[HIGH COURT OF AUSTRALIA.]

THE FEDERATED FELT HATTING EMPLOYEES UNION OF AUSTRALASIA . . . . . } CLAIMANTS;

AND

THE DENTON HAT MILLS LIMITED AND OTHERS . . . . } RESPONDENTS.

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MELBOURNE, *March* 11, 12, 13, 27.

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

Industrial Arbitration—Industrial dispute extending beyond one State—Plaint in Commonwealth Court of Conciliation and Arbitration—Preliminary question as to existence of dispute—Evidence—Amendment of plaint—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *secs.* 23, 38A—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.).

On a special case stated during the hearing of a plaint in the Commonwealth Court of Conciliation and Arbitration,

Held, by *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that on the particular facts stated the Commonwealth Court of Conciliation and Arbitration would be justified in finding that there was an actual, threatened, impending or probable dispute, and in proceeding to investigate the merits under sec. 23 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911.

Held also, by the whole Court, that a plaint before the Commonwealth Court of Conciliation and Arbitration alleging the existence of a dispute between the parties might after the hearing of the plaint had begun be amended under sec. 38A of the above Act, so as to allege in addition or as an alternative that there was a pending, threatened or probable dispute between the parties.

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

On the hearing of a plaint in the Commonwealth Court of Conciliation and Arbitration by the Federated Felt Hatting Employees Union of Australasia against the Denton Hat Mills Ltd. and a number of other employers, the Deputy President, *Powers* J., stated a case for the opinion of the High Court.

The material facts set out in the case are sufficiently stated in the judgments hereunder.

The questions asked were as follow :—

"1. On the facts stated in this case including those set out in the statement of facts" annexed to the case, "is there an industrial dispute within the meaning (*a*) of the Constitution, (*b*) of the said Act (*Commonwealth Conciliation and Arbitration Act* 1904-1911) ?

"2. If there is not an actual industrial dispute on the facts stated in this case including those in the statement of facts" annexed to the case, "is there a threatened, impending or probable industrial dispute which the Court has cognizance of for the purpose of prevention and/or for settlement ?

"3. If there is a dispute, actual, threatened, impending or probable as to some of the prices and conditions complained of in the plaint, has the Commonwealth Court of Conciliation and Arbitration power to make an award as to

"(*a*) Prices in the plaint about which there has not been any dissatisfaction, disagreement or demand before the claimants' demand prior to the plaint, that is, as to prices paid by factories at the time the plaint was filed and since, and now asked for in the plaint ?

"(*b*) Conditions about which there has not been any dissatisfaction, disagreement or demand before the claimants' demand prior to the plaint, that is, as to conditions observed in the factories at the time the plaint was filed and since, and now asked for in the plaint ?

"(*c*) Prices and conditions asked for in the plaint about which there was dissatisfaction amongst the employees at the time of the demand of 2nd August, but not dissatisfaction which caused any threatened, impending or probable industrial dispute at the date of such demand ?

"(*d*) Prices and conditions asked for in the plaint about which there was dissatisfaction which would probably have caused an industrial dispute if not conceded by the employers when demanded and insisted upon—but no demand to rectify them or any attempt to settle them by friendly negotiation had been made before the claimants' demand of 2nd August 1912 because the employees were under the impression that the Court could, after demand made and plaint filed, by an award fix a log of prices and conditions for a term of years for the whole trade, including the prices and conditions they were satisfied with ?

"(*e*) Prices and conditions asked for in the claimants' demand before the plaint—now in the plaint,—which prices and conditions the claimants admittedly seek to secure by an award of this Court for five years, not because of dissatisfaction, but only for the purpose of preventing future disputes if any attempt is made by any of the respondents, and insisted upon, to reduce prices or to alter conditions without the consent of the Unions ?

"4. If there is a dispute, actual, threatened, impending or probable, has this Court power to make an award with respect to the matters claimed in" certain paragraphs "of the plaint, or any of them, and if so which ?

"5. Can the amendment referred to in par. 18 of the case be allowed by this Court ?"

The amendment referred to in question 5 was an amendment which the claimants desired to have made in the plaint so as to allege that there was a pending, threatened or probable dispute between the parties, either as an addition or as an alternative to the allegation in the plaint that there was an existing dispute.

During the hearing of the case the following question was added :—

"1A. On the facts stated in the case and annexures, is this Court justified in finding that there is an actual, threatened, impending or probable dispute, and in proceeding to investigate the merits under sec. 23 ?"

Rundle, for the claimants.

Starke, for the respondents.

Cur. adv. vult.

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The following judgments were read :—

Griffith C.J. The majority of the Court are of opinion that questions 1 to 4 as formally submitted by the learned Deputy President in this case are not questions of law within the meaning of sec. 31 (3) of the *Commonwealth Conciliation and Arbitration Act*, inasmuch as they are all in form hypothetical and involve assumptions of fact. But we are all agreed that the new question 1A, which is in the form approved by the Court in the case of *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1), may be properly answered, and I proceed to answer it.

The case raises for decision in a concrete form the proper construction of the much debated provisions of sec. 51, pl. xxxv., of the Constitution, which empowers the Commonwealth Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. This being a new power conferred upon a legislature of limited jurisdiction, which as a general rule has no authority to interfere with the domestic trade or industry of a State, it lies on the party invoking its exercise to show affirmatively that the case in which the exercise is invoked falls within the power.

The reason for conferring this power upon the Commonwealth Parliament is sufficiently obvious. While the powers of the States to regulate trade and industry and to settle disputes relating to these subjects were limited to operations carried on within their own borders, industrial operations often extended beyond those limits under such conditions that there was a substantial community of interest between the persons engaged in them in different States, and a consequent probability of disputes co-extensive with the operations, and it was thought desirable to provide for so probable a contingency.

When the apparently innocent and benevolent words of sec. 51 (xxxv.) were enacted in 1900 few, if any, persons would have expected that it would be sought to read them as equivalent to "with respect to the settlement of industrial claims jointly preferred by employers or employees engaged in industrial avocations in more than one State, and the regulation of industrial matters included in

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

or incidental to such claims." In the present case, as I understand the facts stated, this is, in effect, the construction which the Court is asked to put upon the words of the Constitution, and the claim put forward by the claimants is (as I will afterwards show) nothing more than such a joint claim.

It has, indeed, for some years been practically asserted that such a joint claim is sufficient to found the jurisdiction of the Arbitration Court. In the present case the claim is avowedly based upon that view.

In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Allen Taylor & Co.* (1) I expressed my opinion at length on this point, and I do not think that I can usefully add much to what I then said. In that case I pointed out briefly that, although the term "industrial dispute" may be used and has been used in legislation in a sense wide enough to include any claim or request made or preferred by a single employee to his employer or *vice versa*, yet, having regard to the fact that the general control of industrial matters is by the Constitution reserved to the States, and to the governing words "extending beyond the limits of any one State," it was plain that in pl. xxxv. of sec. 51 the phrase did not bear that wider meaning.

In the *Sawmillers' Case* (2) I had said by way of opinion, to which I now adhere judicially :—

"The dispute must be single in the sense that there must be a substantial community of interest amongst the demandants and amongst those who refuse the demand.

"There must be a substantial identity of subject matter. For instance, a demand for a set of conditions in State A relating to one matter and another set of conditions in State B relating to another matter, although made by bodies of employees or employers in both States associated for the purpose of making the demand, constitutes not one dispute but two disputes.

"Mere identity of branch of industry is not sufficient of itself to prove substantial identity of subject matter. The difference in one State may be as to hours of labour, in the other as to terms of

(1) 15 C.L.R., 586. (2) 8 C.L.R., 465, at p. 490.

remuneration, in the same industry. In this case there would not be a single dispute.

"On the other hand, there might be substantial identity of subject matter although the branches of industry in connection with which it is made are not the same: For example, a demand for a reduction in the hours of labour in several distinct trades in which the employees are associated together for the purpose of enforcing that demand might be a single dispute. . . .

"Mere verbal coincidence in demands made as regards two States does not prove identity of subject matter. The varying conditions of climate and other physical conditions found in the Commonwealth may make a demand couched in particular language in respect of one State quite different in its essence from a demand couched in the same words in respect of another.

"The term 'industrial dispute' connotes something in the nature of industrial war, existing or threatened. Sporadic differences confined to small localities in two or more States, even if they possess all the other elements of substantial identity of subject matter, cannot be said to extend beyond the limits of one State merely because the parties to the differences in the several States combine in making a request in identical terms to their respective employers.

"There must be real community of action on the part of the demandants, and some community of action on the part of the parties on whom the demand is made. Such community need not be formulated in any written document, nor need the parties who are acting together be bound by any formal agreement. If it is found that large bodies of men in two or more States are in fact acting with one accord, then, if the other elements of an industrial dispute are present, an occasion arises for the exercise of the federal power in question.

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

To this I only desire to add that in my opinion the power conferred on the Parliament by pl. xxxv. is not a power to constitute a board

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or tribunal, consisting of one or more persons, with authority to regulate by its decisions or awards the conduct of industrial enterprises. Nor is it a power to transfer the control of industrial enterprises to such a board or tribunal, by empowering it to accede to any demands made by the employees. The authority which may be conferred upon the tribunal is authority to settle industrial disputes properly so called. I am not for the present purpose concerned with the distinction between actual and threatened or probable disputes.

I repeat that the dispute must be something more than a claim to have the conduct of an industry regulated. It must be a real dispute of such a nature as to indicate a real danger of dislocation of industry if it is not settled. Unfortunately attempts have sometimes been made to take advantage of this provision of the Constitution for the purpose of creating so-called disputes, not for the real purpose of preserving industrial peace but for the purpose of taking the control of industry out of the hands of employers. In my opinion such attempts are a fraud upon the Constitution, and ought to be so treated. Such machine-made disputes are not, in my opinion, industrial disputes at all within the meaning of the Constitution, and cannot be said to be disputes extending beyond the limits of any one State merely because of the identity of the language in which the claims are made, or because a claim relating to the operations of the same industry carried on in two or more States is comprised in a single document. In short, the object of the power is to prevent and settle real industrial disputes, and not to facilitate the creation of fictitious disputes with a view to their settlement by a Commonwealth tribunal.

For these reasons I am of opinion that pl. xxxv. cannot be construed in the wide sense contended for. The real question for determination in this case is whether the claim preferred by the plaint is in substance a request to the Court to settle an existing industrial dispute extending beyond the limits of any one State of such a nature that it was likely, if not settled, to lead to dislocation or disturbance of industry, or a mere request to the Court to lay down a code of regulations for the conduct of the industry.

I proceed to apply this test to the facts as appearing in the case stated by the learned Deputy President.

The claimant Union was registered on 29th June 1912, having branches and members in the States of New South Wales, Victoria, and South Australia. Separate State Unions had previously existed for some years in each of those States. On or about 2nd August 1912 the claimant Union sent to all the respondents what is called a "log," that is, a schedule of wages and conditions which they claimed should govern the conditions of work and wages of members of the organization in the three States. The log contained no less than 308 specific points as to which it was claimed that the industry should be regulated. The respondents were called upon to reply within fourteen days of receipt whether they were prepared to adopt the "log" or to grant a conference with the claimant Union at which it might be discussed with a view to obtaining a settlement of the grievance of the Union members in their employment on the basis of the log. No response was made to this demand, and on 26th September 1912 the plaint was filed. Before the time of delivery of the log no joint demand had been made in any form by or on behalf of the employees in the three States or any two States for any of the points demanded in the log, nor was any claim ever made on the respondents or any of them by the claimant Union, or by the State Unions, or by the employees, for the particular prices or conditions set out in the plaint until the demand of 2nd August. (Statement of facts, par. 18).

The hat mills in the three States of New South Wales, Victoria and South Australia are worked under different systems and conditions, even in the same State, and the conditions attached to the work in each mill affect the price to be paid. A minimum log price was asked for in order to allow that system to continue, and members of the claimant Union intend to continue to require payment of different minimum prices in different mills in excess of the log prices if they consider the conditions in the different mills warrant it (par. 5).

Most of the prices claimed in the log of prices were paid at some one of the mills at the time the plaint was filed, but at no one mill were all the prices claimed paid.

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That was not possible because they worked under different conditions and did different classes of work (par. 12).

Many of the prices for piece-work claimed in the plaint are paid in some of the respondents' mills, and were paid before and at the time of the claimants' demand, and, at the time the plaint was filed, without causing any dissatisfaction (par. 15).

Many of the conditions claimed in the plaint are observed in all the respondents' mills, and were observed before and at the time of the demand of 2nd August, and at the time the plaint was filed, without causing any dissatisfaction (par 16).

The prices and conditions mentioned in the two preceding paragraphs were included in the plaint, not because there was dissatisfaction with them, but because the claimant Union wished to have them secured to the employees for a term of years by an award of the Arbitration Court, so as to prevent the possibility of disputes in future if any attempt should be made to reduce prices or alter conditions without the consent of the claimant Union (par. 17).

In New South Wales there had been some dissatisfaction as to wages of assistants before the log of 2nd August 1912, but a formal demand was not made because the claimants intended to ask the Arbitration Court to fix a log of prices and conditions (par. 32).

There had been strikes in New South Wales in 1907, 1909 and 1911, and in Victoria in 1912, but the strike was in each case confined to one mill only. The strike in Victoria, which was at the Denton Hat Mills, arose in connection with the employment of a non-unionist in place of a workman disabled by illness. It afterwards extended by way of sympathetic strike to other mills in Victoria, but was settled in February 1912, when the employees in all the Victorian mills returned to work on the conditions and at the rates in force in their respective mills before the strike (par. 46), which have ever since been observed except as altered by consent (par. 84).

The officials of the Victorian Union regarded the settlement as a defeat and not satisfactory, but agreed to it, intending at the time to obtain by an award of the Arbitration Court, and not by a wages board, as they had agreed under the terms of settlement, a log of prices and conditions for a term of years, in order to prevent similar disputes in future and to secure the then existing prices and conditions by an award (par. 49). No claim is made in the plaint to disturb the settlement.

During this dispute delegates from the New South Wales and South Australian Unions had agreed at an inter-State conference to strike, if necessary, in support of the Victorian Union, and to abide by any settlement made by the Victorian Union. During the same dispute the delegates decided to join the Victorian Union in a Federation and to come to the Arbitration Court for a log of prices and conditions. After the dispute was settled the three Unions joined in the necessary steps to register as a Federation with a view to taking proceedings in the Arbitration Court to get a log of prices and conditions fixed by an award (pars. 51, 84).

The claims made by the Victorian Union in connection with the Denton Hat Mills strike were not the same as the claims made in the plaint (par. 53).

Before January 1912 the Victorian Union had a discussion with the employers as to the number of apprentices to be employed. The employers desired to employ 37, to be distributed among the Victorian mills. The Union refused to agree to the employment of more than 12, and the employers agreed to that number. The fact that the claimant Unions had decided to apply to the Arbitration Court for a log of prices and conditions, including the number of apprentices, was one of the reasons, if not the chief reason, for consenting to 12 apprentices. The plaint does not ask for a re-opening of this matter (pars. 56-60).

A question arose in 1911 in New South Wales with regard to the mill of the respondents C. Anderson & Co. in which at that time no members of the New South Wales Unions were employed. The question was not, however, between Anderson & Co. and their employees, but arose from a dissatisfaction existing in the minds of other employers and employees in other mills with the methods and conditions of work at Anderson's (par. 36).

In South Australia there was not when the log was presented any actual definite disagreement or local dispute, or any trouble likely in itself to cause any industrial dispute in South Australia. An incidental dispute was only probable in South Australia at that

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time (1) if, and when, any real dispute should arise in Victoria or New South Wales, and they should be asked to strike in sympathy with their fellow unionists in the other States, or (2) if their employers should refuse concessions granted to the New South Wales or Victorian employees, or (3) if the claimant Union should call for joint action to secure a common log (par. 75).

There had been some other sporadic differences in the three States, all of which had been settled for the time being.

The present proceedings in the Arbitration Court were decided upon and initiated by the claimant Union in order to obtain a minimum log of prices and conditions by an award of this Court and thereby :—

(*a*) To bring C. Anderson & Co. into line with the prices and conditions in the Union mills in New South Wales and the other States ;

(*b*) To prevent the Union mills coming down to Anderson & Co.'s prices and conditions if they attempted to do so ;

(*c*) To remedy some prices and conditions about which the employees, including assistants, pressers, trimmers and binders, and apprentices had complained before the settlement of the Denton Mills strike, but which the State Unions after February 1912 had not attempted to settle with the employers ;

(*d*) To secure conditions and prices in force at the time the demand was made and the plaint was filed, which were satisfactory and as to which no request to alter them had been made, in order to prevent disputes in the future if any attempt should be made without the consent of the claimant Union to alter them ; and

(*e*) To prevent possible disputes in future about matters which had caused differences in the past and had been settled by the employers and the State Unions (par. 83).

No definite unsettled disagreement caused by the refusal of any definite claim made by any of the Unions or by the claimant Union (after the Denton Mill strike was settled) was in existence in Victoria, New South Wales, or South Australia at the time when the claimants' demand was made on 2nd August 1912. Some further act by the employees, or the employers, or both, was necessary before an actual industrial dispute would have arisen, or any industrial dispute was probable. It is probable that demands would have been made if the Unions had not decided upon a plaint being filed in this Court (par. 74).

Upon these facts it appears to me (1) that there was not when the plaint was preferred by the claimants any industrial dispute extending beyond the limits of any one State in any real sense; (2) that there was indeed no dispute at all in any State of such a nature that it was not likely to be settled within the State itself without any dislocation of or disturbance of industry; and (3) that the plaint is in substance a mere request to the Court to lay down a code of regulations for the conduct of the industry.

As to the existence of a probable dispute the claimants seem to have made up their mind to create, sooner or later, a dispute extending beyond the limits of any one State. In that sense, therefore, it is probable that such a dispute will arise. This may be predicated in any case where an industrial organization desires to have the operations of the industry regulated by the Court. But, for reasons already given, I cannot think that such a probability is sufficient to constitute a probable dispute in any sense which would bring the case within sec. 51 (xxxv.) of the Constitution.

I think, therefore, that question 1A, which I construe as asking whether there was any evidence before the learned Deputy President upon which he would be justified in a preliminary finding that there was an actual threatened impending or probable dispute and in proceeding to investigate the merits, should be answered in the negative.

Question 5 as to the power of the Court to allow the amendment mentioned should be answered in the affirmative.

Barton J. The learned Deputy President has taken a large quantity of evidence for the purpose of informing himself whether he has jurisdiction to hear and determine the claims brought before him. As he has no power to determine finally whether there is a dispute within sec. 51 (xxxv.) of the Constitution, the case stated by him includes a full statement of facts which he has found pro-

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visionally for the purpose of seeking the opinion of this Court upon certain questions of law which he submits. But several of these questions cannot be decided by this Court consistently with its judgments in previous cases (See more particularly *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1); *Merchant Service Guild* v. *Commonwealth Steamship Owners Association* (2)). On the principles laid down in those decisions the questions numbered 1, 2, 3 and 4 are such as this Court ought not to answer. They are all hypothetical, since evidence which the Court of Arbitration has no power to make the subject of positive findings cannot be taken by this Court as a statement of absolute facts for the purpose of determining questions of law thereon. There remain two questions, the first of which was stated by the learned Deputy President during the argument as an amendment or addendum to the special case. It stands as question 1A, and is as follows :—" On the facts stated in the case and annexures, is the Court justified in finding that there is an actual, threatened, impending or probable dispute, and in proceeding to investigate the merits under sec. 23 ? " The other question is No. 5 in the special case, and is as follows :—" Can the amendment referred to in par. 18 of the case be allowed by this Court ? "

I will deal first with question 5. The amendment was sought by the claimant Union, who asked leave of the Court to insert in their plaint, after the initial statement that the parties were in dispute, a statement that there was at the time of the plaint " a pending, threatened or probable dispute between the same parties."

I think it clear that the Court has full power to make any such amendment on such terms as it thinks fit under sec. 38A, and that under the circumstances of the case it would be justified in making such an amendment.

Coming now to question 1A, the Bench is of opinion that it is one which the Court ought to answer, and so I proceed to answer it.

I would first refer to the fact that a question very similar in terms was before this Court in the case of the *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1). A majority

(1) 16 C.L.R., 591. (2) 16 C.L.R., 664.

there held it answerable, and each of the Justices sitting proceeded to answer it. The question there related only to an actual and not to a threatened, impending, or probable industrial dispute, and my own answer (1) was that (upon the assumptions of fact which the questions appeared to me to involve) "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." The other Justices then sitting answered the question in the same sense.

Similar conditions apply here as to a threatened, impending, or probable industrial dispute; and the question to which I must give an answer is whether, having before him the evidence which the case and its annexures contain, and no other evidence or information, the learned Deputy President would be justified in proceeding to hear and determine the plaint itself, and if necessary to make an award upon it.

It must be borne in mind that in considering for itself such a question in the first instance, a tribunal without power positively to determine the jurisdictional facts is entitled to satisfy its mind as to its duty in any manner that seems best to it.

The reason is that when the superior Court is called upon to determine the question of jurisdiction it is not confined to, nor need it regard, the material upon which the inferior Court has refused to proceed, or has proceeded, with the hearing.

A wrongful refusal of jurisdiction will still expose it to a mandamus, and an erroneous assumption of authority will expose it to a prohibition.

Upon the material which he has submitted to this Court I do not think the learned Deputy President would be justified in proceeding to investigate the merits of the alleged actual, threatened, impending or probable dispute under sec. 23 of the Arbitration Act. I have considered the material which the learned Deputy President has laid before this Court, and have compared it with the analysis which the learned Chief Justice has made in his judgment, which I have had the opportunity of reading. I think with him that the Court of Arbitration would not be justified in even provisionally taking that

(1) 16 C.L.R., 591, at p. 611.

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material as its warrant for treating the matter as involving any kind of dispute which the Constitution or, within the Constitution, the *Commonwealth Conciliation and Arbitration Act*, authorizes it to determine.

No claim was ever made on the respondents or any of them by the claimant Union, or by the State Unions, or by the employees, for the particular prices and conditions set out in the plaint until the claimants made their demand of 2nd August 1912, including a "log" or schedule of 308 items which it is now asserted were in dispute. The mills are in three States, namely, Victoria, New South Wales and South Australia, and are worked under different systems and conditions, not only as between State and State but *inter se.* A minimum log price only is asked for, in order to allow that system to continue, and members of the organization intend to continue to require payment of different prices in different mills in excess of log prices if they consider the different conditions therein warrant their doing so. There is not any one mill at which all the prices claimed have been paid, but there are several at which many of them have been paid. Prices cannot well be uniform, since they are affected by the conditions of work, and the conditions have differed.

There have been strikes before the formation of the claimant Union, three of them in New South Wales in the years 1907, 1909 and 1911, and one in Victoria at the beginning of 1912, known as "the Denton Mills strike." Each strike was at one mill only, though the Denton Mills strike was extended to other mills by sympathy. The claims in that strike were not the same as those made in the demand of 2nd August 1912, and in the plaint of the following September, but between the termination of the Denton Mills strike and the demand of August, there does not seem to have been anything approaching a dispute.

The claimant Union seems to have originated in this way. There was a separate Union in each of the three States mentioned. During the Denton trouble, delegates for each Union met in conference and agreed to strike if necessary in support of the Victorian Union, and to abide by any settlement they might make ; and during the same trouble the delegates agreed to join the Victorian Union in an inter-State Federation of the three Unions, and to come to the federal Arbitration Court for a "log" of prices and conditions. The claimant Union therefore had only been in existence for a few months at the time of the filing of the plaint. In fact it was not registered under the Commonwealth Arbitration Act till 29th June 1912, and between that registration and the making of the demand covering the log, less than five weeks had passed. It is during that period of five weeks that the actual, threatened, impending, or probable dispute is supposed to have arisen, but I find no evidence of it unless the agreement of the three Unions to federate and proceed in the Commonwealth Arbitration Court can be said to constitute such a dispute, which seems to me the reverse of a reasonable proposition, unless we conclude that a mere resolve to approach the Court with a schedule of claims followed by a letter of demand with such a schedule can be called a dispute, and unless trouble thus created is to be held to be the subject matter of sub-sec. xxxv. of sec. 51 of the Constitution. It is true that there had been at various times sporadic differences in each of the States, all of which had been settled for the time being; but the fact that differences have existed does not seem to make them elements in a dispute after they have been settled. Also there was casual and occasional dissatisfaction in different mills upon different subjects not identified with the "log," and it was not shown that the employers knew of it.

The learned Deputy President states that "No definite unsettled disagreement caused by any definite claim (made by any of the Unions or by the claimant Union) being refused (after the Denton Mills strike was settled) was in existence in Victoria, New South Wales or South Australia at the time the claimants' demand was made in August 1912. Some further act by the employees or employers, or both was necessary before an actual industrial dispute would have arisen, or any industrial dispute was probable. It is probable that demands would have been made if the Unions had not decided upon a plaint being filed in this Court" (par. 74).

This statement seems to me to throw great light upon the origin of the present proceedings. There was nothing definite as the subject of a dispute, or a probable dispute; but the claimants

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seem to have been honestly under the impression that by preferring a log providing for all the conditions and possibilities of the industry they could legitimately obtain an award which would regulate the whole of the hat-making trade in Australia. The setting up of some tribunal to regulate the conditions of industry irrespective of questions of dispute, but with a jurisdiction co-extensive with any series of claims that can be made by employees on employers, may or may not be an entirely desirable thing. It is not for this Court to pronounce upon any such question. But it is as clear as can be that the Constitution does not enable the establishment of any such tribunal. The Parliament may legislate for conciliation and arbitration, not for the prevention and settlement of such claims, but of industrial disputes of inter-State extension.

All that is possible to an arbitral tribunal constituted under this provision is the prevention and settlement of industrial disputes as and when they arise, and I am clear that they must be disputes in substance, and not merely claims, however honestly believed in, launched at the instance of employers or employees at a time of peace. I suppose there has never been a time in the history of any industry when there has not been dissatisfaction on the part of one or many employers or employees in respect of some wage, or price or condition. Such dissatisfaction may or may not be the precursor of a dispute, but it cannot be said to constitute a dispute either actual, impending or probable.

However morally justifiable it may be to invoke the action of the Court for the entire regulation of an industry apart from any dispute, that is not the office which under the Constitution can be imposed upon the Court. The adoption of such a process may be called, in a sense by no means opprobrious, an attempt to create a dispute. But it is an attempt which cannot succeed, because the intention of the Constitution is that the Court should operate upon the pre-existing state of facts amounting to a dispute or impending dispute, and not upon some position which follows instead of preceding a demand which is put forward merely to open the door of the Court.

Not only can I not find that there was any industrial dispute in the true sense of the words, but I cannot find as to any dissatisfaction that existed, that it was common, in respect of its subject matter, to any two States at once. There was no trouble which extended beyond the bounds of any one State so as to require settlement, if it ever became a dispute, by any other means than those which the State itself could provide.

No previous decision of the Court was specifically called in question during the argument—much less were we asked to overrule any such decision. I warmly agree with those who deplore the frequency with which the meaning of sub-sec. xxxv. of sec. 51 has come before this Court for interpretation, particularly with reference to the words "industrial disputes." But it seems to me that there is unceasing effort on the part of claimants to obtain some interpretation much looser than the connotation of those two plain English words.

Reading those words in their ordinary sense as fit subjects for federal conciliation and arbitration, it must be admitted that it could not be intended that the machinery of the federal tribunal should be invoked on account of every passing breeze of disagreement. The difference must surely be serious enough and persistent enough to be worthy of the pacificatory efforts of the tribunal. It could not be intended that the tribunal should be paltered with by means of merely fabricated or paper disputes, nor could it be intended that the danger against which the Constitution was providing, was not the danger of a breach of the industrial peace of the community. Hence in the *Sawmillers' Case* (1), and in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Allen Taylor & Co.* (2), the learned Chief Justice expressed the opinion (*obiter* in the first-named case, and judicially in the second) that "The term 'industrial dispute' connotes a real and substantial difference having some element of persistency, and likely, if not adjusted, to endanger the industrial peace of the community. It must be a real and genuine dispute, not fictitious or illusory. Such a dispute is not created by a mere formal demand and formal refusal without more. . . . In considering industrial disputes we are concerned with real facts, not words or word-spinning."

(1) 8 C.L.R., 465, at p. 488. (2) 15 C.L.R., 586, at p. 594.

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Barton J.

In the last-named case I said (1) :—"That the jurisdiction must be founded on something more than a mere claim is, to my mind, quite apparent. That something is not easy to define. But it must be enough to take the whole position above or beyond mere naked demand and refusal. . . . It" (*i.e.*, the dispute) "cannot be created by a mere paper demand." I had already said (2) :—"A grumbling or an agitation will not suffice : see *Conway* v. *Wade* (3)"; and I say now, as I said then (4), "It is further to be observed that there was here no discussion or controversy with the employers, or any representative of theirs. There was no correspondence in which the subjects of discontent were evolved. I do not say that these things are necessary ingredients in the proof; but they go far to show that there is something more than a mere claim. And something more there must be, unless we are to say that a sudden and peremptory claim must either be conceded or must amount of itself and by itself to a dispute."

I have never suggested that all these things must concur in every case. But I say they are of the class of facts by which the reality of a dispute is established. And neither in the shape of such circumstances nor of any others do I find the reality in this case.

I answer question 1A in the negative.

Before concluding, I desire, as I was not one of the Bench who heard the *Sawmillers' Case* (5), to say that I entirely agree in the propositions stated by the Chief Justice on that occasion, and which he has reaffirmed in the present case. I think it necessary to say this because those propositions apply with great force to the evidence stated by the learned Deputy President.

Isaacs J. Question 1.—For the reasons stated by me in *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (6), I am of opinion that it is not competent to this Court to answer the first question.

Question 1A.—I answer this in the affirmative. For the principles guiding me in so answering, I will read what I said in the case already

(1) 15 C.L.R., 586, at p. 605.
(2) 15 C.L.R., 586, at p. 603.
(3) (1909) A.C., 506, at p. 510.
(4) 15 C.L.R., 586, at p. 604.
(5) 8 C.L.R., 465.
(6) 16 C.L.R., 591, at pp. 619 *et seqq.*

mentioned (1). "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] (2) 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 employees: 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 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."

As to this question there is therefore no jurisdiction in this Court to make any pronouncement in this case as to the Constitutional meaning of the term "industrial dispute." Whatever therefore I might say as to that would be extra-judicial and of no binding effect, and consequently I say nothing on the point, but I do not mean to suggest I have seen any reason to doubt the judicial opinions I have already expressed on appropriate occasions, particularly in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Allen Taylor & Co.* (3), and adhered to in *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 2] (4),

(1) 16 C.L.R., 591, at pp. 631, 632.
(2) 12 C.L.R. 398, at p. 454.
(3) 15 C.L.R., 586, at pp. 609 *et seqq.*
(4) 16 C.L.R., 705, at p. 712.

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an opinion shared by my learned brothers *Duffy* and *Rich* (1). Further, as decided in this case in respect of questions 1, 2, 3 and 4, we have no power to find facts or draw inferences, I refrain from expressing any opinion upon the facts as to the actual existence of a dispute in relation to this question also.

Questions 2, 3 and 4.—These stand in the same position as No. 1, and cannot be answered.

Question 5.—I answer Yes.

HIGGINS J. For my part, I see no sufficient reason for refusing to answer the first, third and fourth questions propounded by my brother *Powers*. The case of the *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (2) is not an authority against giving an answer, inasmuch as in the present case the facts are stated as found. But I defer to the opinion of the majority of my colleagues. At the same time, the fact that these most natural and reasonable questions cannot legally be answered demonstrates more clearly than ever the general futility of the power to state cases contained in sec. 31 as it stands, and confirms me in the views which I expressed at pp. 639-643 of the *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (2), and at p. 712 of the same case [No. 2] (3).

As to question 1A—the question as amended—my answer is : Yes; the Court of Conciliation is justified in finding that there is an actual, threatened, impending or probable dispute and in proceeding to investigate the merits under sec. 23.

Looking at the form of the question, we are not asked to say on what subjects there is a dispute. But I should be prepared to hold that there is an industrial dispute on this subject :—Shall the conditions set forth in the log of 2nd August 1912 be the governing conditions of the industry as between members of the Union and the respondent employers ? Accompanying the log was a statement on behalf of the Union that it desired the wages and conditions in the log to " govern the conditions of work and wages of members of my Union in your employ " ; and a request that the terms of the log be adopted " as the governing conditions of this industry."

(1) 16 C.L.R., 705, at p. 714. (2) 16 C.L.R., 591.
(3) 16 C.L.R., 705.

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The reports of this High Court show that a great deal of ingenuity has been applied in considering the meaning of the plain, ordinary English words "industrial disputes." I have not usually been a party to the discussions, for they have arisen generally on applications for prohibition against my action in the Court of Conciliation. But (if we leave out of consideration for the moment the limitation in the Constitution to disputes extending beyond the limits of any one State), there is surely an "industrial dispute" when employees try to persuade or induce or coerce their employers to take a certain course of action in an industrial matter and the employers resist. In this case, the employees endeavoured to get their employers to bind themselves for a term to the conditions of the log, and the employers would not. There is no need for the employees to strike, or throw the industry out of gear, in order to establish the fact of a dispute. The policy of the Act is to substitute conciliation and arbitration for strike.

Prima facie, the request made with the log sent on 2nd August is to be treated as real, genuine, and intended to be pressed by any appropriate means. But it was open to the respondents to prove the contrary, as respondents proved it in the case of the *Federated Engine-Drivers &c. Association* v. *Caledonian Coal Co.* (1). In this case, the facts which preceded the 2nd August have been elaborately discussed; but the discussion has failed to show any ground for treating the request of the 2nd August as being other than real, genuine and intended to be pressed. Up to that date there was dissatisfaction; and the dissatisfaction was all the deeper because of the defeat of the employees in Victoria (where most of the hat factories were situated), in the Denton Mills strike. But the dissatisfaction did not take the form of definite demands until 2nd August, and consequently there was no dispute until the demand. It is now established that there need not be any expressions of dissatisfaction communicated to the employers before the demand made of the 2nd August (*Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 2] (2)). Without the request of the 2nd of August there would have been no dispute, no definite demand made and not conceded; but

(1) 4 C.A.R., 52. (2) 16 C.L.R., 705.

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even the request is not necessarily conclusive as to the existence of a dispute, if the respondents could displace its *ex facie* purport. The respondents have failed to do so. On the contrary, according to paragraph 70 of the facts found—(for instance)—" Definite claims in Victoria and New South Wales for better wages for assistants—log prices for pressers—better prices and conditions for trimmers and binders, and for some adjustment of prices for piece-work paid to journeymen, would have been formally made after the Denton Mills strike to some of the employers because of dissatisfaction, and would probably have been insisted upon if not conceded by the employers when demanded if the persons mentioned and the State Unions had not believed that this Court could, after demand made for a log of prices and a plaint had been filed by the claimant Union, fix by an award for a term of years a log of prices and conditions for the trade generally including the prices and conditions they desired."

It is clear therefore that as regards all the classes of employees —even the journeymen—there were claims in the log for conditions which had not been previously conceded. But it is stated in the facts found that many of the piece-work prices and other conditions claimed were already in practice in some of the respondents' mills (pars. 14, 16). The reason was that the claimant wished to have these prices and conditions secured to the employees for a term of years, as an attempt might be made to reduce prices or alter conditions. There was substantial ground for fearing such an attempt; indeed, one employer had given notice of his intention to reduce his rates of payment as he liked. This notice was given about three weeks before the 2nd August (Ex. F3). The position indeed was one of very unstable equilibrium. Immediate trouble was prevented by the fact that all of the employees of Anderson, the non-union employer who paid lower rates, joined the Union; but Anderson might employ non-union men at any moment. The request that the conditions in the log should be the governing conditions throughout the industry had a very substantial basis; and, in my opinion, even if the log had not contained any claims for improvement in conditions, the claim for a binding and settled industrial rule constituted, when not conceded, an industrial dispute.

I concur with the Chief Justice in the view that the words of the

Constitution are not to be read as if they allowed the settlement of mere claims or prayers to the Court, as distinguished from disputes. But in this case it seems to me that before the plaint, with its prayer, there was an industrial dispute, as the employees had demanded and the employers had (in effect) refused the letter of demand of 2nd August 1912. The employers would not even confer with the Union so as to discuss the log.

I also concur in the view that the constitutional power is not to regulate the conduct of industrial enterprises, but to prevent or settle disputes which extend beyond one State. I have said so frequently ; for instance, in the *Shearers' Case* (1).

But for the purpose of settling or preventing a dispute compulsorily, a certain degree of restraint or regulation is necessary ; and if a matter of regulation be in dispute, the Court of Conciliation is enabled, if necessary, to prescribe what shall be the regulation.

I find it necessary to say that I know of no attempts being made to take advantage of the provision in the Constitution for the purpose of creating disputes, or for the purpose of disturbing industrial peace, or for the purpose of taking the control of the industry out of the hands of the employers. This view seems to be based on *a priori* utterances of partisan journals, in consequence of the plaint in *Federated Engine-Drivers &c. Association* v. *Caledonian Coal Co.*, already referred to—a plaint which was dismissed by the Court of Conciliation. I cannot help thinking that there is frequently a confusion of ideas between the extension of discontent, which is usually reprehensible, and the extension of the remedy for the discontent, which is proper and laudable. It frequently happens that industrial disputes which would have found vent in strikes in single States are averted by the interposition of the Court, the employees in different States having conferred together and found that they have common grievances, and then forming a common organization without which they could not approach the Court (sec. 19). As the main responsibility for the working of the Court falls on me, and as I may be supposed to be more familiar than others with what is being done, silence on this subject on my part might well be taken as an assent to the animadversions which have been made. I concur,

(1) 5 C.A.R., 48, at p. 65.

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however, in the view that the object of the power is to prevent or settle real industrial disputes, not to facilitate the creation of fictitious disputes (as in the *Engine-Drivers' Case* (1)).

In view of the answer to question 1A, it becomes unnecessary to answer question 2.

My answer to the fifth question is Yes.

POWERS J. The first two questions submitted by me as Deputy President were :—(1) On the facts stated in this case including those set out in the statement of facts annexed to the case, is there an industrial dispute within the meaning (*a*) of the Constitution, (*b*) of the said Act ? (2) If there is not an actual industrial dispute on the facts stated in this case including those in the statement of facts annexed to the case, is there a threatened, impending or probable industrial dispute which the Court has cognizance of for the purpose of prevention and/or for settlement ?

For the reasons stated by the learned President of the Arbitration Court I agree with him that there is no sufficient reason for refusing to answer either of the questions, and I regard the judgments delivered in *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (2) (except that of my brother *Isaacs*) as authorities for answering the two questions as submitted. For that reason I submitted the questions 1 and 2 in the form I did. The majority of the Court has, however, decided that the questions cannot legally be answered for the reasons stated by them in the judgments just delivered, and in deference to that decision I do not propose to answer either of the questions.

The learned President has referred to what he said in the *Newcastle and Hunter River Steamship Co. Case* [*No.* 1] (3). The difficulties the President then pointed out caused by the answers to the questions in that case (properly given under sec. 31 (2)) have been increased by the decisions in this case. This Court has now decided in answers to questions submitted by the learned President in previous cases, and by me in this case, that on a special case stated under sec. 31 (2) as it stands at present, it cannot say (1) what are

(1) 4 C.A.R., 52. (2) 16 C.L.R., 591.
(3) 16 C.L.R., 591, at pp. 639-643.

the *indicia* of an industrial dispute extending, &c., or (2) whether there is a dispute on the facts set out on affidavits by witnesses submitted with the case, or (3) whether there is a dispute on facts found by the President, nor can the Court answer questions of law submitted by the President until after there is a dispute, because they do not arise in the proceedings until there is a dispute.

This Court has also decided that, even if the President finds there is a dispute, that does not enable the Court to answer, because (1) the President cannot decide that question finally; (2) the fact that the President finds that there is a dispute would not justify the Court in holding there is a dispute in law and fact, because the Court would have to assume that the facts stated were all the facts, and the Court would also have to draw inferences from the facts. It therefore appears impossible to get a decision of this Court as to a dispute, or to get questions of law answered, until all the expense has been incurred and time spent in investigating the merits of the claim. On a motion for prohibition later on, this Court must, of course, decide on the facts whether there is a dispute.

I did not intend when I submitted the special case to ask for an answer to question 1A. Question 1A has been added during the argument before this Court because the majority of the Court decided questions 1 and 2 could not be answered. The question reads:—On the facts stated in the case and annexures, is this Court justified in finding that there is an actual, threatened, impending or probable dispute, and in proceeding to investigate the merits under sec. 23? The effect of the answers of the majority of the Court to question 1A warrants me in proceeding with the plaint, but places on me the responsibility of deciding later on whether there is sufficient evidence (when all the facts are proved) to satisfy me that there is an actual, impending, threatened or probable industrial dispute extending beyond the limits of one State. This question this Court does not see its way to decide on the facts stated in the case submitted.

I do not therefore propose to decide question 1 or 2 until after I have considered the very important judgments just delivered, and heard all the evidence the respondents tender to show that there was not, at the time the plaint was filed, any dispute, actual, impending, threatened or probable.

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As sec. 31 (2) requires the Court to answer questions of law, &c., arising in the proceedings, I must do so in this case.

In the answer of this Court to question 4 in the *Newcastle and Hunter River Case* [*No.* 1] (1), this Court held that under the power to prevent disputes a binding award can be made even if there is only an impending, a threatened, or a probable dispute.

Subject to what I have just stated, I concur in the answer of the majority of the Court to question 1A—without agreeing with all the reasons given by them. Independently of the fact that the decision of the majority of the Court justifies me in proceeding, I personally consider that I am justified in proceeding to investigate the merits of the case as to part, at least, of the claim set out in the plaint, and as to some at least of the respondents.

My answer to question 1A is, therefore, Yes.

I attempted by question 3 to obtain the decision of the Court as to whether certain parts of the claim could be dealt with by me if a dispute as to part of the claim was proved, but I must now, in the first instance, decide that for myself, after hearing both parties or their representatives. Question 3 is admittedly dependent on the answer to the first or second question being in the affirmative, because the questions submitted only arise in the proceedings if there is a dispute. The questions 3 (*a*) to (*e*) although not answered were fully discussed by counsel and members of the Court, and the views expressed by my colleagues during the argument will be of assistance when I have to decide the questions. No answer is to be given to No. 3.

As to question 4. Because questions 1 or 2 are not to be answered, and question 4 only arises in the proceedings if there is a dispute, no formal answer is to be given to it although some of the questions are admittedly very important questions of law. The questions included in No. 4 although not formally answered were fully discussed, and the views expressed by my colleagues during the argument will be of great assistance to me in arriving later on at a decision upon them.

As to question 5 my answer is Yes.

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

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

RICH J. We are precluded by the decision of the majority of the Court in *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1) from answering questions 1, 2, 3 and 4. As we are not at liberty to answer these questions, we consider it unnecessary and inexpedient to discuss any of the topics raised by them.

In deference to the decision to which we have referred, we confine ourselves to answering questions 1A and 5. These questions we answer in the affirmative.

Questions 1A *and* 5 *answered accordingly.*

Solicitors, for the claimants, *Brennan & Rundle.*
Solicitors, for the respondents, *Derham & Derham.*

B. L.

Appl *Hazlett* v *Presnell* 149 CLR 107

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

[PRIVY COUNCIL.]

THE STATE OF SOUTH AUSTRALIA . APPELLANTS;
PLAINTIFFS,

AND

THE STATE OF VICTORIA . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1914. Jan. 8.

Boundary between States — Boundary fixed by Statute—Degree of longitude—Authority of Executives to mark boundary on ground—Effect of marking—4 & 5 *Will. IV. c.* 95.

The Letters Patent of 19th February 1836, issued under the authority of 4 & 5 Will. IV. c. 95, must be taken to have contemplated that the boundary between the Colonies of New South Wales and South Australia, namely, the

* Present—Viscount Haldane L.C., Lord Moulton, Lord Parker of Waddington and Lord Sumner.