered by the two sub-sections mentioned (the terms of which are well known) to answer question 1; and, after argument, the Court by majority upheld the objection. We then stated that, if necessary, reasons would be given when judgment was delivered upon the case. After the judgments delivered this morning in the case of *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [No. 1] (1), it seems scarcely necessary for me to give any reasons for my opinion other than those there stated by the majority of the Court for holding that its duty was to abstain from answering questions 1 and 2 in that case. It is clear to my mind that the question does not arise in view of the case stated. Indeed, it does not arise upon any concrete state of facts. It is merely an abstract question of law, and it does not appear that an explanation of all the necessary *indicia* of an actual "industrial dispute extending beyond the limits of any one State" is at all necessary to enable the Court to hear and determine the proceeding. In my own judgment, it is scarcely possible to give such an explanation, because what is necessary in one case may not be so in another, though in both cases it may be relevant evidence. See the cases cited by my learned brother *Isaacs* and myself in the judgments in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [No. 1] (1).

Question 2, as stated, has been amended by the insertion of the word "always," so that it asks whether, in the case supposed, "pre-existing dissatisfaction, communicated to or known by the employers before the demand," is "*always* a necessary element," &c.

The main argument proceeded upon question 2. I have grave doubts whether that question is not hypothetical. We have no statement before us of a demand or refusal, but are asked to

(1) 16 C.L.R., 591.

H. C. OF A. 1913.

MERCHANT SERVICE GUILD OF AUSTRALASIA v. NEWCASTLE AND HUNTER RIVER STEAMSHIP CO. LTD. [No. 2.]

Barton A.C.J.

assume both. As my colleagues, however, think that this is such a question as the Court can and ought to answer, I reply that I do not think the proof of pre-existing dissatisfaction communicated to or known by the employers before the demand is always a necessary element to constitute an industrial dispute or to make the demand real and genuine. As Mr. *Knox* truly said, "it depends on circumstances." Where there is a specific and definite demand of an alteration in industrial conditions, made under circumstances which show it to be a genuine effort for the alteration of existing industrial conditions, and where it is met by actual refusal, or by non-compliance under circumstances from which refusal must be implied, and where the circumstances show that the demand and refusal are not transient and fleeting, but real and persistent, I suppose no one can doubt that there is a dispute. But the circumstances which go to show any of these things are many and various, and they vary according to the other circumstances of the case. The pre-existing dissatisfaction, communicated or known—as one instance—may in case A be necessary to complete a proof of the reality of the dispute. In case B its reality may be established by such other facts as render the specific proof of this one unnecessary. It is not because a certain incident is material and therefore admissible as part of the proof of an ultimate conclusion of fact, that the evidence of that incident is always essential to the conclusion. The ultimate state of facts may possibly be established *aliunde*. That depends on the nature of the particular case. And this applies to many of the incidents which are often or occasionally relied on as items of proof of the existence of an inter-State or industrial dispute.

During the argument my learned brother *Higgins* referred to the following passage from my judgment in *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1):—"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

(1) 15 C.L.R., 586, at p. 605.

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." But that passage is immediately preceded by the following:—"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 a mere paper demand." And I take leave to quote the following from the pages referring to the facts of this particular case (2):—"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] (3). A grumbling or an agitation will not suffice: see *Conway* v. *Wade* (4); and here there is not 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."

The passages, read together, so completely evidence that I was speaking in the sense of my present judgment that I need only

(1) 8 C.L.R., 465, at p. 488.
(2) 15 C.L.R., 586, at pp. 603, 604.
(3) 11 C.L.R., 1.
(4) (1909) A.C., 506, at p. 510.

H. C. OF A. 1913.

MERCHANT SERVICE GUILD OF AUSTRAL-ASIA v. NEWCASTLE AND HUNTER RIVER STEAMSHIP CO. LTD.

[No. 2.]

Isaacs J.

say that I was referring to incidents and circumstances which, when proved, go far to establish the existence of a real and genuine dispute. I need scarcely say that I never intimated or supposed that they must all concur in every case. It is one thing to say that a thing is good evidence, and another to say that it is essential to a legal concept.

ISAACS J. In my opinion the first question is answerable, but, being in the minority, I do not proceed to answer it.

As to the second question, in my opinion the answer should be No. My reasons for so thinking have been fully stated in *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1), and I shall not trouble to repeat them.

HIGGINS J. read the following judgment:—

1.—I concur with my brother *Isaacs* in the opinion that this question should be answered under sec. 31 of the Act. I have expressed, at some length, my views as to the proper construction of the section, in the previous case stated between the same parties; and I need not repeat them. This second case I stated in order to meet the difficulties felt by my learned brothers, in answering the first case; but, unfortunately, I have not succeeded; and I can get no guidance, no pronouncement, from the High Court, as to the meaning of the plain words "industrial dispute." In this case, it cannot be said, at all events, that I am asking the High Court to draw any inference from facts. The case states that objection was taken on the part of many of the respondents who appeared, or were represented before the Court, that there is no "industrial dispute" within the meaning of the Constitution or of the Act; and that this question arises in the proceeding—a question which, in my opinion, is a question of law—"What are the necessary *indicia* of an (actual) 'industrial dispute' within the meaning of the Constitution and of the Act?" I can entertain no doubt whatever in my own mind, that the question arises "*in the proceeding*," as soon as respondents in an actual proceeding object that there is

(1) 15 C.L.R., 586.

no industrial dispute; for, in order to ascertain whether there is or is not, I must first know what an "industrial dispute" means. I admit that the question does not arise *out of facts proved and found, which are alleged to constitute an industrial dispute*; for sec. 31 does not confine my question to the time after all the evidence has been taken. I may ask the question "at any stage" —including the stage before any evidence has been taken. Moreover, to "state a case" does not, in sec. 31, mean more, I think, than to state what is necessary to enable the High Court to understand my difficulty of law. But I bow to the opinion of the majority of my colleagues, and therefore I make no attempt to solve the question.

2.—I am glad to be able to concur with all the members of the Bench in answering No to this question, amended, as it has been, at their suggestion, by inserting the word "always." My difficulty arose from the words of the Chief Justice and of *Barton* and *Isaacs* JJ. in the prohibition case decided last December: *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (1). The Chief Justice said that there was no "dispute," pointing out (2) that there was no evidence "of any unadjusted differences existing between the applicants and their employés at the date of the letter of 30th August" (the letter containing the "log" of demands). My brother *Barton* said (3) that a demand for better industrial conditions (the log of 30th August) must itself be "the culmination of a sense of wrong or injustice, made known or become known to the other party." My brother *Isaacs* understood their pronouncements as I understood them, and, in a dissenting judgment, set himself to show that "pre-existing dissatisfaction communicated to or known by the employers" before the presentation of the "log" of demands is *not* necessary to constitute an industrial dispute, or to make the demand real and genuine. I understand now, however, from my brother *Barton*, that the words used in the majority judgments did not mean what I thought they meant; and the unanimous answer to this question will be of considerable use to me whenever I apply my mind to the question of the existence of an "industrial dispute."

(1) 15 C.L.R., 586. (2) 15 C.L.R., 586, at p. 601.
(3) 15 C.L.R., 586, at p. 605.

H. C. OF A. 1913.

MERCHANT SERVICE GUILD OF AUSTRALASIA v. NEWCASTLE AND HUNTER RIVER STEAMSHIP CO. LTD. [No. 2.]

Powers J.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. We think, as we thought during the argument, that the first question does not arise in the proceeding. We think the second question should be answered in the negative, and we agree in the reasons given by our brother *Isaacs* for arriving at that conclusion.

POWERS J read the following judgment:—

The learned President stated a case for the opinion of this Court, in the matter of the Merchant Service Guild of Australasia and the Newcastle and Hunter River Steamship Company Limited and others.

The questions, which the learned President stated in the case arise in the proceeding and which in his opinion are questions of law, are:—[His Honor read the questions, and continued:] As to the first question, I agree with the majority of the Court in holding that the question does not arise in this proceeding, on the facts submitted in the case stated by the President; and, therefore, it should not be answered. The reasons were fully stated by me in the first case between the same parties this morning (1).

As to the second—the following is a copy of the case stated:—[His Honor read paragraphs 1 to 3 (inclusive) of the case stated, and continued:] I do not, personally, see how the question arises on the facts stated in the case, but the majority of the Court holds that the second question does arise in this proceeding, on the facts set out; and an answer must, therefore, be given to the question: See sec. 31 of the *Commonwealth Conciliation and Arbitration Act.*

I hold that pre-existing dissatisfaction communicated to or known by the employers before the demand is not always a necessary element to constitute an industrial dispute; or to make the demand real and genuine. The demand may be the first step, so far as the employers are concerned, and persistence in the demand and refusal after demand may, with other necessary elements of a dispute, be sufficient.

My answer to question 2 is No.

(1) 16 C.L.R., 591.

BARTON A.C.J. Question 1 being in our judgment one that we are not entitled to answer, the answer of the Court is:

To question 2—No.

We order that the case be remitted to the President with this opinion.

Questions answered accordingly.

Solicitors, for the claimants, *Sullivan Brothers.*

Solicitors, for the respondents who appeared, *Scroggie & Dunhill.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA . . . . . } CLAIMANTS;

AND

THE BROKEN HILL PROPRIETARY COMPANY LIMITED AND OTHERS } RESPONDENTS.

[No. 3.]

Industrial Conciliation and Arbitration—Industrial agreement, meaning of—Agreement settling terms of employment—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *secs.* 4, 24, 73, *Part VI.—The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.).

Sec. 73 is the governing section in Part VI. of the *Commonwealth Conciliation and Arbitration Act*, and the only industrial agreement that is contemplated by that Part is an industrial agreement for the prevention and settlement of industrial disputes by conciliation and arbitration.

Held, therefore, that an agreement made by an organization and an employer purporting to settle the rates of wages and conditions of employ-