which have just been delivered, and have nothing to add. I agree that the appeal should be allowed.

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MIDDLETON v. MELBOURNE TRAMWAY AND OMNIBUS CO. LTD.

Appeal allowed. Order appealed from discharged with costs. Order of the County Court Judge refusing a new trial, and verdict and judgment in that Court on the trial, restored. Respondent company to pay costs of appeal.

Solicitors, for the appellant, *A. E. Jones.*

Solicitors, for the respondents, *Malleson, Stewart, Stawell & Nankivell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE MERCHANT SERVICE GUILD OF AUSTRALASIA . . . . . CLAIMANT;

AND

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

[No. 1.]

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MELBOURNE, *June* 6, 9, 10, 11, 12, 13, 16, 23, 25, 26.

SYDNEY, *Sept.* 4.

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

Industrial Arbitration—Case stated by President of Commonwealth Court of Conciliation and Arbitration—Question arising in the proceeding—Propriety of President sitting on determination of question—Question of law—Opinion of President—Facts to be stated in case—Inferences of fact—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Threatened, impending or probable dispute—Power to arbitrate—Conference—Parties not summoned—The

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Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *secs.* 4, 16, 16A, 19, 31.

The President of the Commonwealth Court of Conciliation and Arbitration having, for the purpose of referring to that Court a matter which has come before him on a conference convened by him under sec. 16A of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, decided that an industrial dispute exists, the question whether an industrial dispute exists may nevertheless, on the hearing of the matter so referred, be a "question arising in the proceeding," within the meaning of sec. 31 (2) of that Act, upon which the President may state a case for the opinion of the High Court.

Whether under such circumstances the President ought to sit as a Justice of the High Court on the argument of the case stated is for himself to decide, for it depends on the question whether he has formed a definite opinion that an industrial dispute does or does not exist.

Held, by *Barton* A.C.J., *Isaacs* and *Powers JJ.* (*Higgins*, *Gavan Duffy* and *Rich* JJ. dissenting), (1) that a question asked by the President in a case stated by him for the opinion of the High Court under sec. 31 (2) must be really a question of law, and, notwithstanding the provisions of sec. 31 (2), the opinion of the President that the question asked is a question of law is not binding on the High Court; (2) that the case so stated must also set out the facts upon which the question of law arises, and the High Court is not entitled to draw inferences of fact from the facts so stated.

Per Isaacs J.—The facts so set out need not be found, but must be stated as definite facts actually existing in the case.

Per Higgins J.—(1) The question whether certain facts stated, if true and unqualified, amount to a "dispute" within the meaning of the Constitution is a question of law. (2) Sec. 31 of the Act makes the opinion of the President conclusive so far as his right to bring his difficulty before the High Court is concerned. (3) *Semble*, the Court may then give its opinion subject to certain conditions to be stated.

Held by *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Barton* A.C.J. and *Powers* J. dissenting), that in the case of a dispute being only "threatened or impending or probable" within the definition of "industrial dispute" in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, the Commonwealth Court of Conciliation and Arbitration has jurisdiction to arbitrate as well as to conciliate between the parties and to make a binding award by virtue of its power to "prevent" disputes.

Held, by the whole Court, that, where the President has summoned to a conference under sec. 16A of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 some only of the parties to an alleged industrial dispute, and

has subsequently referred the dispute to the Commonwealth Court of Conciliation and Arbitration, that Court has cognizance of the dispute in regard to those parties who were not so summoned to the conference but who have appeared or been summoned to appear under sec. 29 on the proceedings taken pursuant to such reference.

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

The case as originally stated by the President was substantially as follows:—

"1. This proceeding came before this Court on 29th March 1913 in pursuance of an order of the President dated 24th February 1913. . . .

"2. The claimant is an organization of masters and officers who are employed by the respondents. The respondents are shipowners carrying on business on the coast of Australia.

"3. Objection was taken (in the answers and at the hearing) on the part of many of the respondents that there is no industrial dispute within the meaning of the Constitution or of the *Commonwealth Conciliation and Arbitration Act* 1904-1911.

"4. The conference referred to in the said order was convened because of certain affidavits filed on behalf of the organization. . . . .

"5. On 25th April 1912 an award was made by this Court in a previous alleged dispute between the claimant organization and certain of the respondents and other shipowners. . . .

"6. On 10th May, 28th June and 17th July 1912 certain of the respondents in the said alleged dispute obtained orders *nisi* from Justices of the High Court for prohibition forbidding the President and the claimant to proceed under the said award. . . .

"7. On 13th December 1912 the High Court, by a majority, made absolute the said orders for prohibition so far as the award related to the respondents who obtained the orders *nisi*. . . .

"8. The respondents contend that, even if the facts stated in the said affidavits are true, there is no industrial dispute within the meaning of the said Constitution or of the said Act.

"9. I submit the following questions to the High Court for its opinion—questions which, in my opinion, are questions of law:—

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"(1) On the facts stated in the said affidavits, is there an industrial dispute within the meaning (*a*) of the Constitution, (*b*) of the said Act, and between whom?

"(2) If an industrial dispute is threatened or impending or probable, has the Court cognizance thereof for purposes of prevention and/or settlement?"

The order referred to in the above case was substantially as follows:—

"Whereas in pursuance of sec. 16A of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 the President of the Commonwealth Court of Conciliation and Arbitration convened a conference consisting of certain representative employers in the shipping industry and of certain officials of the Merchant Service Guild of Australasia representing the employés members of the said Guild for the purpose of discussing a dispute actual or threatened in the said industry And whereas at the conference it appeared that there is an actual dispute between the said employés members of the said Merchant Service Guild of Australasia and the employers whose names are set out in the Schedule hereunder written as to all or some of the following matters claimed by the employés (that is to say):—" [The order then set out the matters and continued:—] "And whereas after discussion at the conference no agreement was reached and it appeared that no agreement could be reached as to the dispute Now therefore in pursuance of sec. 19 (*d*) of the said *Commonwealth Conciliation and Arbitration Act* I refer the said dispute to the Commonwealth Court of Conciliation and Arbitration."

The contents of the affidavits referred to in paragraph 4 of the case are sufficiently indicated in the judgments hereunder.

During the hearing of the arguments, and after the Court had disposed of the preliminary objections hereunder referred to, the case was amended by adding the two following paragraphs:—

"8A. Some only of the respondents who are alleged by the organization to be parties to the alleged dispute were summoned by me to the conference referred to in paragraph 4 hereof (that is to say) the persons named in paragraphs 52 and 53 of the affidavit of W. G. Lawrence, sworn 18th February 1913, except that in place of Sir Allen Taylor, his manager, Mr. R. McC.

Anderson, was, at his request, summoned and allowed to attend.

"8B. A doubt has also arisen whether—in case it should turn out that the dispute is not actual, but only threatened, impending or probable—this Court has power to proceed by way of arbitration as well as conciliation for the purpose of prevention and/or settlement."

The questions, also, were, at various stages of the hearing, amended; and in their final form they were as follows:—

"1. On the facts stated in the said affidavits, is there an industrial dispute within the meaning (*a*) of the Constitution, (*b*) of the said Act, and between whom?

"2. On the facts stated in the said affidavits and in the case of such employers as refused (expressly or by implication) the demands of the organization, is there an actual industrial dispute, within the meaning of the Constitution and of the Act, between the said employers and their employés, members of the organization?

"3. On the facts stated in the said affidavits and in the case of such employers as refused (expressly or by implication) the demands of the organization, is this Court justified in finding that there is an actual industrial dispute, and in proceeding to investigate the merits under sec. 23?

"4. In the case of a dispute being only 'threatened or impending or probable' within the meaning of sec. 4 of the Act, has this Court jurisdiction to arbitrate between the parties and to make a binding award?

"5. As all the parties to the alleged industrial dispute were not summoned to the conference under sec. 16A, has this Court cognizance of the dispute as to those who were not summoned to the conference but who have appeared or been summoned to appear under sec. 29?"

Bavin and *Latham*, for the claimant.

H. I. Cohen and *Gregory*, for the Commonwealth, intervening.

Starke (with him *Kelynack*), for the North Coast Steam Navigation Co. Ltd. and nine other respondents, took a pre-

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liminary objection to the constitution of the Court. *Higgins* J., as President of the Commonwealth Court of Conciliation and Arbitration, decided adversely to the respondents the first question asked, when on 24th February 1913 he referred the dispute to that Court. In order to do that, he had to make up his mind that an industrial dispute existed.

[HIGGINS J. I merely decided the question *pro hac vice* for the purpose of making the reference, leaving my mind open.]

BARTON A.C.J. This is a matter on which we have no right to interfere. It is for my brother *Higgins* himself to decide whether he should sit. If I had formed a definite conclusion on a question submitted for the opinion of this Court, I should not sit as a member of the Court to determine that question.

ISAACS J. I agree that we have no right to interfere. The question we have to decide is one of law, upon which our brother *Higgins* has not formed a definite opinion. If he has not, I think he is justified in sitting, and in duty bound to sit, as a member of this Court on the determination of the question.

GAVAN DUFFY J. I agree.

POWERS J. I agree.

RICH J. I agree.

Starke. The first question is not one which the President under sec. 31 (2) of the *Conciliation and Arbitration Act* has power to ask, for it is not a question "arising in the proceeding." Whether an industrial dispute exists is a jurisdictional fact to be determined outside the proceeding. The question whether an industrial dispute exists is not within the jurisdiction of the President to determine. A question which the President has, under sec. 31 (2), power to ask this Court to determine must be a question which he himself has jurisdiction to determine. Any decision the President may give as to the existence of an industrial dispute is not between the parties. [He referred to *Clancy*

v. *Butchers' Shop Employés Union* (1); *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (2); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.* (3); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (4); *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (5); *Baxter* v. *New South Wales Clickers' Association* (6); *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (7); *R.* v. *Deputy Industrial Registrar*; *Ex parte J. C. Williamson Ltd.* (8); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (9).]

The second question does not arise in the proceeding, but is a purely hypothetical question which the facts stated show has not arisen. The President has found that there was an actual dispute existing, and has so stated in his order of reference under sec. 19 (*d*). What was referred to the Arbitration Court was an actual dispute, and not a threatened, impending or probable dispute, and that Court could not inquire into the matter generally.

Bavin. The first question falls within sec. 31 (2). Although it is only incidental to the decision of the President, it is his duty to decide the question. It arises in the proceeding, in the sense that the President cannot ignore it. There is an obligation upon him to make such an inquiry as he thinks necessary, and to make up his mind upon the question: *Engine-Driver's Case* (10); *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (11). The second question is not hypothetical. Under sec. 19 (*d*) the President has power to refer to the Arbitration Court a certain state of facts, and that is what he has done. For the purpose of the Court having cognizance of

(1) 1 C.L.R., 181.
(2) 5 C.L.R., 33.
(3) 8 C.L.R., 419.
(4) 12 C.L.R., 398, at pp. 415, 443, 444.
(5) 15 C.L.R., 586.
(6) 10 C.L.R., 114.
(7) 4 C.L.R., 488.
(8) 15 C.L.R., 576.
(9) 16 C.L.R., 245.
(10) 12 C.L.R., 398, at p. 428.
(11) 4 C.L.R., 488, at p. 495.

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Barton A.C.J.

the dispute, it does not matter whether it is an actual or a threatened dispute. [He referred to *Australian Boot Trade Employés Federation* v. *Whybrow & Co.* (1).]

Starke, in reply.

BARTON A.C.J. I am of opinion that neither of these points should prevail.

As to the first, I think it is apparent from the previous decisions of this Court that if in the course of the hearing the existence of a dispute is questioned as a condition of his jurisdiction, it is in a sense the duty of the President not, as I have put it on a previous occasion (2), "to accept jurisdiction without sufficient inquiry," or "to refuse it with precipitancy." But it is for him to use the opportunities which he has to see that he does not proceed with a futile and useless inquiry. That does not involve a final determination of the question whether he has jurisdiction. Assuming for the present that question 1 is in other respects allowable, the question whether there is or is not a dispute involves, when it arises, a contingency upon which the proceedings are or are not to continue, and I think it must be held to be a question "arising in the proceeding."

On the other point, the objection is founded entirely upon the use of the words "actual dispute" in the order of reference to the Court of Arbitration. I do not think that the use of those words is a bar to the course which the President has afterwards taken in referring the second question for our consideration. The President has gone no further than to act upon the view that the case was *primâ facie* one for reference to the Arbitration Court as an actual dispute. It may or may not be that this is a question which we should not answer. At present we know nothing about that. The President says, in his order, that it appears to him that there is an actual dispute, and in the circumstances it is probable that he means that there is apparently an actual dispute. I do not think that the use of those words in that connection can be held of itself to render the second question in the case stated a merely hypothetical one. Whether it is

(1) 11 C.L.R., 311, at p. 317. (2) 12 C.L.R., 398, at p. 428.

so we may have to consider at a later stage and from another point of view. But that does not constitute the two words used in the order a bar to our hearing argument upon the second question. I think, therefore, that the second objection also fails.

ISAACS J. Subject to further consideration of whether the first question amounts to a question of law, which alone we have jurisdiction under sec. 31 (2) and (3) to answer, I agree that the objections fail. I have stated my view of sec. 31 in *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (1), and I do not want to say anything further upon it. The position of the President I stated in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (2); and I adhere to what I there said. His position in regard to the existence of an industrial dispute is precisely similar to that of certain tribunals in other cases of which *O'Keefe* v. *Williams* (3) is an example. In that case a question was raised as to the Land Appeal Court of New South Wales, which had to consider applications for land and could only deal with such lands as were available for selection. It had to form an opinion as to what lands are available for selection, but could not give a binding decision. It was pleaded in that case that the Land Appeal Court had decided that the land in question was available for annual lease. There was a demurrer to that plea, and this Court held that the demurrer was good because, as I stated (4), although the Land Appeal Court would for the purpose of the day form its own opinion on the point whether the land was available for annual lease, its decision was not in any sense final, not having been made directly cognizable by it. The Privy Council upheld that view: *Williams* v. *O'Keefe* (5). That is an exactly similar position.

With regard to the second question, I think that the construction of the order is simply this, that the President had convened a conference to consider a dispute, threatened or actual, as is said in the order, and he states what the dispute is about and refers the dispute to the Court. It is true that he recites that it appeared

(1) 12 C.L.R., 398.
(2) 11 C.L.R., 1.
(3) 5 C.L.R., 217.
(4) 5 C.L.R., 217, at p. 232.
(5) (1910) A.C., 186, at p. 191.

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to him to be an actual dispute, but that does not cut down his reference of the dispute, nor does it in any way amount to any binding determination as to the actuality of the dispute. I therefore think that so far as the objection taken is concerned the second question is properly put.

HIGGINS J. I am of the same opinion, even assuming in favour of Mr. *Starke* the soundness of the view that the Court of Arbitration has not, by virtue of the Act, the duty, by implication, of deciding as to the existence or non-existence of the dispute alleged. I have not had, as a member of the High Court, any opportunity of considering this question.

GAVAN DUFFY J. I also think that both objections fail.

POWERS J. I agree in the view that both objections fail.

RICH J. I concur.

Bavin. The opinion of the President is, under sec. 31 (2), conclusive as to the questions stated being questions of law. If that is not so, the question whether on the facts stated there is an industrial dispute is a question of law, and the facts are stated on which that question of law arises.

[ISAACS J.—This Court is not entitled to draw inferences of fact (*Liebe* v. *Molloy* (1)), even if they are necessary inferences (*Doe d. Taylor* v. *Crisp* (2); *Latter* v. *White* (3).]

If the President has stated all the facts and only necessary inferences of fact are left to be drawn by this Court, the question is one of law. In *Liebe* v. *Molloy* (1) an inference had to be drawn as to which there was no guidance. In *Doe d. Taylor* v. *Crisp* (2) the inference was disputable; and in *Latter* v. *White* (3) the facts stated were not sufficient to enable the Court to draw the suggested inference.

[ISAACS J. Where there is a power to draw inferences of fact it is only necessary inferences that can be drawn: *Paquin, Ltd.* v. *Beauclerk* (4).

(1) 4 C.L.R., 347.
(2) 8 A. & E., 779.
(3) L.R. 5 H.L., 578.
(4) (1906) A.C., 148.

RICH J. referred to *Newman* v. *Oughton* (1).]

This Court need not draw inferences, but may answer questions on the hypothesis that the inferences are drawn. [He referred to *Encyclopædia of the Laws of England*, 2nd ed., vol. v., p. 666; *Taylor on Evidence*, 10th ed., p. 23.]

[HIGGINS J. The doctrine as to the stating of cases would seem to apply only to common law cases: *Burgess* v. *Morton* (2).

ISAACS J. It may be that where what is usually called a mixed question of law and fact arises this Court should state the law so that the President can apply it to the facts which he finds: *Maude* v. *Brook* (3); *Hoddinott* v. *Newton, Chambers & Co. Ltd.* (4).]

On the facts stated, an industrial dispute within the meaning of the Constitution and the Act does exist, and the first three questions should be answered in the affirmative: *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (5). As to the fourth question, the Act, by the definition of "industrial dispute" in sec. 4, gives the Arbitration Court jurisdiction over a threatened, impending or probable dispute, and the Court may deal with such a dispute either by arbitration or conciliation. The purpose of the grant of the power by the Constitution includes a power to compose differences which are leading up to an industrial dispute. The jurisdiction given by the Act in respect of threatened, impending or probable disputes is an exercise of that power. If there is anything that can be the subject of conciliation, it may be the subject of arbitration: *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.* (6); *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (5). As to the fifth question, the Court can deal with the dispute in respect of those who have appeared or been summoned under sec. 29. The parties to the dispute are not necessarily those who were summoned to the conference, and the fact that all the parties to the dispute were not summoned to the conference does

(1) (1911) 1 K.B., 792.
(2) (1896) A.C., 136, at p. 144.
(3) (1900) 1 Q.B., 575, at p. 581.
(4) (1901) A.C., 49, at p. 68.
(5) 15 C.L.R., 586.
(6) 11 C.L.R., 311, at pp. 317, 324, 327, 330, 336, 340.

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not prevent the Court from dealing with the whole of the dispute as between all the parties to it.

Starke. The first question, on a proper interpretation of it, is a question of fact. The question whether a dispute exists must always be one of fact. Sec. 31 (2) does not authorize the President to ask this Court a question of fact even if he is of opinion that it is a question of law. The question does not arise in the proceeding, because the President has already held that a dispute does exist: *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd* (1). If the question is one of law, the case does not state facts upon which it can be determined. It is, at most, only a hypothetical question. The second question is a hypothetical one. On the facts stated it must appear that the question is one which arises in the proceeding, and it must not be an abstract or hypothetical question: *Glasgow Navigation Co.* v. *Iron Ore Co.* (2); *Federated Saw Mill &c. Employés of Australasia* v. *James Moore and Sons Proprietary Ltd* (3).

[ISAACS J. referred to *R.* v. *Louw*; *Ex parte Attorney-General for the Cape of Good Hope* (4).]

Similar arguments show that the Court should not answer the third question. As to the fourth question, that also is a hypothetical question. The President has already held that there was an existing dispute, and that is what he has referred to the Court. The power as to arbitration in sec. 51 (XXXV.) of the Constitution does not refer to the prevention of industrial disputes: *Australian Boot Trade Employés Federation* v. *Whybrow & Co.* (5). If it does, all that the Constitution enables Parliament to provide for is some ascertained dissidence of opinion existing in more States than one, between parties in more States than one who can be ascertained, upon some subject which can be ascertained. If that is so, then clause III. of the definition of "industrial dispute" in sec. 4 is unconstitutional. If that part of the definition is constitutional, the Act as to threatened, impending or probable disputes gives power to deal only with a dispute which is actually

(1) 12 C.L.R., 398, at p. 415, 445.
(2) (1910) A.C., 293.
(3) 8 C.L.R., 465, at p. 485.
(4) (1904) A.C., 412.
(5) 11 C.L.R., 311, at pp. 317, 320.

threatened and which is definite as to parties and subject matter, and is such that the Court can make an award upon it. There must be some definite and clear-cut issue between the parties. If the words "threatened or impending or probable" are limited so as to refer to an industrial dispute within the meaning of the Constitution, then Part III., Division 3, of the Act does not include the class of dispute indicated by those words, but is limited to something as to which there is a definite difference which can be settled by means of an adjudication between the parties. As to the fifth question, if a dispute is alleged to exist between an organization of employés and a number of employers, it must consist of differences between the organization and particular employers who have refused the demand of the organization, and the whole dispute is the aggregation of the separate disputes. That dispute is what the President is by sec. 19 (*d*) authorized to refer to the Court, and the parties to the dispute must have had an opportunity of settling their disputes. Under sec. 16A the President may summon persons in respect of one or more of the individual disputes. The only persons in respect of whom under sec. 19 (*d*) the whole dispute is referred to the Court are those persons who were summoned in respect of the individual disputes. All the persons as to whom the Court has cognizance on the reference are persons who have had an opportunity of agreeing at the conference.

Cohen. This Court can draw all necessary inferences of fact. That being so, this Court should answer the first three questions. If there is any inference of fact which is essential to the establishment of the existence of an industrial dispute, and which is not a necessary inference from the facts stated but can reasonably be drawn from them, this Court should answer the question whether an industrial dispute exists by saying that there is evidence of the existence of an industrial dispute. As to the fourth question, where the Arbitration Court interposes at a point before there is an actual dispute it may use means to evolve a definite issue between the parties, and upon that definite issue that Court can operate either by conciliation or by arbitration. As to the fifth question, under sec. 16A the President has perfect freedom of

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choice as to whom he will summon to attend a conference, and the fact that he has only summoned certain persons does not prevent him on the reference dealing with the whole dispute with regard to all the parties to it.

Latham, in reply. The words "at any stage" in sec. 31 (2) suggest that a case may be stated before any evidence has been given, so that if there were merely a plaint filed a case might be stated: See *Metropolitan Board of Works* v. *New River Co.* (1).

Cur. adv. vult.

The following judgments were read:—

Sept. 4.

BARTON A.C.J. This is a case stated by the learned President of the Commonwealth Court of Conciliation and Arbitration for the consideration of this Court.

It appears by an order of the learned President attached to the case stated, that he convened a conference under sec. 16A of the *Commonwealth Coueiliation and Arbitration Act* 1904-1911 for the purpose of discussing a dispute, actual or threatened, in the shipping industry; that at the conference it appeared to his Honor that there was an actual dispute between the employés, members of the claimant guild, and 128 employers named in a schedule to the order; that after discussion at the conference no agreement was reached, and that it appeared that no agreement could be reached as to the alleged dispute. The learned President, therefore, referred the matter to the Commonwealth Court of Conciliation and Arbitration. This order was dated 24th February 1913.

It appears by the case stated that the cause for which his Honor convened the conference was that certain affidavits had been filed on behalf of the claimant organization. Copies of the affidavits are annexed to the case.

It further appears that on 25th April 1912 the Arbitration Court had made an award in a previous alleged dispute between the claimant organization and certain of the new respondents and other shipowners. In May, June and July 1912 certain of the

(1) 2 Q.B.D., 67.

respondents in the previous alleged dispute, being shipowners in New South Wales, South Australia and Tasmania respectively, had obtained from this Court orders *nisi* to prohibit proceedings under the award, and on 13th December 1912 these orders had been made absolute so far as the award related to the respondents who had obtained the orders *nisi*: See *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild*; *Ex parte Allen Taylor & Co. and others* (1).

The case states that the respondents contend that even if the facts stated in the affidavits filed as above mentioned on behalf of the claimant organization are true, there is no industrial dispute within the meaning of the Constitution or of the Arbitration Act.

The learned President submitted to the High Court for determination two questions which in his opinion were questions of law, and which it has become unnecessary to set forth.

In the course of the argument his Honor submitted two further questions to this Court, they being in his opinion questions of law, and they were accepted by the Court as in amendment of the case stated. These questions, also, are no longer necessary to be stated.

At a later stage of the argument the learned President submitted another question in place of one of the questions above mentioned, and it was accepted by the Court as in further amendment of the case stated. This question, as will be seen, need not now be considered.

Judgment having been reserved on 16th June, it seemed good to the learned President to submit to the Court certain amendments of the case stated. These consist, first, of the two paragraphs which follow:—

"8A. Some only of the respondents who are alleged by the organization to be parties to the alleged dispute were summoned by me to the conference referred to in paragraph 4 hereof (that is to say) the persons named in paragraphs 52 and 53 of the affidavit of W. G. Lawrence, sworn 18th February 1913, except that in place of Sir Allen Taylor, his manager, Mr. R. McC. Anderson, was, at his request, summoned and allowed to attend.

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

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"8B. A doubt has also arisen whether—in case it should turn out that the dispute is not actual, but only threatened, impending or probable—this Court has power to proceed by way of arbitration as well as conciliation for the purpose of prevention and/or settlement."

Also, his Honor desired to amend the questions for this Court so that their final form might be as follows :—

"1. On the facts stated in the said affidavits, is there an industrial dispute within the meaning (*a*) of the Constitution, (*b*) of the said Act, and between whom ?

"2. On the facts stated in the said affidavits and in the case of such employers as refused (expressly or by implication) the demands of the organization, is there an actual industrial dispute, within the meaning of the Constitution and of the Act, between the said employers and their employés, members of the organization ?

"3. On the facts stated in the said affidavits and in the case of such employers as refused (expressly or by implication) the demands of the organization, is this Court justified in finding that there is an actual industrial dispute, and in proceeding to investigate the merits under sec. 23 ?

"4. In the case of a dispute being only 'threatened or impending or probable' within the meaning of sec. 4 of the Act, has this Court jurisdiction to arbitrate between the parties and to make a binding award ?

"5. As all the parties to the alleged industrial dispute were not summoned to the conference under sec. 16A, has this Court cognizance of the dispute as to those who were not summoned to the conference but who have appeared or been summoned to appear under sec. 29 ?"

The amendment of the case stated in these respects was allowed, and further argument took place. I proceed to deal with the questions as they now appear.

First, it is well to refer to the provisions of sec. 31, sub-secs. (2) and (3), of the *Commonwealth Conciliation and Arbitration Act.* They read thus :—"(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."

There was much argument as to the interpretation of these two sub-sections. Must the "case in writing" be strictly a statement of the facts and of some question of law to which they give rise? Must the "question arising in the proceeding" be a question of law? Must the opinion of the High Court be a legal opinion, or is it called upon to give findings of fact? And may it draw necessary inferences of fact? I think the case to be stated is intended to consist of one or more concrete questions of law arising in the course of the hearing, with a statement of the facts out of which the question or questions of law arise. I know of no instance in which mere hypothesis or assumption has been held to be a sufficient foundation of fact on which to invoke the legal opinion of a superior Court. The object of the special case is to obtain an authoritative determination of the legal complexion of conclusions of fact. The provision of sec. 31 (2) is framed to meet actualities and not suppositions. It is true that the President may see that a question of law is one arising in the proceeding, although it may not yet have been formulated in his Court. But even if it arises only in that sense, it must still arise out of facts, and these facts must be the basis of the question as he submits it to the High Court. The mere statements of witnesses, unless admitted, are not such a basis. They are not yet the facts of the case. But conclusions of fact arrived at by the Arbitration Court are a real basis. The whole scheme of the Act, when viewed apart from these provisions, suggests that the Arbitration Court, when acting clearly within its jurisdiction, has the exclusive determination of questions of fact, and, therefore, of inferences of fact. The section gives this Court no power to draw inferences of fact, nor can such a power be implied. The sub-section contemplates that the President may submit the question not as one of fact but as one of law, for he is only to state it if in his opinion it is one of law. But it does not follow that if the High Court is of opinion that the question is

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not one of law it is nevertheless bound to deal with it. The President is the proper authority for the decision of questions of fact arising in his Court. That the superior Courts of England cannot deal with mere questions of fact submitted upon special case except by the consent of all parties, and that in such instances the proceedings in the superior Court are *extra cursum curiæ*, the judgment being merely in the nature of an arbitrator's award, is made clear by the case of *Burgess* v. *Morton* (1). There the Court of Appeal was held by the House of Lords to have acted erroneously in reversing, indeed in dealing with, an order of the Queen's Bench Division upon a special case agreed on by the parties which erred in raising mere questions of fact. Lord *Halsbury* L.C., in holding that the judgment of the Court of Appeal must be reversed, condemned the course which the proceedings had taken. He said (2):—"It is objectionable as a question of procedure because the legislature has provided a mode of deciding questions of law when the parties are practically agreed upon the facts; but this is an effort to make use of that convenient method of trying a question of law by agreeing to what is called a special case, but which by arrangement between the parties does not state either the inferences of fact or even all the facts from which inferences are to be drawn." (The special case in terms allowed the Court to draw inferences of fact). He further said (3):—"Neither by counsel nor Judges was it treated as being left to the Judges as a special case raising a question of law." Lord *Watson* said (4):—"The rules which govern procedure on the common law side of the High Court of Justice do not contemplate or permit the use of a special case except for the purpose of obtaining the decision of questions of law arising upon facts which are admitted." Lord *Shand*, in concurring, pointed out (5) "that the case was one which the Divisional Court was not bound to entertain"; and he added that "with a special case in which the statements left so much to conjecture, and where the parol evidence of the parties would in many respects have supplied satisfactory grounds for decision one way or another, in place of

(1) (1896) A.C., 136.
(2) (1896) A.C., 136.
(3) (1896) A.C., 136, at p. 137.
(4) (1896) A.C., 136, at p. 141.
(5) (1896) A.C., 136, at p. 144.

mere grounds for speculation as to what the parties meant, and said, and did, it is not unlikely that the ends of justice would have been better served had this course been taken," *i.e.*, the course of declining to give judgment upon the special case.

I think, then, that when this Court finds that a question submitted to it as one of law is not really such a question, it is not bound to answer it even by the consent of the parties, and is keeping to its proper path when it abstains from answering the question, and leaves it to be decided by the appointed arbiter of facts. Without the consent of the parties the High Court is, I think, bound not to answer it. And I doubt whether the High Court ought to answer it even with that consent. We have seen that the High Court has not been given power to draw inferences of fact in dealing with special cases. This makes it the clearer that the case stated to this Court is not complete if it leaves facts to be ascertained by inference, as it generally must when it projects a body of evidentiary statements upon this Court and leaves it to us to determine the conclusion of fact as well as the law.

In dealing with a special case stated by the parties, the Court of Queen's Bench, in *Doe d Taylor* v. *Crisp* (1), refused to infer a material fact. Lord *Denman* C.J. (2) said:—" I do not see how we can draw any inference of fact. The case reserves no such power to us; and, when such a power is reserved, we are often compelled to decline it." *Latter* v. *White* (3) also shows that the Court will not draw inferences of fact upon a special case unless expressly authorized to do so either by the law or by the parties.

In view of these authorities I think it is clear in the present reference that in so far as the case stated leaves matters of fact to inference, it is defective. If the whole basis of the statement, which ought to be one of fact, is hypothetical, we cannot answer at all. And it is equally clear that if we are asked to come to a decision on any matter of fact, whether stated in the form of a question of law or not, we should not, and indeed cannot, do so. We can only answer questions of law based on facts stated or admitted as such. And as these considerations arise

(1) 8 A. & E., 779.
(2) 8 A. & E., 779, at p. 787.
(3) L.R. 5 H.L., 578.

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from the very nature of a case stated, I do not think there is anything in the sub-sections themselves to affect this opinion.

It is proper now to consider how far our duty and our power to answer any of the questions put to us are affected by this view of sec. 31 (2) and (3).

In three of the questions we are asked to assume the truth of the facts stated in affidavits filed on behalf of the claimant organization, which are before the Court of Arbitration in the course of a reference *inter partes*, and on that assumption we are asked to decide a question of law. If, indeed, we were asked to come to a conclusion upon this material, we should be obliged to draw a number of inferences. But what is placed before us is a hypothesis. The learned President informs us that there are also affidavits on the part of the respondents, or some of them. These affidavits are not before us. The affidavits annexed to the case were filed on the question whether there is an industrial dispute between the claimant and some at least of the respondents. Though their truth is in controversy, we are asked to assume it. We cannot make the assumption asked. We are not furnished with facts, and therefore, in my opinion, we have no right to answer any of these three questions, all of which depend upon assumption. In questions 2 and 3 we are further asked to assume that certain employers refused the demands of the claimant organization. This is asking us to assume a fact essential to the existence of a dispute. Obviously, we cannot do this either.

While the majority of the Court are of opinion that we cannot properly answer questions 1 and 2, which I therefore dismiss from consideration, there is a difference of opinion as to the treatment of question 3. In my opinion, the same reasons for which the first two questions are not proper to be answered apply with equal force to question 3. It is not a question of law arising upon a concrete state of facts. But as I am in a minority in holding this opinion, I must endeavour to give some answer to that question. This duty involves the necessity of interpreting question 3 in some sense admitting of a practical answer. I can only do this by treating the two assumptions already mentioned as states of fact. But I protest that this Court cannot properly take that course, for in its basis this

question is identical with question 2, which it has been decided that we cannot answer. However, assuming that the suppositions offered to us are facts, and assuming further that an implication, that demands not expressly refused had been refused by an employer, actually arose out of circumstances in which he had a reasonable opportunity of considering the demands, and of conferring upon them with other employers upon whom the like demands were made, some of whom would no doubt carry on business many hundreds of miles away from him, I should say that the Arbitration Court would be justified in finding, but only *pro hac vice* and not as a finding giving it jurisdiction, that there is an actual industrial dispute, and in proceeding to investigate the merits. But I must observe that my answer depends upon the concurrence of a number of facts which cannot be ascertained as such until the evidence on both sides has been fully given and closely analyzed. Facts then, the existence of which is usually controverted, must, if the question is to be answered in any sensible way, be in this case assumed as existing. For instance, it is usually testified and disputed that before the demand was made there was on the part of the employés a general dissatisfaction with the conditions of their employment, which expressed itself so openly and under such circumstances that the employers in all probability knew of the discontent. There is also in every real dispute evidence of a concrete demand and refusal of definite alterations of the conditions, and if we assume that certain employers, knowing of the discontent, refused the demands made upon them after sufficient opportunity to discuss and consider them, then if the demands were persisted in, and if there is evidence that an express or implied refusal was persisted in, the Arbitration Court would probably be justified in finding for the mere purpose of the hearing, and not as establishing the jurisdictional fact finally, that an actual industrial dispute existed. Let it be clearly understood that I do not say that there can be no dispute without the concurrence of all these *indicia*, but I do say that a genuine and not a mere paper demand, and a real refusal, are involved, and that such circumstances as I have instanced are of the class of facts which go to show genuineness. But I wish to make it plain that my answer is based perforce on the several

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assumptions involved in the question, which assumptions may, of course, be contradicted hereafter by facts. Having thus explained the position which of necessity I assume, and the sense which my answer bears, I answer question 3 in the affirmative.

Before proceeding to deal with questions 4 and 5, I will consider a question which suggested itself to my brother *Isaacs* after the allowance of the final amendments, namely, whether the President, when he has to deal with a mixed question of law and fact, is entitled to obtain the opinion of this Court by way of direction on the law, before coming to a conclusion on the facts. My learned brother cited passages from two judgments. The first was that of *Collins* L.J. in *Maude* v. *Brook* (1). Upon certain facts in evidence before him, a County Court Judge had found that a certain arrangement of trestles and boards had existed at the time of the accident to the plaintiff, and that it was a "scaffolding" within the meaning of sec. 7 (1) of the *Workmen's Compensation Act* 1897. His Lordship said:—"In my opinion, the question whether a particular arrangement is a scaffolding is not a question of pure fact, and therefore not merely a question for a jury without direction as to the law." In that view, an appeal lay as to the law applicable to the facts already found by the County Court Judge. This opinion was quoted with approval by Lord *Brampton* in the case of *Hoddinott* v. *Newton, Chambers & Co. Ltd.* (2). I will not quote the whole of the material passage (3); it is enough to extract these words:—"I thoroughly agree that the arbitrator or County Court Judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not 'scaffolding' within the meaning of the Act . . . and his finding upon such facts is, according to the general rule, final; but whether upon the facts so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of sec. 7 is, in my opinion, a question of law, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment on the question of law being open to review by the

(1) (1900) 1 Q.B., 575, at p. 581.
(2) (1901) A.C., 49.
(3) (1901) A.C., 49, at pp. 68-69.

Court of Appeal." To the reference made by my learned brother the following may be added. Lord *Macnaghton* said in the same case (1):—"I agree . . . . in thinking that the question, whether a temporary staging is a scaffolding within the meaning of the Act, is not a mere question of fact on which the finding of the County Court Judge is final. It is a mixed question of fact and law. *When the facts are ascertained it is a question of law* on which the Court of Appeal is entitled, and I think bound, to express an opinion." (The italics are mine).

In *Maude* v. *Brook* (2) the County Court Judge was bound to find the facts and apply the law to them. This he did, and the case arose by way of appeal.

In *Hoddinott* v. *Newton, Chambers & Co. Ltd.* (3), the County Court Judge had dismissed an action for negligence causing damage, brought against the respondents by the appellant, the widow of one of their employés. He had been killed by falling off a temporary staging while helping another workman to lift an iron stay which fell upon him. The County Court Judge proceeded to assess compensation under the Act of 1897. In doing so he found upon the facts before him (*inter alia*) that the staging from which the deceased fell was "scaffolding" within the meaning of sec. 7 of the Act, and awarded the appellant compensation. The Court of Appeal set aside the County Court Judge's award, and the House of Lords reversed the decision of the Court of Appeal and restored the award.

There was in each case, then, a question of mixed law and fact before the County Court Judge, which he was bound to decide. He could not deal with the case in any other way. That is not so in such a case as the present: the learned President has the power to "state a case for the opinion of the High Court" when he desires to have a matter of law settled for him in that tribunal, apart from the facts, which it is not for this Court to decide. There is not and there cannot be an appeal, as there was in the two cases cited. But the power to state a case in writing means that the President in doing so must put the superior Court in possession of the facts upon which he

(1) (1901) A.C., 49, at p. 56.
(2) (1900) 1 Q.B., 575.
(3) (1901) A.C., 49.

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desires to obtain a conclusion of law. The cases mentioned, so far from authorizing him either to suppose a state of facts, or to ask this Court to assume one, are of a directly opposite character. The necessity for a direction in law does not arise under sec. 31 until the President has a concrete fact or facts to state, giving rise to the question of law. If the question involved be a mixed question of law and fact, it is none the less essential that the tribunal invoked should know the facts to which it is to apply the law. If the learned President does not apply the law himself, then he can send on his concrete statement of facts to this Court, and ask it to apply the law to them. He cannot say to this Court: "To help me in case of such and such facts arising, I want you to tell me the law which will apply if they do arise." Lord *Macnaghten*, Lord *Brampton* and *Collins* L.J. were dealing with cases in which the Court below had already found the facts in a certain way. They were really saying that the finding, when analyzed, resolved itself into law and fact, and that taking the facts as found, the superior Court could and ought to determine the law.

The case of *Metropolitan Board of Works* v. *New River Co.* (1) arose under Order XXXIV., r. 2 (England), after the writ and before pleadings. The writ was indorsed thus:—"The plaintiffs claim damages from the defendants for refusing to supply them with water by meter in accordance with the provisions of sec. 41 of the New River Company's Act of 1852." After appearance the plaintiffs stated on affidavit that they had refused to renew their old agreement with the defendants for the supply of water for watering the Victoria Embankment, and desired to be supplied by meter under the section referred to, and that the defendants had replied by letter that they could not consent to supply the plaintiffs with water for road use under that section. The affidavit further set out that there were no facts in dispute, and the only question was one of law. On this affidavit, which the defendants did not answer, the plaintiffs applied to a Judge in Chambers for an order that the question in the action be stated by way of special case for the decision of the Court, and the Judge made an order accordingly. The Divisional Court

(1) 1 Q.B.D., 727; 2 Q.B.D., 67.

refused to rescind this order, and the Court of Appeal affirmed their judgment. The only facts in the case were stated in the affidavit, and that they were undisputed facts. They involved the question of law, which was the only question in the action. It was proper that the facts, however small their compass, and the question of law, should be stated in a special case. In his judgment in the Divisional Court, *Quain* J. said (1):—"I think that rule 1 throws light upon the second rule. Rule 1 says the parties may after writ of summons concur in stating the questions of law for the opinion of the Court in a special case; that is, on the real facts, and not on the pleader's version of them. Then rule 2 gives the Judge power to order the same thing to be done as to a preliminary question of law, if it appear to him from the pleadings or 'otherwise' that this would be convenient. 'Otherwise' gives the Judge jurisdiction to ascertain this on affidavit." The Court of Appeal decided that the Judge had power to make the order. This case, which was cited to show that the President might raise a question of law without a basis of fact, shows the contrary. The sum of the matter is, that it was held right to raise a question of law which had only a solitary fact for its basis, provided that fact were undisputed.

I now come to question 4, which I answer with considerable doubt as to the propriety of doing so, because it is asked without any basis of fact. It is, in my opinion, a purely hypothetical question. However, my learned brethren decide that this question admits of an answer. Whether the Arbitration Court has jurisdiction to arbitrate where a dispute extending &c. is only "threatened" &c., is a question quite answerable as a matter of abstract law. But questions of abstract law, are not questions "arising in the proceeding." They are therefore inapplicable to special cases either under sec. 31 (2) or from the very nature of a case stated. I proceed, however, to answer this question of abstract law. It has been to some extent discussed in a previous case, namely, the *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.* (2). In that case both the learned Chief Justice and myself made reference to the question, although, in the view taken by the Court, it was not necessary then to determine it.

(1) 1 Q.B.D., 727, at p. 729. (2) 11 C.L.R., 311.

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It is common ground that there must be parties and a subject matter before resort can be had to arbitration. Arbitration is in itself a judicial proceeding for adjusting a difference between two or more parties as to something. It is argued that parties may differ about something without being in dispute. The parties and the difference, it is said, may co-exist, and yet the thing or subject matter be so little defined that the stage of actual dispute has not been reached. But, if the thing is undefined, it is nebulous. I must leave to quicker-witted people the duty of defining an arbitration upon the nebulous. If A complains that his wages are too low, and his employer, B, denies it, how can C arbitrate between them without first finding out what A's wage is, what A claims that it ought to be, and whether B refuses to pay it? The same thing occurs when A says his hours are too long. If A says that B's manager is tyrannical and B denies it, how can C arbitrate between them without finding out what are the alleged instances of tyranny, and whether B admits them? The object of the arbitration in such a case is not merely to procure a general reproof of the manager, but to prevent a continuance or recurrence of specific conduct. To my mind it is impossible to arbitrate unless the subject matter is definite. True, outside the operations of this Act a reference may be expressed in very general terms, but that does not enable an arbitrator to do his work until he knows what is claimed on one side and refused on the other. If, therefore, the process of arbitration presupposes some dispute, how can there be arbitration to prevent the dispute? It is bare justice to assume that on all the subjects on which the Constitution, in sec. 51, gave power to legislate, the framers were thinking of things practical and practicable. The application of this test of practicability is helpful in the construction of sub-sec. XXXV., because it shows that even if Parliament meant conciliation to be applicable both to prevention and settlement, conciliation being practicable for both purposes, it did not necessarily mean to authorize the attempt to apply arbitration to both of the same purposes where as to one of them it is impracticable. Even if the sub-section is not to be construed *reddendo singula singulis*, it does not follow that for the

mere sake of grammatical symmetry Parliament has authorized futilities.

Moreover, the very form of the sub-section gives a cogent reason against the construction contended for. A "dispute extending beyond the limits of any one State" is an existing thing. The sub-section does not speak of the prevention of disputes from extending. It is true that a settlement of an existing dispute by arbitration may tend to prevent a recurrence of the same dispute or the occurrence of a fresh one. But, if that is the meaning, the process is still settlement by arbitration on an actual dispute. As applied to an existing dispute the word "prevention" in its ordinary sense is meaningless, while if applied in the extraordinary sense of putting an end to something, it implies the existence of the thing to be terminated, and so again the existence of the dispute is postulated. It seems to me that if the word is given the sense contended for, it gives the power to intervene at any stage of discontent from the first grumble onwards, in which case it can be applied irrespective of the notion of extension from State to State, which, however, is the root of the subject matter of the power. That, of course, cannot be a correct interpretation.

In my view, therefore, the Court has not jurisdiction to arbitrate for the settlement of a dispute "threatened or impending or probable," because the Parliament is without authority to grant the Court the power.

Question 5 must be answered upon the construction of secs. 16A and 19 (*d*) of the Act. In argument several questions were raised which are more or less conjectural. I think that sec. 16A must be read in the light of the duty, with which the President is charged in sec. 16, "to reconcile the parties to industrial disputes, and to prevent and settle industrial disputes." "Prevent and settle" must, of course, be taken to be used in the sense of the term as employed in the Constitution. It is clear that the conference is intended as a means of reconciliation which, if successful, will obviate the necessity of any reference under sec. 19 (*d*). Sec. 16A (1), with the interpretation given to the words "any person" by the succeeding sub-section, gives the President the widest powers as to whom he may summon to the conference. It

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is argued for the respondents that he is bound, if he calls a conference at all, to summon all who are parties to the dispute, because if any are omitted they have not had the opportunity of coming to an agreement. But the reason does not bear examination. A conference summoned by the President is not the only means of coming to an agreement. I think sec. 16A was passed with the intention of giving the President as wide discretion as possible in exercising the power of summons, provided that what he does is for the purpose of reconciling the parties. It may be that his object is to procure an agreement among those whom a very little persuasion would induce to make one. On the other hand, his purpose may be the bringing together of those who at the moment seem to be the furthest asunder. But whichever of these objects he has in view, as in all cases between these extremes, it does seem to me that it is intended that one at least of the parties on either side should meet in conference. It may be that they are parties so influential in their respective spheres that an understanding between them would speedily lead to a settlement of the entire dispute. At any rate I cannot but think it out of the question that the President should be obliged either to abstain altogether from the exercise of this very beneficial power or to summon to the conference all the parties on each side, even if there be on one side or both so large a number of parties that a full conference among them would assume the dimensions of a public meeting. A conference is ordinarily not a very helpful thing if the number of disputants called together is great. In fact, the greater the number is, the less does the gathering wear the aspect, or possess the advantages, of a conference. It is difficult to suppose that considerations such as these were not present to the mind of Parliament in framing the Act. I take it that the framers intended to allow the President to act as a man of judgment and experience would, in the sincere desire and effort to bring about peace by persuasion instead of submission by coercion. In performing this duty he will of course exercise his judgment in the summoning of persons so that his choice may be most fruitful in the securing of a real peace and not a mere subjugation. Reading question 5 as applying to an actual as distinguished from a threatened dispute,

which I think is the intention of the learned President, I answer that the fact that only some of the parties were summoned to the conference does not operate to prevent the Court from having cognizance of the dispute if the omitted parties have appeared or been summoned to appear under sec. 29. This answer, of course, assumes that all other factors concur to give the Court cognizance of the dispute.

I should like to add that since writing the above judgment I have had the opportunity of reading the judgment of my learned brother *Isaacs*. Referring to his reasons for holding that this Court, upon a case stated under sec. 31 (2), can only answer questions of law, and is not bound or entitled to answer a question which in its opinion is not one of law, by reason that the learned President has entertained, and in stating the case expressed, the opinion that it is such a question, I wish to say that I agree in those reasons, which confirm the conclusion I have stated, but upon further research than I have been able to give.

ISAACS J. The initial problem is whether the Court has power to answer any question that is not a question of law, or whether it is bound to answer every question which the learned President propounds, and which in his opinion is a question of law, though on examination it is found to be either a pure question of fact or a mixed question of fact and law.

That raises a matter of jurisdiction (see *Minister for Lands* v. *Wilson* (1), and *per* Lord *Halsbury* in *American Thread Co.* v. *Joyce* (2)); and as excess of jurisdiction is usurpation of power and illegal, it is the duty of every Court, whether the parties object or not, to take care not to go beyond its lawful judicial limits. The rule we have applied to the Arbitration Court is of universal application where jurisdiction is limited, and we are bound to observe it ourselves: See *Ex parte Cowan, per Abbott* C.J. (3); *Great Southern Fire Proof Hotel Co.* v. *Jones* (4).

Hitherto there have been expressed the distinct opinions of four Justices of this Court, that questions of law alone are to be answered under sec. 31. These are to be found in the *Federated*

(1) (1901) A.C., 315, at p. 322.
(2) 6 Tax Cas., 163, at p. 164.
(3) 3 B. & Ald., 123, at p. 130.
(4) 177 U.S., 449, at p. 453.

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Engine-Drivers' Case [No. 1] (1), by the Chief Justice (2), and *O'Connor* J. (3); and in the *Federated Engine-Drivers' Case* [No. 2] (4), by the Chief Justice (5), and *Barton* J. (6), and by myself (7). On the other hand, in case No. 1, *Higgins* J. said (8) that the questions "are, in my opinion, questions of law (see sec. 31); and as such they ought, I think, to be answered by the High Court judicially."

I agree that whatever "opinion" we give must be given "judicially," and therefore authoritatively, as decided in the second case. The section says this Court "shall hear and determine the question," and according to that decision and the authorities on which it rests, the determination of this Court is one which the law expects and requires the President to accept and apply as a binding declaration of law in the matter before him. Nothing can justify a departure from that, except a competent mandate changing the law before he deals with the plaint, as in the case No. 2. In England under the *Arbitration Act* 1889, even where a case is stated for the "opinion" of the Court —without any express provision as to the effect of that opinion when given, or as to its being a "determination" of the question —the law is as stated in *In re Knight and Tabernacle Permanent Building Society* (9). Lord *Esher* M.R. says:—"What the Court really does when a case is stated for its opinion by arbitrators is to determine the point before it by way of instruction to the arbitrators, which no doubt they are bound to follow. To instruct them as to what their decision is to be does not destroy the finality of their decision when they have made it in accordance with the direction of the Court upon the special case." And that is so, although in a later judgment in the same case (10) the Court of Appeal held the jurisdiction was consultative merely, because the Act did not say the Court should "determine" the matter. See especially *per Bowen* L.J. (11). But here the section further provides that "the High Court shall hear and determine the question," and the result follows which I have

(1) 12 C.L.R., 398.
(2) 12 C.L.R., 398, at pp. 414, 415.
(3) 12 C.L.R., 398, at p. 445.
(4) 16 C.L.R., 245.
(5) 16 C.L.R., 245, at p. 257.
(6) 16 C.L.R., 245, at p. 268.
(7) 16 C.L.R., 245, at p. 274.
(8) 12 C.L.R., 398, at p. 459.
(9) (1891) 2 Q.B., 63, at p. 68.
(10) (1892) 2 Q.B., 613.
(11) (1892) 2 Q.B., 613, at p. 619.

stated in my judgment in the *Engine-Drivers' Case* [No. 2] (1). And except for any change of law by Parliament before the Arbitration Court deals with the case, and a change made applicable to the case before that Court notwithstanding the determination already arrived at, that determination must stand, and not even this Court, except in the case supposed, can in my opinion make as between the parties in the same proceeding a contrary determination. The rule applying in such a case is thus stated by the Judicial Committee speaking by Lord *Macnaghten* in *Badar Bee* v. *Habib Merican Noordin* (2):—"It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal."

Therefore, it is of the highest importance to see that the opinion of this Court, which, when applied by the President to the matter before him, binds the parties, is such as this Court is empowered to give.

Are, then, the four opinions above stated wrong, and can this Court give binding decisions on facts in contest before the President? I put it plainly thus, because the language of the section does not permit of discrimination between jurisdictional facts and facts in issue.

Whatever applies to one class applies to the other. The important, and on this point, as I think, the governing phrase in the section is "state a case in writing for the opinion of the High Court." The two expressions "state a case" and "opinion" have for centuries been coupled together and received a definite signification.

That signification is this: facts must be stated, not evidence of the facts, however cogent and convincing. Ultimate facts only are to be stated, not primary or evidentiary facts. But what would be primary or evidentiary facts for the purpose of one question may be ultimate facts for the purpose of another. A witness's statement in examination-in-chief is evidentiary for the purpose of deciding a matter in issue between the parties; but it is an ultimate fact for the purpose of deciding the relevance of a question in cross-examination, and it is an ultimate fact for the purpose of proving what he said if he is afterwards prosecuted

(1) 16 C.L.R., 245. (2) (1909) A.C., 615, at p. 623.

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for perjury. It depends entirely on the nature of the question of law propounded.

But the rule is clear that in every case the facts stated must be ultimate for the given purpose.

In 1738, in *R.* v. *Inhabitants of Martley* (1), it was held "the sessions had not sufficiently stated the *facts*: They had stated only the *evidence*," and the Court sent down the case for re-statement, saying "They supposed it to be the intention of the sessions to state the facts for the opinion of this Court upon them." And see *R.* v. *Gray* [No. 1] (2).

In the leading case of *R.* v. *Chantrell* (3), the expressions "state the case" and "opinion of the Court" occur repeatedly; and always the "opinion" has reference to a question of law.

So also in *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.* (4), where Lord *Cairns* L.C. speaks of the modern practice of "obtaining opinions from the Courts upon special cases," and says:—"All Courts have from time to time had powers given to them to answer questions put to them upon special cases." And see *per* Lord *Penzance* (5).

So firmly has the Court held to this position, namely, to answer questions of law only and not questions of fact, that it has always refused to draw any inferences of fact from other facts stated.

In *R.* v. *Inhabitants of Lyth* (6) Lord *Kenyon* C.J. and *Buller* J. refused to draw any inference saying (7) "however strong that presumption is, as only the evidence of the hiring is stated, and not the fact itself, we cannot decide upon the case; though the justices at the sessions must be directed to draw the conclusion, that W. Carling was hired for a year, from this evidence": This followed *Palmer* v. *Johnson* (8). *In R.* v. *Inhabitants of St. Cuthbert, Wells* (9) Lord *Denman* C.J. said:—"There ought to have been a positive finding by the sessions of every esssential fact."

Latter v. *White* (10) is a clear and distinct authority to the

(1) Burr. S.C., 120.
(2) 68 J.P., 40.
(3) L.R. 10 Q.B., 587.
(4) 4 App. Cas., 30, at p. 41.
(5) 4 App. Cas., 30, at p. 45.
(6) 5 T.R., 327.
(7) 5 T.R., 327, at p. 329.
(8) (1763) 2 Wils., 163.
(9) 5 B. & Ad., 939, at p. 941.
(10) L.R. 5 H.L., 578.

same effect. As that case appears to be misunderstood, a few words are necessary. Latter sued White in detinue for promissory notes. The case came on for trial and was referred to a barrister to state the facts in a special case. This was done, but no power was given to the Court to draw inferences from the facts stated. The defendant set up a deed of arrangement, the trustees of which held the promissory notes. The plaintiff said it was invalid, not only because obtained by fraud, but also because the assent of the requisite number of creditors representing three-fourths in value had not been obtained (1). In the Court of Queen's Bench (2) *Lush* J. said (3):—"There is, undoubtedly, strong evidence in favour of the deed, but I cannot say it is conclusive, and no power is given to us to draw inferences." *Mellor* J. (4) sets out a number of uncontradicted circumstances all pointing one way, and including an admission under seal by the defendant. That learned Judge and *Cockburn* C.J. inferred that the deed was valid. *Lush* J. dissented. In the Exchequer Chamber the judgment was reversed, *Kelly* C.B. saying (5):—"It is said that we are to look at all the facts stated in the case, and consider whether they do not lead to the conclusion that the deed was a valid deed. We cannot do so, because, as this case is stated, we have no power to draw inferences of fact." The learned Chief Baron does not distinguish between "necessary" and "possible" inferences—but denies the Courts power to draw any inferences.

In the House of Lords the same view was taken.

Two questions were dealt with first as to the form of action whether detinue would lie, and some observations of Lord *Hatherley* L.C. (6) were read to us by learned counsel, as relevant to the point now in question; but to that they have no application, being limited to the detinue point.

On page 586 the distinct circumstance of non-statement in the case whether the deed was valid or not is adverted to. And the Lord Chancellor laid down the clear rule, which up to the present has remained unqualified in every Court, that the Court to which

(1) See L.R. 5 Q.B., 622, at p. 635; L.R. 6 Q B., 474, at p. 476.
(2) L.R. 5 Q.B., 622.
(3) L.R. 5 Q.B., 622, at p. 628.
(4) L.R. 5 Q B., 622, at p. 635.
(5) L.R. 6 Q.B., 474, at p. 478.
(6) L.R. 5 H.L., 578, at p. 585.

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a case stated is sent is bound by the facts as there stated, unless by consent of the parties—where that can be lawfully given—or by some provision of law the Court has been given power to draw inferences from the facts so stated. So *per* Lord *Cairns* (1), who in speaking of a *constat* of a valid deed says:—"That depends upon the statements in this case—statements which we are to deal with as we find them, without any power in your Lordships to enlarge upon those statements, or to draw inferences from them." He repeats that "there being no statement affirming the validity of the deed," there is the second fatal impediment to the plaintiff.

Where power is given to draw inferences, the nature of the inferences which it is competent to draw depends on the terms of the power. If it be merely "power to draw inferences of fact" as in the English Rules (Order LVIII., r. 4), then the Court can draw such inferences as upon the evidence are the only conclusions that can properly be drawn: *Per* Lord *Loreburn* L.C. in *Paquin, Ltd.* v. *Beauclerk* (2). These are what *Collins* M.R. (3) calls "the necessary inferences." If that is the limit of the express power, it is plain the jurisdiction is less in its absence.

Unless care is taken to distinguish between "inference" and "implication," confusion is likely to occur. An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statements upon which it rests however weak or strong being the evidentiary or subsidiary facts. See, for instance, *Metropolitan Railway Co.* v. *Jackson* (4) and *Taff Vale Railway* v. *Jenkins* (5). An inference of fact which the Court stating the case refrains designedly from drawing, but, on the contrary, requests the superior Court

(1) L.R. 5 H.L., 578, at p. 589.
(2) (1906) A.C., 148, at pp. 160, 161.
(3) (1906 A.C., 148, at p. 149 (*n*).
(4) 3 App. Cas., 193, at p. 207.
(5) (1913) A.C , 1, at p. 7.

to draw *as a fact*, cannot possibly be regarded as other than *a fact*, however unreasonable any different conclusion may be. And if the superior Court has no jurisdiction to find facts, it is manifest that compliance with the request is unlawful.

So far the matter seems to be clear.

An element of doubt, however, is suggested by reason of the unusual provision that the question upon which the President is empowered to state a case is one "which in his opinion is a question of law." Even if his opinion should be demonstrably wrong when tested by recognized legal standards, yet, it is said, that erroneous opinion is to countervail the correct opinion of the High Court, and that tribunal must determine the question actually submitted, whether it prove to be one of law or one of fact, or mixed law and fact. It is said the President has authority to state any question which "in his opinion is a question of law," and, once stated, the question must be answered. But it is clear beyond argument that this Court was not intended by Parliament to determine the facts of an arbitration dispute as facts. Besides being contrary to the whole scheme of the Act, it would be *ultra vires* for Parliament to require an industrial dispute—which means the disputed terms of industrial conditions—to be decided except by *arbitration*. The Constitution does not allow it. And the generality of the words of sub-secs. (2) and (3) of sec. 31 permits of no separation of jurisdictional facts from facts in issue. If *ultra vires* as to one class, then on well known principles and authority these sub-sections are *ultra vires* altogether. So that once you construe sub-secs. (2) and (3) of sec. 31 as enabling the President to transfer the decision of facts—not law—to this Court, then those sub-sections would, in my opinion, be invalid. Nor is it any answer that the President may be expected to act with reasonableness in stating a case, so as not to include questions of fact, because the validity of an enactment depends upon what it commands or permits, and not upon the reasonableness of any particular tribunal enforcing it. And the present case is an instance of a clear question of fact being put as a question of law.

The only alternative, then, is that the President's opinion is conclusive and binding on the High Court that the question put

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is one of law, and it must be deemed so. That means, that even if the High Court, testing the matter by ordinary legal principles, concludes the question is clearly one of fact, still it must gravely treat it as that which it is not, and cannot be, and proceed to answer it on an impossible basis. I say "impossible," because there cannot be any legal standard by which it can be answered as a mere question of law.

The true interpretation of the phrase under consideration appears to me to be this: That the legislature, knowing the limitations of the Constitution and determining to make the President's decision on facts final and conclusive, while providing him with means of obtaining authoritative assistance in legal interpretation, took care to impose on him in express terms the preliminary obligation to endeavour to send nothing but a question of law to the High Court. He is invested with absolute discretion as to whether he will or will not seek the assistance of the High Court. He may do so "if he thinks fit," and those words place him beyond compulsion with regard to stating a case. But he is told that he is first to form his *opinion*—that is, *his judicial opinion*—that the question to be submitted is one of law. It emphasizes the legislative intention that only questions of law are to be asked of the High Court. A party may ask for a question to be submitted, but the President must not comply merely because he is asked, nor unless and until he forms his own opinion that it is really one as to the law. It is a real and express obligation of care that is imposed on him by the words referred to, not a fictional obligation of erroneous assumption on the High Court, and the obligation is imposed as an initial safeguard against encumbering this tribunal with the consideration of matters which Parliament did not intend, and against unnecessary delay and expense to the parties in the Arbitration Court. To convert the words into an estoppel against the High Court, so as to prevent that tribunal from considering whether the question is really one of law, simply destroys and reverses the intention of Parliament. If the "opinion" of the President were as to some matter of fact, or as to the desirability of stating a case, it would be a different matter. But his opinion as to whether a question is one of law is itself a question of law, dependent on the face of

it upon legal principles; and it is clear that an erroneous decision as to that necessarily overlooks or misapprehends some principle of law, or some enactment, and in such a way as to exercise jurisdiction to state a case which Parliament never intended to be stated. I think, therefore, on the principles laid down in *R.* v. *Justices of Kesteven* (1), *R.* v. *Vestry of St. Pancras* (2), *R.* v. *Board of Education* (3), and the same case *sub nom. Board of Education* v. *Rice* (4), that the "opinion" is examinable in any case where the matter properly comes before the Court; particularly remembering that this "opinion" is not one of the matters of which revision is prohibited by sub-sec. 1 of sec. 31.

So far for the interpretation of the enactment unaided by precedent.

But there is valuable precedent evidently based on the principles to which I have alluded, and leading to the same result.

As appears from a marginal note to the section, the provision is modelled on sec. 26 of the *Railway and Canal Traffic Act* 1873 (36 & 37 Vict. c. 48). There are differences between the two Statutes—the principal being that (*a*) in some matters the stating of a case by the Railway Commissioners was compulsory and in others discretionary (see as to this *per* Lord *Robertson* in *North Eastern Railway Co.* v. *North British Railway Co.* (5)); (*b*) the words "at any stage" are omitted; (*c*) it is expressly stated that the Court is to hear and determine "the question or questions of law," and (*d*) the decision of the Commissioners may be reversed, affirmed or amended. But the main point is the same, which is as to the nature of the question which the Commissioners may lawfully transmit by way of case stated, namely, one "which in the opinion of the Commissioners is a question of law."

Now, as to those matters which are left to the absolute discretion of the Commissioners with respect to stating a case at all, no decision could possibly be expected. But with regard to the matters upon which stating a case is compulsory, some very important decisions exist.

(1) 3 Q.B., 810, at p. 819.
(2) 24 Q.B.D., 371, at pp. 374, 375.
(3) (1910) 2 K.B., 165, at pp. 174, 175, 178-181, 190.
(4) (1911) A.C., 179, at p. 182.
(5) 10 Nev. & Mac., 82, at p. 110.

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In *Central Wales &c. Railway Co.* v. *Great Western Railway Co.* (1) the Commissioners refused to state a case on the ground that the questions which the applicants desired to raise were not in the Commissioners' opinion questions of law.

An application was made to the Queen's Bench Division for a rule *nisi* for mandamus to state a case. *Quain, Field* and *Mellor* JJ. granted the rule *nisi*, but thought the words as to the Commissioners' "opinion" could not be got over. When the rule came on to be argued, however, the Court consisted of *Blackburn, Quain* and *Field* JJ.

Blackburn J. said in *arguendo* (2):—"The Commissioners' decision on the question of law may not be final because they may make a mistake, but if we should be of opinion that it is not a question of law the rule would not be made absolute."

The Court did not say directly, whether the Commissioners' opinion was binding or not, but entered into the question of whether the question was one of fact or law. If the argument is correct on the Australian Statute, that the opinion of the President as to the question being one of law concludes the matter, and makes it one of law in the eye of the Court, so it would in English Act. But the Court, even upon a question of mandamus to compel the stating of a case, proceeded on ordinary principles to determine for itself whether the question was one of law or not; and finding it was not, discharged the rule. No word was said as to the opinion formerly expressed, and that, if seriously entertained, one would think would have been the all important point, for if the "opinion" were conclusive that it was not a question of law, as Mr. *Thesiger* Q.C. suggested, it left no jurisdiction in the Court to determine otherwise.

In 1880 a similar application was made to the Commissioners, in *Denaby Main Colliery* v. *Manchester &c. Railway Co.* (3), and was refused by them on similar grounds. Again a mandamus was moved for. *Field* J. had apparently abandoned his original passing opinion. He says (4):—"Upon all questions of fact they are made by the Statute the ultimate tribunal. They have themselves a power which they occasionally exercise when-

(1) (1875) 2 Nev. & Mac., 191.
(2) 2 Nev. & Mac., 191, at p. 200.
(3) 3 Nev. & Mac., 426, at p. 434.
(4) 3 Nev. & Mac., 426, at p. 439.

ever they think it right. We must pay respect to their views upon that matter as being a Court of competent jurisdiction, and competent to state any matter of law—indeed under certain circumstances they may be compelled to state matters of law which they have decided." That necessarily means, they may be so compelled in spite of their opinion to the contrary.

And for that purpose the learned Judge proceeded to inquire for himself whether the question was really one of law. He found there was no point of law, and refused the motion. *Manisty* J. agreed.

The case went on to the Court of Appeal, and that Court, like the primary Court, made no suggestion of the "opinion" of the Commissioners' concluding the matter, but assumed that notwithstanding the words a mandamus could go if the opinion were wrong.

Lord *Selborne* L.C. said (1) as to the mandamus:—"The sole ground alleged must be that on some matter of law a question has arisen before the Railway Commissioners upon which the railway company has a right to have a case stated. What is that matter of law?" The learned Lord Chancellor found there was merely a question of fact, and held accordingly. *Baggallay* L.J. and *Brett* L.J. agreed, and the reasons given by the latter clearly show how the Court regarded the matter.

Even more distinct is the case of *Rhymney Iron Co. Ltd.* v. *Rhymney Railway Co.* (2). Sir *Frederick Peel*, Chief Commissioner, said (3):—"We have no power to state any but questions of law in a special case." Lord *Coleridge* C.J., on the mandamus application, quoted (4) that statement with approval, and concluded his judgment by saying all the questions were questions of fact, "questions which the Commissioners are to answer, and which we have no right whatever to call upon them to raise before us, so as to make us a Court of Appeal from their finding, which undoubtedly this Court never has been."

Manisty J. took the same ground, and added (5) that if the notice could be re-moulded so as to raise a question of law, "probably we should think it right to give Mr. Bompas the opportunity

(1) 3 Nev. & Mac., 426, at p. 441.
(2) 6 Nev. & Mac., 60.
(3) 6 Nev. & Mac., 60, at p. 83.
(4) 6 Nev. & Mac., 60, at p. 87.
(5) 6 Nev. & Mac., 60, at p. 89.

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of doing so" (1). That would have been meaningless unless the learned Judge thought the Commissioners' opinion was no bar.

Then the applicants appealed.

Lord *Esher* M.R. inquired whether the point was a point of law, and, for the reasons he gave, thought it was not. *Fry* L.J. agreed, and said (2) that if the Commissioners had laid down a legal proposition in the terms complained of "the case would have been otherwise," by which I understand he would have been in favour of granting the mandamus.

Lopes L.J. took the opposite view, and was in favour of granting the rule. He said (2):—"I am very sorry that my Lord and my brother *Fry* have come to the conclusion that the rule *nisi* for a mandamus is not to go in this case. I think Mr. Bompas has raised a point so important and so arguable, that I should have wished the rule to have been argued." By that the learned Lord Justice means simply as to whether the point was really one of law or not.

No trace appears of any suggestion on the part of any of the many very learned Judges in the last two cases mentioned, as to the efficacy of the words here relied on.

Although the applications were *ex parte* the point could not have escaped them, and so, in my opinion, these decisions go to show that the Railway Commissioners' "opinion" was examinable even for the purpose of a mandamus to state a case; which is very different from the effect of the case when stated. It is an *à fortiori* case, and if examinable on a mandamus, it is examinable when the Court gives its own opinion later, supposing a case to be stated.

The omission of the words "question of law" from sub-sec. 3 of of sec. 31 is consequently immaterial. The word "opinion" there is the same "opinion" of the Court as in the preceding subsection, and connotes merely a question of law.

I now proceed to deal with the questions in accordance with the views stated.

The first question asks whether on the facts stated in the affidavits there exists an industrial dispute. That plainly involves a question of fact, that is to say, whether the parties are

(1) 6 Nev. & Mac., 60, at p. 89. (2) 6 Nev. & Mac., 60, at p. 93.

really in dispute with each other. The Court, having no jurisdiction to answer a question of fact, cannot answer question 1. Even the evidentiary facts of the reality of demand, and of the definite refusal, are unstated. To borrow the words of *Harlan* J., in *Chicago, Burlington and Quincy Railway Co.* v. *Williams* (1), it "brings to us a question of mixed law and fact and, substantially, all the circumstances connected with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises." The learned Judge stated (2):—"This Court is without jurisdiction to answer"; and so here.

The second question is in precisely the same position. It leaves some final evidentiary facts equally unstated; the refusal of employers is not stated but assumed, and in any case there is not what Lord *Denman* C.J., in the case referred to, called "a positive statement" of the ultimate fact of being in dispute.

The third question sufficiently raises a question of law, relative to the incidental duty of the Court of Arbitration to take care not to proceed without jurisdiction. I have stated in the *Federated Engine-Drivers' Case* [No. 1] (3) the position as I view it, in these terms:—"The Court may, in order to ascertain the facts as to its existence, proceed, without being open to legal challenge on that account, either by rigid adherence to the ordinary rules of evidence, or by accepting any information it thinks proper or convenient in the circumstances. What it has to do at the outset is to satisfy its mind that it is not overstepping the bounds which Parliament has laid down for it."

That Court is not bound to insist on all possibly available evidence being placed before it. Its incidental and preliminary duty does not require it to have before it, for instance, full explanations of the employers' acts or intention in not acceding to the demands of their employés: the Court may think, from the materials it has, that a definite refusal was probable and could be proved should the question ever be brought for legal and conclusive determination before the High Court. Whether the

(1) 205 U.S., 444, at p. 453. (2) 205 U.S., 444, at p. 454.
(3) 12 C.L.R., 398, at p. 454.

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Arbitration Court arrives at that conclusion of probability or not is entirely a question of fact for itself, and not a question of law for this Court to advise on. But it is a question of law whether that Court would be justified in so concluding, and it would be so justified on any reasonable materials, admissible or not according to ordinary legal principles of evidence, so long as they conveyed that impression to its mind.

The circumstances stated in the case—ultimate for the purpose of question 3—therefore, necessarily, would justify that Court in proceeding, if it arrived at the conclusion, for the purpose of the day, that probably there was a definite refusal. And so, with every other element of a dispute. The answer, therefore, is "Yes." But that answer does not involve any opinion as to whether there is a dispute, or as to whether this Court would be justified on the evidence stated in concluding definitely and finally that there is a dispute. Those are entirely different questions not asked, and dependent on entirely different propositions of law, for which as to the first there are not the necessary facts stated to enable us to answer.

As to the fourth question: on the whole I consider the facts stated contain sufficient of an ultimate nature for the purpose of this question to enable me to answer it. It is not necessary that the facts should be "found"; it is sufficient that they should be "stated," but—stated as definite facts actually existing in the case. The President states the plaint, the claims, and the contentions, and, in substance, asks for a direction in law, before proceeding to finally determine the cause. See *per Collins* L.J. in *Maude* v. *Brook* (1), quoted by Lord *Brampton* in *Hoddinott* v. *Newton, Chambers & Co. Ltd.* (2); see also *per* Lord *Blackburn* in *Prudential Assurance Co.* v. *Edmonds* (3). A direction to a jury, or a judge acting as a jury, must necessarily precede the finding of facts; and so *Collins* L.J. says (1):—"In my opinion, the question whether a particular arrangement is a scaffolding is not a question of pure fact, and therefore not merely a question for a jury without direction as to the law; it is a question on which the Court must give some guidance."

(1) (1900) 1 Q.B., 575, at p. 581. (2) (1901) A.C., 49, at p. 69.
(3) 2 App. Cas., 487, at p. 507.

Now, what does that mean? Guidance to the jury at the trial before they find the facts, or guidance to the Court of Appeal, if the finding is challenged? In my opinion it can only be the former. The President asks as to his powers in the event of his finding dispute to be "threatened or impending or probable" within the meaning of sec. 4 of the Act. It is no more necessary for him first to find that the dispute was of that nature before asking as to his powers, than it would be to first award a term of employment as fair and just before asking as to his power to do so. The answer to the question involves the meaning of the term as used in the third paragraph of the definition of "industrial dispute" in sec. 4 of the Act, and the validity of that definition. Looking at the Act itself and the decisions upon it, I take "dispute" to mean a difference which has reached the stage of finality, that is, in which the parties find themselves in determined opposition, the demand being an ultimatum, and the refusal being absolute, and both persistent. Paragraph (III.) refers to a difference, clear as to subject matter, but something short of that pronounced character. The parties are out of agreement certainly; their point of non-agreement can be recognized and stated, not necessarily in detailed form, but intelligibly; but neither of the parties may have reached the point of final insistence, or even stated the ultimate details of their desires and intentions. It is properly speaking a stage of discussion and *non-agreement,* rather than established *disagreement or dispute* in its true sense. In that event, and at that stage, prevention is quite possible to avert the acuteness of a dispute in its final form; and may, in my opinion, be applied by means of arbitration. The definition is therefore, in my opinion, valid.

I have stated in *Whybrow's Case* (1) my views as to the interpretation of the words "prevention" and "arbitration" in relation to each other, and I adhere to what I there said, and particularly refer to the following passage (2):—"A want of agreement in respect of some industrial matter may be unmistakably manifested, although in circumstances of time, manner and subject matter which evoke no present conflict nor any fear of immediate rupture.

(4) 11 C.L.R., 311, at pp. 331 *et seq.* (5) 11 C.L.R., 311, at pp. 335-336.

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"Again, a request for an advance of wages six months hence, or an intimation to consider an increase of hours next year, might not present to any reasonable being the appearance of any probable controversy whatsoever. Men may suggest to each other, may discuss, may negotiate in terms which afford no trace of opposition. But though no arbitary rule can be formulated to distinguish between that case and a real disagreement, it is evident that a real disagreement may at any moment supervene. The discussion may assume a form and a consistency which indicates some fixed desires on one side not acceded to by the other. The desires may be urged and pressed, and though not definitely refused by the other party, may not be conceded, where concession is asked for and expected, and so the rudimentary but recognizable features of a probable or possible future conflict may be discerned. When sufficient consistency has been attained to permit the mind of an observer to grasp the fact of real disagreement, and to lay hold of its subject matter, when the outlines of contention, however rough, are nevertheless perceptible, there is certainly room for conciliation, and if for conciliation then, as already shown, for arbitration, should the voluntary method fail. Prevention is always better than cure, whether effected by the milder or the stronger process."

In this view I answer the fourth question in the affirmative.

The fifth question has certainly caused me great hesitation. Secs. 16A and 19 (*d*), as they now stand, lead to the construction that reference to the Court is to be the last resort of controlling a difference by arbitration that has not yielded to conciliation exerted over the parties present at, or summoned to, a conference.

This would mean that no parties could be made cognizable by this method unless they had already been afforded an opportunity of conferring.

The course actually followed by the learned President has the merit of elasticity, and there is no real injustice in it, because parties not present at the conference may, if summoned under sec. 29, nevertheless voluntarily compose their differences.

I can quite see also, that greater promptitude in holding a conference than could be attained by a universal conference of those involved all over Australia in the dispute, may be important.

If the sections referred to had no legislative history behind them, I should feel extremely perplexed. They were, however, not passed at once in that complete form, and only attained their present shape by stages which throw light on the intention of Parliament. Section 16A was originally passed in Act 1910, No. 7, sec. 3. There it was enacted simply in the words of sub-secs. (1), (2) and (3) of the present sec. 16A. The words "any person" were not defined, and must have received their interpretation by reference to the words "a conference." No doubt they meant some persons on each side, or there could be no conference over which the President could preside. But it is noticeable that the legislature did not say "the parties or probable parties," or "disputants or possible disputants," which would probably have embraced all.

And it is a circumstance weighing greatly with me that in that Act there was no provision whatever for the President referring the dispute to the Court. That did not come in till the next year. So that, as the law stood in 1910, "a conference"—that is, some conference—could be held, leaving it apparently to the President to say how many and which persons were in his opinion necessary to achieve the desired purpose of preventing or settling the dispute as a whole.

If that conclusion is once reached, there is not much difficulty. The new sub-sec. (1A) enlarged the meaning of "any person," and sec. 19 (*d*) applied the power of taking curial cognizance to disputes as to which "a conference" in the sense of 16A, sub-sec. (1), had been held, and as to which no agreement—that is, no agreement covering the dispute—had been reached. I cannot say I am even now free from doubt; but, on the whole, looking at the history of the enactments, their practical and effective working, and the absence of injustice in the method adopted so far, I cannot say with confidence that that method is wrong, or that the letter of the Statute compels the President, when desiring to settle the dispute as a whole, to summon every party to the conference as well as to the arbitration.

I, therefore, answer question 5 in the affirmative.

HIGGINS J. This case was stated by me, as President of the

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Court of Conciliation, not for the purpose of evoking an interpretation of sec. 31 of the Act, but because of grave practical difficulties which face me in my work in consequence of decisions of the High Court as to the meaning of the term "industrial disputes" in sec. 51 (XXXV.) of the Constitution.

On 25th April 1912, I made an award on a plaint brought by this Guild against 83 of the 128 employers who are parties to this case; but in December last, on the application of 38 of the 83 (and of 5 others who were not parties to the award), the High Court, by a majority of two to one, made absolute a rule for prohibition forbidding all further proceeding on the award so far as it related to the 43 applicants (1). The ground of the prohibition was that there was no "dispute" within the meaning of the Constitution. The learned Chief Justice held that there was no "dispute," pointing out (2) that there was no evidence "of any unadjusted differences existing between the applicants and their employés, at the date of the letter of 30th August" (the letter containing the "log" of demands); but he did not attempt a definition of "dispute." *Barton* J. concurred, on the ground that the demand for better industrial conditions (the "log" of 30th August) must itself be "the culmination of a sense of wrong or injustice, made known or become known to the other party" (3). That is to say, (*inter alia*) there must be not only a demand preceding the plaint, but this demand must be again preceded by some other communication or knowledge of the grievance brought home to the employers concerned. *Isaacs* J., however, treats the other communication or knowledge, preceding a demand, as not essential; and, acting on this view of the interpretation of the words in sec. 51 (XXXV.), he held that the rule for prohibition should be discharged.

Now it turns out that, in consequence of the proceedings for a prohibition, the members of the Guild, at their various branches, passed resolutions directing the secretary to demand from the prohibiting employers that they enter into an agreement to comply with the conditions set out in the award, with variations in favour of the employés; and, if not, the members of the Guild

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

were to "withdraw their services from vessels controlled by the said employers." This meant strike—strike in the shipping industry, with all its calamitous train of consequences, some foreseen, some unforeseen. The Minister for Labour of New South Wales requested me to exercise my powers under the Act; but I had to decline, in consequence of the decision of the High Court that there was no industrial dispute. Subsequently, the Guild applied for a compulsory conference under sec. 16A, and filed certain affidavits on which I felt justified in, at least, convening a conference. At the conference, which was attended by some of the most representative of the shipowners, I found that no agreement could be procured; and I referred the matter into Court under sec. 19 (*d*). I treated all the employers who had received the new demands, and who had not complied with them, as (provisionally) parties to the dispute.

The case came on before me in Court on 29th March last, and many respondents objected at once that there was no "industrial dispute"—no dispute, even if all the facts stated in the affidavits of the claimant were true. The position was extremely embarrassing. The High Court had just held that there was no "dispute" on the same subjects between the same union and many of the same employers; and, as a consequence, many days which I had devoted to investigation of the merits—many days of public and private time—had been wasted. If I proceeded with the case, I had no jurisdiction (according to other opinions of the High Court) to determine whether there was a dispute in fact or not; any finding of mine would not be treated as being even *primâ facie* right. If I should proceed, and if the High Court should afterwards think that there was no dispute, there would be a prohibition; if I should not proceed, there might be mandamus. There seemed to be one loop-hole of escape from an intolerable position; for the employers insisted that even if all the facts stated in the affidavits were true, there was no "dispute," within the meaning of the Constitution; and this seemed to raise a neat point of law, as on a demurrer.

I certainly should have no right to fling conflicting evidence before the High Court, and ask the High Court to say whether there was a dispute or not, by balancing the evidence. But here

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there was no conflict of evidence—the facts were clear and undisputed—for the purposes of the case stated. The whole difficulty arose in the interpretation of the words "industrial dispute." It appears to be hard to satisfactorily define the class-name "dispute"; it is always easier to say whether a certain state of facts comes under the class name; so I asked:—"On the facts stated in the affidavits, is there an industrial dispute within the meaning (*a*) of the Constitution, (*b*) of the said Act, and between whom?"

No doubt, the question "Is there an industrial dispute?" is a mixed question of law and fact; but when the facts are stated on which the claimant relies for proof of a dispute, it is a question of law whether they amount to a dispute (*per* Lord *Macnaghten* in *Hoddinott* v. *Newton, Chambers & Co. Ltd.* (1)). Whether a bicycle is a carriage within the *Highway Act* was treated as a question of law in *Taylor* v. *Goodwin* (2). If there were a question of easement of light by user, and all the facts and dates were set out as alleged by the person claiming the easement, but were not yet proved, the Court might be asked, "Do these facts, if uncontradicted, justify the inference of a grant?" or "Do these facts disclose a *primâ facie* case of easement by user?" and these would be questions of law. The matter is put plainly by Lord *Brampton* in *Hoddinott* v. *Newton, Chambers & Co. Ltd.* (3):—"I thoroughly agree that the arbitrator or County Court Judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not 'scaffolding' within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, &c.; and his finding upon such facts is, according to the general rule, final; but whether upon the facts so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of sec. 7 is, in my opinion, a question of law, which in the first instance must be adjudged by him to enable

(1) (1901) A.C., 49, at p. 56. (2) 4 Q.B.D., 228.
(3) (1901) A.C., 49, at p. 68.

him to determine the case before him, his judgment on the question of law being open to review by the Court of Appeal."

It is said, however, that the High Court cannot be asked to draw an inference from facts—that the inference must be drawn by the Court of Conciliation. The only inference that can be suggested is that there is a dispute; and how can I draw this inference until I know what the Constitution means by "dispute"? A Judge explains to a jury what a libel is as a matter of law; and the jury then considers, as a matter of fact, whether the definition given by the Judge is satisfied in the circumstances. But then it is said that I have not even found the facts in the affidavits to be true, and that I am putting a hypothetical case. The answer is that a question of law often is dealt with on the hypothesis that the facts alleged are found to be true. This happens in the case of a demurrer to a plea, when the facts alleged in the plea have not yet been proved; and it happens when counsel for the defendant asks the Judge to rule that there is no *primâ facie* case to submit to the jury, even assuming that the plaintiff's evidence is true. Both these proceedings are hypothetical, but not in any objectionable sense; and the question which I ask is on a similar footing. If the High Court can determine the question on prohibition proceedings, without seeing the witnesses, and after an atrocious waste of time, energy and money, why can it not determine the question on sworn uncontradicted statements of the facts?

Unfortunately, most of the time of the long argument has been taken up by a discussion as to the meaning of sec. 31, under which the President can state cases, instead of being devoted to the elucidation of the questions on which I sought guidance.

With regard to sec. 31, I am unable—after full consideration—to take the limited view of its meaning. The words are: "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."

In my opinion, we should not enter on the question of the construction of this short section with the assumption that the cases

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decided under the Judicature Rules are applicable. It is our first duty to consider the words of the section by themselves, to find what is their natural meaning, and to act on that meaning, even if the result differ from the result under the Judicature Rules. If we came to the section without any learned prepossessions, there can be little doubt as to the meaning. The first sub-section had added to the grave responsibilities of the Court of Conciliation by making its awards unchallengeable by appeal. The second sub-section provides an alleviation of the responsibilities by enabling the President of the Court to state a case *at any stage* for the opinion of the *High Court* upon any question arising in the proceeding "which *in his opinion* is a question of law." As the case may be stated "at any stage," it may be stated before any finding of fact, even before any evidence has been taken—as soon as the President finds himself face to face with a difficulty of law. Therefore it may be hypothetical in the sense that a demurrer is hypothetical. Then there is nothing in this section, as there is in the Judicature Rules, about stating facts: the President is merely to "state a case." In my opinion, these words do not mean more than that the President is to state what is necessary to enable the High Court to apprehend his difficulty. Then, the question must be one "arising in the proceeding"—not a fancy question, but a question which, like a ghost, stands in his path in the particular case. It need not arise *on facts found*, but "*in the proceeding*." There is not one word in the section as to the finding or stating of facts. Then it need not be, in the opinion of the High Court, a question of law, but it must be such in the opinion of the President. It is well known that there are many questions on the border line of law and of fact, questions on what Judge *Taylor* calls "the obscure and shifting boundaries of law and fact" (*Evidence*, 10th ed., p. 25)—questions as to whose character different minds may well entertain different views; and the intention of the section is obviously to make the opinion—the real opinion—of the President on this point conclusive, so far as his right to bring his difficulty before the High Court is concerned. By the third sub-section, the duty, as well as the power, is then cast on the High Court to hear and determine the question, and to *remit* the case with the opinion to the

President: "The High Court *shall* hear and determine the question." This is a very different provision from that in the Judicature Rules for a "special case" stated by the parties, where the question, by the express words of the rule, *must* be a question of law or it cannot be entertained—whatever the parties stating the question may think; and where—by the express words of the rule—the case must state the necessary facts (English *Rules of the Supreme Court* 1883, Ord. XXXIV., rr. 1 and 2). It is also a very different provision from that contained in the English *Railway and Canal Traffic Act* of 1873; for in that Act the Court is expressly directed to "hear and determine the question or questions of law arising thereon"—that is to say, only such questions as are truly questions of law. The only difficulty arises as to the shape that the opinion of the High Court should take when the Court differs from the President as to the question being a question of pure law. One solution of the difficulty would be that the High Court should draw such conclusion of fact and of law as the case stated allows. Another solution would be that the High Court should give an answer contingent on certain facts being established, or subject to certain conditions to be stated. Parliament does not in the least restrict the High Court to a Yes or No answer; the answer may be absolute or conditional, as the circumstances may require. I favour the latter solution; but, for my practical guidance in this case, either solution would serve. No one denies that the interpretation of sec. 51 (xxxv.), and of the words "industrial dispute extending" &c., involves a question of law; and why should not that question of law, at least, be extracted and answered for my guidance? Even if I were a jury, having to decide the question of fact, does a dispute exist or not, I should be entitled to ask of the Judge a direction as to the meaning of industrial dispute.

To my mind, however, it seems an obvious fallacy to introduce into the short and simple words of sec. 31 the doctrines which are based on the rigid demarcation between the functions of Judge and jury at common law. When a man "put himself on his country" (as the phrase went), he had a legal right to have all the facts decided by a jury, and by the jury alone; and the ancient jealousy as to this right prevented the Judges from even

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drawing inferences from the facts. The Judge could not ask the guidance of the higher Court on facts, as facts were not within his function. But in civil cases the objection to the confounding of functions could be waived: *Maskelyne* v. *Stollery* (1). In equity, there was no jury; and, from the facts proved, the Judge drew the proper inferences: *Cf. Gresley's Evidence in Equity*, 2nd ed., pp. 459, 473. Where a presumption of law arose, the right of the jury to draw inferences was a mere fiction; for the Judge charged the jury that they *must* find in accordance with the presumption. The Courts of equity never referred such a presumption, although rebuttable, to a trial before a jury: *Ellison* v. *Cookson* (2). The doctrine that forbids the use of a special case "except for the purpose of obtaining the decision of questions of law arising upon facts which are admitted" is, as Lord *Watson* cautiously expresses it, one of the "rules which govern procedure on the common law side of the High Court of Justice": *Burgess* v. *Morton* (3). Even in the common law Courts, the theory that inferences from facts are not for the Judge has broken down, as illogical, unscientific, and impracticable, in several conspicuous instances, such as the issue of reasonable and probable cause in actions for false imprisonment, &c. Why are we to go back to the jury theory for our guidance in the case of such a Court as the Arbitration Court, or of a Court such as the High Court, in which the principles of equity are to prevail if the principles of the common law are in any way in conflict? I can see no objection, either practical or theoretical, to the President stating a case to this effect:—Here are the facts on which the claimant relies as showing an industrial dispute; the members of the High Court have been differing from the President and from one another as to the meaning of the words in the Constitution; the High Court has not yet laid down any definition; the respondents here say that even if all those facts alleged are true they do not show a dispute; before I plunge into a long and costly trial, I ask the High Court to say whether the facts alleged, if proved, as they stand, bring the case within the proper definition of the words "industrial disputes." I de-

(1) 16 T.L.R., 97.
(2) 1 Ves. Jun., 100, at p. 108.
(3) (1896) A.C., 136, at p. 141.

sire to know, at all events, whether, assuming all the facts alleged by the party on whom the burden of proof lies to be true, there is any evidence on which the jury (in the present case, the Court of Conciliation) could properly (that is, without acting unreasonably in the eye of the law) decide in his favour. This is a question of law, and this question it is the duty of the High Court to determine: *Best on Evidence*, 7th ed., p. 18.

I have been compelled to state the position, and examine the meaning of sec. 31 at considerable length, because I feel that the narrow construction of the section will seriously diminish its practical value, and will deprive the Court of Conciliation, in many cases, of what Parliament intended to be a valuable aid and safeguard attainable without technicality. By applying the rules of the *Judicature Act* and the decisions thereunder, we stumble in meshes of our own making.

Inasmuch, however, as the statutory majority of the Bench is of opinion that the first and second questions should not be answered, I defer to that opinion, and make no answer to the question.

As to the third question, my answer is Yes.

To the fourth question—Can the Court arbitrate in the case of a dispute that is only "threatened or impending or probable?"—I answer Yes. I unreservedly accept the position that the term "industrial disputes" in sec. 51 (xxxv.) of the Constitution means actual existing industrial disputes; and that Parliament cannot, by any definition of the term in sec. 4 of the Act, extend the meaning of the term in the Constitution. But the Constitution allows laws for the *prevention*, as well as for the settlement, of actual industrial disputes; and when Parliament, by sec. 4 of the Act, says that "industrial dispute" is to include "any threatened or impending or probable industrial dispute," it is merely exercising its powers with regard to *prevention* of actual industrial disputes. The extended meaning is only "in the Act," and for the purposes of the Act. It cannot be laid down that "conciliation" in the Constitution applies only to "prevention," and "arbitration" only to "settlement," of industrial disputes. If that reading were right, there could be no "conciliation" for the "settlement" of an actual industrial dispute. Both terms—

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"conciliation and arbitration"—refer to both terms—"prevention and settlement." Nor is this position affected by the cheap and obvious criticism, that you cannot arbitrate between people unless they are in actual dispute. There are many cases in which the intervention of a conciliator-arbitrator may be most salutary, before the points of dispute have been formulated, before they have become "fairly definite" within the language of *Conway* v. *Wade* (1). As I said during the argument, Servia and Bulgaria may be massing troops on each side of a river, preparing for battle as to the division of Macedonia—there may even be a battle—although as yet neither State has made a definite demand. There may be two nations arming against each other, jealous, suspicious, bitter and abusive; there may be no definite matter in dispute between them; and yet a stray spark may at any moment produce an explosion. In industrial matters as well as in other evils, prevention is better than cure; and an arbitrator can often do good service by bringing the parties together to discuss an agreement if they are standing apart and preparing for a strike; by even getting them to formulate their precise demands, and to reduce the hostility to precise issues; by bringing them out of the region of hot antagonism into the region of cold reason. There is nothing either impracticable or absurd in the intervention of an impartial arbiter before discontent has taken shape in definite demands, before growling has turned into biting. If A is complaining that his wages are too low, without saying what they should be, it may be that the matter is as yet too indefinite to amount to a "dispute"; but what is absurd or impracticable in the Court taking cognizance of the threatened dispute, trying to get the parties to come to an amicable agreement, and, if they will not, arbitrating? It must be borne in mind that, unless the Court can take cognizance of a threatened dispute for the purposes of arbitration, it cannot take cognizance of it for the purposes of conciliation (secs. 19, 23). It is true that one of the first steps taken by the conciliator-arbitrator in the proceedings would probably be to ask the parties what the one claims and what the other offers, so as to narrow and make definite the difference; but we must not

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

confound the steps which are necessary in the process of conciliation-arbitration with the facts which are necessary before the conciliator-arbitrator can bring the parties together for the compound process. There is no need of a definite plaint. The registrar may learn of a widespread movement for a strike of seamen, before a "log" has been prepared, much less a plaint; and he is given power to certify that the threatened dispute is proper to be dealt with in the public interest (sec. 19 (*a*)). This is the very point—before the parties have prepared for war—at which intervention may be most useful; and what is there in the Act or in the Constitution to exclude it?

To the fifth question, my answer is Yes. There are now four ways, instead of three, of giving the Court of Conciliation cognizance of an industrial dispute: (1) by certificate of the Registrar; (2) by plaint of an organization; (3) by request of a State industrial authority, &c.; (4) by the President's own initiative—when he has held a compulsory conference under sec. 16A, and no agreement has been reached, and he refers the dispute to the Court. In this last case, there is nothing in the Act confining the conciliation (and arbitration) proceedings to the persons who were present, personally or by agents, at the conference. The conference is a device for enabling the President to get information as to parties, subject matter, possibilities of settlement, &c.; and any person may be summoned "whether connected with an industrial dispute or not, whose presence at the conference the President thinks is likely to conduce to the prevention or settlement of an industrial dispute" (sec. 16A). It may not be amiss for me to say that in my experience persons who are not employés or employers in the industry concerned can often give most information as to the position, and can give most aid in the procuring of a friendly agreement. Where there are thousands of pastoralists, the secretaries of pastoralists' associations, even though not authorized to represent the pastoralist employers at any conference, would generally be the best persons to summon. There are even cases in which prominent and influential speakers taking the side of one or other of the contending parties, would be the best to summon. It is absurd to say that sec. 16A necessarily implies that, in the case of thousands of

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pastoralists being concerned, no one can be treated as a respondent to the dispute who has not been summoned to the conference; or that there is no power to refer into Court a dispute, so far as it relates to an employer who chooses to stay away incurring the risk of a penalty. All that is required for a reference into Court is (1) a conference on the subject under sec. 16A; and (2) the fact that no agreement has been reached as to the dispute. Of course, it still remains open to the person alleged to be a party to a dispute to show that no dispute exists, or that he is not a party to it. The onus of proving the dispute rests on the party affirming it.

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

GAVAN DUFFY J. The form of the questions submitted for our opinion by the President of the Court of Conciliation and Arbitration has been the subject of consideration during the argument, and has been altered more than once by the President, either at his own instance or on the suggestion of one of the parties.

The questions as they stand finally are these: [His Honor read them.]

We have to consider in the first place whether we are at liberty to answer these questions under the provisions of sec. 31 sub-secs. 2 and 3 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911.

In our opinion the point of law involved is now raised for the first time, and, though we have had the advantage of reading the judgment of our brother *Isaacs*, we regret that we have been unable to derive material assistance from the *Railway Cases* which he has cited, or to concur in the conclusion at which he has arrived.

It is said that before we can answer any question submitted for our opinion under that section, it must appear that it is one of law only, and that if the case leaves any inference of fact to be drawn by us before the question can be determined we have no jurisdiction to determine it. We do not accept this as a correct presentation of the law. In our opinion the section empowers the President to decide whether any question arising in the pro-

ceeding is or is not a question of law. If he decides that any question arising in the proceeding is a question of law, we think this Court is bound to hear and determine it. It has long been recognized that a special case stated on a point of law should state findings of fact, and not merely evidentiary facts, and that where no power to draw inferences is contained in the Statute or Rule of Court authorizing the statement of the case, or in the case itself when the consent of parties can confer such power, no inference of fact can be drawn by the Court for whose opinion the point of law has been reserved. The reason for this rule is obvious. In such cases the point of law, and the point of law alone, is referred for consideration, and if the point of law cannot be settled until some preliminary question of fact is determined, no power has been reserved to determine such question of fact. But in sec. 31 what is submitted for the opinion of the Court is not necessarily a question of law, but whatever in the opinion of the President is a question of law, and if he chooses to refer a mixed question of law and fact, like the question of reasonable and probable cause in an action for malicious prosecution, he is at liberty to do so. No doubt the President should endeavour to make all the necessary findings of fact himself so as to leave a question of law only for the consideration of this Court; but if the question referred arises in the proceeding, and if he persists in the opinion that it is a question of law, the circumstance that this Court considers it to be a mixed question of fact and law will not relieve it from the necessity of determining the question submitted, though it may be necessary to draw some inference or inferences of fact while determining it.

It is objected that the logical result of the interpretation we have adopted is this: that a President, unmindful of his duty, might possibly submit for the opinion of the Court matters of fact the decision of which should form part of his arbitration and award, that this Court would then be exercising the power of settlement by arbitration, and that an enactment of the Commonwealth Parliament which permits this Court to exercise such a power is *ultra vires* sec. 51, sub-sec. XXXV., of the Constitution. It is conceived that, if this objection is of any weight, it renders sec. 31 altogether inoperative, for precisely the same difficulty

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might arise where a question of pure law was submitted for the opinion of the Court, unless, indeed, the objection be limited to this—that this Court cannot exercise the power of ultimately adjusting the terms of settlement between the parties to the arbitration. The objection may be answered thus. Either the determination of a question under sec. 31 cannot operate as a judgment of the Court of Conciliation and Arbitration, and therefore does not involve the exercise of any part of the power of settlement by arbitration (see *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (1)); or, if it can so operate, then there is nothing in the Constitution which forbids the Commonwealth Parliament to vest part of such power in this Court, though it cannot change the nature of the power from arbitral to judicial.

The interpretation we have given to sec. 31 would enable us to answer all the questions submitted by the President, but the majority of the Court is of a different opinion, and in deference to that opinion we must confine ourselves to answering questions 3, 4 and 5. These questions we answer thus:—

3. Yes.

4. Yes.

5. Yes.

POWERS J. In the case, as first submitted, the learned President submitted two questions for the opinion of the Court which in his opinion were questions of law. [His Honor read the original questions.]

The case has been amended by the substitution of five questions, in place of the questions mentioned. [His Honor read the questions as finally amended.]

The learned President has submitted these questions to this Court for its opinion under sec. 31, sub-secs. 2 and 3, of the *Commonwealth Conciliation and Arbitration Act* 1904-1911. We must therefore deal with them under that section.

The section has already been quoted in some of the judgments delivered to-day.

Before dealing with the important questions submitted, this

(1) 16 C.L.R., 245.

Court has to consider whether it is at liberty to answer the questions, or any of them.

I hold that in every case submitted under sec. 31 of the *Commonwealth Conciliation and Arbitration Act* to this Court for opinion, before this Court has jurisdiction to determine the questions asked—

(1) The facts must be set out, not the evidence to find the facts from;

(2) It must appear from the facts in the special case—definite facts set out in the case—that there is a question of law.

My learned brethren *Barton* and *Isaacs* have referred to so many cases in support of this view that I do not think it necessary to refer to any further authorities. I also agree with my learned brethren *Barton* and *Isaacs*, for the reasons stated by them, that we cannot in a case stated under the Act draw inferences of fact.

The learned President is authorized to submit to this Court any question which he considers a question of law, arising in the proceedings before him; and this Court must consider it.

This Court must, however, in my opinion, decide (1) whether it is a question of law; and (2) whether it arises in the proceeding, on the facts stated in the case submitted for the opinion of the Court—without drawing inferences of fact.

The first question submitted was: "On the facts stated in the said affidavits, is there an industrial dispute within the meaning (*a*) of the Constitution, (*b*) of the Act, and between whom?"

We are asked to find, as a fact, whether the parties are really in dispute within the meaning of the Constitution and of the Act, and on the evidence contained in the affidavits—not on facts stated.

For the reasons already mentioned, I agree with my learned brethren *Barton* and *Isaacs* that this question cannot be answered. Assuming, however, this Court could consider the whole of the statements contained in the affidavits and in all the annexures, although not set out as definite facts, the first point to be decided—namely, whether there was dissatisfaction—is, on the evidence set out in the affidavits, in dispute. I say this, because I cannot bring my mind to consider some of the annexures to

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the affidavits, and ignore others. All the employers who replied to the request for a conference (and these replies are in certain exhibits annexed to one of the affidavits) denied that there was any dissatisfaction; and the learned President has not stated as a fact whether there is, or is not, dissatisfaction. Other facts necessary in my opinion to constitute an industrial dispute within the meaning so far given to it by this Court, are not found, assumed, or stated.

For both the reasons I have mentioned, the first question submitted cannot, in my opinion, be answered.

The second question submitted was: "On the facts stated in the said affidavits and in the case of such employers as refused (expressly or by implication) the demands of the organization, is there an actual industrial dispute, within the meaning of the Constitution and of the Act, between the said employers and employés, members of the organization?"

For the reasons already given, I do not think this Court can answer question 2. The Court cannot consider the evidence contained in the affidavits. The Court has not the necessary facts submitted to it in the special case to enable it to answer the question. The refusal of the employers referred to is only one of the facts necessary to constitute an industrial dispute within the meaning of the Constitution and of the Act. Other facts necessary to constitute an industrial dispute, to which I have already referred, are wanting.

I therefore agree with my learned brethren *Barton* and *Isaacs* that the second question cannot be answered.

The third question submitted was: "On the facts stated in the said affidavits and in the case of such employers as refused (expressly or by implication) the demands of the organization, is this Court" (the Conciliation Court) "justified in finding that there is an actual industrial dispute, and in proceeding to investigate the merits under sec. 23?"

In question 2 this Court was asked to say, whether "on the facts stated in the said affidavits and in the case of such employers as refused (expressly or by implication) the demands of the organization, was there an actual industrial dispute," &c.

In this question we are asked, on the same statement exactly

as the statement in question 2, to say whether the Conciliation Court is justified in finding there is an actual industrial dispute, and in proceeding to investigate the merits under sec. 23.

All the evidence, and the one stated fact on which we are asked to answer question 3, are contained in question 2, word for word, and we have decided by a majority that we cannot answer question 2.

For the reasons given why the Court should not answer question 2, I am of opinion the Court should not answer question 3.

The majority of the Court has, however, decided that this question should be answered, and an answer must therefore be given by the Court.

Before answering the question in the affirmative—viz., that the President is justified in finding there is a dispute,—this Court would, in my opinion, have to decide the question of fact in issue, whether there is or is not dissatisfaction. This Court is only required to answer questions of law on facts stated.

The Arbitration Court is to decide facts. In this question as submitted, this Court is asked to decide on facts shown to be in issue on the affidavits and annexures.

I think the President is justified, on the evidence submitted, in proceeding to determine, so far as he can, whether there is a dispute; and, then, if he is satisfied there is a dispute, in proceeding to determine the merits; but on the question as submitted (even if the evidence submitted can be considered), as material facts are in issue my answer to question 3 is No.

The fourth question submitted was: "In the case of a dispute being only 'threatened or impending or probable' within the meaning of sec. 4 of the Act, has this Court jurisdiction to arbitrate between the parties and to make a binding award?"

In the form in which it is submitted I look upon it as an abstract question, not arising in this case, and applicable to any dispute "only threatened, impending or probable," and, therefore, that it ought not to be answered.

The majority of the Court, however, has decided that it is not necessary for the learned President to find the facts in any case before asking this Court for a direction in law to enable him to proceed to finally determine that cause; and that this question should be answered.

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I am of opinion there must be a *definite difference between definite parties*, amounting to a disagreement in fact, before arbitration is possible. I do not see how a Court can arbitrate on threatened, impending, or probable differences, about claims not yet made by one party and refused by the other. The Court may use its powers of conciliation to prevent any inter-State industrial dispute, threatened or impending—within the meaning of the Constitution and of the Act; and if the Court, by conciliation, fails to settle the differences between the parties, and some definite claim is made by one party and refused by the other, the Court can arbitrate between the parties; but that is because there is *then* some definite matter in *dispute* to arbitrate upon.

The learned President in his judgment referred to two countries on the eve of battle about undefined claims, and pointed out that it was possible for an arbitrator to step in and arbitrate upon their dispute. I cannot help thinking he could only step in as a conciliator, in the first instance, and, before he could arbitrate and make any binding award, he would have to require one party to state definitely what he claimed, and if the other party refused to comply with the demand he could then arbitrate and make an award in the matter in dispute, and not before.

This the learned President practically admits, because he adds: "It is quite true that arbitration and award are impossible until the demands have been made fairly definite."

To answer in the affirmative, I would have to assume (1) that the Commonwealth Parliament can empower the Commonwealth Conciliation and Arbitration Court to arbitrate, *and make binding awards*, where an inter-State dispute is only "threatened, impending, or even probable"—that is, before it is a dispute in fact; (2) that the Parliament has done so; and (3) that the facts are found, stated, or assumed in this case, which constitute such a state of affairs. I cannot do so, and therefore my answer to question 4 is: No; the (Conciliation) Court cannot arbitrate, *and make binding awards*, until there is some definite difference, between definite parties, amounting to an inter-State dispute.

The fifth question submitted was: "As all the parties to the alleged industrial dispute were not summoned to the conference under sec. 16A, has this Court cognizance of the dispute as to

those who were not summoned to the conference but who have appeared or been summoned to appear under sec. 29?"

This important question of law does arise in the proceeding, and on the facts stated in the case and in the question.

I do not think the Act requires the President to summon all the parties to the differences, or disputes, to the conference, as well as to the arbitration proceedings later on.

The Act deals with organizations and inter-State disputes.

Parliament gave to the learned President exceptional powers to deal with very important matters, in a special way, and it authorized him to decide what persons should be summoned to a conference under the Act, instead of requiring him to summon every person likely to be affected, from all parts of Australia, to a conference, at which no order can, in any case, be made against him.

It is left by the Act to the President to summon to a conference such persons as are, in his opinion, likely to assist in bringing about a settlement of the difference or dispute by conciliation. If a second conference is necessary, because the persons summoned to the first are unable to speak for the whole of the employers or employés, the President has power to call a second conference.

Before any order or award can be made against any party (or parties) he (or they) must appear, or be summoned to appear under sec. 29. On an appearance, under sec. 29, parties can, if they wish, settle their disputes in conference, or by conciliation, or arbitration.

My answer to question 5 is Yes.

Questions (3), (4) *and* (5) *answered in the affirmative.*

Solicitor, for the claimants, *G. E. Loughrey* for *Sullivan Brothers*, Sydney.

Solicitors, for the respondents, *Malleson, Stewart, Stawell & Nankivell* for *Scroggie & Dunhill*, Sydney.

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

B. L.