H. C. OF A. 1914.

DREW, ROBINSON & Co. v. SHEARER.

Respondents to be at liberty to apply within three weeks for a variation of this order as to reserved costs, they undertaking to pay the costs of such application in any event. Respondents to pay costs of appeal.

Solicitors, for the appellants, *Parker & Parker*, Perth, by *Varley & Evan.*

Solicitors, for the respondents, *James & Darbyshire*, Perth, by *Bakewell, Stow & Piper.*

B. L.

Appl *R v Coldham; Ex parte Fitzsimons* (1976) 137 CLR 153

Appl *Ludeke, Re; Ex parte QEC* (1985) 60 ALR 641

Appl *Caledonian Collieries v Asian Coal & Shale Employees Fed (No2)* 42 CLR 558

Foll *Waterside Workers Fed v Gilchrist Watt & Sanderson Ltd* (1924) 34 CLR 482

Dismissed *Jones v Cth Court of Concil & Arb; Ex parte A-G (Cth)* (1917) 24 CLR 396

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE PRESIDENT THEREOF AND THE AUSTRALIAN BUILDERS' LABOURERS' FEDERATION.

H. C. OF A. 1914.

SYDNEY, *April* 16, 17, 20, 21; *May* 15.

EX PARTE G. P. JONES AND OTHERS.

EX PARTE W. COOPER & SONS AND OTHERS.

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

Industrial Arbitration—Industrial dispute extending beyond the limits of any one State, meaning of—Award, validity of—Compensation for injuries—Board of reference to determine claims for compensation—Prohibition to Commonwealth

Court of Conciliation and Arbitration after award—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxv.), 75 (v.)—*Commonwealth Workmen's Compensation Act* 1912 (*No.* 29 *of* 1912).

Held, by *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that the building trade is an industry in respect of which there may be an industrial dispute extending beyond the limits of any one State within the meaning of sec. 51 (xxxv.) of the Constitution, and that, on the evidence, such a dispute existed.

By *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ.—An industrial dispute extending beyond the limits of any one State is an industrial dispute which at a given moment exists in more than one State, that is, extends over an area which embraces territory of more than one State.

By *Griffith* C.J. and *Barton* J.—If an industry is of such a nature that all possible questions as to conditions of work arising in connection with it are in their essence of a local character, so that there cannot be any competition between the products of the industry in different States, and the operations and conditions in one State cannot have any direct action or reaction upon the operations or conditions in another State, there cannot in respect of that industry be an industrial dispute extending beyond the limits of any one State.

The President of the Commonwealth Court of Conciliation and Arbitration by an award directed compensation to be paid to employees, members of the claimant organization, by employers who were bound by the award, in respect of personal injuries arising out of and in the course of their employment in accordance with the provisions of the *Commonwealth Workmen's Compensation Act* 1912, and appointed a Board of Reference by whom the liability to pay, and the amount of, such compensation should be determined.

Held, by the Court, that the award was in those respects invalid.

Held, by *Griffith* C.J., *Barton*, *Isaacs* and *Powers* JJ., that where the President of the Commonwealth Court of Conciliation and Arbitration has, without jurisdiction, made an award prohibition will lie to prevent further proceedings in that Court under the award.

ORDERS *nisi* for prohibition.

On a plaint in the Commonwealth Court of Conciliation and Arbitration by the Australian Builders' Labourers' Federation, an organization of employees, against a large number of employers an award was made by the President fixing a minimum rate of wages, the hours of duty of employees, &c., and containing the following provisions (*inter alia*) :—

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

"18. If personal injury by accident arising out of and in the course of his employment be caused to a workman in the service of any of the respondents who is a member of the claimant organization the respondent shall be liable to pay compensation in accordance with the provisions of the *Commonwealth Workmen's Compensation Act* 1912 and the first Schedule thereto *mutatis mutandis* as if in the said Act and Schedule the respondent were substituted by name for the 'Commonwealth,' and as if the provisions herein contained for a Board of Reference were substituted for the provisions of the said Act and Schedule for arbitration or proceedings in a County Court.

"Secs. 6, 7, 8, 9, 10 and 11 of the said Act shall not apply and a person or persons nominated by the Board of Reference from time to time, and subject to removal by the Court, shall be treated as the 'prescribed authority' for the purpose of the said Schedule.

"19. This Court appoints for the purposes of this award a Board of Reference for each of the several districts mentioned in this award. The Board is to consist of three persons . . .

"The Court assigns to each Board the function (*a*) of determining the amount of compensation to be paid under clause 18 of this award, and any other question which may have to be determined in pursuance of the provisions of that clause."

Two orders *nisi* were obtained, one by G. P. Jones and a number of respondents to the plaint and the other by W. Cooper & Sons and a number of other respondents, calling upon the Commonwealth Court of Conciliation and Arbitration and the President thereof and the claimant organization to show cause why a writ of prohibition should not be issued to prohibit further proceedings in the plaint and upon the award.

The material facts and the nature of the arguments appear in the judgments hereunder.

Knox K.C. and *MacLaurin*, for G. P. Jones and others.

Knox K.C. and *Beeby*, for W. Cooper & Sons and others.

Arthur, for the respondent organization.

Cur. adv. vult.

May 15.

The following judgments were read :—

GRIFFITH C.J. I begin by repeating what I lately said in the *Felt Hatters' Case* (1), which is exactly applicable to the present :— "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" (See *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (2)).

"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

(1) 18 C.L.R., 88, at p. 91.
(2) (1914) A.C., 237, at p. 255 ; 17 C.L.R., 644, at p. 653.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Griffith C.J.

than one State, and the regulation of industrial matters included in or incidental to such claims.' In the present case . . . 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." It is high time that the question should be authoritatively and finally settled.

We start, then, with the position that the regulation of domestic trade and industry is by the Constitution reserved to the States. The question to be determined is whether—to quote the language of the Lord Chancellor in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1)—it can be shown that such a general control over the liberty of the subject as is asserted by the respondents was transferred to [Qu., conferred upon] the Commonwealth by sec. 51 (pl. xxxv.). The award purports to control the trade of 560 persons, firms and corporations.

The applicants contend that the general reservation to the States shows that the grant, whatever its effect may be, is not a grant of unlimited power. Some limit is, they say, implied in the word "extending." They further contend that the implied limit is to be found in the necessity of the case; that, the reason of the grant being the inability of the States to deal with certain cases, the grant itself should, according to the rules in *Heydon's Case* (2), be construed as limited to cases with which the States could not deal; and that, if the industry in connection with which the alleged dispute arises is of such a nature that all possible questions as to conditions of work arising in connection with it are in their essence of a local character, so that there cannot be any competition between the products of the industry in different States, and the operations and conditions in one State cannot have any direct action or reaction upon the operations or conditions in another, the matter is one with which the State is fully competent to deal, and the case is one

(1) (1914) A.C., 237, at p. 255; 17 C.L.R., 644, at p. 654.

(2) 3 Rep., 7b.

in which an industrial dispute cannot extend beyond the limits of any one State within the meaning of the Constitution.

In my judgment this contention is well founded. The States have full and ample powers to deal with all such cases, which are in their nature essentially of a local character. I do not lose sight of the fact that there have often been, and no doubt often will be, strikes and disturbances which are spoken of as sympathetic strikes, and that in this sense an industrial disturbance or dispute anywhere in the world may act or react upon an industry anywhere else, but I do not think that this is what was meant by the words "extending" &c. Nor do I forget that there may be industrial disputes—for instance, a claim for a general eight-hours day in all industries—to which such a consideration would not apply. What I am now saying is limited to claims relating to the internal management of a single industry.

I have often had to express my opinion on this subject, and I am loth to repeat myself. I content myself by referring to what I said in the *Sawmillers' Case* (1), and repeated judicially in the *Felt Hatters' Case* (2).

In *Whybrow's Case* (3), which related to the industry of boot manufacture, the Court held, giving perhaps a liberal interpretation to the power in question, that that industry was a single industry throughout the Commonwealth, and that, having regard to the competition between the products of the different States, the conditions of the industry in each so far reacted upon those in the others that, *e.g.*, the wages in one State could not be satisfactorily adjusted without an adjustment of the wages in all. But I do not think that the same considerations apply to the industry now in question, which is that of builders' labourers. The work to be done in that industry is essentially local in character, and the conditions under which it is carried on are essentially dependent upon local conditions. Compare, for instance, the conditions in the tropical city of Townsville in North Queensland with those in Ballarat, nearly 1,500 miles further from the Equator, both of which are dealt

(1) 8 C.L.R., 465, at p. 490. (2) 18 C.L.R., 88.
(3) 10 C.L.R., 266.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Griffith C.J.

with identically in the award now in question. In my judgment, therefore, the objection is a good one, and this is a case in which the State authorities have full and ample power to deal with the matter. It may be that the determinations made by the State authorities may not be satisfactory to the employees, but that dissatisfaction is a dissatisfaction with the State law which the President of the Arbitration Court has no more authority to over-ride than the Commonwealth Parliament itself.

On this point I will only add that the power relied upon by the respondents is not, as seems to be sometimes thought, an over-riding power, but must be construed in connection with the other provisions of the Constitution.

I turn now to the facts of the particular case, on the assumption that I am in error in the opinion so far expressed, and that the nature of the industry is such that an industrial dispute in respect of it might extend beyond any one State.

Before 1910 there had been in existence associations of builders' labourers in the States of New South Wales, Queensland, South Australia, Tasmania and Victoria. In September of that year the claimant organization was formed by a combination of the different State Associations. In October 1910 the claimant organization adopted what is called a log or schedule of demands to be made upon employers throughout Australia, but nothing came of it. In May 1912 they drew up a second log, which was forwarded to a large number of employers in the five States with a demand for the acceptance of the terms specified or a conference to consider them. The employers did not accede to the demand. On 9th July of the same year the plaint in the present case was filed in the Arbitration Court. The claim comprises 32 separate demands—a modest number compared with the 308 demands made in the log in the *Felt Hatters' Case* (1).

The respondents contend that the mere fact of the presentation of this log with the accompanying demand and the failure of the employers to accede to it was sufficient to constitute an industrial dispute extending beyond the limits of any one State.

On this point I repeat what I recently said in the *Felt Hatters'*

(1) 18 C.L.R., 88.

Case (1) :—" In my opinion the power conferred on the Parliament by pl. xxxv. is not a power to constitute a board 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. . . .

" 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."

It is contended, however, that if the claim is a *bonâ fide* claim founded upon a real desire, and is persisted in, it is sufficient to found jurisdiction in the Arbitration Court. I will return to this point later. I will now briefly summarize the relevant facts antecedent to the log and demand of 1912.

Before that time there had been considerable dissatisfaction in the several States with the wages paid to builders' labourers, and in some instances with other conditions of work, and in each State

(1) 18 C.L.R., 88, at p. 93.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Griffith C.J.

disputes had arisen between employers and employees. The subject matter of the disputes and the action taken with respect to them, however, differed in the several States. In all the States except Victoria Wages Boards or Industrial Courts entrusted with power to deal with the matters in controversy had been constituted before May 1912. Such a board was constituted in Victoria in September of that year.

In New South Wales an award was made by the Industrial Court in November 1909, which remained in force for a period of three years. This award was varied in certain particulars in 1910, but otherwise remained in force without any further application to vary it. In October 1910 the claimant organization framed a log, which formulated demands practically identical with those which had been dealt with by the Industrial Court, the wages then claimed being 10s. a day. This log was sent to the New South Wales Employers' Association, who replied to the effect that the log had been already dealt with by the Industrial Court.

In April 1912 a new Industrial Arbitration Act was passed, which repealed the Act of 1908 then in force, and in July of the same year an Industrial Board was constituted under the new Act the authority of which extended to the occupation of builders' labourers.

In the meantime, in May, the new log had been sent to the New South Wales Master Builders' Association, who replied that, as work was proceeding satisfactorily and without any grievance or dissatisfaction under the award which was still in existence, it was thought desirable to adhere to the award.

In October of the same year, *i.e.*, after the filing of the plaint in this case, the Master Builders' Association filed a claim before the Industrial Board asking in effect for an award in the terms of the previous award which would shortly expire.

In Queensland the Builders' Labourers' Association formally adopted the log of 1910. In December of that year there was a strike at Brisbane in support of a demand of 9s. a day. In January 1911 the log of 1910 was formally sent to the Master Builders' Association in Brisbane. In February 1911 a Wages Board was

constituted, which on 27th April made an award fixing the wages at rates varying from 1s. to 1s. 2d. an hour as from 1st May.

In South Australia the State Union joined the claimant organization in September 1910, and adopted the log of that year. A local dispute arose, which was referred to the Court of Industrial Appeals and settled by an award of 20th September 1912.

In Tasmania a provisional agreement was made in September 1911 between the employers and employees, who agreed to follow the New South Wales award of 1909, and on 30th October a definite agreement was made to the same effect. On 28th November a Wages Board was appointed under Statute law. The only matter in controversy was the rate of wages, which, after correspondence, was settled in January 1912 by an agreement that the rate should be 1s. per hour as from 25th March.

On receipt of the log of May 1912 the employers replied to the effect that there was no dispute between them and their employees, and that there was no need for a conference.

In Victoria a local dispute as to wages occurred in Melbourne in October 1910, which on 10th November was settled by an agreement that they should be fixed at 9s. 6d. a day. The Labourers' Association then resolved that in future the hours of work should be forty-four per week, but nothing was done in pursuance of the resolution.

After the events which I have narrated no further communication was made to the employers in any of the States of any existing dissatisfaction as to wages or any other conditions of employment until the sending of the log of May 1912.

The case made by the respondents in answer to these facts is, in effect, that notwithstanding the settlement or termination of the various disputes that had been made, whether by agreement or award of a Court or Board, the employees were still dissatisfied, and were resolved to get better terms; that in some cases strikes were threatened, which the leaders of the men with difficulty prevented; that at that time it was generally thought by them that if the employees in the several States combined in making a common demand the Commonwealth Court of Arbitration would be able to entertain the claim; and that although the men would have preferred to strike

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Griffith C.J.

the leaders were able to restrain them by holding out this expectation. All this may, I think, be taken as true. It was further said that the causes of dissatisfaction in the different States were various, that the awards of the several State authorities were not identical, that the men demanded what is called a "flat rate," while some Boards classified the men, and fixed wages at rates varying with the classification, and that the State authorities had not jurisdiction to deal with some of the claims put forward. One of the claims put forward in the log of 1912 was that the employers should insure the workmen against accidents, and it was complained that the Workmen's Compensation Acts, which were in force in all the States except Victoria, varied in their provisions, and that the provisions themselves were not satisfactory.

Under these circumstances the log was prepared and put forward, and when the demands contained in it were not acceded to, the plaint was filed.

The substance of the matter, therefore, is that five different sets of disputants in five different States, disputing about different things, agreed to consolidate their disputes, and to make in a single document on behalf of all a series of demands, which comprised everything that any of them had demanded; and the question is whether this is sufficient to constitute a single dispute extending beyond any one State within the meaning of sec. 51 (xxxv.). I assume in favour of the respondents that the demand was genuine and *bonâ fide*, and was intended to be persisted in, and that it was the outcome of real dissatisfaction existing in the breasts of the disputants, although not communicated to the employers, the reason for non-communication being that they thought that nothing more than such a common demand was necessary.

If such a joint demand is sufficient, it is plain that the whole subject matter of the regulation of any and every branch of industry can be taken out of the hands of the State and transferred to the Commonwealth Arbitration Court by the mere consolidation of separate disputes in a common demand in which the employees in each State combine to demand for themselves and for their fellow employees in the other States a single set of conditions of labour.

So to hold would be in effect to hold that the power reserved to

the States to regulate such matters was potentially abrogated by the provision of sec. 51 (xxxv.). In my judgment that provision is not capable of being so interpreted. The matter is one of construction of a power, and, as I have had occasion to remark more than once, the Court is not concerned with the wisdom or unwisdom of the provisions of the Constitution.

For these reasons I am of opinion that there was not in this case any industrial dispute extending beyond any one State within the Constitution, and that the Arbitration Court had no jurisdiction to deal with the plaint.

A subsidiary question is raised by the applicants with respect to some specific provisions of the award assuming that it is not wholly invalid.

I have already said that one of the claims preferred by the log and by the plaint was that the employers should insure the employees against accidents, and that the men were dissatisfied with the provisions of the State Acts dealing with that matter. I premise that, as I said in the *Sawmillers' Case* (1), dissatisfaction with the provisions of a State law and a desire to be freed from its obligations cannot be an element of an industrial dispute within the meaning of the Constitution. The learned President thus dealt with the matter in his award :—"In each of the States, other than Victoria, the British *Workmen's Compensation Act* has been applied with varying qualifications ; but the provisions of the State Acts lead to painful anomalies and hardships. If the Commonwealth Parliament had power to legislate for compensation for accidents, and to regulate scaffolding and the arrangement of the building trade on lines uniform in principle for all the States, I should gladly refrain from awarding on the subject. But the Parliament has no such power ; and I can see no better course than to make an award on the lines of the Commonwealth Act for compensation for accidents occurring to public servants, or the corresponding Act for seamen in inter-State commerce. In Victoria there is at present absolutely no provision to meet accidents ; for, since the Wages Board determination was given (now suspended), the employers have considered themselves as forbidden to deduct,

(1) 8 C.L.R., 465, at p. 487.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Griffith C.J.

as they used to deduct, 6d. per week from the wages for insurance. I award in accordance with the 'new and almost world-wide theory that industrial risks should be perceived by society to be inseparable accompaniments and expenses of industrial enterprises.'"

The learned President, in effect, assumes to abrogate the State laws, and to substitute for them a rule to the effect of that which has been prescribed by the Commonwealth Parliament with respect to its own servants, but which it had no power to make with respect to the claimants in this case. In my judgment he has no such power. He is not a legislator, and the Commonwealth Parliament had no authority to delegate to him legislative powers, even if it itself possessed them, *à fortiori* no authority to confer upon him legislative powers which it did not itself possess.

It was sought to support this part of the award on the ground that it was in effect a direction as to conditions of employment. In my opinion the conditions of employment which the President has power in a proper case to regulate are the external conditions in which a workman will find himself when engaged in work (including, of course, wages and companions) and do not include stipulations as to the liability of his employer to him in respect of matters that may happen while employed.

The distinction between the matters over which he has and those over which he has not jurisdiction is, I think, as I suggested during the argument, a distinction between matters which were when the Constitution was framed commonly regarded as subject matter for agreement and matters which were then regarded as subject matter for legislation. Compensation for injuries appears to me to fall within the latter class.

A further provision in the award that the liability to, and amount of, such compensation should be determined by a Board of Reference is open to the further obvious objection that it is an attempted creation and delegation of judicial powers, which by the Constitution are vested in federal Courts.

With regard to the point suggested by the Bench but not argued at the Bar, that the application for a prohibition is too late, since the arbitral functions of the President terminate with the making of the award, and his powers of enforcing the award are judicial, it

is sufficient to refer to the well known rule that prohibition may be applied for so long as anything remains to be done under the judgment impeached: *Roberts v. Humby* (1). The foundation of the writ being that jurisdiction has been usurped, the writ is directed to the person who has usurped it, whether the execution of the judgment requires his further personal intervention or not. In the present case one of the orders *nisi* has, apparently *per incuriam*, been drawn up directed to the Court of Conciliation and Arbitration instead of to the President, but the error is not of any consequence. There is, however, no room for the objection, for the Act provides (sec. 11) that "there shall be a . . . . Court . . . . which shall be a Court of Record, and shall consist of a President." It is impossible to contend that his personality can be divided into two parts, one that which makes the award, the other that which has large powers to enforce obedience to it.

The importance of the rule that prohibition may be granted so long as anything remains to be done under the judgment is enhanced by the provisions of sec. 28 of the Act, which, if valid (on which point it is not necessary to express an opinion), would have the effect of transferring the control of the business of all the 560 respondents to the claim to the President in perpetuity.

For the reasons which I have given I am of opinion that the orders *nisi* should be made absolute.

BARTON J. Having had the advantage of reading the judgment of my learned brother the Chief Justice, in which I agree, I do not propose to deliver a separate judgment.

The cases are now numerous in which the Judges of this Court, or a majority of them, have laid down the principles on which sec. 51 of the Constitution is to be interpreted. They were recently endorsed in the judgment of the Judicial Committee of the Privy Council in the case of *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (2), delivered in December last (See particularly pages 653 *et seqq.*).

The judgment of my learned brother is based mainly upon these principles. I have taken part in most of the decisions in which

(1) 3 M. & W., 120. (2) 17 C.L.R., 644.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Barton J.

they have been declared, and it would be unnecessarily wearisome to pronounce them again to-day. But I cannot, without departing from them, accede to the arguments which have been advanced on behalf of the respondent Federation. Applying sub-sec. xxxv. as hitherto construed, and our previous decisions, to the facts now before us, of which his Honor has expressed a view in which I agree, I cannot but arrive at the same conclusions.

I think there is nothing in the preliminary objection, with which the Chief Justice has adequately dealt.

I therefore agree that the prohibition ought to go.

ISAACS J. (1) *President and Court of Arbitration.*—It is desirable to clarify the position at the outset in order to understand the problems the Court is called upon to consider.

The President as arbitrator exercises the functions attributable to sub-sec. xxxv. of sec. 51 of the Constitution. He settles a dispute by making an award. That power is arbitral only, and though in a certain sense judicial (*Spackman* v. *Plumstead Board of Works* (1)), is not part of the judicial power of the Commonwealth within the meaning of Chapter III. of the Constitution. As Lord *Selborne* says, "He is not a Judge in the proper sense of the word."

The real nature of his functions I have described at some length in *Whybrow's Case* [No. 1] (2). The article "Roman Law in the Roman Drama," in the Journal of the Society of Comparative Legislation for October 1913 (at p. 562), contains a passage not inapt to express the arbitrator's position. It is this:—"The special function of the arbiter is to determine a dispute not like the *judex* by mere strict *Jus Quiritium*, but by considerations of moral fairness which are applied by him in different ways so as to meet the countless combinations of circumstances which may be brought under his notice."

When the award is once made, then—except for varying it, which is an exercise of the same authority as that under which it was originally made—the President is *quâ* arbitrator *functus*. As I stated in the recent prohibition case (*The Tramways Case* [*No.* 1] (3)), the

(1) 10 App. Cas., 229, at p. 240. (2) 10 C.L.R., 266, at pp. 316 *et seqq.*
(3) 18 C.L.R., 54.

mere fact that the President is even for this purpose called a "Court" may be disregarded. It neither adds to nor detracts from the constitutional power of his actual substantial authority conferred by the Statute.

The rights of the parties are created by the award under the authority of the Act supported by the Constitution. The enforcement of those rights when created belongs to the judicial branch of the Government.

To this end, there exists the Court of Conciliation and Arbitration as a true Court of Record, its powers and authorities expressly conferred by the Statute, being derived from the sections of the Constitution referring to the judicial power. As a tribunal it is distinct from that of the President sitting as a mere arbitrator; as distinct as if different individuals presided in each case.

(2) *Jurisdiction of Court of Arbitration.*—It is now established law that both tribunals are subject under sec. 75 (v.) to prohibition —of course, in a proper case; and the first question is whether the present is a proper case. That depends on whether the Court has been given jurisdiction to determine the various questions agitated in the present case. If it has, then prohibition does not lie, on the principles recognized and acted on in *R.* v. *Deputy Industrial Registrar*; *Ex parte J. C. Williamson Ltd.* (1), and cases there cited.

The authority of the President to make an award was made by sec. 38 of the Act, as originally framed, contingent upon (*a*) the existence of the necessary dispute and (*b*) the dispute being brought within the cognizance of the Court. See, for instance, *per O'Connor* J. in the *Broken Hill Case* (2), and myself in *Whybrow's Case* [No. 2] (3) and *Allen Taylor's Case* (4). This, as will be presently seen, is to a certain extent modified, but the Act still, as I read it, makes the existence of the requisite dispute a condition of the exercise of jurisdiction, and not, even in the case of the Court, a *res judicanda*, in other words a matter to be judicially ascertained and determined by that Court, in the manner described by

(1) 15 C.L.R., 576.
(2) 8 C.L.R., 419, at p. 449.
(3) 11 C.L.R., 1, at p. 56.
(4) 15 C.L.R., 586, at p. 607.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Isaacs J.

Lord *Esher* M.R. in *R.* v. *Commissioners for Special Purposes of the Income Tax* (1).

I therefore think the present a proper case for this Court to entertain, and in which to ascertain for itself whether the necessary condition exists for the exercise of the assumed action of the party and the Arbitration Court in relation to the enforcement of the award as it stands.

(3) *Industrial Dispute extending, &c.*—It is important to remember that the question is as to the existence of an industrial dispute extending beyond the limits of one State. I emphasize the importance of so stating the question for the following reason :—It has been not uncommon to separate this question into two parts, the first being the existence of a dispute, and the second the extension of that dispute.

That process was followed in the argument in the present case, and, as usual, led to some confusion. It was argued that there were several distinct disputes which, if I may employ my own paraphrase of the argument, were merely sought to be fastened together by the plaint, while still retaining their separate individuality, and have never become fused into a single dispute.

And the test from the constitutional standpoint suggested by the applicants is this : Can each State effectively settle the controversy within its own borders ? If that only means, to inquire whether in fact there is what is known in the industrial world, apart from any special constitutional limitation, as an industrial dispute, which as a matter of fact extends beyond one State, it adds nothing to the discussion. The answer to the question must then be, Yes, if the controversy does not in fact extend beyond the State.

If, however, it is proposed—as was intended—as an independent legal standard to measure how much of the whole Australian power over industrial disputes is granted to the Commonwealth, and how much reserved to the States, it needs separate examination, as raising a distinct and highly important question respecting the limitation of this power *inter se* as it is termed, that is, whether that is the true line of demarcation separating Commonwealth from State

(1) 21 Q.B.D., 313, at pp. 319-320.

authority. And as in such a question this Court, subject to its own certificate, is absolutely the final tribunal, it behoves us to be specially careful of the conclusion at which we arrive. To say that it involves the construction of a power is irrelevant, as is clearly shown by the judgment of the learned Chief Justice and *Barton* and *O'Connor* JJ. in *Baxter's Case* (1). Construction is necessarily involved as to every power granted, but here the demarcation of Commonwealth and State powers is also *ex hypothesi* in question, and is always so except as to those powers that are new and never were within State competency—as sec. 51, sub-secs. x., xxix., xxx., xxxi.; sec. 52 (i.); the Federal Judicature; sec. 119, and so on. The judgment of the Privy Council in the recent *Sugar Commission Case* (2), in this respect, at all events, leaves nothing in doubt. Whatever else it determines, apart from the particular case, remains to be considered.

The test so presented, when considered on its merits, in substance, amounts to this: Industry may in fact in some particular branch be convulsed by reason of identical demands and refusals from end to end of Australia—as in the great maritime strike of 1890, which so greatly influenced the introduction of the power in the Constitution; yet, if it can be shown that by separate and possibly discordant legislation or administration in the various States, the controversy can be "dealt with," which, I presume, means "ended" in some way—whether forcibly or peaceably does not matter, whether by repression, concession, conciliation, arbitration or fine, imprisonment or death, is immaterial—so long only as each State can "end" the controversy in its own way, and whether it chooses to do so or not, the Commonwealth jurisdiction does not arise. The mere statement of the position, which is the inescapable outcome of the suggested test, so clearly answers itself that comment is unnecessary. That test is clearly opposed to the definition of "a dispute extending" given by *O'Connor* J. in the *Jumbunna Case* (3), and repeated by him in the *Broken Hill Case* (4), and if it be sound I am not aware of a single instance of a Commonwealth award made that could stand its application. The last mentioned

(1) 4 C.L.R. 1087, at p. 1119.
(2) (1914) A.C., 237; 17 C.L.R., 644.
(3) 6 C.L.R., 309, at p. 352.
(4) 8 C.L.R., 419, at p. 446.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

ISAACS J.

case was distinctly one where each State might have easily dealt with the local demands. The suggestion is open to the further objection that it is really an "implied prohibition," a doctrine repelled by the Privy Council in *Webb* v. *Outrim* (1).

If there be drawn in to its aid another suggestion—quite independent, and affirmatively advanced by the applicants—namely, that there must be some competition among the employers concerned, the answer is that given by me in *Allen Taylor's Case* (2), which is, in short, that it substitutes *commercial* unity which is *external* to the industrial operations, and affects employers only, for *industrial* unity which is an *internal* consideration, and affects both employers and employees alike. If, beyond this mutual industrial bond, anything further is needed by way of community of interest among the respective disputants on each side, the employers have it in employing labour for the same class for industrial enterprise (*per O'Connor* J. (3)), and the employees have it in engaging in the same class of industrial enterprise. Again, the *Broken Hill Case* (4) is a precedent against the contention that competition between employers is a necessary element. There the employer in both States was the same company—making competition impossible; but if, as I stated in the *Jumbunna Case* (5), the *nexus* of an industrial dispute is "the industry" itself, that is, the means of satisfying public requirements over the given area, the identity of the employer in that case made it an *à fortiori* example. The passing, but not decided, opinion of the learned Chief Justice in the *Broken Hill Case* (6) goes even further. Competition, however finding place in individual judgments, has never been adopted as a test by this Court.

Now, the problem is not whether the New South Wales dispute extended into Victoria and ultimately became a Victorian as well as a New South Wales dispute, or whether the Victorian dispute extended into New South Wales and so added the latter State to itself, or whether either of these single State disputes gathered in South Australia, Queensland and Tasmania as an accretion. If the matter commenced simultaneously in several States, it is obviously impos-

(1) (1907) A.C., 81.
(2) 15 C.L.R., 586, at p. 623.
(3) 12 C.L.R., 398, at p. 435.
(4) 8 C.L.R., 419.
(5) 6 C.L.R., 309, at p. 373.
(6) 8 C.L.R., 419, at pp. 431-432.

sible to say that the dispute extended from any one of the States concerned into any other. The truth is that the question is inseparable. The industrial disputes referred to in the Constitution are disputes which at the given moment are seen to possess, besides their industrial quality, a certain indispensable character of extent. They are industrial disputes which at the moment do in fact *extend* beyond the limits of any one State, that is, which *cover Australian territory* that is not confined to the limits of any one State. They may originate in one part or several parts of the Commonwealth, just as a physical eruption may originate in one or several portions of the body and spread, or they may originate—as in the present case—by a synchronous growth all over the area affected. Sub-sec. XXXVII. of sec. 51 is a useful instance of the word " extend " in this sense.

If a given industrial dispute answers the requisite geographical character, it is *ex vi termini* not a " State " dispute. It is, when considered in its integrity, neither a single nor a multiple State dispute, nor a *fasciculus* of separate State disputes; it is an *Australian dispute*, and cognizable as such by the Commonwealth authority. It is, when regarded as an entity, as distinct from a State dispute or State disputes as inter-State commerce is distinct from the intra-State commerce of one or of several States. An inter-State commercial transaction, such as the carriage of goods across the border, is not a combination of two intra-State transactions of carriage, although it is transparent that, so far as relates to its own limits, each State could deal with the act of transit.

The mutual limits of States are referred to in sub-sec. XXXV., not as introducing the political effect of the several State Constitutions, or as collecting separate State industrial disputes, but as providing for this purpose a geographical landmark on the soil of the Commonwealth territory, whereby to indicate the national character of an industrial dispute ; that is, whenever in fact it exists on both sides of a boundary of two States, which an industrial dispute may do, paying no attention whatever to their geographical or political separateness.

To determine whether such an industrial dispute existed at the date of the award and was then within the arbitrator's cognizance, we have to regard the actual situation of the parties in the industry.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Isaacs J.

The problem is: Were the claimant employees and the respondent employers in such a situation relatively to each other that over the necessary area an industrial demand was made or several industrial demands were made and refused, so as to answer the concept of an industrial dispute as formulated in *Allen Taylor's Case* (1), re-affirmed in *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co.* [*No.* 2] (2), with the concurrence of my learned brothers *Duffy* and *Rich*, and adhered to in the *Felt Hatters' Case* (3)?

It is a pure question of fact. The Constitution looks to the fact of dispute or no dispute, over a territorial extent transcending the limits of any one State, and involving the hard and serious fact of possible or actual interruption of public services in connection with the industry, over the area occupied by the dispute. We have consequently to consider the actual circumstances of the industrial relations of the parties concerned, unembarrassed by legal theories that find no place in the words conferring the power, that do not and cannot alter economic realities, and have no power to satisfy the material requirements of the contesting parties, or to supply the public wants in case of interruption, and which therefore cannot be supposed by implication to stand in the way of the operation of the constitutional authority given and thereby to obstruct the rectification of the public evils coming within the ambit of that authority.

"The commanding principle," says Lord *Shaw* in *Butler* v. *Fife Coal Co.* (4), "in the construction of a Statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable." I know of no legislative provision to which the "commanding principle" can in its integrity as a guide to legal construction be more appropriately applied.

It is said in the first place that the very nature of the building

(1) 15 C.L.R., 586, at p. 609.
(2) 16 C.L.R., 705, at p. 712.
(3) 18 C.L.R., 88.
(4) (1912) A.C., 149, at pp. 178-179.

trade is such as to preclude an extension of a dispute because building is local: a house is rooted to the spot.

If one bears in mind the true question above stated no such difficulty can arise.

The question I ask myself is: Was there at the proper time existing in the building trade and extending over an area comprised in more than one State, a dispute between the parties to the award, relative to the industrial conditions of that trade?

The employees in the trade, for many years before organized in State Unions, formed themselves in September 1910 into a federal organization called the Australian Builders' Labourers' Federation. The facts clearly establish that the trade employees covering an extent of territory constituting portions of several States—namely, Queensland, New South Wales, Victoria, South Australia and Tasmania—on or about 10th May 1912 caused to be served upon their employers covering the same area a written demand for an alteration of mutual trade rights and obligations. This demand took the form of a log, which is in fact a code of stipulations. The letters enclosing the log (1) asked for agreement to the terms enumerated; (2) asked for a meeting to draw up an agreement to be ratified as an award; and (3) stated that failing a satisfactory agreement the dispute would be submitted to the Court. It is admitted the demands were all absolutely refused.

The demand by one side that the other shall accept a certain code of rules and the refusal by the other side to so accept have long been recognized as sufficient to cause an industrial dispute. Taking, for example, the Board of Trade Reports as far back as 1895, we find (*House of Commons Papers* 1895, vol. 92, p. 324, p. 114 of Appendix I.) that in the ship painters' trade in Liverpool there were a strike in one firm and a lockout in twelve others, because the men refused to accept a new code of working rules drawn up by the employers' association allowing men to be taken on for a quarter of a day. There were 100 men concerned and the dispute lasted from 22nd October to 6th November. In the report for 1900 relating to 1899 (vol. 83) we find instances such as dispute of painters at Todmorden for "advance in wages from 7d. to 8d. an hour and a code of working rules" (p. 481); so at Ludlow as to carpenters

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Isaacs J.

and joiners (p. 485); so at Uttoxeter and Norwich with bricklayers (p. 487); so at Gosfort—building labourers (p. 489), and other instances in the same report.

The mere fact that a code is presented as a whole instead of each item being fought over piecemeal is, therefore, neither novel in fact nor different in principle.

It is clear in the present instance that the demand was deliberately framed, considered and made, and has been persisted in; and that the refusal was and is as deliberate and persistent. The plaint was filed on 9th July 1912. *Primâ facie* at all events there was in fact a dispute over the whole area, and not the less so because the demands were plainly and categorically inscribed on paper: See *Allen Taylor's Case* (1).

There is absolutely no evidence to the contrary. If there were, the matter might be different. That would depend on the weight of the evidence. For it must never be supposed that this is a decision which asserts that a mere demand and refusal in all cases *constitutes* an industrial dispute, which is very different from saying that a regular and formal demand for altered conditions and a distinct refusal is *primâ facie evidence* of such a dispute; or that a mere claim by plaint to regulate an industry is sufficient to give jurisdiction to the Commonwealth Court.

In all cases the Court is bound to be satisfied of the existence and reality of the dispute, and if the circumstances show that the *primâ facie* appearance of the industrial relations of the parties is incorrect, it will say so, and refuse to proceed. Further, if, on prohibition, that appears to this Court, the Arbitration Court may be restrained. And if the Arbitration Court proceeds, it determines on the justice and reasonableness of the demands, according to the whole circumstances as then existing, and having regard to the public interests and for that purpose to what is fair as between the immediate parties. That is its special constitutional function, a function that the Constitution thought not properly performable otherwise.

This is the basis on which industrial arbitration has, without untoward or dangerous results, proceeded for many years in New South Wales, and apparently in New Zealand (see the cases cited

(1) 15 C.L.R., 586, at pp. 620, 621, 622.

in *Allen Taylor's Case* (1)); and unless some artificial element is added to the natural meaning of the word "dispute," an element not to be found in the language of the Constitution, or Act of Parliament, it is difficult to see how any other course can be pursued consistently with ordinary judicial methods. The view here expressed, in short, maintains the true position of the Court as the mere interpreter of the law, and guards against the judiciary assuming the rôle of legislators by adding to the language of the law, for any reason whatever, something it does not contain. What evidence there is in the present case on the subject shows a long period of struggle on the part of the employees to get better conditions, marked at intervals by Wages Boards' scales in various States, and by efforts on one side to confine the remedy to State provision, and on the other to get the desired improvement, if not by State provision, then by Commonwealth award. There is no evidence whatever that the employees were ever contented with the conditions of their employment. The refusal of State Boards to accede to their demands left them not satisfied, but disappointed.

These State awards did not produce in the workers an intention of abandoning their claims, but left them still discontented and determined to try further for the attainment of their wishes, leaving it to the only tribunal left to determine for itself how far these wishes were justifiable or not.

Until a comparatively late period the question of "insurance," as it is called—that is, of securing an assured compensation in the event of accident—was not generally adopted. But it was adopted and deliberately considered and included in the demand, and has since been as strenuously insisted on as any other term of the log, and now as an item of dispute stands in no different position from the rest.

But, say the applicants, there cannot be an extension of a building dispute in a State, because of the essential localization of building operations. This question was also dealt with in *Allen Taylor's Case* (2), and on the principles there stated, and now adhered to, the objection must fail.

Reference to the Board of Trade Report for 1900 (*House of*

(1) 15 C.L.R., 586, at pp. 620, 621. (2) 15 C.L.R., 586, at pp. 622, 623, 624.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Isaacs J.

Commons Papers 1900, vol. 83, p. 427 and following pages) confirms that view and furnishes a complete practical answer to the objection of impossibility of a building trade dispute extending. Commencing with a demand early in January 1899 by the plasterers of three London firms, the matter by the end of that month assumed so wide an aspect that the National Association of Master Builders of Great Britain and Ireland called on the National Association of Operative Plasterers to give certain assurances. This being refused, the masters' association declared a general lockout against the plasterers' association. Over 2,000 men were locked out in 56 districts. At a conference in April it was stipulated that any agreement arrived at should be applicable to the whole country, and eventually work was resumed. In other branches of the building trade, friction arose in connection with the plasterers difficulty, and, as the report says (p. 431), "a strong feeling in favour of a general lockout in the building trades had developed among some of the local employers' associations especially in Yorkshire." See in *Webb's History of Trade Unionism* (1911 edition, p. 210 and following pages) for the instructive instance of the builders' London strike in 1859, and its important unifying effect on the trade union movement. It would be singular, indeed, that the very trade which by its actual disputes led to such unification should be considered the trade *par excellence* incapable of concerted action. The great English building dispute now in actual progress is a significant disproof of the applicants' contention.

It has been worth while dwelling upon the concrete instances, because the same argument has been on various other occasions advanced, that employers in different States and unconnected by actual business inter-relations cannot be involved in the same industrial dispute. And on the present occasion, as already stated, it was urged that the building industry was the strongest example of industrial isolation. If that were true, there could not be a united State dispute in that industry in New South Wales, because there is no greater industrial cohesion between Albury and Newcastle than between Sydney and Melbourne.

But if a single national dispute is possible in that trade, it affords some hope that the last has been heard of the contention referred to.

I would add this further observation, that in respect of a subject of this nature—involved it is true in unavoidable complexities of circumstance, yet not like Jonah's gourd the product of a night but the result of a long period of growth and development still proceeding —an hour spent in observing the actual and recorded line of progress and the accepted terminology of the subject will often tend more to a proper understanding of the question than a week of debate resting on mere conjecture, and will therefore conduce to the shortening and clarifying of issues and arguments.

(4) *Compensation for Risks.*—The next contention is that compensation for risks of accident is not an industrial condition at all. In the circumstances, nothing said on this subject on the present occasion will be of any binding force, but as some views are expressed I add my own. In my opinion it clearly is. If the matter be regarded from the standpoint of reality, we must recognize that in industrial occupations the worker has two things to encounter as necessarily and inherently incidental to his occupation—the physical demand upon him to perform the task allotted, and the risks (if any) of attendant danger. See the judgment of Lord *Herschell* in *South* v. *Baker & Sons* (1). If the compensation for the first is an industrial condition, it is impossible to deny the same character to compensation for the other.

The principle in controversy is: Shall pecuniary compensation for the risk be allowed at all? If allowed at all, then the particular form which that compensation may take is a detail. The amount of it is another detail. The conditions upon which the obligation to pay arises when the risk has eventuated in injury is a further detail.

Reliance was placed upon the fact that, as in the English Act of 1906, serious and wilful misconduct of the employee causing the accident does not afford any answer to a claim if death or serious and permanent disablement ensues. The point made was that such a provision was not a condition of employment, not an industrial condition. "Conditions of employment" as used in the Act, as expressed in the judgment of my brother *Rich* and myself in the recent *Tramways Case* (2), are the elements that constitute the

(1) (1891) A.C.. 325, at pp. 362, 363. (2) 18 C.L.R., 54.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

ISAACS J.

necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment in the industry. See the use of the expression by *Haldane* L.C. in *Watkins' Case* (1). I am unable to see any principle why such a provision as this, is not an industrial condition any more than a provision that wages should be paid notwithstanding serious and wilful misconduct and disobedience during the time they are claimed for. But it is really, in my opinion, answered by decisions of the House of Lords.

In *Fenton & Co. Ltd.* v. *Thorley* (2), and again in *Clover, Clayton & Co. Ltd.* v. *Hughes* (3), it is laid down that the "accident" essential to liability is "an unlooked for mishap or an untoward event, which is not expected or designed."

Next, in *Moore* v. *Manchester Liners Ltd.* (4) it was pointed out that "in every case the accident, to be a ground of compensation, must also be one arising out of the 'employment'"; and the Lord Chancellor observed (5) that the danger incurred in that case was "in its nature incidental to the service."

In *Barnes* v. *Nunnery Colliery Co. Ltd.* (6) the House of Lords held that a boy doing a prohibited act by which he placed himself outside the range of his service was not entitled to the benefit of the Act. His death ensued, and so the case is exactly in point. The judgments show that to bring the case within the Act the accident must always be caused by something "reasonably incidental to the employment." Lord *Atkinson* said (7):—"Wilful misconduct is out of the case since death ensued, and, indeed, its existence cannot in any case help to a decision as to whether an injury by accident arose out of or in the course of a workman's employment; so that whether the deceased knew of the danger he was running or did not know of it is irrelevant. In these cases under the *Workmen's Compensation Act* a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment. A peril which arises from the negligent or reckless manner in which an employee does the work he

(1) (1912) A.C., 693, at p. 702.
(2) (1903) A.C., 443.
(3) (1910) A.C., 242.
(4) (1910) A.C., 498, at p. 501.
(5) (1910) A.C., 498, at p. 500.
(6) (1912) A.C., 44.
(7) (1912) A.C., 44, at p. 49.

is employed to do may well be held in most cases rightly to be risk incidental to his employment. Not so in the other case." And, further on (1) :—" The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employment. That is the crucial test."

Finally, *Plumb* v. *Cobden Flour Mills Co. Ltd.* (2) is to the same effect.

So we have it clearly laid down that serious and wilful misconduct, if within the scope of the employment, does not prevent the risk being incidental to the employment; and, if beyond that scope, there is no right to the compensation, because the risk then is not incidental to the employment.

(5) *Form of Award as to Compensation for Risks.*—Incidentally in connection with the clause in the award as to compensation, it appeared that the clause in the demand is not in the same form. Both are for " insurance," but the one in form by a third person at the master's expense, the other by the master direct. There is a difference in wording, and perhaps in strict legal construction, and yet the difference may have presented no real or substantial difference to the parties; and so may have been treated by them and the President as immaterial. No objection on this ground was taken by the applicants here.

It is important, to my mind, to consider the conduct of the parties at the hearing. It appears, from what was stated and read by learned counsel during the argument, that no objection to the form ultimately adopted was raised before the learned President—that is, in point of form, though its actual adoption was strenuously contested.

For two reasons I think the verbal departure from the item in the claim cannot militate against the respondents on the present application.

First, it is a matter in which, as *Willes* J. says in *Mayor &c. of*

(1) (1912) A.C., 44, at p. 50. (2) (1914) A.C., 62.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Isaacs J.

London v. *Cox* (1), the conduct of the party, the importance of making an end to litigation, the fact that the writ of prohibition, though of right, is not of course, would lead the Court not to interfere, merely because another possible construction now presents itself.

Next, I consider sec. 38B of the Act to be most important. It consists of two amending Acts (No. 7 of 1910, sec. 8, and No. 6 of 1911, sec. 16) obviously passed in consequence of the *Broken Hill Case* of 1909 (2). Its effect is to enlarge the jurisdiction of the Court beyond the restricted conditions originally imposed by sec. 19. I do not see why the President, if he found the parties, as to this item, disputing in fact, even after the plaint as to the matters contained in par. 18 of the award, could not deal with it in his award. The Constitution would be satisfied, because there would be an industrial dispute to settle; and unless the Act interposed some preliminary restriction as in sec. 19 unqualified by later legislation, then under the wide terms of sec. 18 there would be nothing to prevent an award upon the subject in dispute.

I consequently attach no importance to the fact of a possible variance between the item as demanded, and as awarded.

(6) *Board of Reference.*—There remains the objection as to the Board of Reference. I observe, from the notes, that a question was raised as to the jurisdiction to transfer the powers in question to the Board.

In my opinion, some of the powers so transferred are not arbitral but enforcing, and therefore strictly judicial. The Court itself, or some Court, must undertake them as occasion arises, and not confer them on another tribunal: See *per Charles* J. in *In re London Scottish Permanent Building Society* (3). In this respect I agree that the application must prevail.

I would add that even if instead of the Board of Reference a specified Court had been substituted, it would have been beyond jurisdiction so far as relates to enforcement of rights.

But the nomination of the Board has a further relevance. It has been imported into the First Schedule to decide—par. 7

(1) L.R. 2 H.L., 239, at p. 283. (2) 8 C.L.R., 419.
(3) 63 L.J.Q.B., 112.

of that Schedule—questions of who are dependants, also in par. 9 as to variation of order, and so on. Now, this comes under the general heading "Scale and Conditions of Compensation." I think this goes too far also, but, that being so, the defect strikes at the main provision, namely, that creating the right. Merely striking out "Board of Reference" will not insert "County Court" —even if that would be good, and I think it would not.

The result is that the whole provision for compensation as framed is inherently invalid, the Board of Reference provision vitiating it entirely—there being no means of separation.

Extreme care is necessary to adapt the Act to the arbitral power.

Apart from pars. 18 and 19, I think the application should be refused.

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

GAVAN DUFFY J. In the case before us it is sought to prohibit the parties and the President of the Court of Conciliation and Arbitration from proceeding or from further proceeding in a plaint and upon an award so far as the plaint and award relate to the applicants. It is now settled law that prohibition will lie to the Court of Conciliation and Arbitration or the President to restrain the usurpation of jurisdiction, but it is said that the functions of the Court are arbitral in making the award and judicial in enforcing it, and that in the case we are considering the arbitral functions have been completely discharged. Then it is suggested that nothing remains to prohibit with respect to the arbitral functions, and that with respect to the judicial functions it is the duty of the Court of Conciliation and Arbitration when asked to enforce its award (as it would be the duty of any other Court under the circumstances) to inquire and determine for itself whether the award was valid or not, and that it should not be restrained from making such inquiry and determination.

The question is, in our opinion, worthy of argument and consideration, but it received scant consideration and no serious argument during the hearing. Counsel for the respondent announced that he was instructed not to take any preliminary objection, and declined to argue the point. Counsel for the applicants contented them-

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Gavan Duffy J. Rich J.

selves by saying that the arbitral functions had been completely discharged because the Court of Conciliation and Arbitration had power to vary the award under the provisions of sec. 38 (*o*) of the *Commonwealth Conciliation and Arbitration Act*, and might do so in the future. Had it been necessary we must have decided the question without the assistance of counsel, but as our colleagues have been able to do so and thus pronounce a judgment of the Court, we are glad to be relieved from the necessity of expressing any opinion with respect to it.

We next come to a question the investigation of which necessitates an inquiry into the conflicting rights of the Commonwealth and the States. It is said by the applicants that there is no dispute extending beyond the limits of any one State. First it is urged that the nature of the industry is such that a dispute in it cannot be one "extending beyond the limits of any one State" within the meaning of sec. 51 (xxxv.) of the Constitution. We are asked to say that some limitation must be put on the natural meaning of these words so as to preserve to the States as far as possible the right which they had before the passing of the Constitution Act to deal with disputes within their own boundaries. The limitation suggested may be expressed thus:—A dispute in the industry cannot extend beyond the limits of one State if the industry is of such a nature that there cannot be any competition between the products of the industry in the different States, and the operations of conditions in one State cannot have any direct action or reaction upon the operations or conditions in another. This proposition is attractive because it divides disputes into two distinct classes, and reserves those in one of the classes for settlement directly or indirectly by the State legislatures; but we can find no authority for the suggested limitation either in the words of the Constitution or in any judicial decision interpreting them. Nor can we, if we attempt to ascertain the evils which were intended to be remedied, and enumerate the circumstances in which State legislation was inadequate and Commonwealth legislation was therefore necessary for the purpose of preventing and settling industrial disputes. It is true that in certain industries it was impossible for a State authority to impose what it considered equitable industrial conditions because of trade

competition with other States where such conditions were not imposed, but it is also true that it was impossible for a State authority to deal satisfactorily with any industrial dispute where the disputants making common cause and insisting on similar concessions to all were not subject to the same State legislative authority. The suggested construction is in fact an attempt to interpret sec. 51 (xxxv.) by first arbitrarily fixing the power of the State and then giving what remains to the Commonwealth, or, as has been said in homely phrase, by making the tail wag the dog instead of letting the dog wag its tail.

It is next said that even if this limitation is not to be attached to the words of sec. 51 (xxxv.) still in this case there is not one dispute extending beyond the limits of one State but a number of separate disputes existing in separate States.

A dispute extends beyond the limits of any one State when it exists in more than one State, that is to say, extends over an area which embraces territory of more than one State. When persons engaged in industrial disputes, and living some in one State and some in another, join together to insist, and do insist, on the concession of common industrial conditions which are definitely and finally refused by those from whom they are demanded, the words of the sub-section are satisfied, and that is so here. The submission by employees to employers in two or more States of industrial conditions in the shape of a common log, and the refusal by employers to concede those conditions, do not necessarily constitute such a dispute, but they are evidence of its existence. The demand may be the outcome of a settled determination on the part of the employees to have that which they demand by lawful or it may be even by unlawful means ; the refusal may be the result of an equally deliberate determination on the part of the employers. If so there is a dispute. On the other hand the demand may merely represent what the employees would like to have though they are not really discontented with existing conditions, or, being discontented, are not disposed to insist on concessions; the employers' refusal may represent a mere unwillingness to give too easily that which, if pressed, they would be ready to consider or concede. In such a case there may be no dispute. In our opinion the evidence in this case shows that the

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Gavan Duffy J. Rich J.

demand by the employees for the conditions contained in the log and the refusal by the employers to concede such conditions were the culmination and completion of a single dispute extending beyond the limits of one State.

We have not endeavoured to enumerate all the *indicia* of a dispute "extending beyond the limits of any one State," but to state certain facts which exist in the present case and which in our opinion constitute such a dispute. If these facts exist it is nothing to the purpose to divide and arrange them, and to say that what exists in any one State would have constituted a State dispute had no dispute existed in any other State. It is equally beside the question to inquire how or where the dispute originated, or whether the conditions asked for are reasonable or unreasonable. It is said that the result of all this will be that by joining in common demands employers or employees may obtain from the Court of Conciliation or Arbitration a code regulating the conditions of labour in every industry in every State. It is true that a number of disputes which in other circumstances would never have become disputes "extending beyond the limits of any one State" have become so, because some of the parties desired to be in a position to claim the intervention of the Court and deliberately took the steps they considered necessary to put them in that position; and it is probable that some of these disputes have been fostered or encouraged by registered organizations. It is also true that there is nothing to prevent so many disputes from being brought before the Court, and settled by it in the future, as to bring about something very much like the suggested result. But the same thing may happen whatever conditions are imposed as necessary to constitute a dispute cognizable by the Court so long as they are conditions which the disputants can fulfil, and so long as the performance of these conditions is not so difficult or distasteful as to outweigh the advantages expected from the intervention of the Court. It is inevitable that the establishment of a tribunal designed to satisfy or allay discontent will bring to that tribunal those who are discontented if they think the tribunal will assist them. If men feel aggrieved, or even if they recognize that by disputing they may obtain better conditions than they actually enjoy, they will dispute, whatever be the formal

conditions precedent to their so doing. The truth is that the remedy for the abuse of the power to claim the intervention of the Court of Conciliation and Arbitration is to be found not in artificial restrictions and limitations but in the sanity and moderation of the tribunal itself.

There remains the question whether clauses 18 and 19 of the award are within the jurisdiction of the Court of Conciliation and Arbitration. They make employers liable to pay compensation to employees injured in their service, and appoint a Board of Reference to adjudicate on the claims. In our opinion this is an attempt to vest in the Board of Reference judicial powers which can be exercised only by a Federal Court, and is *ultra vires*. The two clauses are interdependent, and, as clause 18 cannot stand without 19, both must go.

POWERS J. During the argument the questions raised for decision by this Court were :—

1. Is the building industry, in connection with which the alleged dispute arose, of such a nature and the work so local in its character that any dispute arising in connection with it cannot extend beyond the limits of one State, and must necessarily be a local and State dispute, and not a dispute extending beyond the limits of one State ?

2. Was it one industrial dispute extending beyond the limits of one State or only five separate State disputes, the disputants joining in one claim, or was it only, as the learned Chief Justice puts it, an industrial claim jointly preferred by employees engaged in industrial avocations in more than one State for settlement, and for the regulation of industrial matters included in or incidental to such claim ?

3. Had the Court power to make the order for workmen's compensation contained in the award challenged ?

4. Had the Court power to make the order for a Board of Reference contained in the award challenged, so far as it refers to workers' compensation ?

As to the first question, Mr. *Knox* for the applicants, I understood, claimed that a dispute in the building trade could not extend

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

POWERS J.

beyond one State on three grounds:—(1) There could not be an inter-State dispute because the building industry is of such a nature and the work is so local in its character that a dispute in the industry could not extend beyond the limits of one State. (2) There is no inter-State competition in the building industry, and there could not therefore be any inter-State dispute between employers and employees within the meaning of sec. 51 (xxxv.) of the Constitution. (3) All disputes in the building industry could (because of the nature of the work in connection with the industry) be effectively settled by the State; and the dispute could not become an inter-State dispute because under the powers reserved to the States by the Constitution the States retained the right to settle all disputes that could effectively be settled by the States.

Before proceeding to deal with the questions mentioned I think it only right as Deputy President of the Court to say that while I do not arrive at the same conclusions as my brothers the Chief Justice and *Barton* J., it is chiefly because I differ from them as to the facts proved in this case. The law as laid down by the learned Chief Justice in his judgment for the most part I agree with.

For instance, I agree with him that sec. 51, pl. xxxv., of the Constitution is not to be read as "with respect to the settlement of industrial claims jointly preferred by . . . . employees engaged in industrial avocations in more than one State, and the regulation of industrial matters included in or incidental to such claims"; but I cannot agree with the learned Chief Justice when he adds that "in the present case 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 . . . . nothing more than such a joint claim."

I also agree with the learned Chief Justice in holding that "the mere fact of the presentation of" a "log with the accompanying demand and the failure of the employers to accede to it" was not sufficient in itself to constitute an industrial dispute extending &c.

The respondents, however, contended that in this case the presentation of the log with the demand and the failure of the employers to comply with it, coupled with (1) the dissatisfaction proved in

this case, (2) prior demands made for increased wages and conditions, (3) the attempts by the respondents to secure a settlement of their demands by conference and otherwise, (4) the genuineness of the demand, and (5) the fact that it was to be persisted in to the extent if necessary of industrial disturbance in the industry if not settled by agreement or by the Commonwealth Arbitration Court, —constituted an industrial dispute.

I agree with the Chief Justice when he says that a "dispute must be something more than a claim to have the conduct of an industry regulated. It must be a real dispute." But I cannot agree that "the substance of the matter" (in this case) "is that five different sets of disputants . . . . agreed to consolidate their disputes, and to make in a single document on behalf of all a series of demands, which comprised everything that any of them had demanded"; or that "the question" (in this case) "is whether this is sufficient to constitute an industrial dispute extending beyond any one State within the meaning of sec. 51 (xxxv.)." Nor can I agree that a "dispute must be . . . . of such a nature as to indicate a real danger of dislocation of industry if it is not settled."

The *Commonwealth Conciliation and Arbitration Act* was passed to prevent any real danger of dislocation of an industry through inter-State disputes, by providing the Arbitration Court in place of dislocation of an industry by a strike; and heavy penalties were provided by the Act to prevent any real danger of dislocation of any industry. As the law now stands, there cannot, except by breaking the law, be any dislocation of any industry by persons engaged in an inter-State industrial dispute. I therefore hold an essential of a dispute cannot now be an indication of real danger of dislocation of an industry or of any other illegal act.

I have referred to some of the reasons why I dissent from the judgment of the learned Chief Justice, because, as Deputy President during the learned President's absence in England, I do not wish any body of unionists to uselessly institute proceedings in the Arbitration Court under the impression that I hold that the Commonwealth Arbitration Court has power to make a complete code for the regulation of labour—on the contrary it is a Court for the prevention

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Powers J.

or settlement of disputes by conciliation and arbitration (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1)); or to assume, because I dissent from the judgment of the Chief Justice in this case, that I hold that the mere fact of the presentation of a log of prices and conditions and the failure to accede to it necessarily established the existence of an industrial dispute extending beyond the limits of one State, without some proof of the genuineness of the demand, and the intention to persist in it if the demand is not conceded or settled.

Dealing with the questions raised in this case I fail to see anything to prevent a dispute in the building industry extending beyond the limits of one State.

The building industry is local in one sense although carried on in all the States of the Commonwealth.

All industries except transport by land and sea are local in one sense and subject to State laws—such as shearing, coal mining, gold and silver mining, building, tanning, ironfounders, bootmaking, &c.—and some meaning must be given to the words "extend beyond" in sec. 51, pl. xxxv., applicable to the chief industries established in the Commonwealth at the date of the Constitution. In the same section (51), pl. xxxvii., the word "extends" must be read as "applies"; and in pl. xxxv. I think the word "extends" must be read as "exists"— that is, the power given was one to prevent and settle a dispute which exists in more than one State, reserving the power to the State to deal as it thinks fit with disputes which exist only in the one State.

Disputes between employers and employees do not extend from one State to another in the same way as a railway does; but they extend by an increasing number of employees engaged at different places in the State or Commonwealth in the same class of industrial enterprise dissatisfied with their wages or conditions, and determined to have their wages increased or conditions altered, demanding from their respective employers the same increased wages or altered conditions, and, after the employers refuse to concede them, persisting in their demands for such increased wages or altered conditions. The fact that some of the employers and employees in

(1) 4 C.A.R., 1, at p. 7.

the dispute are on a different side of a State boundary line cannot surely of itself prevent the dispute extending.

It was admitted during the argument that a dispute in the building trade can extend from one town to the district adjoining, and over the whole of one State; but it was contended that it cannot extend beyond one State.

Shortly before the Constitution was passed by the Imperial Parliament, namely, in 1900, an industrial dispute in the building industry commencing in London did, as a matter of fact, extend from London over England and into Ireland, Scotland and Wales, including 58 districts. (See *House of Commons Papers* 1900, vol. 83, p. 427 and following pages, referred to by my brother *Isaacs*). The industrial dispute in the building industry in that case extended across the border between England and Scotland and across the Irish Sea dividing England from Ireland, and I cannot conceive how the fact that the States in the Commonwealth are under different State Governments could in any way prevent a dispute extending in the same way beyond the limits of one State. Home Rule for Ireland and Home Rule for Scotland and Wales, if granted, will not prevent disputes in the building industry again extending across the borders from England to those countries if the circumstances necessary to cause such a dispute to extend arise.

I hold that if all the other essentials of an inter-State industrial dispute are present there can be a dispute in the building industry extending beyond the limits of one State.

As to ground No. 2 of question 1—namely, there cannot be inter-State competition in the building industry between the employers; and for that reason alone a dispute (within the meaning of the words in sec. 51, pl. xxxv., of the Constitution) cannot extend beyond one State and must necessarily be a State dispute.

This contention that the Commonwealth Arbitration Court could not be legally empowered to prevent or settle industrial disputes if there were no inter-State competition between the employers was strongly urged upon the Court.

I do not find anything in the Constitution to warrant me in holding that, when the power was given to the Commonwealth to make

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Powers J.

laws with respect to the prevention and settlement by conciliation and arbitration of *disputes* extending beyond the limits of one State, it was only intended to include disputes in industries where there was inter-State competition between the employers in the products of the industry, or otherwise; and that industrial disturbances extending as a fact over the whole Commonwealth were to be allowed to continue to the great loss of the community—as well as to the disputants—if there was no inter-State competition in the industry affected. The Constitution authorizes the Commonwealth to make laws with respect to the settlement by conciliation and arbitration of disputes if they are inter-State, without any qualification. If the contention is correct, a genuine inter-State dispute between employers and employees (even for a living wage) extending to all the gold mines in Australia would have to continue without the Commonwealth Arbitration Court having any power to interfere to prevent or settle it; and no one State could settle the inter-State dispute effectively. Further, if the contention is correct the Arbitration Court had no power to settle the great Broken Hill dispute about wages and conditions in connection with work done at the silver mine in New South Wales and the smelting works in South Australia, in connection with those mines owned by one employer, but the Arbitration Court did settle that dispute, and the High Court, when prohibition was asked for, upheld the award made in that matter by the Commonwealth Arbitration Court.

If it is sufficient from the nature of the industry that there could be inter-State competition, then that applies to the building industry where contracts for large works can be, and are, competed for by contractors in the different States. This competition may be increased.

If there must at the time of the dispute be inter-State competition in the industry between the employers, then disputes extending beyond the limits of one State in the following industries cannot be settled by the Commonwealth Arbitration Court:—In the inter-colonial shipping industry, because the shipping companies are not in inter-State competition with each other—this is common knowledge; in the shearing industry, because the squatters and graziers are not in inter-State competition with each other; in the coal

mining industry of Queensland, Victoria, Tasmania and Western Australia, because there is not any inter-State competition between them, and a dispute in New South Wales only would be a State dispute. These were the three great industries in which recognized inter-State disputes and strikes occurred before the Constitution was passed.

I do not agree with the contention, but, even if it was a good one, the claimants proved that there is to some extent inter-State competition in the building industry in the Commonwealth.

As to the third ground of question 1, I do not think it can be questioned that the States do retain the right to settle all State industrial disputes in their own way, so long as they continue State disputes; and if a dispute is a State dispute only, and can be effectively settled by the State, the Commonwealth has no power to interfere; but I think it also just as clear that once the industrial dispute extends beyond the limits of one State the power to prevent or settle it by conciliation and arbitration is vested by the Constitution in the Commonwealth, and not in the States.

The State retains the right to deal with all industrial disputes because they are local and State disputes so long as the dispute exists in only one State, and to make its own industrial and factory laws, and to decide upon the conditions under which the industry is to be carried on in the State. The State also has the power to tax the State industry to any extent it may think fit; but that does not prevent the Commonwealth from taxing the land on which the industry is carried on, even if the owner carries on the industry in one State only, however seriously it affects the industry—simply because the Constitution gives the Commonwealth Parliament the power to tax. In the same way although the industry is local the Commonwealth power to prevent and settle industrial disputes existing in more than one State can be exercised by the Commonwealth Arbitration Court to the extent necessary to prevent or settle the industrial dispute existing in more than one State. The States have no power to create Courts or tribunals to prevent or settle disputes extending beyond one State. The State Wages Boards' jurisdiction is limited not only to area, but to subject matters also, and to fixing a minimum wage only. The part of the inter-State

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Powers J.

dispute within the State borders could not be settled effectively, or at all, by the State Wages Boards.

As to question 2—Was it one industrial dispute extending beyond the limits of one State within the meaning of the Act and the Constitution at the time the plaint was filed; or was it only five separate State disputes—the disputants joining in one claim; or, as the learned Chief Justice put it, was it only an industrial claim jointly preferred by employees engaged in industrial avocations in more than one State for settlement and for the regulation of industrial matters included in or incidental to such claim?

This Court has on several occasions given definitions of what a "dispute" is, and what an industrial dispute extending &c. is, and the evidence in this case I hold proves every essential laid down from time to time as necessary to constitute such a dispute.

Take, for instance, the alleged dispute as to wages—

(1) There was dissatisfaction and discontent by the employees in all the States at the time the plaint was filed at the rate paid by the employers. This is proved in all the States by the affidavits filed and the evidence to which this Court has been referred.

(2) The dissatisfaction and discontent was not caused by sympathy only for employees in one State, but because the employees in all the States were dissatisfied with the wages they were receiving at the time.

(3) The dissatisfaction was warranted in each State, for the learned President found the employees (the builders' labourers), were not receiving even a living wage in any of the States.

(4) The dissatisfaction was communicated to the employers in each State (although that has been held not to be necessary in every case) by demands made for increased wages, by requests for conferences, and even by strikes of builders' labourers in three of the States before the final demand of the federal Union with the log. In all the States, on the evidence before the Court on the affidavits filed, there would have been a strike of the federal Labourers' Union members throughout all the States for the better wages and conditions demanded if the officials of the federal Labourers' Union had not urged the members, time after time, to

let the common dispute be settled by the Arbitration Court, instead of by one strike in all the States.

The demand was a genuine one caused principally by a common need for a living wage for builders' labourers in the industry throughout the Commonwealth. The demand in this case was in the form deemed sufficient in other prohibition cases before this Court, namely, one for wages (and other conditions) or for a conference if the demand was not acceded to. The refusal to grant the claims made, or any of them, and the refusal to confer have been proved. The demand was persisted in. The evidence shows that in each of the States the members of the federal Union persisted in the demand all along, but chose to allow the common dispute to be settled by the Arbitration Court instead of by a strike to secure what they demanded. There was a delay between the service of the last demand prior to the demand of 12th May 1912, and the demand with the log of prices and conditions on which the plaint is based; but that was caused by the time it necessarily took to get the log submitted to all the members through all the branch Unions in five States to get it assented to by all the members, and to get the necessary authorities in accordance with the Act from all the members to the Executive of the federal Union to make the demand on their behalf as members of one Union and to take proceedings in the Arbitration Court if the dispute was not settled. The dissatisfaction, discontent, and the determination to insist on the claims, however, continued from the date of the first demand in 1911 until the plaint was filed in September 1912, and the members were only prevented by the Union officials during that time from striking to obtain their demands. This is shown by the affidavits filed in this Court.

There was a community of interest between all the employees in all the States for the same cause, namely, to secure one and the same living wage. The work done in each State was exactly similar; and the grievances complained of, which it was desired and intended to rectify throughout the Commonwealth, were the same. Employees in the States passed from one State or district to another for work as occasion arose, and were therefore affected by the wages in other States. The demand for higher wages and

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Powers J.

better conditions before the plaint was a joint one by the claimant Union, on behalf of all its members, for the same wages for each class of work throughout the Commonwealth, not for different wages or conditions in different States, and all the members wanted the same wage, not different wages and conditions in the different States.

The employers in the building industry throughout the Commonwealth also have a community of interest, for they formed a federal Union of master builders as far back as 1900 for defensive purposes to defend themselves against claims by their employees. In the *Federated Engine-Drivers' Case* (1) the late Mr. Justice *O'Connor* said :—"The common interest, for the protection of which the associated employers combine, is that which arises from their employing labour in carrying on the same class of industrial enterprise." This "Federal Union of Master Builders" after the first federal log was served met in November 1911, and dealt with the demands of the "Federal Union of Employees," and practically declared industrial war in their common interests throughout the Commonwealth by passing a resolution to oppose the builders' labourers' claim "in the log."

The only question for consideration under the circumstances mentioned is whether it was only five separate State disputes at the date of the plaint or one inter-State dispute. The evidence to my mind shows conclusively that the dispute extended in the ordinary way as one dispute for the same cause, and for the same remedy, namely, to obtain for the employees in all the States in the same class of industrial enterprise a living wage and other claims in common desired and demanded by all the members throughout the Commonwealth, and not for members in one State only.

The members of the five State Unions as far back as 1910 decided to dispense with their State Unions and to become members of one federal Union to obtain a settlement of one dispute by one federal Union of the one set of grievances existing in all the States for all their members.

The position therefore was that for some time before the plaint

(1) 12 C.L.R., 398, at p. 435.

was filed none of the States had any State Unions to make claims on the employers, and the only Union capable of making claims for their members and settling any dispute with the employers for its members was the federal Union. Whatever State disputes the State Unions had previously with the State employers necessarily ceased as such when the State Unions lapsed, although the dissatisfaction and discontent and intention to insist on redress of grievances continued and a new dispute with all the employers, after demands for increases and for conferences, &c., by the federal Union, crystallized as one federal dispute when the authorized final demand was made by the federal Union and was refused by the master builders.

Referring to *Whybrow's Case* [*No.* 2] (1), the learned Chief Justice in *Allen Taylor's Case* (2) said :—"As to those two matters this Court thought that the proper inference to be drawn from the evidence was that there was in existence a dispute existing over four States, which was single, in so far as it involved an increase of wages in each State and, as far as possible, the establishment of a uniform rate in all, and that the formal demand crystallized that dispute into a definite form."

In the present case I think the same inference can properly be drawn.

My brother *Barton* in the *Jumbunna Case* (3), dealing with the question of an inter-State dispute extending, said :—"Surely disputants in different States may make common cause to defend a common interest when it is attacked or threatened, provided that mere sympathy is not confounded with material interest"; and later on on the same page :—"I am of opinion that organizations in the States concerned in a dispute within sub-sec. xxxv. each of them consisting wholly of members belonging to one or the other of those States, may join together as claimants or be joined as respondents in respect at least of an existing dispute in which their interests coincide."

The evidence in this case proves all that my brother *Barton*

(1) 11 C.L.R., 1.
(2) 15 C.L.R., 586, at p. 601.
(3) 6 C.L.R., 309, at p. 342.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Powers J.

considered necessary to warrant him in coming to the conclusion that there was an industrial dispute extending in that case.

In the *Sawmillers' Case* (1) the late Mr. Justice *O'Connor* referring to a Commonwealth dispute said :—"If the workers so united obtain the co-operation of their fellow-workers in the same trade in another State in such a way that the combined workers in the trade in both States take concerted action against their respective employers in both States for the making and enforcing of the same demands, there is an industrial dispute extending beyond the limits of one State."

The evidence in this case to my mind proves all that the learned Judge said was necessary to prove an inter-State industrial dispute.

A common log of prices and conditions was agreed to—to remedy common grievances, and not to remedy different grievances in different States. All State grievances as to different wages claims were sunk for a common claim, and a demand was made for wages and conditions which all members required and all intended to insist upon.

I hold the dispute was one inter-State industrial dispute at the date of the plaint.

A further objection was raised that in this case a dispute did not extend beyond the limits of one State at the time the plaint was filed because the State disputes had all been settled by State Wages Boards before the plaint was filed.

That objection fails because (1) the disputes were not settled by State Wages Boards in any of the States on the evidence before the Court; (2) the State Wages Boards are not appointed to settle disputes, but only to fix a minimum wage to be paid in the particular trade in question, whether there is any dispute or not at the time in the industry.

The Board fixes a minimum wage irrespective of disputes or probable disputes. The Wages Boards simply fix a minimum wage, and the law does not compel any person to work for that wage. The employees can legally demand more than the minimum; they can legally disagree as to the amount to be paid in excess of the minimum, and they can legally cause a dispute as to the amount to be paid

(1) 8 C.L.R., 465, at p. 504.

in excess of the minimum rate; and a disagreement or dispute may legally arise, notwithstanding the existence of a Wages Board decision. This was clearly laid down by this Court in *Whybrow's Case* [*No.* 1] (1), where this Court held that the award in question as to the wages should stand, although awards from the four State tribunals affected were then in force fixing lower minimum wages than the learned President awarded in that case. Such an award was not inconsistent with the State awards fixing a minimum only. The four State awards in *Whybrow's Case* did not prevent the dispute being an inter-State dispute, and until that case is reversed by a Full Court called to consider it we should follow it.

The further objection was raised that this Court cannot be used as a Court of appeal from State Wages Boards decisions. The claimants have not asked the Court to act as a Court of appeal against those decisions, and whatever decision this Court arrives at, the State Wages Board decisions will not be affected in the slightest. They will continue in force, and the parties to this dispute will still remain subject to those awards.

It has been contended that the four State disputes have been converted into a federal dispute in this case in a way never contemplated by the framers of the Constitution—that the dispute as an inter-State dispute is only a manufactured dispute.

Surely the answer to that objection is: It does not matter how it has been made into an inter-State dispute if in fact it is a genuine industrial dispute extending beyond the limits of one State—as I think this is. The dispute if not settled, however it starts, can and will cause industrial disturbance, and the Constitution and the Act were intended to prevent and settle all inter-State industrial disputes however they arise.

So far as I can see the federal Union was formed, the federal organization was constituted and the steps generally taken by the federal Union were all in strict accordance with the plan laid down by the Commonwealth Parliament as the only way a federal organization could legally deal with employers to settle an inter-State dispute, or to have it submitted to the Commonwealth Arbitration Court for settlement.

(1) 10 C.L.R., 266, at p. 287.

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE.

Powers J.

It has been contended that the matters were all settled before the plaint by conferences and by Wages Board decisions, and after those conferences or decisions, as the case may be, up to the date of the joint demand in May 1912, there were only discontent and grumbling amongst the men not communicated to the employers and not likely to cause any industrial trouble. I cannot understand how this contention could be insisted upon, for the evidence in the notes to which we have been referred and the evidence of the claimants in the affidavits filed do not bear it out. In Victoria, Queensland and South Australia the dissatisfaction was expressed to the employers by demands and requests for conferences to settle claims in federal log No. 1, and, in the strongest way possible, by strikes. In New South Wales the Wages Board decision before the plaint was filed was made on 24th November 1909, and the last conference at which a settlement was arrived at in New South Wales was prior to that award. After that date in New South Wales the employees appealed to the Industrial Court against the decision of the Wages Board. There were conferences between the employers and employees as to claims for higher wages in September 1910, and a compulsory conference in February 1911. Applications for further conferences were made in December 1910 and in January and March 1911. Claims were made for the items in the federal logs (No. 1 and No. 2) in September and December 1910, and January, February and October 1911, and in May 1912. In December 1910 the employers were informed that the men were so dissatisfied that they were almost on strike. In February 1911 the employers were informed that the dispute would be submitted to the Commonwealth Arbitration Court. In November 1911 the employers met to consider the claims made in the federal log and resolved to resist the builders' labourers' claim in the log. In March 1912 the employers applied for a new Wages Board for minimum wages. In May 1912 the demand for the federal log was made. In Tasmania no strike took place, but dissatisfaction was expressed to the employers right up to January 1912 by demands by the men and at conferences with employers. In September 1911 an agreement was arrived at by which the employers agreed to pay Sydney rates from 1st January 1912. In January 1912 that agree-

ment was broken by the employers on the ground that notice of acceptance had been given later in October than expected. At a conference in January to consider the labourers' claims, when the representatives of the employees urged the employers to carry out their agreement, one of the representatives of the employers told them "they could go to the devil." The members preferred to go to the Commonwealth Arbitration Court, and in the meantime until the dispute was settled by the Arbitration Court to go on working if 1s. an hour, part of the extra wage the employers had agreed in September to pay from 1st January, was paid in the meantime. The dissatisfaction, discontent, and the intention to insist in the claim in the federal log continued.

I do not think it essential, but if a real danger of the dislocation of the industry is necessary to constitute a dispute, on the evidence I find that there was such a danger in this case:—(1) The chief claim made was for a living wage in the industry throughout the Commonwealth; (2) the evidence of the intention to persist in the demand is clearly proved in the affidavits filed in this case and by the many attempts just referred to to secure a settlement of the dispute; (3) the evidence also clearly shows that there was an earnest desire on the part of the members of the Union in all the States to strike to obtain their demands, and that members were only prevented from causing an inter-State industrial disturbance by the efforts of the officials of the federal Union; (4) the evidence also shows that the officials would have been unable to prevent the members of the federal Union from striking throughout the Commonwealth to obtain their common demand as to wages and some conditions, if the Arbitration Court had not been in existence to settle inter-State disputes by arbitration instead of by a strike. There was a real danger of industrial disturbance, and it was only prevented by the fact that the Commonwealth Arbitration Act was in existence.

In this case, if the evidence does not prove an inter-State industrial dispute, I hold that there was a probable dispute within any meaning of that term at the date the plaint was filed.

I personally did not agree with the decision of the Court in holding that there could be a binding award in the case of a probable dispute,

H. C. OF A. 1914.

THE BUILDERS' LABOURERS' CASE

POWERS J.

but I shall, of course, loyally adopt that decision until reviewed and reversed.

On all the grounds mentioned I am of opinion that the prohibition asked for should be refused except as to the two matters I will now refer to.

I agree that the special order in the award as to workmen's compensation in this case cannot stand; also that the order for a Board of Reference so far as it delegates to that Board judicial functions, including the determination of the many mixed questions of law and fact arising under the *Workmen's Compensation Act*, could not legally be made by the President. I agree with the learned Chief Justice that the President cannot delegate to a Board of Reference judicial functions such as he has delegated by this award to the Board, so far as workmen's compensation is concerned.

As to the question whether this Court has jurisdiction to grant a prohibition after an award has been granted, I hold the view expressed by me in March last in Melbourne in the *Tramways Case* [No. 1] (1), namely, that prohibition will lie to the President and to the Commonwealth Arbitration Court after an award while anything remains to be done under the award.

Order absolute for prohibition so far as the award relates to compensation for accidents and so far as it relates to a Board of Reference quoad hoc.

Solicitors, for G. P. Jones and others, *Ellison Rich & Rundle.*

Solicitors, for W. Cooper & Sons and others, *Finlay, Watchorn & Clarke*, Hobart, by *Ellison Rich & Rundle.*

Solicitors, for the respondent organization, *Brennan & Rundle.*

B. L.

(1) 18 C.L.R., 54.