[HIGH COURT OF AUSTRALIA.]

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

AND

THE BROKEN HILL PROPRIETARY COMPANY LIMITED AND OTHERS } RESPONDENTS.

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MELBOURNE, *Mar.* 18, 19, 20, 21.

1913.

SYDNEY, *Mar.* 27, 28; *April* 7.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Industrial Conciliation and Arbitration—Registration of organization—Association of employés—Registration declared invalid by High Court—Subsequent Statute validating registration—Retrospective legislation, effect of—Municipal corporation—Instrumentality of State—Municipal trading—Board of Reference—Matters assigned to Board—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *secs.* 4, 19, 31, 40A, 55—*Commonwealth Conciliation and Arbitration Act* 1911 (*No.* 6 *of* 1911), *sec.* 4.

Practice—High Court—Case stated by President of Commonwealth Court of Conciliation and Arbitration—Right of audience in High Court of officer of organization—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *sec.* 27.

On a case stated under sec. 31 of the *Commonwealth Conciliation and Arbitration Act* by the President of the Commonwealth Court of Conciliation and Arbitration for the opinion of the High Court upon a question, the answer of the High Court to the question asked is a conclusive judgment binding on the Commonwealth Court of Conciliation and Arbitration and on the parties.

So *held* by *Griffith* C.J., *Barton* J. and *Isaacs* J. (*Higgins* J. dissenting).

Per Higgins J.—Under sec. 31 the final result of what the High Court does is only an "opinion."

On a case so stated by the President, the High Court had held that an association of land engine-drivers and firemen engaged in various industrial undertakings was not entitled under sec. 55 of the *Commonwealth Conciliation and*

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Arbitration Act 1904 to be registered as an organization, and that the Commonwealth Court of Conciliation and Arbitration had no jurisdiction to entertain a plaint made by such an association which was *de facto* registered. The case was remitted to the President, and before he had further dealt with it the *Commonwealth Conciliation and Arbitration Act* 1911 was passed.

Held by *Griffith* C.J. and *Barton* J. (*Isaacs* J. and *Higgins* J. dissenting), that sec. 4 of the latter Act only operated so as to validate the plaint as from the date of the passing of the latter Act.

Per totam curiam.—A municipal corporation in Victoria, so far as it engages in trading operations, is subject to the jurisdiction and award of the Commonwealth Court of Conciliation and Arbitration.

The power given to the Commonwealth Court of Conciliation and Arbitration by sec. 40A of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 to include in an award a provision for a Board of Reference is limited to such matters or things dealt with by the award as are specifically mentioned in the provision, and the provision cannot be made in general terms.

So *held* by *Griffith* C.J., *Barton* J. and *Isaacs* J. (*Higgins* J. dissenting).

Per Higgins J.—"Specify" in the section means merely to state in full and explicit terms, to name expressly.

On the hearing of a case stated by the President of the Commonwealth Court of Conciliation and Arbitration, under sec. 31 of the Act, the secretary of an association registered as an organization under the *Commonwealth Conciliation and Arbitration Act* 1904-1911 has not the right of audience in the High Court as representing the association.

So *held* by *Griffith* C.J., *Barton* J. and *Isaacs* J.

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

On a plaint in the Commonwealth Court of Conciliation and Arbitration brought by the Federated Engine-Drivers and Firemen's Association of Australasia against the Broken Hill Proprietary Company Ltd. and a number of other corporations, firms and individuals, the President stated the following case for the opinion of the High Court:—

"1. The claimant is an association of employés which is in fact registered as an organization under the Act on 2nd March 1908 in or in connection with what is styled the industry of 'land engine-driving and firing.'

"2. Members of the association are employed for the purposes of engines in many undertakings of various characters, *e.g.*, in

mines, in timber yards, in tanneries, in jam factories, in soap and candle works.

"3. According to the opinion of a majority of the members of the High Court, as expressed on a previous case stated by me on 12th May 1911 and remitted to me on 12th October 1911, an association of land engine-drivers and firemen is not an association that can be registered under sec. 55 of the Act.

"4. Objection was taken at the hearing that certain of the respondents are not subject to the jurisdiction of this Court under the Act as being State agencies or instrumentalities.

"5. In deference to the opinions expressed by members of the Court the claimant now does not ask for an award as against some of the said respondents, but it still presses for an award as against the Mayor, Aldermen, Councillors and Citizens of the City of Melbourne.

"6. This respondent corporation is constituted under State Acts, and the parties are at liberty to refer to all relevant Acts in argument. But the relevant Acts which I have found are the Victorian *Electric Light and Power Act* 1896, *Electric Light and Power Act* 1898, *Electric Light and Power Act* 1900, and *Electric Light and Power Act* 1901.

"7. The said Corporation of Melbourne has works in the city at which (with the aid of engine-drivers and firemen) electricity is generated without distinction for the use of the said respondent and for sale to the public. The electricity is used for lighting the streets of the city and the town hall and other municipal buildings. It is also supplied to other public and private buildings in the city for lighting and heating purposes and for elevators, but always for payment.

"8. The said corporation has also desiccator works in the city at which (with the aid of engine-drivers and firemen) it makes manure which it sells to the public.

"9. The said corporation has also refrigerating plant for which it employs engine-drivers and firemen, and it lets to the public, for payment, refrigerating space which is used for the purpose of cooling and storing perishable produce.

"10. I have prepared provisionally an award" (which was annexed to the case).

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"11. The following questions are questions arising in the proceeding, and are, in my opinion, questions of law, and I submit them for the opinion of the High Court:—

"1. Has this Court power now that the *Commonwealth Conciliation and Arbitration Act* 1911 has been passed to make an award in this case at the instance of the claimant?

"2. Is the respondent, the Corporation of Melbourne, subject to the jurisdiction and award of this Court in any and what respect?

"3. Has this Court power to include in the award the provisions for a Board of Reference appearing in the proposed award?"

The provisions in the proposed award for a Board of Reference, above referred to, were as follows:—

"A Board of Reference may be appointed by the Registrar consisting of five persons, and he may fill vacancies in the Board from time to time.

"The Court assigns to the Board the function of determining or dealing with, in the manner and subject to the conditions hereinafter mentioned, any dispute or question arising between any of the parties out of this award.

"The dispute or question must be submitted in writing to the Registrar, who may convene a meeting of the Board for such time and place as he may think fit, and if any member of the Board be absent the other members may proceed in his absence.

"The decision of the Board by a majority of those present shall be final and conclusive as between the parties to the reference."

The secretary of the claimant organization having announced that he appeared for the claimants,

GRIFFITH C.J. This Court may permit anyone to appear before it. But, if the secretary of the association has the right under sec. 27 of the *Commonwealth Conciliation and Arbitration Act* 1904 to appear before this Court as representing the association, Mr. *Duffy* and Mr. *Mitchell* cannot appear without

his consent. This would be an absurd result. This Court has determined that this Court is a distinct Court altogether from the Arbitration Court. In this Court we proceed according to the practice as laid down in the Rules of Court. But every Court can allow anyone to appear, and we allow the secretary, not as of right, to appear in this case.

BARTON J. It is entirely in our discretion to say whether we will hear the secretary or not. The Court does not ordinarily allow parties to appear except by counsel or in person. If the secretary is not the association appearing in person, he has no right to appear. It is not for me to say in what way the association could appear in person. It could appear by counsel, and that would be in accordance with the usual practice. A party not appearing in person or by counsel can only appear in any other way by special permission of the Court. I think such permission may be given in this instance without impropriety.

ISAACS J. I also think that the secretary has not an absolute right to appear for the association in this Court. Sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904 allows the President of the Court to state a case in writing for the opinion of the High Court. There are two different Courts; and although the President must be appointed from amongst the Justices of the High Court, Parliament might, in its wisdom, at any time remove that condition, and then the matter would be so clear as to be beyond argument: the President, not being then a Justice of the High Court, would state a case for the opinion of the High Court, and that case would, of course, be determinable according to the practice of the High Court, and sec. 27 of the *Commonwealth Conciliation and Arbitration Act* 1904, which relates to representation before the Court of Conciliation and Arbitration, would have no reference, nor has it, in my opinion, any reference, to appearance before this Court. As far as the right of appearance is concerned, besides the litigant himself Parliament has by secs. 49 and 50 of the *Judiciary Act* 1903 said who shall have the right to practise in a federal Court, namely, certain barristers and solicitors and the Crown Solicitor

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for the Commonwealth. Therefore I agree with what has been said, that there is no right in the secretary to the association to appear on behalf of the association in this Court.

But, on the other hand, sec. 27 has, in my opinion, a very important bearing in this way: that it is a recognition by Parliament that it is a very convenient and proper thing for the secretary to represent an organization in the Arbitration Court, and, on an application being made in this Court by such representative to be heard, it is a weighty consideration for this Court in the determining whether it will or will not accede to the application. In this case it seems to me a very proper thing to accede to the application, and, while there is no right to appear, I quite agree that the secretary should be permitted to appear in this case.

HIGGINS J. I should like to reserve my opinion as to the right of the secretary to appear in this Court; but, of course, no one can contend that sec. 27 gives him the right. A litigant is under no obligation to employ counsel; the organization cannot appear before the Court physically; and to say that a duly authorized secretary cannot put its views before the Court seems to involve a denial of justice to an impecunious organization. In this case the rules of the association provide that "The General Secretary shall be the officer to sue and be sued on behalf of this association."

I am not prepared, however, to dissent from my brethren on this point, especially as they see their way to allow, in this case, the secretary to express the views of the organization without expense.

Mitchell K.C. and *Starke*, for twenty-two respondents. The President was bound, notwithstanding sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1911, to act in pursuance of the determination of the High Court and dismiss the plaint: *May* v. *Martin* (1). That section may, and should, be construed so as not to apply to any case as to which there has been a final determination by the High Court, although the

(1) 12 V.L.R., 115.

matter has not finally been disposed of by the Arbitration Court. As to the effect of such a final determination, see *Eyre* v. *Wynn-Mackenzie* (1); *Day* v. *Kelland* (2). If sec. 4 must be interpreted as applying to the present case, it is not merely curing an irregularity in the registration of an association of the kind contemplated by the Acts of 1904 and 1910, but it is giving jurisdiction to bring within the meaning of the various provisions of those Acts an association which up to that time had not been treated by the federal Parliament as capable of having a justiciable dispute. That is not legislation for arbitration at all, and the section would be invalid even if there had been no decision of the High Court. If sec. 4 includes the present case, it is an exercise by the federal Parliament of the judicial power of the Commonwealth which under the Constitution is invalid: *Cooley's Constitutional Limitations*, 7th ed., pp. 134-139; *Ogden* v. *Blackledge* (3), *Postmaster-General of the United States* v. *Early* (4); *Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (5); *James* v. *Appel* (6). The interpretation of Acts of Parliament is for the judiciary, and an Act which purports to declare the meaning in the past of another Act is in substance a judicial act. It is, therefore, not competent for the Parliament to put a meaning upon an Act in a proceeding which is pending. That is seeking to interpret for the Court the existing law: *Willoughby on the Constitution*, vol. II., p. 1265.

[GRIFFITH C.J. referred to *Steele* v. *M'Kinlay* (7).

ISAACS J. referred to *United States* v. *Heinszen & Co.* (8).

HIGGINS J. referred to *Harding* v. *Commissioners of Stamps for Queensland* (9).]

The legislature can never by retrospective proceedings cure a defect of jurisdiction in the proceedings of Courts: *Cooley's Principles of Constitutional Law*, 3rd ed. p. 357; *McDaniel* v. *Correll* (10); *Denny* v. *Mattoon* (11); *State* v. *Doherty* (12).

[HIGGINS J. referred to *Calder* v. *Bull* (13).

(1) (1896) 1 Ch., 135.
(2) (1900) 2 Ch., 745.
(3) 2 Cranch, 272.
(4) 12 Wheat., 136, at p. 148.
(5) 18 How., 421.
(6) 192 U.S., 129.
(7) 5 App. Cas., 754.
(8) 206 U.S., 370.
(9) (1898) A.C., 769.
(10) 68 Am. Dec., 587.
(11) 2 Allen (Mass.), 361.
(12) 60 Me., 504.
(13) 3 Dallas, 386.

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ISAACS J. referred to *Simmons* v. *Hanover* (1).]

If the judicial act is vitalized by the legislative act, then the legislature is taking upon itself an action which is prohibited. Before sec. 4 was passed the Arbitration Court, in order to be seized of jurisdiction in a particular case, had to have a plaint lodged by an organization registered under sec. 55. Sec. 4 has left that provision standing, and it continues to apply to organizations registered before the Act of 1911.

As to the second question, a municipal authority in carrying out what are recognized as the ordinary functions of municipal government is an instrumentality of the State: *Federated Engine-drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (2); *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (3).

As to the third question, under sec. 40A of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 the Board of Reference can only be given authority to deal with "any specified matters or things," and to give the Board a general power to deal with any dispute or question arising out of the award is not within that authority.

Duffy K.C. and *Arthur*, for the Commonwealth. Sec. 4 is *intra vires* the Commonwealth Parliament. It purports, on its face, to deal with a matter which is clearly within the jurisdiction of the Commonwealth Parliament. It is applicable in the present case if there is a live proceeding in which it may be applied. Whether there is a live proceeding depends upon sec. 31 of the Act of 1904 and the general policy of the Acts. A determination by the High Court of a question of law under sec. 31 may be intended to be advice to the President of the Arbitration Court upon which he may or may not act, or it may be intended to be an authoritative declaration of the law binding upon the Arbitration Court but not acting directly upon the rights of the parties, but it is not intended to be a decision acting directly upon the rights of the parties: *In re Knight and*

(1) 23 Pickering (Mass.), 188. (2) 12 C.L.R., 398, at p. 403.
(3) 4 C.L.R., 488.

Tabernacle Permanent Building Society (1); *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board* (2); *Shrewsbury* v. *Shrewsbury* (3); *Re Arbitration between Holland Steamship Co. and Bristol Steam Navigation Co.* (4); *Ex parte Dawes*; *In re Moon* (5); *Ex parte Kent County Council* (6). Sec. 31 only authorizes the High Court to declare the law, not to act as arbitrator. If the President is told by Parliament, before he acts upon the law as so declared, that the law is different as to the particular case, he must act upon what he is told by Parliament. Sec. 31 (1) provides that the President cannot be set right if, acting within his jurisdiction, he makes a mistake of law, and sec. 31 (2) as a corollary allows him to ask the High Court for guidance as to what is the law. The words "hear and determine" are apt to express the idea that the High Court is to interpret the law for the guidance of the President, and are not apt to give the High Court authority to finally determine the particular case. The giving such a power is not unusual. See *Mines Act* 1890 (Vict.), secs. 209, 265; *Justices Act* 1890 (Vict.), secs. 137, 139; *Local Government Act* 1903 (Vict.), sec. 302.

[ISAACS J. referred to *Regulation of Railways Act* 1873 (36 & 37 Vict. c. 48), sec. 26; *Kilbourn* v. *Thompson* (7).

HIGGINS J. referred to *Satterlee* v. *Matthewson* (8); *Watson* v. *Mercer* (9); *Hepburn* v. *Curts* (10).]

If sec. 4 had been passed before this case had come before the Arbitration Court, it would not have been an exercise of the judicial power, and its nature must be the same if it was passed while this case was pending: *United States* v. *Heinszen & Co.* (11).

[HIGGINS J. referred to *Cooley's Constitutional Limitations*, 7th ed., p. 531.]

The difference between an exercise by Parliament of the legislative power and an exercise by it of the judicial power is this: Any Act of Parliament which operates to give validity to an invalid decision of a Court, or which itself operates to rescind or alter a judgment of a Court, is a judicial act; but an Act of Par-

(1) (1892) 2 Q.B., 613.
(2) (1893) 1 Q.B., 375.
(3) 23 T.L.R., 224.
(4) 95 L.T., 769.
(5) 17 Q.B.D., 275.
(6) (1891) 1 Q.B., 725.
(7) 103 U.S., 168.
(8) 2 Peters, 380, at p. 413.
(9) 8 Peters, 88.
(10) 7 Watts (Pa.), 300.
(11) 206 U.S., 370.

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liament which alters the general law and leaves the law as altered to be applied by any Court having before it an existing matter, is a legislative act: *Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (1).

The secretary of the claimant organization, by permission of the Court.

Mitchell K.C., in reply, referred to *Bruce* v. *Commonwealth Trade Marks Label Association* (2).

[ISAACS J. referred to *Mechanics' and Traders' Bank* v. *Union Bank* (3).]

Cur. adv. vult.

Sydney, March 27.

THE COURT having directed the case to be re-argued before a Full Bench, and it being impracticable to constitute a Court of more than the original number of Justices without waiting for a long time, the case was now further argued before the same Justices.

Starke, for a large number of the respondents.

McArthur K.C. and *Arthur*, for the Commonwealth.

The secretary of the claimant association, by permission of the Court.

[In addition to the authorities cited on the first hearing, the following were also cited:—*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (4); *J. C. Williamson Limited* v. *Musicians' Union of Australia* (5).

ISAACS J. referred to *Quilter* v. *Mapleson* (6); *Attorney-General* v. *Theobald* (7).

HIGGINS J. referred to *Lemm* v. *Mitchell* (8).]

Cur. adv. vult.

(1) 18 How., 421.
(2) 4 C.L.R., 1569.
(3) 22 Wall., 276, at p. 298.
(4) 11 C.L.R. 1.
(5) 15 C.L.R., 636.
(6) 9 Q.B.D., 672.
(7) 24 Q.B.D., 557.
(8) (1912) A.C., 400.

The following judgments were read:—

GRIFFITH C.J. The first matter raised for decision in this case is from one point of view a matter of considerable importance, while from another point of view it is almost purely technical and even trivial. But in neither aspect does it affect the merits of the dispute between the claimants and the respondents which, for present purposes, is assumed to exist.

By the *Commonwealth Conciliation and Arbitration Act* 1904, sec. 19, it was provided that the Court should have cognizance of certain industrial disputes, of which the only one material to be now mentioned was "(*b*) All industrial disputes which are submitted to the Court by an organization, by plaint, in the prescribed manner." By sec. 4 the term "organization" was defined to mean "any organization registered pursuant to this Act." The conditions of registration were prescribed by sec. 55, which, so far as material, authorized the registration of "Any association of not less than one hundred employés in or in connection with any industry." I need not read the definition of "association." The terms "employer" and "employé" were respectively defined as meaning employers and employés "in any industry," and the term "industry" as meaning "business, trade, manufacture, undertaking, calling, service, or employment, on land or water, in which persons are employed for pay, hire, advantage, or reward," with certain exceptions not material to be mentioned.

The term "industrial dispute" was defined, so far as now material, to mean "a dispute . . . . . arising between an employer or an organization of employers on the one part and an organization of employés on the other part."

It will be seen that the only disputes of which the Court had cognizance under the provisions that I have quoted were disputes between employers and organizations of employés, and then only if they were submitted to the Court by an organization.

The claimants are an association of land engine-drivers and firemen engaged in various industrial undertakings requiring the use of engines, and are what may be called a "craft association," as distinguished from an industrial association, using the word "industrial" according to the meaning of the word "industry"

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as defined in the Act of 1904. They were *de facto* registered as an organization under the Act before the year 1910.

In October of that year they submitted a plaint to the Commonwealth Court of Conciliation and Arbitration against a large number of employers, alleging an industrial dispute between themselves and the respondents. The respondents, or some of them, objected to the jurisdiction of the Court. After a protracted hearing the learned President prepared and read in Court a draft award, but before formally pronouncing his judgment he stated a case for the opinion of this Court under the provisions of sec. 31 of the Act, which provides that "(1) No award or order of the Court shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition or mandamus, in any other Court on any account whatever. (2) The President may, if he thinks fit, in any proceeding before the Court, at any stage and upon such terms as he thinks fit, state a case in writing for the opinion of the High Court upon any question arising in the proceeding which in his opinion is a question of law. (3) The High Court shall hear and determine the question, and remit the case with its opinion to the President, and may make such order as to costs as it thinks fit."

The first two questions submitted to the Court were:—

(1) Is an association of land engine-drivers and firemen an association that can be registered under sec. 55 of the Act?

(2) If not, is the objection fatal to the claim when the case comes on for hearing?

On 27th June 1911 this Court gave judgment, answering the first question in the negative, and the second in the affirmative (1). They decided in effect that the Arbitration Court had no jurisdiction in the matter of the plaint, both because the alleged industrial dispute was not between employers and an organization of employés, and because it was not submitted to the Court by such an organization.

A good deal of argument was addressed to the Court as to the effect of this section, and particularly on the question whether the determination of the High Court pronounced after "hearing" the matter operates as a judgment in the cause itself, or merely

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

as a pronouncement of the law which the President is bound to follow. It was contended, on the one hand, that the opinion or determination is merely consultative, and, on the other, that it is judicial. There can, I think, be no doubt that it is appealable to the King in Council under the Constitution. And I think that the use of the words "hear and determine" indicate unmistakably that the proceeding is judicial. But I do not think, though at first I was disposed to do so, that the pronouncement of the High Court operates as a judgment of the Arbitration Court. If the matter in question does not go to the whole alleged cause of suit, it can only operate as a direction to the President as to the law which he is to observe in giving his judgment in the suit. And, having regard to the structure of sec. 31, I think that the same result follows even where the decision of the High Court goes to the whole cause of suit. For, since an appeal does not lie from the Arbitration Court, it seems to follow that that Court alone can formally pronounce judgment in the suit. On the other hand, I am clearly of opinion that both the President and the parties are bound by the decision of the High Court, which, as between the parties, is *res judicata*, and, as to the President, is a direction which it is unthinkable that he can disobey.

It follows from what I have said that on 27th June 1911 it was decided by a conclusive judgment binding both the Arbitration Court and the parties that the plaint itself was a nullity, and that all the proceedings taken upon it were equally null, and should be regarded, as the French say, as "*non avenus.*"

If an application had then been made to take the plaint off the file or dismiss it, the President would have been bound to grant the application. No such application was, in fact, formally made to the Court, although we were told by counsel that ineffectual attempts were made to bring the matter on for that purpose. This, however, is, in my judgment, immaterial in view of what subsequently happened.

On 23rd November 1911, five months after the judgment of the High Court had been given, an Act was passed by the Commonwealth Parliament which amended the *Conciliation and Arbitration Act* 1904 in several respects. In particular it substituted for the former definition of "industry" the following:—

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"Industry includes . . . . (*b*) any calling, service, employment, handicraft, or industrial occupation or avocation of employés, on land or water;" and, for the former definition of "industrial dispute," the following:—"Industrial dispute . . . . includes any dispute as to industrial matters."

It follows from these amendments that, for the future, associations of employés in any handicraft would fall within the words of sec. 55, and become registrable as organizations.

Sec. 4 of the Act of 1911 is as follows:—"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."

After the passing of this Act the learned President was asked to proceed with the claim which had been the subject of the decision of this Court in June 1911, and he has stated a case submitting the following question:—

"(1) Has this Court power, now that the *Commonwealth Conciliation and Arbitration Act* 1911 has been passed, to make an award in this case at the instance of the claimant?"

The contention of the claimants is that sec. 4 operates retroactively. They put their argument in this way:—Their registration as an organization, which was void when made, is now to be treated by the Court as valid *ab initio*. They are, therefore, to be deemed to have been competent both to be parties to an industrial dispute within the Act of 1904 and to prefer the claim of October 1910. It must, therefore, be deemed that the alleged dispute which was the subject matter of the plaint, and which was not at that time cognizable by the Court, was a dispute within the Act, and, consequently, that the Court by the retroactive operation of the Act of 1911 acquired jurisdiction *eo instanti* to pronounce judgment in a cause which, up to the termination of the actual hearing, it had no jurisdiction to entertain.

In my judgment, having regard to the recognized rules for the interpretation of Statutes, the words of sec. 4 are not capable of

such a construction. In the case of *Lemm* v. *Mitchell* (1) the effect of legislation intended to confer a right of suit retroactively was considered by the Judicial Committee of the Privy Council. It was held that it did not operate to avoid the effect as *res judicata* of a judgment already given for a defendant in a suit brought and decided before the passing of the Act. The learned Lord who delivered the opinion of the Board said (2):—"In the absence of appeal the judgment was a final determination of the rights of the parties, and the ordinary principle that a man is not to be vexed twice for the same alleged cause of action applies, unless it be excluded by the legislature in explicit and unmistakable terms." And again (3):—"It would require language much more explicit than that which is to be found in the Ordinance of 1908 to justify a Court of law in holding that a legislative body intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting."

That case differs from the present in that formal judgment dismissing the plaint has not yet been given, but I think that the decision of this Court that, until the passing of the Act of 1911, the Court of Arbitration had no jurisdiction to entertain the suit still remains in force, and that it would require language "much more explicit" than that of sec. 4 to justify the Court in holding that the legislature "intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting."

It would, indeed, in my opinion, require very clear and explicit words to validate retrospectively supposed judicial proceedings which were wholly null and void when taken. The consequences of such an enactment would be very serious. *Inter alia*, witnesses who had given false evidence in the void proceedings would become retrospectively liable to prosecution for perjury. Moreover, as the only power of the Commonwealth Parliament in connection with industrial disputes is to provide for their settlement by arbitration, it could hardly be seriously contended that sec. 4 operates as a declaration that proceedings in the nature

(1) (1912) A.C., 400. (2) (1912) A.C., 400, at p. 405.
(3) (1912) A.C., 400, at p. 406.

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of arbitration taken before a person who was not an arbitrator should be adopted and regarded as proceedings in an arbitration by an arbitrator whose authority came subsequently into existence.

To say the least, it is not likely that the Commonwealth Parliament would make such a law, or, if they did, that they would express it in language so obscure in view of such a purpose as that of sec. 4.

Apart from these considerations, the real intention of that section seems plain enough. A large number of craft associations had been registered as organizations (so becoming corporations under sec. 68) and had incurred many liabilities and acquired many rights. The decision of this Court of June 1911 would have had the effect of invalidating all that had been done by them, and it was manifestly desirable, if the Parliament so thought, to validate them retroactively. The language of sec. 4 is apt for that purpose, and would plainly have the effect, *inter alia*, of validating any agreements entered into by them. But it is, in my judgment, impossible to construe it as a declaration that the law as declared by this Court in June 1911 was not the law at that time.

Sec. 4 can, therefore, in my opinion, only operate prospectively so far as regards this case. But I think that it does operate prospectively upon it, in this way. If an application were now made to the President to take the plaint off the file on the ground that the claimants are not an organization, I think that sec. 4 would be a good answer. See *Quilter* v. *Mapleson* (1). In other words, I think that the plaint became a valid plaint on 23rd November 1911, and that from that time forward the President had jurisdiction to entertain it.

Some difficulties were suggested as likely to arise with regard to the dispute alleged in the plaint to have existed between the claimants as an organization and the respondents when the plaint was filed. But I do not see any more difficulty in giving retrospective operation to sec. 4 in this regard, *i.e.*, as making them competent disputants, than as making them competent litigants. The essential nature and identity of the dispute is not affected.

(1) 9 Q.B.D., 672.

We were told that a fresh plaint has been filed by the claimants in respect of the same dispute, which, of course, has not yet been judicially settled.

It occurs to me that some difficulties might be avoided by proceeding on the second plaint rather than on the first. This is not a matter with which this Court is concerned, but I take leave very humbly to suggest that they might both be retained, and if necessary consolidated.

Under ordinary circumstances it might appear that, since the President's jurisdiction was not validly invoked until November 1911, the previous proceedings were altogether wasted. But that difficulty is obviated by sec. 25, which provides that "In the hearing and determination of every industrial dispute, and in exercising any duties or powers under or by virtue of this Act, the Court or the President shall act according to equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its or his mind on any matter in such manner as it or he thinks just."

Upon the hearing, which, in my opinion, must be regarded as a fresh hearing (instead of a further hearing, which I suppose would in any case have naturally taken place after so long a lapse of time), the President can under this provision avail himself of all the evidence which he has already heard, just as he might make use of evidence given before a Royal Commission or before a Select Committee of Parliament in a like case. He would, of course, have the same power if he proceeded on the new plaint. It was from this point of view that I said that the matter involved is in one respect almost purely technical.

For these reasons I think that the first question submitted should be answered in the affirmative, but not with a simple "Yes." I think that the answer should be qualified by adding "on the basis that the plaint first came into valid existence on 23rd November 1911."

The second question submitted by the case is whether the respondents the Corporation of the City of Melbourne are subject to the jurisdiction and award of the Court in any and what respect. This question was also submitted to the Court in the case between

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the same parties reported in 12 C.L.R., 398. On that occasion I said, speaking *obiter*, (1):—"With regard to the Melbourne Corporation we were invited to hold that a municipal corporation is an instrumentality of the State Government, and is entitled to the same immunity from interference by the federal power as the Government Departments of the States. I express no opinion upon the grave and difficult question of how far, if at all, the doctrines which have been laid down in the United States of America on this subject should be regarded as implicitly adopted by the Constitution of the Commonwealth. But as at present advised I see no serious reason for doubting that, if a municipal corporation chooses to engage in what has lately been called 'municipal trading,' and join the ranks of employers in industries, it is liable to the same federal laws as other employers engaged in the same industries. This limitation is, indeed, I think, generally accepted in the United States (see *South Carolina* v. *United States* (2) and the decisions of the Supreme Courts of New York and Pennsylvania cited in that case)." I am content to say that I adhere judicially to the opinion which I then expressed *obiter*. I think, therefore, that the second question should be answered: "Yes, so far as the corporation engages in trading operations."

The third question is whether the Arbitration Court has power to include in its award the provisions for a Board of Reference appearing in the proposed award. Those provisions assign to the proposed Board the fuuction of determining or dealing with any dispute or question arising between any of the parties out of the award, subject to certain prescribed conditions.

The power relied upon for this direction is sec. 40A of the *Arbitration Act* as now amended, which authorizes the Court by its award to appoint a Board of Reference, and to assign to the Board the functions of allowing, approving, fixing, determining, and dealing with, in the manner and subject to conditions specified in the award, any specified matters or things which, under the award, may require from time to time to be allowed, approved, fixed, determined or dealt with by the Board.

In my opinion the proposed provision is too wide. I think that the power of reference to the Board, which extends to "any

(1) 12 C.L.R., 398, at p. 414. (2) 199 U.S., 437.

specified matters or things," is limited to such matters or things dealt with by the award itself as are specifically mentioned in the assignment, and that the assignment cannot be made in general terms as proposed. The third question should therefore be answered in the negative.

BARTON J. This case was first argued in March 1912. The Court, having taken time to consider the matter, ordered it for re-argument. Efforts were made to constitute a bench of five Justices, but it was found impracticable to do so, unless the re-argument were delayed until next year, when the Chief Justice will have returned from his absence on leave. As such a delay would have extended to about two years from the time of the first argument, it was decided to avoid it by hearing this second argument before his Honor's departure.

Sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1910 was amended in its first paragraph by the *Commonwealth Conciliation and Arbitration Act* 1911, assented to on 23rd November of that year, but that Act was passed after the determination of this Court, which I shall mention presently, and the amendments of paragraph (1) do not affect this case.

In October 1910 the claimant association submitted to the Arbitration Court by plaint (see sec. 19 (*b*) of the Principal Act) an alleged dispute with a number of persons, firms and companies, including the present respondents. The claimants had previously gone through the form of registration (see secs. 4 and 55). When the matter came on for hearing, objection was taken to the jurisdiction of the Court.

The learned President completed the hearing of the case both as to the question of jurisdiction and on the merits, and then stated a case for the opinion of the High Court upon certain questions which had arisen in the proceeding, which, in his opinion, were questions of law. Among them were these:—

"(1) Is an association of land engine-drivers and firemen an association that can be registered under sec. 55 of the Act?

"(2) If not, is the objection fatal to the claim when the case comes on for hearing?"

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The objections to the jurisdiction are summarized in these two questions.

The case was argued at great length in this Court, which gave its judgment on 27th June 1911. The answers to the questions were: (1) No; (2) Yes.

Sec. 55 allows "Any association of not less than one hundred employés in or in connection with any industry," on complying with the prescribed conditions, to be registered as an organization. By the definition in sec. 4 an "employé" is "any employé in any industry." The definition of "industry" did not in 1910 include a craft, and the majority of the Court considered that the craft of the engine-drivers or firemen was not an industry within the meaning of the Act, having regard as well to the definition of that word as to the manner of its use in the several sections in which it occurred. Hence the Court thought that the claimant association was not such an association as was contemplated by sec. 55 (*b*). Of course, as the claimant association was thus one that could not be registered, it was not an "organization" within sec. 4. Hence the alleged dispute was not "submitted to the Court by an organization" in pursuance of sec. 19, nor was it a "dispute arising between an employer or an organization of employers on the one part and an organization of employés on the other part." The association was not entitled to file a plaint, as it had not become a competent litigant; and its plaint was a nullity.

The Arbitration Court, then, had no jurisdiction to hear and determine the matter.

The case is reported in 12 C.L.R., at p. 398.

So matters rested from June 1911 until the following November. Obviously, if the respondents had moved the Arbitration Court to strike the plaint out for want of jurisdiction, judicially declared, the Court must have done so. Mr. *Starke* assured us that the respondents tried to obtain an opportunity of moving to that end. But, in point of fact, the matter never came on; possibly the Court was otherwise engaged. We have no knowledge whether the proceeding was abandoned as a dead thing. But there was silence for five months apparently.

Then on 23rd November came the Act No. 6 of 1911. The

amendments which it made in the definition section of the Principal Act need not be dwelt on here. It is enough to say that after its passage an association of employés in a handicraft, such as that of engine-drivers and firemen, became capable of obtaining valid registration as an organization on complying with the requirements of the Act. The provision, however, which it is essential to examine is sec. 4, which I need not repeat.

Upon the passage of the amending Act the claimant association, conceiving not only that its registration had been validated *ab initio*, but that its plaint and all past proceedings upon it in the Arbitration Court, had also been revived from their inception by the effect of sec. 4, applied to that Court to proceed to an award upon the old plaint of October 1910. The learned President has stated a case, the first question submitted being as follows:—"Has this Court power, now that the *Commonwealth Conciliation and Arbitration Act* 1911 has been passed, to make an award in this case at the instance of the claimant?"

The answer to this question depends on the construction of sec. 31 of the Principal Act and of sec. 4 of the Act of 1911. First, then, is the decision of the High Court upon questions submitted to it by the President by way of case stated under sec. 31 an adjudication which binds the parties, or is the submission merely consultative? There is no appeal from the Arbitration Court. It is expressly denied. On that Court alone, through its President, rests the duty to pronounce final judgment. The President states a case "for the opinion" of the High Court. After dealing with the case stated, that Court is to "remit the case with its opinion to the President." It is then for him to give the award or order formally disposing of the suit. If the matter rested there, one would say that the proceeding is merely consultative. But it does not rest there. I have not yet referred to the most important words of the section. The High Court "shall hear and determine the question," and only then is it to "remit the case with its opinion" to the President. So that it arrives at its opinion upon a hearing and determination of the question. It may make such order as to costs as it thinks fit. That is the ordinary consequence of a judicial determination. It is a duty to

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hear as well as to determine. That, I think, gives the parties an absolute right to be heard before the decision. It is therefore a determination *inter partes*.

I will mention only two or three authorities touching this question.

In *Ex parte Dawes* (1) a case had been stated for the opinion of the High Court by a County Court Judge sitting in bankruptcy, under sec. 97 (3) of the *Bankruptcy Act* 1883, by the terms of which the High Court was to "determine" the question. The Court of Appeal held that the decision of the High Court was not consultative but judicial, and, therefore, that an appeal lay to the Court of Appeal.

In *Ex parte County Council of Kent* (2), the Court of Appeal (Lord *Halsbury* L.C., Lord *Esher* M.R. and *Fry* L.J.) held that the jurisdiction of the High Court upon questions submitted to it under sec. 29 of the *Local Government Act* 1888, is consultative only, and not judicial, so that no appeal lies from its decision to the Court of Appeal. But the judgment of the Court shows that they came to their conclusion upon reasons the very absence of which in the present case tends to a different result. By the enactment there discussed, the question is to be submitted to the High Court for "decision," which, as the Court of Appeal pointed out (3), is "a popular, and not a technical or legal, word." But "hear and determine" are words of well known legal import. Then their Lordships referred to the context of the section. The provision relates not only to a question that arises but to any question that "is about to arise." The submission to the High Court is to be "without prejudice to any other mode of trying it." That Court is only called on to "hear such parties and take such evidence (if any) as it thinks just." A question which may be "about to arise" can only be "decided" in the sense of expressing the opinion of the Court how it ought to be decided when it does arise. "So far as we can see," said their Lordships (4), "there is no obligation on the High Court to hear anybody who might be interested as a matter of fact in the decision of the question." A reference to the entire judgment, and to the section

(1) 17 Q.B.D., 275.
(2) (1891) 1 Q.B., 725.
(3) (1891) 1 Q.B., 725, at p. 728.
(4) (1891) 1 Q.B., 725, at p. 729.

(1), will show that in its whole intention the section dealt with in that case differs from sec. 31, and that it is these differences that show why the jurisdiction given by the English Act is purely consultative and not judicial. In my view, they tend to show the converse as to sec. 31, in view especially of the words "hear and determine."

In *In re Knight and Tabernacle Permanent Building Society* (2), the Court of Appeal was asked to say whether, in its judgment, an appeal lay to it from the decision of the High Court upon a special case stated by an arbitrator with regard to a question of law arising in the course of a reference under sec. 19 of the *Arbitration Act* 1889. That section provides that an arbitrator may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. This provision closely resembles the second paragraph of sec. 31, and the decision of the Court of Appeal is just that which I, for one, should think correct in the present case, were the third paragraph of sec. 31 eliminated. But it is just there that, in my opinion, the difference arises. Lord *Esher* M.R. said (3):—"The question . . . depends upon an accurate consideration of the language of the section under which the case is stated. In the bankruptcy case to which our attention was directed" (*Ex parte Dawes* (4)), "the Statute spoke of a question of law to be determined by the Court. It was held that, although the Act did not in terms provide for any judgment or order of the Court, inasmuch as the Court was to determine the matter, there was what was equivalent to a judgment or order of the High Court." His Lordship went on to refer to the case of *Ex parte County Council of Kent* (5), which I have cited, and specially referred to the fact that in that case, upon a consideration of the context, it appeared that the jurisdiction was only consultative, and that there was nothing which amounted to a judgment or order. He then quoted sec. 19 of the *Arbitration Act* 1889, and said (3):—

(1) (1891) 1 Q.B., 725, at p. 726.
(2) (1892) 2 Q.B., 613.
(3) (1892) 2 Q.B., 613, at p. 617.
(4) 17 Q.B.D., 275.
(5) (1891) 1 Q.B., 725.

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"It appears to me that what the Statute in terms provides for is an 'opinion' of the Court to be given to the arbitrator or umpire; and that there is not to be any determination or decision which amounts to a judgment or order."

I cannot help thinking that the words "hear and determine" govern paragraph 2 of sec. 31, and that the "hearing and determination" there prescribed is a judicial act, so closely equivalent to a judgment that an appeal would lie from such a decision given by this Court to the Judicial Committee of the Privy Council, subject, of course, to special leave. I think that on the statement of a case the question becomes transferred from the Court of Arbitration to the High Court, to be there determined, though the result is remitted to the President. I think the question submitted is to be determined by this Court once for all, and not to be determined over again one way or the other by the learned President, and that our decision binds the Court of Arbitration and the parties as well. The parties are heard and the question is determined, although the result of the decision may be embodied in the award of the Court when the President pronounces it. Nor need it be embodied expressly so long as the award does not contravene, but conforms to, the law which it determines. Suppose, for instance, that the question is one concerning the constitutional powers of the Commonwealth within the meaning of sec. 3 of the *Judiciary Act* of 1912, will it be contended that where a majority of all the members of this Court has determined such a question, for example, in favour of the powers of the Commonwealth, it is open to the learned President to decide it the other way, and to award accordingly? Of course, there is the corrective jurisdiction of this Court, but cases may arise in which it may not be exercisable effectively. But though the determination is equivalent to a judgment of this Court, so as to be appealable, I do not say that it also amounts to a judgment of the Arbitration Court. It is conclusive between and upon the parties in the sense that it is *res judicata*, and cannot be afterwards controverted by them; but, as I have indicated, the President must take his direction from it, and receive it as the law which his judgment or award is to enforce.

As to the meaning of the words "hear," "determine," "hearing,"

"determination," I desire to refer to the Principal Act, secs. 24 (2), 25, 26, 27, 38 (*a*) (*b*) (*j*) and (*k*), and 38A. In all of these provisions one or more of these words are used to signify the award of the Court, or the trial of the dispute and the making of the award. On each such occasion they refer to the final adjudication of the Court. Used, then, as they are in sec. 31, in the same *fasciculus* of sections (Part III., Division 3), can there be any doubt remaining as to their meaning in that section when the context is brought in aid of the canons of construction?

Now, the decision of this Court, binding in the broad and powerful sense I have attached to it, was that the plaint, filed by the claimant association while in law not registered as an organization, was absolutely void. Of course, then, no proceeding taken upon it was of any greater validity. What, then, is the effect of sec. 4 of the Act of November 1911? It is conceded by the respondents that the original registration of the claimant association is to be taken as valid "to all intents and purposes," and that the registration is to be taken to have had the effect of turning it into an organization, just as if this new provision had been in force at the date when the form of registration was tendered at the Registry. But, when that is conceded and understood, what further effect has the section? None, say the respondents. But the claimant association says that there is much more. If the void registration is now to be deemed valid, and valid from its date, then the association says that it must also be taken to have been all the time a competent disputant in such a dispute as the Act contemplates, and a competent claimant by plaint, and that the plaint also must be taken as valid all the time. Not only, say the claimants, must you treat us as an association properly registered, and therefore an organization all the time, but you must read this enactment as if it said that our plaint was good all the time, filed in a dispute in which we were engaged as such an organization, and in which we were a claimant from the time we put that plaint on the file.

That is saying a good deal. But how is all this to be extracted from the terms of the enactment? An enactment retrospective in terms will not be given any greater retrospective effect than is expressed in or necessarily implied from its terms. If it is

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clearly retrospective, it will be so construed, but that does not mean that it will be liberally construed in derogation of existing rights. That would be a queer way to set about the interpretation of Statute law.

It is common knowledge that at the time of our decision, reported in 12 C.L.R., 398, associations of members of the same crafts, registered or seeking registration, were as common as associations of members of the same industries pursuing similar objects. It is probable the former were the more numerous class of associations. Those which had gained registration had, of course, undertaken many burdens, and they had also acquired property of one kind or another as bodies incorporated for the purposes of the Statute. In the case of those which had been or were associations of craftsmen, their incorporation had been made invalid by the decision in the registration case; many of their acts had become void; many of what they had supposed their rights, untenable. The Court had struggled against giving the decision. Here was clear reason for sec. 4 to validate their registration, and to confirm their proprietary rights and their compacts by consequence. But what is there in the section to warrant the construction that it retrospectively subverts that which as between these parties the Court declared to be the law binding them and defining their rights *inter se*? Such an intention will not be presumed. Where is it expressed?

Day v. *Kelland* (1) is a case which illustrates the principle that where the rights of parties in suit have been ascertained by the order of a competent Court, and a Statute afterwards enacted applies expressly to transactions which took place before as well as to those which took place after the commencement of the Act, the Statute will not be construed so as to alter the rights ascertained before its passage. There may be room, indeed, to question whether the Parliament has power to validate a proceeding in an action, void when taken and pronounced to be void by a competent tribunal before the making of the Statute. That, however, it is not necessary to decide. It is sufficient that where an enactment is open to either of two constructions, one of which involves and the other averts the alteration of rights already

(1) (1900) 2 Ch., 745.

judicially defined—and this is to put upon the section a complexion more favourable to the claimant association than its terms fairly warrant—the construction which would alter rights already ascertained by judicial authority is not the one which the Courts will accept. In this connection *Lemm* v. *Mitchell* (1) is an instructive case. The Hong Kong Ordinance, No. 20 of 1908, by its retroactive effect, might have been taken to give to the appellant, a plaintiff who had already sued without success, a right of action for criminal conversation committed before its enactment; but the Judicial Committee held that, in the absence of explicit words to that effect, it did not avail the respondent, because his cause of action had been barred as *res judicata* by a final judgment prior to the Ordinance, and founded on the then existing law. The question was thus stated by the Board (2): —"It is . . . clear that the Ordinance had a retroactive effect to the extent of enabling actions to be brought in respect of criminal conversation during the period when the right of action had ceased to exist in the Colony, but the question now to be determined is whether it went further and operated to annul a valid and subsisting judgment as between parties whose rights had been duly determined under and according to the law which existed before the new Ordinance was passed." That question their Lordships answered in the negative.

I am of opinion, therefore, that the section does not annul or affect the decision of this Court as to the nullity of the plaint and the absence of jurisdiction. But I am also of opinion that, as the Act validates the registration *ab initio* and also the plaint as from the passage of sec. 4, the Arbitration Court can proceed to deal with the dispute now, as to matters occurring after the date of the passage of the Act, namely, 23rd November 1911.

As to question 2, I need not add to the views I expressed in the previous case between these parties (3). Though what I said was not in the form of an actual decision, it expresses the opinion that I still hold now that the matter demands judicial decision.

As to question 3, I do not think the Court has power to include in the award the provisions for a Board of Reference in the wide

(1) (1912) A.C., 400. (2) (1912) A.C., 400, at p. 404.
(3) 12 C.L.R., 398, at pp. 425-428.

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terms in which they are at present expressed. The functions assigned to the Board of Reference must relate to "specified matters or things which under the award or order may require from time to time to be allowed, approved, fixed, determined or dealt with by the Board." In the proposed award the Court assigns to the Board the function of determining, &c. "any dispute or question arising between any of the parties out of this award." Things specified must be specific things. Here all is general. It was not intended by the terms of sec. 40A that the Court should have power to assign to the Board the right to determine, &c., all questions arising out of the award. "Specified" means specified in the award, not merely described in writing by the Registrar.

I am of opinion that the questions ought to be answered in the terms proposed by the Chief Justice.

ISAACS J. (1) The answer to the first question depends upon whether the words of section 4 of the Act of 1911 are wide enough, when construed in accordance with recognized principles, to include such a case as the present.

The respondents contend that the section ought not to be read so as to include the present case and they invoke the doctrine of *res judicata*.

The question is whether the judgment of this Court in 12 C.L.R., 398, was a judgment in a former stage of the cause pending in the Arbitration Court which *finally determined* the rights of the parties in relation to that cause. If it was, then *Eyre* v. *Wynn-Mackenzie* (1), *Day* v. *Kelland* (2) and *Lemm* v. *Mitchell* (3) are decisive authorities in favour of the respondents.

The principle is stated in the last named case (4), first in the passage quoted from the judgment of *Tindal* C.J. in *Kay* v. *Goodwin* (5) referring to "actions which were commenced, prosecuted and concluded," and next in Lord *Robson's* own words interpreting the qualification of *Tindal* C.J., "that it," (the Statute) "must not be taken to deprive persons of vested rights acquired by them in actions duly determined under the repealed law."

(1) (1896) 1 Ch., 135.
(2) (1900) 2 Ch., 745.
(3) (1912) A.C., 400.
(4) (1912) A.C., 400, at p. 406.
(5) 6 Bing., 576.

In this connection, and in accord with these quotations, reference may be made to the words of Lord *Selborne* in *Lockyer* v. *Ferryman* (1):—"When there is *res judicata*, the original cause of action is gone, and can only be restored by getting rid of the *res judicata*." Substitute "plaint" for "cause of action" and the passage is applicable if the former opinion of this Court amounted to a decision *in the plaint* that it be dismissed, leaving the Arbitration Court no function but that of registering the decision.

In view of the unique position of the Commonwealth Court of Conciliation and Arbitration, to which I shall refer as the Arbitration Court, it is necessary to examine the position closely, for fear of being misled by false analogies. The first question submitted by the Arbitration Court to this Court on the former occasion, was as follows:—"Is an association of land engine-drivers and firemen an association that can be registered under sec. 55 of the Act?" The second question was:—"If not, is the objection fatal to the claim when the case comes on for hearing?"

To the first, the answer (of the majority) was No; and to the second, the answer (unanimous) was Yes.

Both questions were, so to speak, on their face impersonal, the facts being stated so as to lay the foundation for the questions, and to aid in understanding them. But they were *primâ facie* pure questions of law, though having reference to a given proceeding; and, unless in view of the proper interpretation of sec. 31 of the Act they are to be regarded as determining the concrete proceeding then pending in the Arbitration Court, they must be all through considered as general, but authoritative, declarations of law proper to be applied by the Arbitration Court to that proceeding.

Sec. 31 of the Act is part of the scheme of arbitration enacted under sub-sec. xxxv. of sec. 51 of the Constitution. That sub-section, as has been often pointed out by this Court, confers only a limited power upon the Parliament, the limitation being that nothing but conciliation and arbitration, with, of course, all that these connote, can be provided for the prevention and settlement of inter-State industrial disputes. This provision the legislature has made by means of the Arbitration Court, and its jurisdiction

(1) 2 A.C., 519, at p. 528.

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is made completely exclusive. As it is a question here of the intention of Parliament so far as that may be gathered from the words used by the legislature, I disregard, in considering the terms of sec. 31, the effect of sec. 75 of the Constitution on the attempted exclusion of prohibition. Apart from that, it is clear that, in forbidding any appeal, review, quashing, calling in question in any other Court—which can only mean this Court—on any account whatever, Parliament meant to leave the decision of the Arbitration Court absolutely and finally decisive. Mistakes of fact and mistakes of law might be made, as they may be made by any human tribunal, but, on the whole, Parliament manifestly thought finality better than confusion. The prevention or cessation of industrial dissatisfaction with existing conditions, which must or might disturb the peaceful progress of industry, was apparently considered not too dearly purchased, even if the legislative directions were on occasions misinterpreted.

But then, says sec. 31, the President may take steps to assure himself of the law before proceeding further. If he thinks fit—and only then—he may in any proceeding before the Court, at any stage, state a case in writing for the opinion of the High Court upon any question arising in the proceeding which in his opinion is a question of law, and the High Court shall hear and determine the question, and remit the case with its opinion to the President. The decision of the High Court is, after all, only its "opinion" on a matter of law; and the requirement to "hear and determine" the question is only to place a judicial duty upon this Court to answer the question, and to make that answer authoritative when remitted; that opinion is certainly to guide the President, and to guide him as authoritatively as if it were set out plainly in an Act of Parliament. The legislature, while not in so many words directing him to follow it, expects him to do so. "Hear and determine" involves a decision which all subordinate tribunals must follow, and I agree that it is appealable to the Privy Council. But that does not end the present problem. The power of the House of Lords to ask of the Judges such questions as it thinks necessary for the decision of a particular case (see *Attorney-General for Ontario* v. *Attorney-*

General for Canada (1)) presents some features of resemblance. Of course, the House of Lords being the ultimate appellate tribunal is not expected to adopt the answers unless it agrees with them. The procedure is only to assist the House of Lords to arrive at its own opinion as to what the law is.

But allowing for the altered position, the object of the proceeding is very much the same. While the Arbitration Court is exclusive in its jurisdiction, and is intended by Parliament to be non-correctable, the power of obtaining a judicial opinion from the highest Court in Australia as a timely prevention of irremediable error is not altogether unlike the instance referred to. There is no legal sanction if the President does not follow the opinion. For instance, if, though endeavouring to apply it correctly, he misapprehends its import or in some way misapplies it, there is no method of correcting the error. He does not thereby exceed his jurisdiction, and so no prohibition will lie, and appeal is taken away.

Of course, for any actual excess of jurisdiction prohibition lies after such an opinion, to the same extent as, but neither more nor less than, if none were given.

Some of the questions propounded by the President may relate to his jurisdiction to enter upon the matter at all, as, for instance, the legal requirements of an inter-State industrial dispute either under the Constitution or the Statute; others may relate to his power to make an order in a case within his jurisdiction, or to the legal validity of some contract before him, or the construction of a State Statute, and so on. In the former reference in the present plaint the questions put had reference to the jurisdiction of the Court to enter upon the inquiry at all. If such an association could not be registered under sec. 55, then—not having been proclaimed under sec. 62—it was not an "organization," and if not, then under the law as it then stood, it could not submit a plaint under sec. 19, and the result of this would be that the Arbitration Court, as the law then stood, had not been given cognizance of the plaint by the legislature, and was bound to dismiss it as non-cognizable. And so the questions were answered. Doubtless, if the Arbitration Court had then reached

(1) (1912) A.C., 571, at p. 585.

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the point when it had to determine what course to adopt in view of those opinions, it would have been bound, upon judicial principles, to dismiss or strike out the proceedings as incompetent, because that was the true reading of the Act of Parliament definitely ascertained. The respondents do not deny that another plaint might have been immediately filed; though, if it had, they do not admit it would have been supported by the old dispute. And this for two reasons. During the course of the proceedings many of the disputants had made industrial agreements on the footing of secs. 23 and 24, and as to them the dispute had in fact ceased. Further, if the submission of the plaint was incompetent by reason of the incapacity of the association to register, and thus to become an organization, the same incapacity must be fatal to the dispute being an industrial dispute within the meaning of sec. 4 of the Act as then existing.

A new plaint certainly, and a new dispute in my opinion with equal certainty, would in that case be necessary to adjust the differences between employers and employed. Those alleged unjust conditions of the industry *ex hypothesi* had never been adjusted except by the industrial agreements which were founded on the basis of a valid plaint; and those conditions are, admittedly, open to revision. What corresponds to a cause of action still remains. It is only a question of a new dispute, with its attendant expense and turmoil, and a new plaint.

That undoubtedly appears to me a most remarkable application of the principle of *res judicata*, observed for the public policy of ending litigation, where its only effect must be to increase and complicate it. Can such have been the intention of Parliament? It must be remembered that it is not "rights," as ordinarily understood, that are ever in question in the Arbitration Court. That Court does not sit as the ordinary tribunals do, merely to ascertain, declare and enforce existing rights, but to ascertain, declare and enforce what ought in fairness and justice to be and shall be the newly created mutual rights in future. So it is in the highest degree improbable that, when making further provision extending the power of the Arbitration Court to maintain industrial peace and secure to the people of Australia the orderly progress of industry, Parliament should have intended to inter-

pose, where there are no vested rights at all, a merely technical and temporary obstruction to the operation of a section remedial in its nature, and expressly retrospective in its character.

That would be a misuse of a doctrine most beneficial in its proper sphere. *Corruptio optimi pessima.* No doubt, even admittedly retrospective legislation is limited by the clearness of its retrospectivity; and, no doubt, also rights that have passed from the original contractual or relational character into rights measured by judicial determination, are, *primâ facie*, outside retrospection, which usually applies to rights not yet so determined. But, for the reasons I have stated, neither of these considerations can apply to the present case, and so the words of sec. 4 of the Act of 1911 are applicable here. Those words are not only retrospective, but clear and all embracing. The rule of interpretation that an Act, even when retrospective, is construed so as to interfere as little as possible with vested rights, means as little as possible consistently with the real intent of the enactment, and, as Lord *Morris* said, speaking for the Privy Council in *Reynolds* v. *Attorney-General for Nova Scotia* (1), "the result is that in all cases it is necessary to ascertain what the legislature meant." And, in any case, the right to have a plaint dismissed or struck out for want of jurisdiction is not a "vested right" to be excluded by mere presumption from the operation of a subsequent Act expressly conferring jurisdiction in such a case, and applying in its natural import to include it. The original plaint still exists: it has never been discharged or struck out. If that were not so, this opinion could not be given by the Court.

The plaint still standing, the position is this: though the Arbitration Court, on the remission of this Court's opinion upon what so far as the Arbitration Court is concerned was—as Lord *Watson* in *Le Mesurier* v. *Le Mesurier* (2) calls it—a "præjudicial question," would there and then have been judicially bound to accept the interpretation and the effect of the law then existing as stated, and to have declined jurisdiction, and, consequently, to have dismissed or struck off its files an incompetent plaint. In the meantime, however, Parliament, acknowledging and respect-

(1) (1896) A.C., 240, at p. 244. (2) (1895) A.C., 517, at p. 526.

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ing that interpretation of the law, thought fit to intervene and save that plaint and that dispute and all they involved, by giving the jurisdiction theretofore lacking. The want of jurisdiction was not by reason of the Constitution, but by reason of a restriction upon the power committed to a duly constituted arbitration tribunal in the parliamentary authority. The restriction was removed by the body which created it, and the authority amplified by declaring that such an organization should be henceforth "deemed" to have been such an organization as Parliament intended, and as from the date of actual registration. That was obviously no interference with the former judicial decision. It was, as I have said, an implicit recognition of its correctness, because the new enactment uses the word "deemed."

Adapting the words of the Privy Council in *Bell* v. *The Master in Equity* (1), the word "deemed" is not an uncommon expression in Acts of Parliament, the meaning of which here is that although in strictness of language the association was not actually an organization, it shall be deemed and taken to be such for the purposes of the Act. That the fiction is, of course, not to be extended beyond those purposes is clear as well from the case just cited as from *Hill* v. *East and West India Co.* (2). Though as between the parties the prior proceedings, appearances, taking evidence, and argument would be deemed to be in a matter of which the Court had full jurisdiction, yet no witness or other third person would be affected by the fiction. It would not retrospectively make that perjury which was not previously so. But from the moment the new Act came into operation the law was changed, as between the parties, and was applicable to pending proceedings (see *Attorney-General* v. *Theobald* (3), and *In re Lovell and Collard's Contract* (4)). The objection previously existing to entertain the plaint was no longer fatal, and the Arbitration Court could take up the matter at the last point touched, and proceed, and determine the dispute, if it existed and otherwise complied with the law.

And so the answer I make to the first question is simply Yes.

(1) 2 App. Cas., 560, at p. 565.
(2) 9 A.C., 448, *per* Lord *Cairns*, at p. 455.
(3) 24 Q.B.D., 557.
(4) (1907) 1 Ch., 249.

(2) To the second question I answer that the Corporation of Melbourne is subject to the jurisdiction and the award of the Arbitration Court to the extent and for the reasons stated in my judgment in 12 C.L.R., 398, at pp. 451-453.

The views there stated are confirmed by some observations in *Vilas* v. *Manila* (1), a case which has since come to hand.

(3) To the third question the provisions for a Board of Reference are in my opinion too general. The matters assigned to a Board under sec. 40A must be "specified" and the "manner" and conditions "must be also specified." By "specified" I understand sufficiently indicated, by name, description or otherwise, so as to be intelligible to the minds of such persons as those to whom the award is addressed, and conveying fairly to their minds what matters, manners, conditions are intended by the President.

HIGGINS J. In the course of the two arguments of this case the discussion of the first question has taken a very wide range of learning, but the answer seems to turn ultimately on the effect of two sections—sec. 4 of the amending Act 1911, and sec. 31 of the Principal Act 1904.

I find that I can best show how the matter strikes my mind by re-stating the material facts in order of date. This association of engine-drivers and firemen—working in undertakings of various kinds—was in fact registered as an organization on 2nd March 1908. No application was made to strike it off the register. It filed its plaint on 15th October 1910. As President of the Court, I heard the case, and on 12th May 1911 announced the award which I proposed to make; but before making the award, I stated a case for the opinion of the High Court. The questions, so far as material were: Could an association of employés of the same craft, employed in various kinds of undertakings—a "craft union"—be registered as an organization under sec. 55; and, if not, was the objection fatal to the claim when the case came on for hearing? On 26th June 1911 the High Court (by a majority of three to two) gave its opinion to the effect that such an association is not an association that could be registered under sec. 55, and that the objection was fatal at the hearing. The case

(1) 220 U.S., 345, at p. 356.

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with the opinion was remitted to me as President, in pursuance of sec. 31, on 12th October 1911. On 23rd November 1911 an amending Act was passed, providing, in effect, that "craft unions" may be registered as organizations (sec. 3), and (sec. 4) that the registration *de facto* of an association as an organization before the amending 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."

This sec. 4, it will be seen, applied to all the craft associations which had been making the same mistake as the claimant, and it clearly means that everybody—the High Court as well as others—is *thenceforth* to treat the registration on the 2nd March 1908 as being valid for all purposes, and as having constituted the association an organization on and from that date. Now, if the association is to be deemed to have been an organization ever since 2nd March 1908, whatever it did that an organization could do is to be treated as the act of an organization. As an organization, then, it had a dispute; as an organization, it filed its plaint; as an organization, it appeared in Court by its secretary, called evidence, and argued; as an organization, it became entitled under the amending Act to have some award made. If the question is to be treated as one of mere interpretation of the words of sec. 4, the matter seems to me to be beyond doubt; and when the case came before me again on 24th November 1911, I, as President, was bound to treat the association as having been an organization ever since 2nd March 1908, with all the consequences which follow from that fact. But it is said that an exception is to be implied in sec. 4—that sec. 4 does not apply to proceedings which have been concluded before the amending Act. The Courts usually presume that an exception must be implied, unless clearly negatived, as to cases which have been concluded before a retrospective amendment (as in *Lemm* v. *Mitchell* (1)). But it is apparent (2) that this presumption is based on the principle that no one ought to be twice harassed for the same cause; and there is in this case no second harassing, for the arbitration case was not, and is not yet, concluded. The case had

(1) (1912) A.C., 400.

(2) (1912) A.C., 400, at p. 405.

yet to be decided by the Arbitration Court, in the light, of course, of the opinion of the High Court. In the meantime, the amending Act was passed; and the case now "must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered" (*Cooley's Constitutional Limitations*, 7th ed., p. 543; and see *Quilter* v. *Mapleson* (1); *United States* v. *Heinszen & Co.* (2)).

It will be seen from what I have said that the only duty imposed by the section—the duty of deeming ("shall be deemed") is a future duty—a duty as from 23rd November 1911. The section accepts as a true statement of the law the interpretation put by a majority of the High Court on the word "industry" in the first case stated, and Parliament says, in effect:—"As the definition of the word 'industry' in the Principal Act does not cover all the ground that we wish it to cover, and that many persons have supposed it to cover, we want the Courts in future to treat the word as covering a craft as well as a business undertaking. It has not hitherto covered a craft; it shall cover a craft hereafter, and shall be deemed hereafter to have covered crafts in the case of associations *de facto*, though not *de jure*, registered." There is thus no flouting of the High Court's judgment given on the first case stated, no encroachment by the legislature on the judicial power. To amend the law in consequence of a decision of the High Court is not the same thing as reversing the decision—not the same thing as saying the High Court was wrong. It cannot be too clearly understood that the federal Parliament can make any laws that it thinks fit for the Commonwealth "with respect to" (*inter alia*) any of the subjects mentioned in sec. 51 of the Constitution, and that these laws may be retrospective as well as prospective. The delegation of power by the British to the Australian Parliament is unlimited—as to the subjects in sec. 51. What the Australian Parliament could have done before 2nd March 1908, it can do after that date. The amending Act would have been an exercise of legislative power, if passed before that date; and the fact that the plaint has been filed, or the evidence heard, or an opinion given on a special case, does not convert a legislative act into a judicial act.

(1) 9 Q.B.D., 672. (2) 206 U.S., 370.

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There is no usurpation of the function of determining the meaning of the Acts as they stand, or of applying the law as it stands to a given cause. There is no reversal of the opinion of the High Court, but a change in the law to be applied in all future proceedings in the same cause or in other causes.

The numerous cases which have been cited by the respondents from the United States do not, in my opinion, apply; and I again enter my protest against the growing habit of rushing to the United States law reports as a storehouse of subtle constitutional objections, and of dragging the cases, without careful discrimination, into the discussion of our laws and our Constitution. I may instance the case of *McDaniel* v. *Correll* (1), which was cited to show that the legislature has no power to make a void proceeding valid. It is obvious that the learned Judges relied for their decision on a constitutional provision against taking away property by legislation—probably on article v. of the Amendments to the federal Constitution, which says that no person shall be "deprived of life, liberty or property, without due process of law." This, and other analogous constitutional provisions, have led to extraordinary difficulties in the United States, and have been omitted from the Australian Constitution. The Victorian case of *May* v. *Martin* (2) is also inapplicable. There, the whole case—not merely a question in the case—had been referred by the primary Judge to the Full Court of the Supreme Court; the Full Court was seized of the whole case, and gave the final determination of the Supreme Court before the Act was amended. Here, the High Court never was seized of the arbitration case, and never affected to give a final determination of that case. The case of *Harding* v. *Commissioners of Stamps for Queensland* (3) was a case in which the Privy Council held the Act not to be retrospective at all. There were no retrospective words as to past grants of probate.

With regard to sec. 31, I concur in the view that the opinion of the High Court on the first special case did not put an end to the proceedings in the Arbitration Court. Logically, the opinion in this case would probably have compelled me to dismiss the

(1) 68 Am. Dec., 587; 19 Illinois, 226.

(2) 12 V.L.R., 115.

(3) (1898) A.C., 769.

plaint; but it was not in fact dismissed before the amending Act 1911 came into operation. The case was on that day still pending. Under sec. 31 the case with the opinion has to be remitted to the President after the High Court has given its opinion; and what would be the use of remitting the case with the opinion, if the opinion is to be treated as in itself a conclusion of the cause? The High Court merely "determines the question"; the Arbitration Court has to "determine the dispute" (secs. 24, 25 and 28). It is contended that there was no "dispute" here to determine, as there was no valid organization of employés; that the alleged dispute had no valid disputant, no organization, on the employés' side (see definition of "industrial dispute" as it stood at the filing of the plaint), and that there was therefore no valid plaint, and no need to remit the case to the President; but the answer is that there was a "proceeding" in fact before the Arbitration Court which had to be dealt with somehow by that Court, even if the only decision could be that there was no dispute, and no jurisdiction. Whatever the nature of the question of law is, whether the question goes to the root of the jurisdiction, or to some minor matter, the case for the opinion has to be remitted to the President to make the fitting order; otherwise, the respondents are driven to the other horn of an absurd dilemma—that because there was no "dispute," there was no valid "proceeding," and no valid case stated, and therefore no valid "opinion" given by the High Court. The "opinion" of the High Court would be a nullity, if the "proceeding" in the Arbitration Court is a nullity, and if the provisions for remitting the case with opinion do not apply.

Personally, although it may be unnecessary to decide the point, I think that the opinion of the High Court is merely interlocutory and consultative (as in *In re Knight and Tabernacle Permanent Building Society* (1)); that although the President would ordinarily fail in his duties as a Judge if he did not act on the opinion of the High Court, he is not under any legal obligation to do so. There is certainly no sanction by which it could be enforced, and there is no appeal. In other words, the award would not be invalid if the President acted on another

(1) (1892) 2 Q.B., 613, at p. 619.

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view, although if the question went to the root of jurisdiction, he would be liable to prohibition. Parliament makes no distinction in sec. 31 between cases where further evidence may alter the whole position, and make the opinion inapplicable, and cases where further evidence cannot alter the position; nor does the section distinguish between cases where the question involves jurisdiction, and cases where it does not; and if the President has legal power to act contrary to the opinion of the High Court in the latter class of cases, he has power to act contrary to the opinion in the former class—subject, of course, to the liability to prohibition. Moreover, if the President found that the Privy Council, on the very next day after the High Court had expressed its opinion, had laid down the law to a contrary effect, it would, in my opinion, be his judicial duty to accept the law laid down by the Privy Council. I cannot treat the words "hear and determine the question" as necessarily implying a finding of law which is to be binding between the parties, or such of them as appear to argue the question. After all, the "hearing and determination" are only with a view to an "opinion"; the final result of what the High Court does is only an "opinion." The word "opinion," which is used twice in the previous parts of the section, is not an appropriate word for a final and conclusive judgment between parties. Indeed, the question asked need not be in issue between the parties at all, although it must "arise in the proceedings"; it may be asked by the President for his own guidance, even though both parties object.

I answer the first question "Yes."

(2) To the second question I answer "Yes"—as to all the operations mentioned of the Corporation.

(3) Except as to the provision making the certificate of the Registrar conclusive—which is either futile or superfluous—I think that the proposed clause for a Board of Reference is within the powers of the Arbitration Court. The chief difficulty is as to the word "specified." It may either mean that the Court should state specifically in the award, with prophetic mind, the precise question that is to be dealt with by the Board—which is impossible; or the word may bear the popular sense which gives a reasonable result—the sense of stating and defining—"stating

in full and explicit terms," "naming expressly." It would not be an abuse of language, if a sheriff's officer ask a claimant to "specify" what articles in a house are his property, to say, "I specify all the articles." Here the clause specifies any question that arises under the award.

Questions answered as follows:—

1. *Yes, on the basis that the plaint first validly came into existence on 24th November* 1911.
2. *Yes, so far as the Corporation is engaged in trading operations.*
3. *No.*

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

Solicitor, for the Commonwealth, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

RANKIN . . . . . APPELLANT;
DEFENDANT,

AND

PALMER (OFFICIAL ASSIGNEE OF CROSS) . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—High Court—Dismissal of appeal for want of prosecution—Failure to set down appeal for hearing—Transcript, extension of time for lodging—Rules of the High Court 1911, *Part II., Sec. III., rr.* 15, 18.

Indemnity, action for—Principal and agent—Money received by agent and paid over to principal—Declaration of agents' right to indemnity—Order to pay the money to agent—Subsequent bankruptcy of agent—Official assignee—Rights of.