[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE PRESIDENT THEREOF AND THE AUSTRALIAN TRAMWAY EMPLOYEES' ASSOCIATION.

EX PARTE THE BRISBANE TRAMWAYS COMPANY LIMITED.

EX PARTE THE MUNICIPAL TRAMWAYS TRUST, ADELAIDE.

[No. 2].

H. C. OF A. 1914.

Industrial Arbitration—Award—Validity—Dispute extending beyond the limits of any one State—Demand and refusal—No genuine grievance—Demand merely a means to obtain an award—Organization—Rules—Amendment—Preference to unionists—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1910 (*No.* 13 *of* 1904—*No.* 7 *of* 1910), *secs.* 4, 55 (2), *Schedule B—Industrial Peace Act* 1912 (*Qd.*) (*No.* 19 *of* 1912), *s.* 34.

MELBOURNE, *June* 1, 2, 4, 5, 8-12, 15-19, 22-26.

SYDNEY, *July* 27-31; *Aug.* 3.

MELBOURNE, *Oct.* 16.

The President of the Commonwealth Court of Conciliation and Arbitration having, on the application of an organization of tramway employees, made an award purporting to bind a tramway company in Queensland and a tramway trust in South Australia, on an order *nisi* for prohibition,

Held, by *Griffith* C.J. and *Barton*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* and *Powers* JJ. dissenting), that upon the evidence there was no dispute extending beyond the limits of any one State, inasmuch as, assuming the organization of employees to have validly served on the employers in several States a demand

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

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2].

in the form of a log of conditions of employment which the employers were required to adopt, and that demand had not been acceded to by the employers, yet that demand did not represent the real grievances of any body of employees but was put forward by the organization merely as a means of invoking the jurisdiction of the Commonwealth Court of Conciliation and Arbitration and obtaining from it an award on the most favourable terms possible; and, therefore, that the President had no jurisdiction to make the award.

The rules of an association, copies of which have been lodged with the Industrial Registrar together with an application for registration of the association as an organization pursuant to Schedule B to the *Commonwealth Conciliation and Arbitration Act* 1904-1910, may not thereafter be altered until the association has been registered as an organization, and then only in the manner prescribed by those rules.

So *held* by *Griffith* C.J. and *Barton*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Isaacs* J. dissenting).

Held, also, by *Griffith* C.J. and *Barton* J., on the evidence, (1) that the alleged dispute was not submitted to the Court by an organization, but by an irregular voluntary association of persons assuming to act in its name; (2) that at the date of the award there was no subsisting dispute extending beyond a single State, or that if there was it did not extend to Queensland.

Held, further, by *Griffith* C.J. and *Barton* J., that the award so far as it purported to extend to Queensland was invalid so far as it directed preference to unionists, as being contrary to the provisions of the *Industrial Peace Act of* 1912 (Qd.)

ORDERS *nisi* for prohibition.

This was a continuation of the hearing of two orders *nisi* obtained, respectively, by the Brisbane Tramways Co. Ltd. and the Municipal Tramways Trust, Adelaide, for prohibition in respect of an award made by the President of the Commonwealth Court of Conciliation and Arbitration after a preliminary objection to the jurisdiction of the High Court had been overruled: *The Tramways Case* [No. 1] (1).

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

Mitchell K.C., *Feez* K.C. and *Henchman*, for the Brisbane Tramways Co. Ltd.

O'Halloran and *Angas Parsons*, for the Municipal Tramways Trust, Adelaide.

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

Arthur and *Hain*, for the Australian Tramway Employees' Association.

Starke and *Schutt*, for the Commonwealth intervening.

Cur. adv. vult.

The following judgments were read:—

Oct. 16.

GRIFFITH C.J. These are two applications for prohibition against the President of the Commonwealth Court of Conciliation and Arbitration and the Australian Tramway Employees' Association, an organization registered under the *Conciliation and Arbitration Act*, in respect of an award made by the President on 21st December 1912, which purported to establish two separate codes of conditions governing the respective applicants in their relationship to their employees. The award is in both cases to be in force until 30th June 1916, but under sec. 28 of the Act it will continue in force after that date until a new award is made or the Court otherwise orders. The importance to the applicants of their contention that the award or awards was or were made without jurisdiction becomes therefore manifest, since, if it fails, the control of their business is taken out of their hands for an indefinite period. Several objections have been taken to the jurisdiction of the Court, with which I will deal in order.

The foundation of the award or awards is, of course, that there was in existence an industrial dispute extending beyond any one State, with which the Arbitration Court had jurisdiction to deal, and to which the respondents to the plaint or some of them were parties. The original respondents to the plaint were eleven in number, being the owners of tramway systems in the five States of Queensland, South Australia, Tasmania, Victoria and Western Australia. Beyond the fact that they were all owners of tramway systems there was no connection of any kind between them, and the operations of the tramway systems in one State had no effect, direct or indirect, upon those of the systems in any other State. Some of the respondents used electrical traction, some cable traction, and some horse traction in conjunction with one or the other; one used horse traction alone. The only bond of

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

community was that they all owned tramways used for passenger traffic. Under these circumstances it seems to me to be *primâ facie*, if not impossible, at least in the highest degree improbable that a dispute between the employers and employees in any one State as to the details of conditions of employment should extend to any other. I understand that I am bound by the decision of this Court in *The Builders' Labourers' Case* (1) to assume that such an extension is, in the abstract, possible. But if it should appear, as it does in this case, that all the matters involved in an alleged dispute are in fact as to local conditions, I do not think that I am bound to hold that there is a single dispute extending beyond one State, however earnestly the parties on one side may have striven to bring about such a dispute.

During the progress of the hearing of the plaint all the respondents to the plaint except the present applicants were either dismissed from the suit or entered into negotiations with their employees.

I quote from the judgment of the learned President (2):—"In this case, I am happy to say that after long negotiations, and some references to myself as a mediator on details, agreements either have been made, or will probably be made, between the claimant and the following respondents:—The Melbourne Tramway and Omnibus Company Limited, the Hobart Tramway Company Limited, the Prahran and Malvern Tramway Trust, Meakin & Thomas (Northcote), the North Melbourne Tramways Company, the Electric Supply Company of Victoria, the Perth Electric Tramways Limited, the Fremantle Municipal Tramway Board. In pursuance of sec. 24, a written memorandum of the terms of each contract is to be certified by me, and filed in the office of the Registrar; and the memorandum will have the same effect as an award."

It appears that most of the agreements were not actually signed until after the date of the award, although they were all retrospective, and, with one exception, were to have effect from a date antecedent to the award. The representatives of the several respondents to the plaint except those of the present applicants had, however, practically withdrawn from the proceedings as

(1) 18 C.L.R., 224. (2) 6 C.A.R., 130, at p. 142.

soon as the terms of agreement had been substantially agreed to. Under these circumstances I think that the dispute, if any, was no longer a pending dispute at the date of the award except as regards the States of Queensland and South Australia. At the date of the award or awards, therefore, the only employees really represented by the claimant organization (if any) were those of the Brisbane Tramways Company and the Adelaide Tramways Trust.

In my opinion it is essential to the jurisdiction of the Commonwealth Arbitration Court to make a valid award that there should be in existence when it is made an industrial dispute extending beyond one State. I do not think it necessary to state at length my reasons for so obvious a conclusion. It is sufficient to say that, in the contrary view, any industrial dispute whatever, however purely local in character, might with the exercise of very little ingenuity be brought within the jurisdiction of the Court.

With these introductory observations I proceed to deal with the relevant facts of the case, none of which are substantially in controversy.

In this, as in many other recent cases, the existence of the alleged dispute depends almost entirely, if not altogether, upon the effect of sending to employers a log or schedule of claims. Such a log was twice sent in this case, first on 5th May 1911, and secondly on 8th September 1911, each being accompanied by a letter asking to be informed within seven days whether the employers would adopt the log or grant a conference for the purpose of discussing it with a view to entering into an industrial agreement based upon it, and stating that failure to reply within that period would be taken as a refusal to agree to either alternative.

No reply having been sent to either demand, the plaint was filed on 26th October 1911. The applicants contend that apart from this demand there is no evidence of the existence of any industrial dispute extending beyond a single State to which they were parties.

Sec. 22 of the *Commonwealth Conciliation and Arbitration Act* prescribes that no industrial dispute shall, without the approval of the President, be submitted to the Court by an

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

organization without a certificate from the Registrar (1) that the consent of the organization has been given in manner prescribed by the rules of the organization, or (2) that such consent has been given by resolution of a general meeting of members convened in the manner prescribed by its rules or as the result of a poll of members taken in the prescribed manner, or (3) that consent has been given under the hands of a majority of the committee of management of the organization.

By the law in force in October 1911 (sec. 4 of the Principal Act) the term "industrial dispute" was defined to mean "a dispute . . . . arising between an employer or an organization of employers on the one part and an organization of employees on the other part." The qualifying words beginning with "arising" were omitted by an amending Act which became law on 23rd November 1911, after the filing of the plaint, but they govern the present case. The term "organization" was defined as meaning a registered organization.

On 25th October 1911 Mr. A. C. Warton, describing himself as general secretary of the claimant organization, made an affidavit in which he deposed that he had been general secretary of the organization from 10th February 1911, and as such was the proper officer to take and keep the minutes of meetings of the organization and of the executive and all committees thereof, and had in fact kept such minutes. He also deposed that the consent of the organization to the submission of the dispute to the Arbitration Court had been given by a body calling itself the "Executive" of the Association passing a resolution to that effect, that being the manner prescribed by the rules of the organization, at a duly convened meeting of the Executive held at Melbourne on 4th September 1911, of which resolution an alleged copy was set out, which he swore to be a true and correct copy. On the faith of this affidavit the Registrar gave a certificate following the words of the affidavit. On cross-examination before this Court Warton admitted that he had not compared the alleged copy with any original, and said that the affidavit was sent by the Association's solicitors in Melbourne to him in Sydney to be sworn, and that he swore it accordingly. A book, purporting to be the minute book of the Association and of its Executive, was

produced, which contained minutes of meetings of what was called the "Federal Council" (of which I shall have something to say hereafter) on 29th August and 6th September, and a minute of a meeting of the Executive on 16th September, but did not contain any record of a meeting of the Executive on 4th September, or of the passing of any such resolution as that sworn to on that or any other day.

No explanation has been offered of the absence of any original record of the resolution, if it was ever passed, nor any evidence of the existence of any such record, or of any document from which the alleged copy set out in Warton's affidavit was made. It was said that such an explanation could be given, but as it appeared (as will hereafter be shown) that the so-called Executive had no authority under the rules of the organization to authorize the submission, the matter was not further pursued. It appeared, however, that the minutes of a meeting of a body calling itself the "Federal Council," held on 29th August, contain a record of three resolutions, two of which are to the same general effect as the alleged resolution of the Executive of 4th September.

It will hereafter appear that neither the so-called "Federal Council" nor the persons who called themselves the "Executive" had any authority under the rules of the claimant organization to act on its behalf in bringing the alleged dispute before the Court, and the applicants contend that under sec. 22 of the Arbitration Act this is a fatal objection to the jurisdiction of the Court to entertain the plaint. I will state, as briefly as I can, the relevant facts established by the evidence on which they rely in support of this contention.

There had been in existence in the State of New South Wales for several years a union of tramway employees, of which Warton, already mentioned, was the general secretary. In that State, however, as all the tramways are, with a trifling exception, the property of the State, the employers are not amenable to the jurisdiction of the Commonwealth Arbitration Court.

In May 1910 it was proposed by the New South Wales union to form a federation of all tramway employees in the Commonwealth, with the avowed object of making a common demand upon their employers in all the States, and then invoking the aid

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

of the Commonwealth Court of Arbitration, which it was confidently expected would regard their claims favourably. Although the New South Wales employees could not directly become parties to such a claim, they thought that the New South Wales Railway Commissioners would be practically obliged—it was said, indeed, that they had promised—to adopt the better terms expected to be granted by the Commonwealth Court. With this view a conference was called and held in Sydney in that month, which was attended by representatives of the New South Wales union and of unions of tramway employees in South Australia and Western Australia. The Queensland and Tasmanian employees were not represented. The conference was also attended by a former tramway employee from Victoria, where up to that time no union had been formed. It was resolved by the conference to form a tramway federation by the name of the "Australian Federated Industrial Organization of Tramway Workers," and a constitution was drawn up and submitted to the unions in South Australia and Western Australia for approval. It is alleged that the South Australian union formally adopted it at a meeting held on 6th July 1910, but the Western Australian unions do not appear to have done so formally.

Officers were appointed of this body, Mr. H. Lawton, president of the Sydney union, being president and Warton being secretary.

About August in the same year an independent movement was started in Victoria by a Mr. Prendergast, then an employee of the Prahran and Malvern Tramway Trust, which was made a respondent to the plaint now before us. Prendergast, who had very recently entered the service of the Trust, left it shortly afterwards. In September the employees of that Trust resolved to form a union. In October Prendergast, who had been away from Melbourne, came back and resumed his operations, with the result that on 6th November an association was formed, by the name of the Australian Tramways Employees' Association, of which Prendergast was elected president and Mr. H. J. Duke secretary, and it was resolved that the Association should be registered as an organization under the Arbitration Act.

Sec. 55 of the Act prescribes the conditions on which an

association may be registered as an organization, some of which, set out in Schedule B, are that its rules must provide, *inter alia*, for (*a*) a committee of management and officers, and (*b*) their powers and duties, (*f*) the power of bringing industrial disputes before the Court, (*g*) the times when and terms on which persons shall become or cease to be members, (*m*) the repeal and alteration of, and addition to, the rules. The application for registration is required to be in duplicate and accompanied by two copies of the rules of the Association. Other conditions may be, and were, prescribed by regulations of the Governor-General in Council.

The rules adopted on 6th November were lodged on the 9th with an application for registration. By statutory regulations made under the authority of the Act (*Statutory Rules* 1910, *No.* 3) it was prescribed that before registration of an association as an organization the Registrar should give thirty days' notice of the application by advertisement, during which time any person might lodge objections to registration, which were to be heard and determined by him before registration. On registration the association becomes a corporation (sec. 58).

By these rules the Association was to be open to all employees in the tramway services of Australia (rule 2). By rule 3 one of the objects of the Association was declared to be the establishment of branches, but the rules did not contain any provision as to the mode of establishment. Rule 5 provided that the affairs of the Association should be managed by a Board, to be called the Committee of Management, and consisting of the president, two vice-presidents, treasurer, and general secretary (called executive officers), and five members of committee, five to form a quorum. The Committee of Management was to have full power to govern the Association according to its rules (rule 8A).

Rule 10A, bearing the statutory heading "The times when and terms on which persons may become or cease to be members," provided that "Any competent person on making application to the general secretary and being approved by him and unless and until vetoed by the Committee of Management shall on paying the entrance fee be enrolled a member of the Union."

Rule 22 provided that before any industrial dispute was sub-

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

mitted by the Association to the Commonwealth Court of Arbitration the Committee of Management should submit the matter for the decision of the members. Rule 23 provided that the decision of the members might be obtained either at a general or special meeting, or by ballot. Rule 27 was as follows:—"No new rule or any of the rules herein contained or hereinafter to be made shall be amended altered or rescinded unless notice to that effect be sent to the general secretary to be laid before the Committee of Management directly stating such alteration." The mode of making additions to the rules was not otherwise stated.

It will be important to bear in mind four fundamental provisions of these rules:—(1) The governing body was a committee of management (presumably elected by the members in general meeting) with a quorum of five; (2) application for membership was to be made to the secretary; (3) the question of submitting any industrial dispute to the Arbitration Court was to be submitted (*a*) by the Committee of Management, (*b*) for the decision of the members, (*c*) to be obtained at a general or special meeting or by ballot; (4) new rules could not be made without notice to the general secretary, to be laid before the Committee of Management. It will be found in the sequel that every one of these provisions was entirely disregarded in the institution and submission of the alleged dispute.

On the same 9th November a representative of the New South Wales Federation came to Melbourne with a view of inducing Melbourne tramway employees to join that Federation. He entered into communication with Prendergast, who suggested that the New South Wales men should join his new association. Shortly afterwards, Lawton, the president of the New South Wales Federation came to Melbourne with the same object. A compromise was arranged to the effect, in substance, that the Federation should take the name "Australian Tramways Employees' Association," and that the newly formed association of that name should become a branch of it. Lawton had with him a copy of the federal constitution drawn up and adopted at the Sydney conference of May. The mode proposed for giving effect to the arrangement was that the Australian Tramway Employees' Association, whose application for registration was then pending,

should adopt *in globo* the New South Wales Federation constitution as an addendum to its own. At a meeting of the Association held on 22nd November it was resolved that the rules be amended "by the addition of the federal constitution."

The document described by this name was practically a transcript of the rules drawn up for the federation proposed and agreed to at the New South Wales conference of May 1910, with one addition (sub-rule 37). It was called collectively rule 28, and was divided into 37 sub-rules. It was headed "Federal Constitution: The Australian Tramway Employees' Association." Rule 1 consisted of the name "The Australian Tramway Employees' Association." Rule 2 provided that the Federation should include all employees of the various tramway systems throughout the Commonwealth. The objects of the Federation, which were declared by rule 3, included the establishment of branches of the Federation. Rule 4, under the heading "Federal Council," provided that the government of the Federation should be vested in a council composed of representatives of branches, the number varying according to the membership of the branch, and that the functions of the Federal Council should be to administer the rules of the Federation for the benefit of its members and to endeavour to carry out its objects.

Rule 5 provided that the officers of the Council should consist of a president, two vice-presidents, treasurer and secretary. The "Executive" was to consist of the president, two vice-presidents, treasurer and secretary, with power to any State not represented on it to appoint a member with equal power to any of the officers named (rule 6). Rule 22, corresponding to rules 22 and 23 of the rules adopted on 6th November, provided that before any industrial dispute was submitted by the Federation to the Commonwealth Arbitration Court the "Committee" (which apparently means the Executive) should submit the matter for the decision of the members, to be obtained either at a general or special meeting or by ballot. Rule 23 provided that there should be one branch of the Federation in each State. Rule 33 provided that no rules should be amended or rescinded but at a conference at which the several branches were represented, and that notice of any alteration should be sent to each branch at least one month

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

before the conference, whereupon the branches were to instruct their delegates how to vote. Alterations decided upon by a majority vote of the conference were to be binding after approval by the "Registrar of Industrial Unions" (a phrase used in the New South Wales industrial laws, but inapplicable to organizations under the Commonwealth Act).

Rule 37 was as follows:—"Until a conference representative of two or more branches shall have otherwise determined the powers and duties of the Council shall be exercised by the Association in general meeting assembled, and the powers and duties of the Executive shall be exercised by the Committee of Management. Until such determination as aforesaid, in the event of an inconsistency in the federal constitution with the rules of the Association, the rules of the Association shall prevail, and thereafter the federal constitution shall prevail."

A printed copy of this document (which I will call the "federal constitution") was left at the Registrar's office, and was brought before that officer when he held a sitting to consider objections which had been lodged against the registration of the Association. He was asked by the applicants to take the new rules into consideration, but, very properly, refused to do so, on the ground that the rules lodged with the application were the only rules that he could consider. The application for registration was then granted (on or about 13th December) upon these rules, and a certificate of registration was granted on 5th January 1911. Shortly afterwards a verbal application was made to the Registrar that the rules of 22nd November might be filed as an amendment of the rules of the organization. The copy of those rules which had been left at the registry was then attached to the original rules, but no record of any sort was made of the transaction.

The Court during the argument announced, on 22nd June (my brother *Isaacs* dissenting), that in its opinion the attempted amendment was ineffectual, and that the constitution of the claimant organization consequently remained as declared by the original rules until altered in accordance with them. I will state briefly the reasons which led me to that conclusion, in which I

understood my brothers *Barton*, *Gavan Duffy*, *Powers* and *Rich* to concur.

In my opinion it follows from the provisions of the Act to which I have referred that the constitution and powers of an organization when incorporated are, at any rate so far as regards matters as to which rules are imperative, such as are defined by the rules on the faith of which registration and incorporation is obtained. Such an organization cannot therefore make any alteration either in its constitution or its powers with respect to the matters which are required to be contained in the rules as a condition of registration except in the manner prescribed by the rules themselves. I think further that any such alteration must be made by the corporation itself after it has been incorporated. In any other view an association formed for one purpose might after the application for registration be converted into an association having quite different objects, of which no notice had been given as prescribed by the regulations, and the provision of the regulations requiring thirty days' notice, which is a condition precedent to registration, would be nugatory.

No alteration of the original rules has in fact ever been made in the manner prescribed by them, although two attempts were made to alter them under the provisions of the supposed federal constitution.

In considering the next step taken it will be convenient to bear in mind that the so-called federal constitution provided that the government of the Federation should be vested in a council, called a Federal Council, comprised of representatives of branches, and that there should be one branch of the Federation in each State. It did not, however, contain any provision as to the mode of establishing branches.

In June 1910 Warton had communicated with one Campbell, an employee of the Brisbane Tramways Company, asking him to get up an agitation in Brisbane in favour of joining the Federation agreed to at the Sydney conference of May. On 3rd November of the same year he had again written to Campbell, pointing out the necessity of obtaining at least 100 members in order to obtain registration of an association as an organization when, he said, " the Arbitration Court can be moved."

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2]

Griffith C.J.

Lawton, having accomplished his work in Melbourne, went on to Adelaide in South Australia, where a trade union called the "South Australian Tramway Employees' Association" had been in existence for some years. A meeting of "all tramway employees" was called for 27th November. A circular calling the meeting stated that the business of the meeting would be "Federation, and in particular (1) to extend a welcome to Lawton, president of the New South Wales Tramways Union; (2) to adopt federal constitution submitted to the federal Registrar (*i.e.*, the rules of 22nd November); (3) to arrange conference of the States to draft claims for wages, hours and general working conditions of the tramway employees to be referred to the Federal Arbitration and Conciliation Court." A meeting was held on 27th November, but, not being considered sufficiently representative, was adjourned to the 30th. A record purporting to be a record of the proceedings of the meetings of 27th November and 30th November is contained in the minute book of the South Australian Tramway Employees' Association. The minutes in that book are in all other cases headed "Minutes of the Tramway Employees' Association," or to the like effect. Those of the meeting of 27th November are headed "Mass Meeting of Tramway Employees," and those of 30th November "Minutes of Meeting held on November 30th." These minutes record that at the meeting of the 30th, after speeches from Lawton and others, it was resolved that "the name of the Federation" (*i.e.*, the name which had been adopted by the Sydney conference of May) "be altered to read thus: That the Federation be known as the Australian Tramways Employees' Association." Opposite to the end of the entry of this resolution the word "Carried" was written in the margin, and there followed a statement that the meeting closed with cheers for Lawton and the New South Wales Tramway Association. So far, it would appear that this was a record of a meeting of "all tramway employees," and that the "Federation" with which the meeting was dealing was that then recently formed in New South Wales.

At a later date the words "and that this Association be the South Australian Branch thereof" were interpolated in different ink after the word "Carried." Prendergast says that the inter-

polation was made in 1912, preparatory to the hearing of the plaint before the President, when it was thought essential to the success of the claimants to show that the South Australian Tramway Employees' Association had become a branch of the claimant organization (which had not at the date of the meeting been registered). There is no doubt, as will appear from the proceedings next to be narrated, that it was then thought essential to do so. There is no other record showing that the South Australian Association ever became a branch of, or that this resolution was even communicated to, the claimant organization. It is to be noted that the interpolation treats the meeting as a meeting of the South Australian Association and not as a mass meeting of "all tramway employees." The only answer attempted to Prendergast's allegation as to the time of making the interpolation is extremely unsatisfactory. Moreover, before it was produced to the President, both Prendergast and Warton had sworn that the members of the alleged branches had come in individually and not by branches. I arrive at the conclusion, notwithstanding affidavits made to the effect that a resolution was passed in those terms, that the interpolated words, which are—to use a phrase used in discussions as to authenticity of documents—of a tendential character, are not authentic, and do not record an actual fact.

In support of the statements of Prendergast and Warton just mentioned, evidence was adduced to show that a South Australian branch of the claimant organization had been in fact established by the admission of a large number of South Australian employees as members of it.

The alleged applications for membership first made by Adelaide employees were made upon printed cards headed "S.A. Tramway Employees' Association," followed by the words "Federated throughout the Commonwealth Representing about 10,000 Tramway Employees." The applicant applied "for membership in the South Australian Tramway Employees' Association." The card bore the printed signature of the secretary of that Association, and stated as the entrance fee and monthly contributions sums which were those of that Association, and different from those of the claimant organization. About May 1911, *i.e.*, about

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

the time when certain rules alleged to have been adopted by an assemblage held in February of that year, and to which I shall have occasion to refer at length, were filed, another form of application was printed, which was signed by a large number of South Australian employees. This form was headed "Australian Tramway Employees' Association, South Australian Branch," followed by the words " Federated, &c.," as before, and the applicant applied for membership in the South Australian branch of the Australian Tramway Employees' Association, but the original form was still in use up to 1912. None of these applications were sent to the secretary of the claimant organization, as required by rule 10A, until after the filing of the plaint. During the hearing of the case, when it was desired to take advantage of sec. 21A of the Act, which provides that a certificate of the Registrar that any specified persons were at any specified time members of any specified organization shall be conclusive evidence that the facts are as stated, a large number, if not all, of the first set of cards were altered by erasing the letter " S " and the word " South." In some cases the signature of Duke, the secretary of the claimant organization, and, in others, that of Warton, was added. On the faith of these altered cards and the cards of May a certificate was obtained from the Registrar that the persons named in it were members of the organization on 16th October 1911, a day preceding the filing of the plaint. Upon the evidence I cannot entertain any doubt that the persons who signed the first form intended to become members of the South Australian Association, and I have equally little doubt that they did so in the belief that it was a branch of a larger federation. Indeed, several of them made affidavits to the effect that they intended to join a federal union having branches in the several States, and not a local union. Nor can I doubt that the signatories of the later form also believed that they were applying to become members of an association of that character. Whether they did or did not intend to become members of the claimant organization in the belief that it was such a federal association, it is hardly necessary to point out that a man cannot become a member of a corporation merely by desiring or intend-

ing to do so, or that a branch of a corporation cannot be composed of persons who are not members of it.

From Adelaide Lawton went to Brisbane with the same purpose, where he represented that by joining the Federation tramway employees would be able to submit a claim to the Arbitration Court, the President of which, he said, was sure to be sympathetic. By these representations and other arguments he induced many of the employees of the Brisbane Tramways Company, which up to that time was on the best of terms with its employees, to agree to form a branch of the Federation. On 13th December 1910 Warton sent to Brisbane forms of application for membership. The form was headed "Federal Constitution of the Australian Tramway Employees' Association," and the applicant applied to become a member of "the above Association." About 400 of these forms were signed, but none of them came into the possession of the secretary (Duke) of the claimant organization until after the plaint was filed. The persons who had signed them, however, called themselves the Queensland Branch of the Australian Tramways Employees' Association.

The circumstances under which these forms were sent are disclosed by Warton's letter accompanying them, in which he said, amongst other things, that the registration of the federal Association had been approved by the federal Registrar "so that absolute protection is afforded the employees who join the Federation." He went on to say:—"We intend to convene a conference of tramway workmen from all the States in the Commonwealth who will discuss all industrial matters affecting the industry. We will then submit claims to the Federal Court *re* wages, hours and general working conditions of the employees. We are very hopeful that a satisfactory award will be given by the Judge of the Court." He enclosed the forms of application for signature, adding that the branch would have to contribute 1s. per member to the Federation per annum to meet the expenses in connection with the proposed conference.

No applications for membership were forwarded from Western Australian employees until late in 1911, and there is no evidence that any came from the Tasmanian employees.

It is abundantly clear from the facts which I have stated that

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

the main, if not the only, purpose for which the Federation was to be formed was to formulate joint claims to be submitted to the Commonwealth Arbitration Court. It was at that time supposed by many persons that the making of a joint claim by employees engaged in any industry in two or more States, followed by the refusal of the claim by the employers, was sufficient to constitute an industrial dispute extending beyond one State, and therefore within the jurisdiction of the Court, provided that certain formalities prescribed by the Arbitration Act were duly observed.

It will be remembered that under the so-called federal constitution the government of the organization was to continue to be vested in the general committee until a conference representative of two or more branches should have otherwise determined (rule 37). For this purpose it was necessary that there should be branches whose representatives could meet in conference.

The subsequent proceedings were admittedly based upon the assumption (which I have shown to be erroneous) that the so-called federal constitution had in some way been substituted for the original constitution of the claimant organization, and that branches of the organization had been formed under its provisions. In fact, however, as I have already shown, there were no such branches in Queensland or South Australia, or, indeed, in any other State.

On 3rd January 1911 Warton wrote from Sydney, on paper headed "New South Wales Government Tramway Employees' Union," to Prendergast in Melbourne, saying: "Now that registration has been effected we are desirous that a conference be arranged . . . . to fix up the detail matters in connection with the Federation and to draft claims for submission" to the Arbitration Court. "As a preliminary we suggest that 'your branch' draw up claims" (relating to ten different subjects, which he enumerated) "to be submitted to general meetings of the branches for consideration." He asked that typed copies might be forwarded to the "several State unions" (giving the names of the secretaries of the unions), or in the alternative to him.

On 9th January Mr. L. L. Hill, secretary of the South Australian union, wrote to Warton, acknowledging a letter of the same

date and containing apparently a similar request, promising to send the log when formulated in Adelaide.

On 23rd December 1910 Warton, purporting to speak on behalf of the whole Federation, had written from Sydney to one Champ in Brisbane with respect to the formulation of claims. In the course of his letter he remarked that "the claims in many respects will be purely local matters," but that on some points there must be unity.

The minute book of the claimant organization, which was put in evidence, contains what purports to be a record of an Executive meeting held on 6th January 1911, at which a resolution was passed "that a Federal Council meeting should be held at Melbourne as soon as possible under the federal constitution to frame a log of wages and claims and re-frame federal rules and elect federal officers, and that the secretary give notice immediately to all branches calling meeting except such already notified."

On examination of the minute book it is apparent that this minute was interpolated at a later date. Duke, the secretary, says that he wrote it in 1912. The object of the resolution, if it was passed, or of the interpolation, if it was not passed, was apparently to show a compliance with sub-rule 33 of the so-called federal constitution, but the framers apparently confused the conference referred to in that rule with the Federal Council referred to in sub-rule 4. A meeting of the Association itself was held on 8th January, at which it was resolved "that the Executive shall be empowered to call a conference of all the States which have come into the Association, such conference to be held in Melbourne and to be formulated in accordance with the federal rules. Such body shall fix a uniform claim with regard to wages, conditions, &c., and submit the agreement arrived at to a ballot of the members of the Association." It was also resolved that the Executive be empowered to appoint the representatives on the conference.

A conference was accordingly called for February, but how and by whom it was formally convened does not clearly appear. The circumstances attending the calling of it purport to be fully set out in a statement published in a newspaper called the *Rail-*

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

way and Tramway Record, of which Warton was editor and publisher. This statement, which appeared in the *Record* of 11th April 1911, was signed by Warton and addressed "to the Federated Tramway Employees of Australia," and he deposed that it was accurate. It set out that in May 1910 "your union," *i.e.*, the New South Wales union, convened a meeting and formed a conference of all the States which had agreed to join the Federation, that in February 1911 the representatives of the unions met in Melbourne and formulated claims, that the other States (*i.e.*, other than New South Wales) had agreed to invoke the Arbitration Court, and the writer asked the New South Wales men to continue as members of the Federation and give the employees in the other States pecuniary assistance.

The inference which I draw from these facts is that the conference was substantially called by the New South Wales officials, whether it was or was not formally convened by the general committee of the claimant organization.

In pursuance of these proceedings an assemblage—I use a neutral word—was held in Melbourne on 8th February 1911 and following days. At the hearing before the President a book was produced and put in evidence, purporting to contain a record of the proceedings of this assemblage. It is headed "Minute Book of the Federal Council and Executive of the Australian Tramways Employees' Association." The persons present are recorded as "G. L. Prendergast, president; H. J. Duke, secretary; J. V. O'Connor and E. Ward, representing Victoria; D. Marshall, representing Tasmania; E. J. Campbell, Queensland; Messrs. Dalzell, Irvine, South Australia; and W. Johnston, West Australia." The minute goes on to say that there were present as visitors L. L. Hill, secretary South Australian Branch, and Messrs. Warton, Lawton, Chambers and Harding, of New South Wales, members of the Tramway Federation. The minutes further record that after exchange of credentials the election of officers was discussed, and a deputation was appointed to confer with the federal Registrar to ascertain whether there was any objection to the election of the "Australian Tramway Federation" officers as officers of the Association. It appears that at this time Campbell, Dalzell, and Irvine signed cards of application to

become members of the claimant organization, which were, however, attested by Warton and not by Duke, the secretary.

The minutes of the following day, 9th February, record that "the officers of the Federation were declared to be Prendergast, president; Hill and Campbell, vice-presidents; Duke, treasurer; and Warton, secretary." "Nominations were then called for the various offices, and the gentlemen mentioned above being the only ones nominated for the offices they were declared elected." Of what body they were elected officers does not clearly appear. If of the registered Association, the election was obviously invalid, not being made by a general meeting of members. If of or by the supposed Federal Council, the election was equally invalid, since the persons present at the meeting did not constitute a Federal Council, the composition of which is defined by sub-rule 4 of the federal constitution. As there were no branches there could not be any delegates of branches.

The explanation given by Warton is that the assemblage was of a dual character, being (1) a meeting or conference of representatives of the branches of the Federation formed in New South Wales in May 1910, of which the persons named were elected officers at the meeting of 8th February, and (2) a meeting of a Federal Council of the Australian Employees' Association under the federal constitution.

The minutes were evidently framed so as to record the proceedings of the assemblage from the latter point of view.

The minutes of 10th February record that the secretary brought forward proposed rules as follows (the rules being set out), and that they were adopted subject to approval by the federal Registrar, and the secretary was "instructed to inquire as to such and to register the rules." The second of these rules proposed to change the constitution of the Association so as to include all persons engaged in or connected with the transport of goods or passengers in the Commonwealth, excepting conveyance by sea and excepting horse-drawn vehicles other than on rails. It is now conceded that such a radical change in the constitution of the Association was unauthorized by the Act.

In adopting these rules, if they were adopted, the provisions of sub-rule 33 of the federal constitution were altogether dis-

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

regarded. There were, as already said, no branches, and notice of the intended alteration of rules had not been sent to anyone.

The minutes of the meeting of 11th February 1911 record that "the claims as formulated by the delegates were read and adopted, the secretary being instructed to forward them to the branches for consideration, and that he on receipt of any communication from a branch of suggested amendments of the claims or any additional claims should refer them to the Executive, who have power to incorporate such in claim. When checked the claims to be immediately forwarded to the several branches in order to obtain the signatures of employees of the respective tramway companies to such claims. The Executive to be empowered to submit such claims to the employers for acceptance, and failing acceptance . . . . to take the necessary steps for submission of the said claim" to the Arbitration Court.

It was also recorded that it was resolved "that the branches be informed that the constitution as amended would be submitted to a legal firm for the purpose of ascertaining its legality, and steps will then be taken to submit the rules for registration when copies would be available for the branches;" further, that the federal Executive should exercise all the powers of the Council until its next meeting, which was appointed to be held in February 1912, or such other time as might be appointed by the Executive after consulting the branches.

Finally, a resolution is recorded adopting the rules as passed, and declaring them to be the rules of the Association, and formally adopting the claims as framed. This last resolution is on a slip of paper pasted into the book over a formal entry of the closing of the Council. These minutes, with another to which I shall have occasion to refer, were put in evidence before the President by Prendergast, who conducted the case for the claimants, as genuine minutes of the meetings which they purported to record, and as proof of the due submission of the plaint to the Court. They were typed on sheets of foolscap paper put together in a cover. After the award was made Prendergast disclosed to the applicants the fact that they had in fact been compiled just before the opening of the case, and that they were typed by Mr. Rundle, a solicitor, at his dictation, and he made an affidavit to

that effect. The fact is not denied by the respondents, but they filed an affidavit made by Warton, in which he swore that he had checked the minutes typed by Rundle with the original minutes of the Federal Council meeting of February, and that they were true and correct records "so far as they go" of the business transacted at the meeting. He further swore that the rules as set forth in the minutes were the rules as adopted by the Federal Council meeting of February, as drafted by solicitors in accordance with instructions given to him by the meeting and as confirmed and adopted by the federal Executive in April 1911. He said, further, that a record of the proceedings was published in the *Railway and Tramway Record* of 28th February, a copy of which was exhibited to his affidavit.

On cross-examination, on being asked what had become of the original minutes with which he said he had checked the minutes typed by Rundle, he said that they were rough notes taken by himself, which he had handed to Prendergast about October 1911 together with a typed document in which they were expanded and put in order. He produced a typed document, which, he said, was a copy of the one which he had given to Prendergast, and which is very far from being a copy of the minutes put forward as genuine at the hearing of the plaint. He also swore that the rules, which, according to the minutes, were then adopted, were revised by solicitors, and finally adopted at a meeting of the Executive Council held in April. A minute purporting to record the proceedings of this meeting, and which, like those already mentioned, was dictated by Prendergast to Rundle, was put in evidence before the President, but contains no record of such adoption. On 17th May a document purporting to be these amended rules was lodged with the Registrar. A copy of it is inserted in the minutes of February, but it is admitted that the rules were to a very great extent redrafted and amplified by the solicitors, and that the document so lodged is not a copy of the rules which were before the Federal Council.

The minutes published in the *Railway and Tramway Record*, which may be regarded as contemporaneous, are headed "Australian Tramway Employees' Association," and purport to record the "deliberations and decisions of Annual Conference, Melbourne,

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

Victoria, held on February 7, 8, 9, 10, 11, 1911." The representatives of New South Wales, and Hill, who came from South Australia, are named as members of the conference, and not as visitors. The first business was the election of officers, as stated in the other minutes. The resolutions arrived at are stated as resolutions of " this conference, representative of Victoria, Queensland, Tasmania, South Australia and Western Australia," and it is recorded that the conference adopted the rules and constitution of the Australian Tramways Employees' Association as formulated by the Committee, and instructed the Executive to register the constitution as amended; also that the conference adopted the " Scale of wages, hours of duty and industrial conditions as submitted by the Committee," and instructed the Executive of the Association to take all necessary steps for submitting it to the various employers for adoption, and, in the event of refusal, to take the dispute to the Federal Arbitration Court for settlement.

Warton also exhibited to his affidavit a copy of the *Railway and Tramway Record* of 23rd May, containing what purported to be a copy of the minutes of the Executive in April, which contains no mention of the approval of the rules as altered by the solicitors.

No record of the proceedings of the assemblage of February was made in the minute book of the claimant organization, as might have been expected if it was really a meeting of that body.

The conclusions of fact which I draw from this evidence are: (1) that the assemblage of February 1911 was not a meeting of the Federal Council held under the supposed federal constitution (this inference is strongly supported by a document in Prendergast's writing, put in evidence by Mr. *Arthur* on the 15th day of the hearing before this Court, and purporting to be a report of a meeting of the Executive held on 6th January for presentation to the general meeting of the 8th, which makes no mention of any proposed meeting of the Federal Council); (2) that the pretended minutes of the assemblage cannot be relied upon as an authentic record of what took place at it; (3) that the document registered on 17th May did not represent rules adopted in fact either by that assemblage or by the Association under its original

rules or by a Federal Council. The record in the contemporary minutes published in the *Railway and Tramway Record* of 28th February that the rules were adopted by the conference suggests that the compiler had in mind the requirement of sub-rule 27 of the federal constitution, the provisions of which, however, as I have already said, had been entirely disregarded.

The result of all these proceedings, from whatever point of view they are looked at, is that the persons appointed as a federal executive council were never validly appointed as officers of the claimant organization, and never had any authority to act on its behalf.

The importance of the requirement that a plaint must be presented to the Court by, *i.e.*, by the authority of, an organization, is emphasized by the provisions of sec. 24 of the Act, which provides that if an agreement is made between the parties as to the whole or any part of the dispute a memorandum of its terms shall be made in writing and certified by the President, and when certified shall be filed in the office of the Registrar, and unless otherwise ordered shall as between the parties to the dispute have the same effect as, and be deemed to be, an award.

The rules supposed to have been adopted by the so-called Federal Council and finally adopted by the Executive, *i.e.*, the rules a copy of which was inserted in the minutes of 10th February, were registered on 17th May. By these rules it was provided (rule 30) that a quorum of the Executive should be formed by the presence of the general secretary and the president, or either of them and some other member, and that the submission of industrial disputes to the Court should be made by the Executive passing a resolution to the effect that it should be submitted (rule 53). Thus all authority was to be practically concentrated in the hands of a small junta of agitators.

The promoters of the dispute, having thus, as they thought, concentrated full authority in their own hands, proceeded to serve a log of demands upon employers in all the States except New South Wales and Western Australia, and on 10th July Prendergast and Warton signed and filed a plaint. It is said that it then occurred to the promoters that it was desirable that the plaint should include Western Australia also, and application for leave to withdraw it was made to the President and granted.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

About this time doubts appear to have arisen as to the validity of the rules of February or May, and as to the due observance of the formalities supposed to be requisite for the due creation of an industrial dispute extending beyond one State, which doubts I am disposed to think contributed to the withdrawal. Various steps, which form the last chapter of this curious history, were then taken to validate the proceedings.

At a meeting of the so-called federal Executive held on 2nd July it was resolved that "the plaint at present before the Court" (it was not in fact filed till the 10th) "be withdrawn, and that Messrs. Prendergast and Warton be instructed to act accordingly and to then re-serve all the employers and re-file the plaint. Further that the rules of the Association be amended as recommended by the President and that the whole be indorsed as amended. Further that the Executive authorize the summoning of the Federal Council for 28th August to deal with these two items of business." (This last resolution was apparently passed in attempted compliance with rules 9A and 33 of the federal constitution, or a similar provision in the rules registered on 17th May.) It assumes the existence of branches lawfully constituted by whom representatives could be appointed. But it appears to confuse the Federal Council, which had no power to alter rules, with the conference referred to in rule 33, by which alone under the federal constitution the rules could be altered.

A meeting of the so-called Federal Council was accordingly held on 28th August, at which a new set of rules was adopted, which were filed in the registry on 5th September. They, like the rules registered on 17th May, provided (rule 53) that disputes should be submitted to the Court by resolution of the Executive, a quorum of which was to be constituted as in those rules provided. At a meeting held on the following day the action of the Executive at the meeting of 2nd July was confirmed, and they were directed to take immediate steps to re-serve the log and take all necessary steps to bring the matter before the Court.

At another meeting held on 6th September after filing the new rules resolutions in the same words were again passed.

Finally, at an Executive meeting held on 16th September, and consisting of Prendergast and Duke, it was resolved: "That the

action of the Federal Council on the 11th day of February 1911 be and is hereby confirmed and approved, and resolved that the rules of the Association adopted by the Federal Council on the 11th day of February 1911 be hereby adopted and confirmed as the rules of the Association from the said 11th day of February to the 5th day of September 1911, and that all acts, deeds or things done by the Association, its Council or Executive Branches, Divisions, Officers or Members thereof under or in pursuance of or in accordance with or otherwise based on such rules from the said 11th day of February be and are hereby confirmed and ratified."

The utter futility of this resolution is apparent. At best it was an attempted ratification by unappointed agents of their own appointment and their own unauthorized acts.

A resolution in the same terms and open to the same comments was passed at a meeting of the Federal Council held on 16th October.

The log was, as I have already said, sent in September 1911 for a second time to the employers, including those in Western Australia, and on 26th October the plaint was again filed by the authority of the supposed Executive.

I have already pointed out that the original rules of the organization were the only ones that ever had any validity. Even if those of 22nd November (the so-called federal constitution) were valid, the attempted alteration of them by the assemblage of February was invalid for the various reasons already pointed out. Those registered in September were equally invalid.

A book was produced to the Court, which contained rough notes unsigned, purporting to record the proceedings of two meetings of Victorian employees held in Melbourne on 2nd May 1911, at each of which it was resolved that the meeting "adopt the log to be served, and appoint Prendergast and Warton to file the plaint and take all necessary steps to bring it before the Court." One meeting purports to have been held in the morning, and the other in the evening. These two entries stand alone in the book. The other end of the book contains minutes duly signed of meetings of the Australian Tramway Employees'

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

Association held in Melbourne, the last entry being of a meeting held on 27th April 1911.

It is apparent that these two meetings were not either a general or special meeting of the organization within the meaning of rule 23 of its authentic rules. Indeed, they were evidently not regarded as a record of such a meeting. On the contrary, it is apparent that they were regarded as meetings of members of the Victorian branch of a supposed federal association. They could not in any view be regarded as a valid authority to submit to the Court a future dispute which it was only then proposed to create.

The alleged dispute had not, therefore, been submitted for the decision of the members of the Association, as required by rules 22 and 23 of the original rules (and by the identical rule of the federal constitution) nor were the so-called Executive the Committee of Management of the organization.

It follows that the dispute was not submitted to the Court in the manner prescribed by the rules of the organization, and the certificate of the Registrar (upon the face of which that non-compliance appears) cannot alter this fact.

It also follows that the dispute, if any, was not a dispute between the employers and an organization, represented by its authorized agents, but between the employers and a self-appointed body of persons whom I have described as the promoters. Under the law in force when the plaint was filed this fact was a technical bar to its presentation. It is also a very substantial matter in considering the quality of the alleged dispute, which is a much more important question, and which depends not upon the provisions of the Arbitration Act, but upon the terms of the Constitution.

The whole of the proceedings which I have recounted were, in reality, not proceedings of the claimant organization, but proceedings of a voluntary association of persons who had informally associated themselves together for the purpose of instituting a suit in the Arbitration Court, and, as a necessary preliminary to such a suit, of creating an industrial dispute which would in law be regarded as a dispute extending beyond any one State, and who assumed without authority the name of the claimant

organization. The dispute, if any, was a dispute between that voluntary association and the employers, and the plaint was submitted to the Court not by the authority of the claimant organization but of persons who borrowed its name without legal warrant.

It was contended that the rules of the Association on the faith of which it obtained registration are directory and not obligatory, and that it is sufficient that there should be a rule, its observance or non-observance being immaterial. I do not think so. In my opinion the rules on the prescribed subjects are imperative, and any action of the organization not in accordance with them is a mere nullity.

I am sorry that I have been compelled to occupy so much valuable public time in unravelling the curious web so laboriously woven by the promoters in their attempt to establish the existence of a dispute created in due and proper form. I pass to what may be regarded as the substantial, as opposed to the formal, merits of the case.

I will deal first with the alleged dispute in Queensland. When the Brisbane employees, who thought themselves a branch of some federal association, were asked in December 1910 and January 1911 by the New South Wales Federation to formulate their claim for the purpose of compiling a joint log, they resolved to reply "that we are unable as yet to say definitely what we require." They accordingly appointed a committee to draw up a log to be submitted to the Melbourne conference, and the committee did so. Their draft was adopted by a meeting held on 30th January, and their delegate was instructed to use his own discretion at the conference. The Tasmanian employees did not draw up any draft log, but gave plenary powers to their delegate, who was not a Tasmanian. The South Australian Association adopted a draft log, and a draft appears to have been drawn up by a sub-committee of the Association in Melbourne.

The log adopted at the assemblage of February differed in many most important particulars from any of these drafts. The principle adopted was apparently to embody in it all the claims proposed in any State, whether exclusively applicable to that

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

State or not, and whether or not the question of making such a claim had ever arisen in any other State.

For instance, the federal log, as it is called, contained 76 separate claims, besides the claims as to wages, of which 31 only were contained in the Brisbane draft log. Of these 76 claims 40 had either been already granted or withdrawn, or were inapplicable to the Brisbane Tramway Company, or already in practice. Of the claims regarding motormen and conductors in the federal log 49 were not included in the Brisbane draft and less than half were included in the South Australian draft. The Brisbane draft contained a claim of preference to unionists, which was not contained in any of the drafts sent from the other States, in none of which, indeed, had any claim for preference ever been put forward. The log comprised 72 different classes of employees, of which only 22 were employed in Brisbane and only 27 in Adelaide. The federal log asked for an addition of 10 per cent. for Brisbane employees, which they had not themselves thought of asking, and an addition of 15 per cent. for West Australian employees. It amplified the claim for preference to unionists to a claim for the exclusive employment of members of the claimant organization upon or in connection with the tramways of the respondents or the power employed upon them and the repair and examination of their carriages. Similar amplifications were made with respect to the drafts from other States. When the so-called federal log had been thus compiled, copies of it were sent to the several States for adoption, and it was adopted by meetings held in all of them. The South Australian Association in adopting it resolved that the Committee be congratulated on drawing up "such a splendid code of conditions and wages." This phrase very aptly describes both the purpose of the assemblage and the quality of the alleged dispute.

The next step was to obtain the signatures of persons supposed to be members of the Association to a document to the following effect:—"We the undersigned members of the (Queensland) Branch of the Australian Tramways Employees' Association being employees in the Tramway Industry . . . being dissatisfied with our working conditions do hereby authorize and appoint A. C. Warton General Secretary of the Federal Council

of the Australian Tramways Employees' Association of which Association we are members to request our respective employers to grant us the following improvements in our working conditions." The consolidated claims were then set out at length, and the document proceeded:—"The said A. C. Warton is hereby duly authorized to receive our respective employers' reply, and in the event of the claims not being granted by the day of now next the said A. C. Warton is hereby instructed to bring the matter before the Australian Tramways Employees' Association in the manner prescribed by its rules with the request that they submit the dispute arising by reason of non-compliance with the said request made on the respective employers to the Commonwealth Court of Conciliation and Arbitration for determination."

It is apparent on the face of these documents that the signatories intended to sign as members of some association of a federal character, of which Warton was the general secretary. The claimant organization was not such an association, nor was Warton an officer of it.

Fortified by these documents, Warton made the desired "request" in May 1911, and filed a plaint which was afterwards withdrawn, as already stated. The renewed request in September was made through the claimants' solicitors. In the plaint the claim for exclusive employment of members of the Association was modified to a claim for preference to them, and a demand of an additional 15 per cent. to Western Australian employees was added, as already stated.

It is worthy of note that the letter of request implicitly assumed that non-compliance with the joint demand would, *ipso facto*, constitute a dispute of which the Commonwealth Court would have cognizance. And there is no doubt that that opinion was commonly held, and was the basis of all the proceedings I have described.

Up to this time the relations between employers and employees in Queensland and South Australia were, to all outward appearance, perfectly amicable.

The conditions in Brisbane are thus stated in the affidavit of Mr. A. G. Stephens, superintendent of the Brisbane Tramway Company. "As Traffic Superintendent of the Company it is and

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

always has been part of my duty to appoint all the motormen and conductors and to supervise and control all the traffic arrangements and to receive all reports and complaints in reference to all matters respecting such employees. My duties consequently bring me into close daily contact with large numbers of employees of the Company and more particularly with employees engaged in the Traffic Department such as motormen, conductors, signalmen and sweepers, who form the large majority of the Company's employees. A large number of such employees have been on terms of considerable intimacy with me for a number of years, and they have been in the habit of consulting me as to matters respecting their duties and even their private affairs. It has, moreover, been always part of my duty to receive and consider any complaints or grievances emanating from members of the Traffic Department or made against them, whether by Inspectors of the Company or by their fellow employees or members of the public, and to decide upon such matters as in my opinion did not call for consultation with the Manager. All reports from Traffic Inspectors, which reports were made from time to time as occasion arose, were made by the said Inspectors to me as Superintendent. I have consequently been always in a position to be conversant with the feelings and wishes of the great majority of the Company's employees and to know of the existence of any feelings of discontent or dissatisfaction with wages, hours or other conditions of employment on the part of such employees or any of them.

"Save as regards the matter of an increase of wages as from the first day of July 1911, the circumstances as to the request for which and the granting thereof are detailed in my evidence before the said Court as appears upon pages 3378, 3379 and 3380 of the transcript Exhibit C of this my affidavit, at no time in the years 1910 and 1911, and except with regard to the question of the right to wear the badge of membership of the Association, which matter is dealt with in paragraph 20 of this my affidavit, at no time in the year 1912 did the employees of the Traffic Department or any of them or of any other department approach me, or as I verily believe the Manager or any other official of the

Company, with a request for the redress of any grievance or alleged grievances or the granting of any further privileges with respect to hours, wages or other conditions of labour, or with respect to any of the matters mentioned in the said logs or in the said plaints or any of the matters dealt with by the said award, nor was there save as aforesaid to the knowledge of me this deponent, or as I verily believe to the knowledge of the said Manager or any other official of the Company, at any time during the said years any dispute between the Company and its employees or any of them with reference to any of the matters mentioned in the said logs and plaints or any of the matters dealt with by the said award.

"At all times during the years 1910 and 1911, and except with regard to the matter of the said badge during the year 1912, the Company and its employees, so far as the knowledge of me this deponent and I verily believe of the said Manager and of the other officials of the Company extended, were working in perfect harmony, and I this deponent say of my own knowledge that in fact, except with regard to the matter of the said badge in the year 1912, no dispute existed as to any of the matters mentioned in the said logs or in the said plaints or as to any of the matters dealt with by the said award at any time during the said years."

The matter of the badge referred to arose in 1912 after the filing of the plaint, and is not material to this part of the present inquiry.

The conditions in Adelaide are thus stated in the affidavit of Mr. W. G. T. Goodman, chief engineer and general manager of the Municipal Tramways Trust: "Referring to the plaint herein I say that save and except on the question of the recognition of union officials who are not employees of the Trust and of the wearing of the Association badge and of the time for meal relief on Sundays no demands or requests for or in respect of any of the conditions of work or employment set out in the said plaint have at any time been made by or on behalf of the employees of the Trust to the said Trust or to me, save and except the service of the log as mentioned in paragraph 4 hereof."

He annexed a schedule showing all the requests that had been

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

made by the employees of the Trust from December 1909 to 25th October 1911 and the manner in which they had been dealt with.

The statements of these affidavits are not controverted, nor is it suggested that, apart from the sending of the log in May and again in September 1911 and the requests set out in the schedule to Goodman's affidavit, any communication of discontent was ever made by the employees in Brisbane or Adelaide to their respective employers. The only answer made is that notwithstanding this apparent peace the employees were in reality discontented with the conditions of their employment, and that this undisclosed discontent, taken in conjunction with the formal log, was sufficient to constitute an industrial dispute extending beyond one State within the meaning of the Constitution.

I will refer later to the nature of the evidence relied upon to show the existence and quality of this discontent. But before doing so I think it convenient to premise that in my opinion the facts which I have narrated show, unless qualified by other facts, that the true character of the final demands made by the service of the logs was that they were a mere formal joint request for alteration of industrial conditions, not proposed with any intention of insisting upon them but with the hope that some of them would be granted by the Arbitration Court, and that they were prepared in that form because such a joint demand was regarded as a necessary formality, and indeed the only necessary formality, required for the successful invocation of the jurisdiction of the Court. None of the signatories to the documents by which Warton was authorized to make the demand wanted all the things asked for. Some of them really desired some of the things asked for. The majority of them merely wished to get whatever the Arbitration Court would give them, and thought that it was sure to give them something. In short, the proceedings in the Court were regarded as in the nature of an action, and the demand as a notice of action required by law.

In my opinion it is a misuse of language to call such proceedings as I have described an "industrial dispute," in the sense in which that term is used in the Constitution.

The evidence relied upon to show that the demand had behind it a great body of undisclosed discontent was confined to conver-

sations between the men themselves and not communicated to the employers. Attempts were made to show that both in Queensland and South Australia during the operations of the promoters of the dispute strikes were threatened, and were only prevented by their intervention. It clearly appeared, however, that in South Australia the only cause of the threatened strike was the refusal of the Tramway Trust (dating from 1908) to receive officials of the South Australian Association who were not in their employment for the purpose of discussing matters relating to their employees. In Queensland the employees were dissatisfied with the long delay in bringing the matter before the Court, and threatened to break off all connection with the promoters and join a local union called the "Australian Labourers' Federation," which comprised employees in several industries, and with their support to make independent demands upon the Brisbane Tramway Company, and if necessary enforce them by a strike.

These facts only show that, as I have already said, some of the employees really desired some of the altered conditions asked for, such as increase of wages and shorter hours of labour, but they are in my opinion irrelevant to the question whether the alleged industrial dispute was a dispute within the cognizance of the Arbitration Court.

Upon these facts I am of opinion that there was not in existence when the plaint was filed any industrial dispute extending beyond one State within the meaning of the Constitution, unless the service of the log upon the employers was sufficient to constitute such a dispute. I have in other cases given at length my reasons for holding that this is not sufficient.

The argument in support of the contrary conclusion involves, as I understand it, three distinct fallacies: (1) that discontent amongst employees not communicated to employers is evidence of the existence of an industrial dispute; (2) that separate disputes in different States on different matters can, by mere formal consolidation in a single demand with a threat to take it to the Arbitration Court, be converted into an industrial dispute extending &c.; (3) that an intention to persist in trying to obtain an

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

award of the Arbitration Court is material in determining the existence of such a dispute.

In my judgment, therefore, the Arbitration Court had no jurisdiction to entertain the plaint filed in October 1911.

There are other subsidiary objections to the award or awards, some not going to the jurisdiction of the Court to entertain the plaint filed in October 1911, but to its jurisdiction to make the award or awards in December 1912, and some going to its jurisdiction to adjudicate upon some of the matters included in the awards, with all of which I ought to deal.

It is objected that, even if the Court had jurisdiction to entertain the plaint, it had no jurisdiction to make an award in December 1912 because at that date the alleged dispute, if it ever existed, was no longer in existence in Queensland, since all the members of the claimant organization who had been in the employment of the Brisbane Tramway Company at the time of the filing of the plaint had either ceased to be in their employment or were no longer in dispute with their employers. If this is so, the dispute was at the date of the award confined to South Australia, and was no longer a dispute extending beyond one State. I will briefly state the material facts relevant to this objection. At the time of filing the plaint there were between 500 and 600 employees of the Brisbane Tramways Company who claimed to be members of the claimant organization. In January 1912 after the filing of the plaint 480 of these men left their employment under the following circumstances. One of the claims made in the log was that the employees should be allowed to wear a union badge while on duty, to which the Company objected. All the employees had on entering the Company's employment agreed to be bound by all rules and regulations published by the Company from time to time. In May 1911 the Company had promulgated a rule forbidding the employees to wear such a badge while on duty. On 18th January some of the employees did so. Thereupon some of them were taken off the cars and directed to report themselves to the head office in Brisbane, and others were instructed to remove the badges. At an interview with the manager, Mr. Badger, on the same day, he told the men that he did not propose to dismiss them, and

that work was ready for them if they would do it subject to the Company's rules. They intimated their intention to continue wearing the badges, and were told that they could not go on duty wearing them. They refused to take them off, and their places were filled by other men. On 22nd January the Company published an advertisement to the effect that all employees prepared to resume work and to observe the rules and regulations of the Company were required to report themselves for work before noon on the following day, and that all not so reporting themselves would be considered as having vacated their positions and were required to return their uniforms. 460 of the men failed to report. Then followed a general sympathetic strike of 45 unions affiliated with the Australian Labourers' Federation already mentioned, with which the so-called Queensland Branch of the claimant organization had also become affiliated, practically paralyzing all business in Brisbane for several days.

In my opinion the effect of those proceedings was that the 460 men definitely severed their relationship with the Company and could no longer be regarded as their employees. It is not disputed that the order of the Company to discontinue wearing the badges was a lawful order, or that disobedience to it would have been a good ground for dismissal. The disobedience was definite and persistent, and the Company accordingly engaged other men to take the places of the men who refused to return to work on the existing conditions of their employment. Whether the legal effect of these events was (as I think) an abandonment of their service by the men, or a lawful dismissal by their employers, or a rescission of contract by mutual consent, is immaterial. In either view there was a definite and permanent cessation of relationship between the Company and the men. This Court has held in *Colliery Employees' Federation of the Northern District, New South Wales*, v. *Brown* (1) and *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.* (2) that when such a definite and permanent cessation of relationship has occurred the jurisdiction of the Arbitration Court comes to an end so far as regards the men concerned.

(1) 3 C.L.R., 255. (2) 8 C.L.R., 419.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

65 employees, however, remained in the service of the Company and accepted their terms of employment.

It was proved before the Arbitration Court that these 65 men no longer had any controversy with the Company and did not desire the intervention of the Court. The learned President, however, declined to accept their statement that they were at peace with their employers, and held that they were still in dispute with them, apparently on the ground that he thought that some improper influence must have been used to induce them to make peace. I cannot accept this view. I think that when parties inform a tribunal that they have no controversy with their opponents it is not competent for other persons to litigate on their behalf, or for the Court to say that it does not believe them and to insist upon treating them as actual parties to the litigation.

A further objection is taken that it is not competent to the Court to make separate awards for the several States concerned in a joint dispute. It is pointed out that whatever the Court is competent to grant it is competent for the claimants to ask for; from which it would follow that the claim put forward might be a joint claim for as many distinct and separate sets of regulations as there are States combining in the joint claim, and that this is inconsistent with the notion of an industrial dispute extending beyond any one State. In my opinion such a claim would not be any evidence of such a dispute, but would be a mere claim for the intervention of the Arbitration Court to settle industrial conditions. And this was, in my opinion, the real nature of the claim in the present case.

Without saying that an award must necessarily impose conditions of employment in all the States identical in all respects, I think that when it appears, as it does in this case, that the conditions of the States are so diverse as to require different codes of conditions of employment it follows that the dispute is not a single dispute, and is not within the jurisdiction of the Court.

The Queensland award embodied a grant of preference to members of the claimant organization. This was not included in the South Australian award. As already said, it was not

asked in any of the draft logs sent from any of the States other than Queensland.

It is objected that this part of the award is bad for several reasons.

First, it is pointed out that the dispute, if any, as to it did not extend beyond Queensland. This is indisputable, unless the service of the log is of itself sufficient to constitute a dispute extending, &c., a proposition which I regard as quite untenable.

Secondly, it is said that there never was any dispute on the subject even in Queensland. The only evidence in support of the affirmative proposition is that the Queensland employees thought, perhaps not without reason, that the Brisbane Tramway Company had sometimes discriminated against unionists, and that this supposed discrimination had given rise to discontent, which was not communicated to their employers. The claim put forward in the log was for exclusive employment of unionists in and about all the undertakings of the employers. No such claim had ever been made before in any State. Moreover, the claim made in the plaint was for preference of the members of the organization, and not of unionists in general.

Under these circumstances I think that there was not, even in Queensland, a dispute as to preference, and there certainly was not such a dispute extending beyond that State.

Sec. 40 of the Arbitration Act purports to empower the Court to grant preference to unionists even when the matter is not in dispute. As at present advised I am disposed to think that this provision is invalid, but I reserve my opinion until it is necessary to decide the point.

A further objection is that the award of preference is confined to Queensland alone. For reasons already given, I think this objection valid.

It is further objected that by the *Industrial Peace Act of* 1912 of Queensland, which was passed before the date of the award, discrimination against any persons on the ground of membership or non-membership of any association or organization of employees is prohibited under a penalty. In *Whybrow's Case* (1) it was held by this Court that the Arbitration Court is

(1) 10 C.L.R., 266.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Griffith C.J.

bound by State laws lawfully made, and has no jurisdiction to require anyone to do an act forbidden by law. This also is, in my opinion, a fatal objection to this part of the Queensland award.

A provision in both awards as to Boards of Reference is admittedly invalid under the decision of this Court in *The Builders' Labourers' Case* (1).

In my judgment both orders *nisi* should be made absolute.

BARTON J. I have carefully read and considered the judgment just delivered by the learned Chief Justice. As the considerations which have commended themselves to me are virtually identical with those which he has stated, I content myself by expressing my agreement with his conclusion that these rules should be made absolute.

ISAACS J. In the true interests of all concerned, and with a view of avoiding such calamities in the future, to say nothing of the stoppage of the ordinary appeal functions of this Court in regular litigation, I venture to repeat for the consideration of the legislature what I have said before in 1912 (see *Allen Taylor's Case* (2)), that it seems to me it ought to be judicially determined at the threshold whether the entry of the Arbitration Court upon an arbitration inquiry is justified or not. If it is, let it proceed, and the result, whatever it may be, depend on the merits alone. If not justified, then let it be prevented at the outset. Such a shocking waste of public and private time, money and energy as has occurred in the present instance ought not even to be possible.

As the law at present stands—clearly set out in *Allen Taylor's Case* referred to—the Arbitration Court is only permitted to *guess* whether there is a dispute or not. It is bound to ask itself whether a dispute exists or not, and whether it is properly submitted; and it is bound to answer these questions *for its own guidance only*, and not by way of decision binding the parties. And this answer may have to be given upon testimony that is not ordinarily, and according to strict law,

(1) 18 C.L.R., 224.

(2) 15 C.L.R., 586, at p. 606.

considered as evidence. If in fact its answer is right, it has jurisdiction; if wrong, there is no jurisdiction. And see *per Moulton* L.J. in *In re North-Western Rubber Co. and Hüttenbach & Co.* (1).

The Court then proceeds at its peril, and the peril of everyone concerned, including the general public.

If, after hearing witnesses and therefore judging, as it better than any other tribunal can judge, of their credibility, the Arbitration Court thinks a dispute exists, it is bound to proceed whether that opinion is ultimately found to be correct or not.

Claimants, however anxious to have the fundamental question determined at once, have no means of doing so, but must run their chance to the end. Respondents, on the other hand, can if they choose move at once, or if they prefer to have a double chance of winning, by evidence or by exhaustion, may wait. It is not only inimical to general welfare, but quite unfair, that one party alone should have the choice of lying by, taking the chance of a favourable judgment, and, if not then satisfied, of upsetting the whole proceeding, very possibly on some merely technical point. If the respondent is dissatisfied with the award, and can only manage to ferret out some technicality that happens to be considered part of the strict and unbending machinery of the law, the merits of the question count for nothing, substantial justice counts for nothing, the probability or even certainty of general turmoil, and public loss and inconvenience are immaterial and irrelevant; so too are the supposed settled relations of other parties perfectly contented with the award. Thus the whole structure laboriously and patiently built up by the Arbitration Court as an equitable settlement necessary to secure industrial peace disappears as an unreality in the eye of the law—but one which certainly leaves very real and very lasting evil effects behind. If, however, as previously suggested, jurisdiction were given under the Judicature Chapter of the Constitution, to the Arbitration "Court" within the meaning of that Chapter, it is clear (see *Ex parte J. C. Williamson Ltd.* (2)) that, subject only to whatever appeal or assistance by way of case stated to this

(1) (1908) 2 K.B., 907, at p. 921. (2) 15 C.L.R., 576, at p. 583.

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2]. Isaacs J.

Court the Parliament chose to permit or provide, the basic question could be definitely settled before the huge expense of the main controversy was incurred. I must not, however, be taken as recommending an appeal. This Court has laid it down—at least as a principle—that the existence of a dispute is a mere question of fact. A second contest over that mere question of fact after all the merits have long been settled, this case demonstrates may be deplorable; and paper evidence in such a case is altogether unsatisfactory where personal testimony is to be had. The question of dispute or no dispute is one which, if justice is to be done at all, manifestly requires the promptest settlement, and preferably by a Court which sees and hears the witnesses. Delay may defeat the whole object of the claim; the double expense is an almost intolerable burden; trade becomes unsettled, and in a most especial manner all parties, including the public, should have the earliest possible certainty.

Prohibitions of this nature would then, as expressly intended already by Parliament, but ineffectually enacted, be put an end to, and the merits both as to whether there is a dispute, and, if so, whether the claims are properly submitted and are just, would be once and for all determined.

In the present case a patient and exhaustive investigation took place, lasting 93 days. The President's efforts at conciliation succeeded in inducing the parties immediately concerned in eight separate undertakings to assent to an award for improved conditions as to them; and in pursuance of the powers conferred by the Act—as was supposed by those eight sets of participants, employers and employees—their agreements have been certified, and, but for this application by two companies who refused all conciliation, would have stood as an award, satisfactory to both sides, fixing and enforcing the rights of the workers, ensuring tranquil relations between employers and employed, and ensuring the peaceful continuance of public traffic upon the tramways of those undertakings at all events.

In every case of prohibition the applicant has, according to long established English authority repeatedly followed in the Australian States, a recognized burden to discharge as the

minimum requirement of his success. For instance, in *Re Birch* (1), *Jervis* C.J. said :—"Prohibition is not a matter of absolute right: the party asking for it is bound to make out a clear case." So *per Martin* B. in *Ricardo* v. *Maidenhead Local Board of Health* (2). Australian authorities are numerous, and some may be found collected in *Curlewis, Edwards and Sanderson on Prohibition and Orders to Review*, at pp. 131 and following.

But in a case of this kind, where many thousands of employees and eight other employers are interested in maintaining peace and contentment, and where the disorganization of public services in five States of Australia may result from acceding to the application, additional reasons of unusually weighty character exist for insisting upon the undoubted discharge of the onus.

The Public Welfare.—I have frequently expressed my opinion that the governing consideration in construing sub-sec. xxxv. of sec. 51 of the Constitution, the real key in fact to its proper interpretation, is the public welfare. One occasion was in *Allen Taylor's Case* (3). The arbitration constitutionally provided for is not to settle a dispute concerning merely two sets of individuals, but to prevent any two sets of individuals engaged in a public industrial service, owing their very business existence as well as their profitable conduct of trade to the presence and permission of society at large, from obstructing the public by interrupting the regular progress of that service, and consequentially others depending on it, through internal disagreement.

To my former observations on this point, I would add the following important references, and regret I have not time to quote them fully:—Mr. Sydney Webb's memorandum as a member of Lord Dunedin's 1906 Commission on Trade Disputes (H.C.P. 1906, vol. LVI., at p. 18), and Sir George Askworth's Report to the Board of Trade as to the Canadian *Industrial Disputes Investigation Act* 1907 (Cd. 6605) and especially his quotation of Mr. Mackenzie King's report to the Government of Canada.

This central and dominating principle, if given its proper influence in this case, would, as I think, entirely free the matter from difficulty. So long as such cases as the present are considered on

(1) 15 C.B., 743, at p. 755. (2) 2 H. & N., 257.
(3) 15 C.L.R., 586, at p. 610.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

the narrow platform of mere individual right and wrong, looking no further than the immediate contestants and shutting out the public from direct consideration, such as prevails in an ordinary case of an action for the price of a pair of shoes, so long will there be danger that strikes and lock-outs will be still resorted to as a means of enforcing industrial claims, because the broad significance of the constitutional provision will be missed.

If this commanding principle be, for instance, applied to the question whether the Brisbane men really wanted the extra few pence per day they demanded in the combined log, or were mentally content to receive what they put into their sectional log, the answer would be that the danger to the public disregards such a test; whether they would or not, the result in the case of a possible stoppage to the travelling public, and to other industries dependent on the prompt arrival of passengers, is the same in either case, and should be averted.

Acting on this principle, I am unable to concur in the decision of the majority of the Court, and think this application for prohibition, with the minor qualification to which I shall afterwards refer, ought to be refused.

I must even confess that, having regard to the proved circumstances, my mind is unable to grasp the reasons that are said to lead to the conclusion that no dispute within the meaning of the Constitution or the Act existed in this case, that no cognizable difference—and what I mean by this is explained in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1)—as to industrial conditions capable of being adjusted by arbitration ever arose between employers and employees.

If that is a possible conclusion, having regard even to the admitted and the uncontroverted facts established before us, then a serious blow is indeed struck at the power of the Constitution to secure a peaceful and orderly continuance of national industries. The practical effect of recent decisions of this Court is to a large extent nullified, and the whole question reduced to a condition of instability. Indeed, if this decision is logically applied to precisely the same words in State Acts, then it undoes

(1) 16 C.L.R., 591, at p. 632.

much that has already been achieved, and up to now accepted as established, in the domain of industrial peace within purely State jurisdiction.

The argument before us occupied several weeks—the evidence consisting of over 1,500 pages of closely printed matter, independently of over 400 pages of printed exhibits, a whole volume of type-written affidavits, and innumerable separate exhibits and some verbal cross-examination. It follows that it is not easy to compress into a minute compass a sufficient statement of the facts relevant to the chameleon-hued objections raised to the validity of the award. Those facts cover six States, and a period of over two years and a half.

The Facts.—In May 1910 the New South Wales tramway employees, who had a State union, were dissatisfied with their conditions of employment, but the Commissioner, unable from a single State standpoint to grant better terms—a not uncommon situation in Australia—informed the men that should tramway employees in other States obtain improved conditions he would advance his employees to the same level.

Accordingly they started a movement to establish an Australian federation of tramway workers. They called a conference, attended by delegates from Victoria, Western Australia and South Australia, as well as New South Wales. None attended from Queensland, for reasons which are not far to seek, and none from Tasmania. The conference decided to form a federation called "The Australian Federated Industrial Organization of Tramway Workers." They dealt with questions of common interest affecting the industrial conditions of their occupation, and they framed a federal constitution.

There are one or two points which need to be made quite plain at this juncture. First, as a Commonwealth award, or the possibility of it, would probably be necessary—concessions otherwise being unlikely in view of the known attitude of employers in the industry—a registered organization was an indispensable part of the scheme. Next, it had long been decided in the *Federated Railway Servants' Case* (1) that New South Wales State employees could not be members of that organization. So much would be

(1) 4 C.L.R., 488.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

apparent to all who took part in the scheme. It seems to me therefore, at the outset, to be an argument of despair that the employees throughout Australia intended to join a registered organization of which the New South Wales men would be part. The men were not consciously aiding an application for prohibition. Experience proves that such a proceeding is, independently of special effort on the men's part, sufficiently accessible. It scarcely needed the clear indication by Lawton and Warton in their respective affidavits that there was no intention to register an organization which included the State employees as members.

The men in other States were at first agreeable to join the intended registered organization projected by the New South Wales conference because for a time it was the only one suggested.

Brisbane had sent no delegates to that conference. It was not that the men were contented—far from it. From 1904 their discontent had manifested itself in efforts to form a union. Mr. Badger, the manager and attorney under power of the Company, the directors being all resident out of Australia, held supreme control, and his policy was to repress unionism and maintain all the strategic advantages of individual bargaining. He succeeded perfectly. When the 1904 effort was made it was met with prompt dismissals. Restoration was made only on terms of unconditional promise to drop the union. In 1908 circumstances again drove the men to try and form a union ; and again it was defeated. When the State Wages Board Act was passed the men approached the manager, and the outcome was an agreement fixing wages at so much per hour, including overtime, and stipulating that it should last three years. The time limit prevented the Minister from ratifying. Then a Special Board was formed, with Mr. Badger himself as one of the Company's three representatives, there being three of the men on the other side, and a chairman. Without a union, and a strong one, every one of the men's representatives must have known he was in the hollow of the manager's hand, and their verbal assent to terms approved by the manager does not necessarily mean satisfaction. However, in June 1909 a Wages Board determination came into existence,

which subsisted till the slight rise in July 1911. Silence on the men's part between June 1909 and the conference of May 1910, and the absence of Brisbane representatives from that conference, do not in the circumstances prove contentment.

In August 1910, nothing definite having been done, an independent Victorian movement originated to form an organization, and proceeded to some extent contemporaneously with that begun by New South Wales.

We now enter upon a phase necessitating reference to evidence and conduct—I mean that of one George Luke Prendergast—unprecedented, I venture to think, in Australian annals. He must be carefully distinguished from a gentleman whose name also occurs in these proceedings, the Hon. G. M. Prendergast, M.L.A.

George Luke Prendergast has changed sides in the course of these proceedings. At first he was the president, then the paid organizer of the claimant organization, its trusted leader, and then conductor of its legal proceedings in this matter. Mildly superseded for sufficient reason, he has resented it. He has made affidavits for the applicants, supplying material upon which they largely rely not only to destroy the structure he assisted to raise but to attack the truthfulness and moral character of some of the men with whom he was formerly associated. The attempts to assail their characters have, in my opinion, entirely failed. In no instance save one has there, in my opinion—and I have closely scrutinized the matter—been shown any moral obliquity. That one exception is the man himself who makes the charges against others, and whom the applicants put forward as their witness. There is, I think, no single assertion of any importance whatever which he makes damaging to the respondents, that is not contradicted and refuted by a mass of trustworthy testimony; sometimes also by his own. To this extent only were the applicants, in face of the testimony to the contrary, able at last to stand by him: they have urged he should be believed whenever he made a statement that no one contradicted. But with such a man as Prendergast, even that is perilous. The danger of regarding anything he has said—on oath or without oath—since he became actuated by a desire for revenge is evident from certain statements he is proved to have made regarding the applicants

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

themselves, and these statements have not been contradicted. In my opinion these statements are neither more nor less trustworthy than those he has made against the moral character of the men who formerly had the misfortune to be associated with him. Speaking for myself, I decline to place the slightest credence in anything said by a man when moved by such ignoble passions and malicious motives as exist in his case. I therefore place no reliance on any part of the statements he has made on this application, except where learned counsel for the respondents has accepted them.

He is corroborated as to one matter that has received attention out of all proportion to its real importance. I mean the fact that minutes of the central organization put in evidence before the learned President were, during the progress of the case, written out in clear form mainly from the rough minutes then existing. The importance of this incident, I say, has been unduly magnified for this reason. The question which the law leaves to the President to *decide* is not whether there is a dispute, but whether, supposing a dispute to exist, the claim is a just one, whether the men are getting a proper living wage, whether their safety is jeopardized, whether their general working conditions are reasonable. Those are the merits, and the only merits, as far as he is concerned. And whatever the conduct of Prendergast or Rundle, or any other person conducting the case in Court, might be as to the minutes evidencing the existence of the dispute, the true merits are unaffected, and are not based on that evidence. The penalty for any impropriety as to the minutes is not to deprive the men of what has been awarded them as just conditions, if we find in fact there was a dispute. And whether there was in fact a dispute does not depend in the smallest degree on whether the recent writing up of the minutes was or was not disclosed to the President. We know it now, and any former impropriety is immaterial. The facts, however, as to the challenged minutes are these. It is undisputed that they were signed by Prendergast himself, and were put in evidence by Prendergast himself, and sworn to as correct, without his disclosing to the President that they had only just been written out.

As to the course taken by Mr. Rundle, the solicitor, in not

seeing that the fact attacked by the applicants was disclosed: it was thoughtless; he committed an error of judgment in deciding for himself that it made no real difference to put in the clear minutes, instead of disclosing the fact of their recent transcription. But I am absolutely clear nothing worse can be laid to his charge. Rundle was not conducting the case. He was not allowed to. Prendergast conducted the case, and Prendergast, the head of the organization, had neglected to have the rough minutes transcribed. The case, if it had gone on without their transcription, would have entailed a confused reference to rough memoranda. Time was pressing, and Rundle simply typed what he understood Prendergast, with the aid of these rough memoranda, dictated as truthful records of the transaction, and when Prendergast signed them as correct, there was no reason in Rundle's mind for doubting their accuracy. I am satisfied Rundle believed—as he swears—that they were accurate, and that he was assisting and not misleading the Court. What, then, are the facts themselves?—for that is the only material question.

Before recapitulating them further, I have to refer to the exclusion of a large body of important evidence tendered by Mr. *Arthur* for the claimants as to the fact of dispute. A considerable time before the hearing, when it was thought the case would come on earlier, the claimants, desiring an adjournment, were put upon terms of delivering affidavits by a certain date. The hearing did not come on, however, for twelve months afterwards; and, about a month before it did come on, some affidavits were made on behalf of the claimants on the question of actual discontent with existing conditions, and these were sought to be put in before us. They were objected to, and technically the claimants had not complied with the requirements as to date. But no injustice could have arisen by admitting them if the deponents were cross-examined, and great and widespread injustice may have arisen from their exclusion. I accordingly dissented from the decision of the majority of my learned brothers, and I understand my brother *Powers* agrees with me in this, that this evidence of the true facts ought not to have been excluded, full opportunity for testing them by cross-examination being accorded. And I further think that this view

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

is strengthened by the circumstance that the applicants were even during the hearing permitted to amend their technical grounds of objection stated in their rule *nisi*.

The further facts, themselves established as recorded in the minutes and as sworn to by a number of witnesses whose credibility cannot be doubted, are substantially as follow:—

In August 1910 there was started, as I have said, a Victorian movement to form a registered Commonwealth organization. Prendergast's original account, when unswayed by unworthy motives, was that the men were extremely dissatisfied and thought it desirable to form an association; that the movement for this association and that for the New South Wales association went on at the same time and independently. In their broad facts the statements he then made are fully supported by independent testimony now.

On 6th November rules were passed, and on the 8th a resolution was passed to register the Association under the Commonwealth Act.

On 9th November the application was made, and, in accordance with the Statutory Rules, the rules of the Association as then existing were lodged. Statutory rule 5, sub-rule (v.), requires the application to be accompanied by two copies of the association rules.

One or other of the concurrent movements for the establishment of a registered organization had obviously to give way. It did not matter to the men which was registered.

The matter was arranged by the Victorian association agreeing to adopt a federal constitution already framed by New South Wales.

This was honourably carried out, and on 22nd November the general body of the Association added the federal constitution to their rules, and instructed the president and the secretary to lodge this with the Industrial Registrar.

The Association—then an unregistered common law body of men—agreed in fact to these rules. No one dissented then, no one has ever dissented since. Everyone knew of them and worked under them. I know of no reason why men so situated

could not so adopt them as their rules; or validly instruct their officers to lodge them as their rules.

The new rules were in fact lodged. But it is said that they are not in law part of the organization rules. The majority of the Court have agreed with that view. I dissent. The Statutory Rules then in force (1910, No. 3) provide for various matters. Rule 5 is headed "Conditions for Registration"; this is the only rule which is a "condition for registration," and this rule has been complied with. Sub-rule (v.) says that every application for registration shall be accompanied by

(*a*) two copies of a list of the *members and officers* of the association, so far as known to those signing the application;

(*b*) two copies of the *rules* of the association.

This was done.

No law says that the rules are inalterable between application to the Registrar and actual registration, which, if contested, may last for months.

Reliance is placed on sub-paragraph (*b*), above mentioned, that two copies of the rules must be lodged as a condition, and it is said that implies incapacity to alter the rules until after registration. I do not agree. If that is a correct implication, however, it follows that sub-paragraph (*a*), as to membership and officers, is also liable to the same implication, and no alteration of membership or of officers can take place. No new member can join, and no old member can leave until after registration—which, in the language of Euclid, "is absurd." Further, as trade unions may register as organizations, it seems to me altogether untenable that their statutory power of making rules and carrying on their ordinary business should be impliedly stopped because awaiting registration.

Suppose in any case, either trade union or the claimant organization, the registration is successfully resisted, can it be really the law that membership and rules instituted in the meantime are invalid? Because I did not think so, I was compelled to dissent from the ruling that excluded the federal constitution. I agree with the answer given by my brother *Powers* to the objection, namely, that the case is met by the

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

statutory remedy provided by sec. 60 if the Court sees it is a proper case for that remedy. Not alone for this reason do I think those rules sustainable. They were acted on, and others were on their authority made and also acted on. The whole Association and all its members must have been well aware of the existence of the rules and their supposed force, and everybody regarded them as binding on himself and all fellow-members. The circumstances are such that in my opinion the validity of the rules cannot be challenged by strangers, and have been effectually ratified by the members. See *Lindley on Companies*, 6th ed., p. 219; *Phosphate of Lime Co.* v. *Green* (1); *Muirhead* v. *Forth and North Sea Steamboat Mutual Insurance Association* (2); *Ho Tung* v. *Man On Insurance Co.* (3); *Montreal and St. Lawrence Light and Power Co.* v. *Robert* (4). The decision of the majority of my learned brethren, however, on this point cuts away at a stroke also the rules of February 1911 and August 1911. The facts, therefore, have to be pursued as if those rules had never existed. How this decision is reconcilable with the principles to which I have referred I do not understand.

While the registration was proceeding Lawton went to Brisbane and Adelaide, and told the tramway men there of the arrangement that had been made and what was being done. No doubt could therefore have existed in the minds of those men as to the particular organization they were invited to join. In Adelaide for some time back there had been a request for an increase in wages, and the question was active in September and October and November.

On 30th November a mass meeting was held in Adelaide. The men already belonged to the South Australian State union, and the vice-president of that union took the chair. They approved of the scheme, and passed a resolution which embodied their individual and collective approval in these words: "That the Federation be known as the 'Australian Tramway Employees' Association,' and that this Association be the South Australian Branch thereof." The last ten words were written into the minutes, with a different pen and perhaps different ink. The

(1) L.R. 7 C.P., 43, at pp. 58-63.
(2) (1894) A.C., 72, at p. 82.
(3) (1902) A.C., 232.
(4) (1906) A.C., 196, at p. 203.

fundamental fact, however, of the men there and then passing a resolution to form the South Australian branch of the Australian Association is proved by the affidavits of E. Dickson, Smeaton, a member of the South Australian Legislature, Lawton, Hill, Eitzen, Symonds and Richards, and some of these depose to the confirmation of the minutes as they stand. There is absolutely no evidence to the contrary. No blemish has been cast upon the honour of these men as citizens, or their trustworthiness as witnesses; and to doubt their oaths on this point would, in my opinion, be to cast a reflection upon them without judicial warrant; to disbelieve them altogether would be, as I hold, to violate the first principles of law. But unless that step is taken, it is established by them indisputably that the South Australian men in November 1910 determined advisedly and directly to join the claimant organization, and to become a branch of it.

The men individually also took further steps to join the organization itself. This is supported by Hill's evidence given on the arbitration hearing, and by the affidavits of Scally, Needham, Newson, Milne, W. J. Dickson, Frost. The cards themselves signed by the men show beyond question that it was a federated body the men were joining; and, without entering into *minutiæ* that would unduly prolong the matter, the verbal divergencies relied on are nothing more than the result of honest but unprofessional men engaging in a task, supposed to be one of a practical simple nature, but which experience has now shown is surrounded by a very zareba of technicalities, the breach of any one being possibly fatal.

One substantial test, to my mind, is how did the men regard themselves, under what rules did they act, what was done with the money? These things, to my mind, are far more decisive than microscopic points of form, magnified until they look considerable.

In effect, the South Australian Tramway Employees' Association, as such, had gone out of existence since November 1910. The men henceforth had ceased to consider themselves as a State body, but as a branch of the federal body. It is said that it is not possible in law. Perhaps the building itself was not legally destroyed; but it was abandoned. The men henceforth gathered

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

under the dome of the larger Commonwealth structure. The branch as a branch paid its capitation fees to the organization and from the date of the receipt of the application form of the member. The minutes of the branch dated 24th May 1911 show a pecuniary adjustment between Federation and branch.

In December the same course was taken as to Western Australia, where dissatisfaction had some months previously given rise to strikes. The Victorian organization was there agreed to in December, expenditure passed for payment, and since that time (4th and 10th December 1910) the local unions have been deemed to be wound up, and the employees have regarded themselves as a branch of the claimant organization. Dues have been paid in accordance with the Association rules since 1st January 1911.

Not until 15th December 1910 was the organization actually registered. The Queensland Government had intervened and delayed it. At Brisbane Lawton openly held a meeting in the Town Hall, said that they intended to cite a case to the Court, that delegates were being sent to various States to form branches, and "a log would be drawn up to be submitted to a conference of delegates from the various branches." Dissatisfaction, latent and suppressed before, now became "discontent, shot with the colours of hope," and the men could act openly.

On 18th and 20th December they decided to come into the Federation, and over 400 joined then by signing applications. These were sent on to Warton as general secretary, and he says that all the branches—which therefore includes Brisbane—have paid capitation fees as from the date of the receipt of the application form by the branch secretary. The identity of the organization the Brisbane men attempted to join is, as in the case of Adelaide, placed beyond reasonable dispute, and by the affidavits of Campbell and Donovan.

Warton's letter of 23rd December 1910 to Champ states a conference would be called to consider claims, and this important passage occurs, which was the basis—and naturally so—of the whole of the log proceedings:—Warton says: "*These matters will be decided by the conference, subject of course to the approval of the several State Branches.*"

To all who have taken notice of the methods of labour organizations in any part of the British Dominions where such movements have life, or even in America—for the matter is not merely national, but international,—conferences and congresses which meet to consider industrial rights are always recognized as the ultimate body to formulate the general demands. Local or sectional bodies draw up tentative proposals, not for submission to employers, but for internal consideration, drawing attention to special local necessities. It is the central body which "standardizes" the claims, looks at them from the common and wider standpoint, and reduces them to a more or less uniform shape for presenting to the employers as a demand. The essence of the thing is that it must be so.

A sectional log standardizes individual requirements; and a central demand performs the same office for sections. The elimination of undercutting competition between workers is frequently an element in each case, and runs through the system, and applies to nearly every branch of the industrial conditions. Consequently, when a section sends in its suggested claims—as Brisbane or Adelaide did—it sends it in not as a definite final statement, but subject to the modification which it ought to receive from a standardization standpoint.

If the section could foresee the effect of that standpoint it would itself make the modification. So it leaves that to the conference, reserving only the ultimate right of approval after central consideration has moulded the suggestion. And this is what every tramway worker must have thoroughly understood by the statement I have quoted from Mr. Warton's letter. Learned counsel for the applicants have urged that it was leaving to others to make whatever claim they liked for each section. I repeat that that is a capital error of principle; the parties did in that case exactly what is done in most large labour disputes, examples of which I shall give later. If, however, what was done in this case is alleged to be fatal to the existence of a dispute, it rests with those so alleging to indicate how otherwise large and segregated bodies of men could practically have a united dispute. Only in one way, as far as I can see—namely, by the conference abandoning all ideas of discussion, and simply

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

adopting the minimum claims suggested by any section and without modification. Is that reasonable? Applied to any other phase of life where suggestions for common action are made, whether a company meeting, or Parliament itself, it would be rejected *instanter*. The only reasonable view, I take it, is that *the combined body must be taken to want what the combined body ultimately, with the consent of all concerned, resolves upon and declares it wants.*

On 5th January a general meeting of the organization—that is, a conference—is called. The declared purpose of the gathering was "to frame a log of wages and claims, and re-frame federal rules, and elect federal officers," and the secretary was instructed to give notice immediately to all the branches not already notified. That minute is said by Prendergast to be fictitious, and the substance of it is implied by him to be imaginary. It is impossible to conceive a more shocking instance of wilful deception, and yet the applicants press it.

When the actual minute Prendergast challenges as a fabrication is looked at, it is found that in his own handwriting is the word "carried" and after it his own signature. In his own sworn evidence before *Higgins* J. on 7th March 1912 he produces this very minute, and testifies to the resolution being passed. In addition to that, Duke in his affidavit swears to the correctness of the proceedings recorded in the minute, though, as he says, the date should be earlier, probably the 5th, the 6th being inserted on Prendergast insisting it was right.

On 8th January the general meeting, which proved to be a mass meeting of 1,000 men, was held at the Temperance Hall, Melbourne. They resolved to call the conference for 7th February. The Hon. G. M. Prendergast, M.L.A., spoke at the meeting. His observations as to a good investment was a mere rhetorical flourish by an outsider, but yet it is imputed to the whole organization, even absent members, as if they had uttered it personally.

Not only is the imputation unjust to the men who had already determined to go forward, but it is legally irrelevant. It is as irrelevant as if it were proved that the applicant Companies here had resolved on the recommendation of an outsider to apply

for this prohibition as an investment, to run the chance of a successful issue, a comparatively small expenditure leading to an ultimately great pecuniary gain.

On 13th January at Hobart the tramway men determined to form a branch of the organization. Marshall was appointed delegate from the Hobart branch.

On 24th and 26th January the Brisbane sectional log was prepared and considered, which Campbell was to take with him for submission to the conference. Everyone in the branch knew the steps being taken; they knew what organization was moving; they formed part of it; they consciously shared its action and its identity. The Company took the precaution of laying in a stock of coal. So real did the Company then think the action of the employees. Indeed, its reality must have impressed itself on the mind of the acting manager, Mr. Stephens, when he on 25th January cabled Badger, who was at Vancouver returning to Australia, "Employees' conference will be held week after next Melbourne in order to prepare demand."

On 7th February the conference met, and sat for six or eight days. The States represented were Western Australia, South Australia, Victoria, Tasmania, New South Wales and Queensland. The first day was devoted to tramway matters outside the specific affairs of the organization, but common to all the Australian employees. On the 8th the special business of the conference took place—the New South Wales men being visitors only and having no vote—and the result was the formulation of a standardized and combined log.

Mr. Warton was cross-examined as to this conference and other matters. I feel it my duty to say I believe Mr. Warton was an honest official, and an honest witness. Substantially his story is correct, as it proves; quite apart from his evidence the truth of the main story he tells is fully sustained. Like many another witness who makes an affidavit some of his expressions deposed to, when closely examined, go further than intended, and this he frankly admitted. But I am perfectly satisfied Warton never consciously deviated from the truth, and as a matter of substance what he said can be relied on as accurate.

A sub-committee formulated the resolutions passed and the

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

conference adopted the log as finally formulated, and did so by formal resolution. It also directed it to be submitted to the branches, and in case of a branch suggesting an amendment, the Executive was to have power to amend accordingly. The log and these determinations had to go back to the constituencies themselves for adoption, and they did so. All the branches, and ultimately the organization, finally adopted the log as settled in conference.

Up to February 1911, when Adelaide adopted the log, Mr. Smeaton, M.L.A., was president of the South Australian branch, and he swears positively that, up to his retirement then, there was the gravest discontent. The discontent continued.

On 16th March an extremely important letter was written by the organization to the Brisbane Company. It informed the Company: (1) that the organization had been formed and registered; (2) that a branch existed in Brisbane of which Champ was local secretary; (3) that Warton was general secretary. It politely requested some recognition, at least by honouring correspondence, and stated that it was not formed in antagonism to the Company, but to discuss and determine what proposals should be made to the Company affecting the working conditions of the employees. It also stated that in the event of claims not being granted or assented to the Association's business was to submit them to the Arbitration Court. The Company's courtesy was not equal to a reply.

These repeated incidents, all part and parcel of a policy to refuse recognition of unionism, recall the following observations of Mr. and Mrs. Sidney Webb in their great work on *Industrial Democracy* (at p. 177):—"'I will pay each workman according to his necessity or merit, and deal with no one but my own hands'—once the almost universal answer of employers—is now seldom heard in any important industry, except in out of the way districts, or from exceptionally arbitrary masters." Certainly Brisbane is not an out of the way district. The memorable report of Dr. Garran's New South Wales Commission in 1892 pointed out specially, and necessarily including Australia, that "the federation of labour and the counter-federation of employers is the

characteristic feature of the labour question in the present epoch."

It is patent, therefore, that the persistent refusal to recognize the union, and the determination to ignore the characteristic feature of the position, were, for reasons I shall advert to later, to deliberately exasperate the employees if they had a genuine sense of grievance with respect to their conditions; it ran the manifest risk of strife and the disorganization of public tranquillity and welfare. This deplorable result, practically on the surface, eventually followed; and that it did so is, to my mind, unanswerable testimony of the genuineness of the claims.

The argument that non-recognition amounted to a distinct dispute unconnected with the general demands is referred to later.

On 20th April a general meeting at Adelaide appointed Edward Dickson to witness the signatures of the men to the log and authorization. He afterwards did so. Every man who signed was asked if he were a member of the claimant organization, and he said he was. On the 23rd Ballarat approved of and signed the log and authorization. It is sworn they were discontented with the poor wage they were then receiving. Eventually by the end of April all the copies of the log sent out to the various branches were returned to headquarters duly signed by the men.

All the employers were duly served, except in the case of Western Australia. The various branches—Victoria (2nd May), Queensland (4th May), Hobart (5th May), Perth (7th May), South Australia (8th May), Ballarat (14th May), Fremantle (11th June)—authorized all necessary steps to be taken to proceed before the Arbitration Court. These events constituted a distinct and specific authorization by the men disputing to the organization to submit their claims to the Court.

At this point I ought to notice one portion of the evidence that was made much of. Jessop (Brisbane) stated in cross-examination to Mr. Frew that six motormen and conductors who were on the sub-committee to draw up a tentative log for suggestion to the conference were personally satisfied with the log as it left their hands. This, the only piece of evidence as to satisfaction, of course affected only the particular six motormen

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

and conductors. Their satisfaction obviously does not extend to any others of the hundreds of Brisbane men concerned. He goes on to say "If we could have bettered them we would," and that the general meeting to which the list was submitted made alterations. But that evidence was relied on to support the argument that all the Brisbane men really did not want any more than was in the tentative log, and—strange *sequitur*—there was no dispute as to them. But, apart from the transparent inadequacy of this shred of testimony to support so huge a structure, I agree with what *Higgins* J. said, namely, "It is not a question what six of the sub-committee wanted, but it is a question what the men wanted," and also "Supposing if six representatives say 'We want this thing in the log' and then the whole meeting say 'It is not strong enough, we must have more in the log'—surely that is all right."

The legal effect of the evidence I deal with later.

The log was served on all employers, except that through mistake Western Australia was omitted. The demands were refused, in some cases by courteous denials. Brisbane maintained its lofty policy of silent disdain.

An application on 21st July to insert Western Australia in the plaint was refused, and *Higgins* J. signed an order allowing its withdrawal so as to permit of a complete plaint being re-filed.

On 28th and 29th August the organization held an important conference at Melbourne. Delegates were present from every State in Australia. Rules were amended; but, as these have been decided to share the fate of the former rules, I say nothing further as to them.

It was resolved to re-serve immediately the logs of wages and conditions; and, failing settlement of dispute, to proceed to arbitration. Prendergast and Warton were appointed to conduct the case and execute documents.

On 5th September the first plaint was taken off the file. The delegates met, representing Western Australia, Queensland, Tasmania, Victoria and South Australia; ratified all that had been done; and for greater safety, and in order as it was thought to cover all possible objections that ingenuity could raise, the Executive of the organization, on 16th September, also purported

to ratify all past acts. The latter may not count for much, but the further action of the branch representatives of all the States, purporting at all events to act for their respective fellow-members, seems to me—endorsed and ratified as it was by subsequent conduct of the men themselves—to make their action unimpeachable, if tested by ordinary rules of law.

On 8th September the log is re-served on all the employers, together with a letter of demand signed by Brennan & Rundle on behalf of the organization. It intimates that the log of wages and conditions is that which it is desired to govern the conditions of work and wages in the particular company's employment. It asks for an intimation within seven days whether the conditions will be acceded to, or whether a conference will be granted to discuss it with a view to entering into an industrial agreement. Failing reply within the period—that is, a reply of any kind—a refusal will be inferred. The Adelaide, Fremantle and some other companies recognized the existence of the men and replied fairly enough, but not agreeing. The Brisbane Company made no answer.

On 18th September, or a little prior, Lightbody resigned from the union. Why did he and Meyer and Gore resign? Was it, as suggested, that each of them had come to see the sinfulness of his former conduct, and so become transformed from a demon of strife to an angel of peace? Or was it, judging by such evidence as Monahan and Clifford gave, that the men were made to choose practically between their bread and their principles? If it were important here, there is abundant evidence to establish coercion. But it is not important, and may be passed by with this observation, that I am satisfied the resignations did not take place because the men were content with their conditions. They were afraid of worse.

The organization resolved to seek a compulsory conference through the medium of the Court. I do not dissent from the view that it may have been looked upon as a good move strategically, but nevertheless the refusal of the employers to accede to it, equally open to the considerations of strategy, is conclusive evidence of their disputing the conditions which were asked for by the men. On 16th October another meeting of

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

State delegates took place. Notices had been sent to all the States, setting out proposed resolutions confirming all that had been done, and these were now passed. On the 26th the second plaint was filed.

Ordinarily, the matter would rest at that point, but, in view of the contested facts, subsequent events are important as evidentiary circumstances.

In Adelaide, on 5th, 11th and 12th December, there is evidence of discontent and complaints.

On 27th December the Brisbane men were so exasperated at the conduct of the Company, and impatient at the slow progress of the Court proceedings, that they determined to affiliate with the A.L.F., and the organization felt constrained to consent. This is the claimant organization, be it remembered, of which it is strenuously contended the Brisbane men formed no part, and intended to form no part.

The result was that on 18th January there came Badger's famous ultimatum demanding the surrender of "Badge or billet." At that time there were 480 unionists in the Brisbane branch; they were forbidden to come to work so long as they wore a little brass symbol called a badge. They had agreed, it is true, to abide by the Company's regulations, and it was within the letter of the law that the Company could, without breaking its agreement with them, forbid them from coming to work so long as they wore the badge. And the Company did so forbid them. It was, however, an undoubted lock-out, and not a strike. The difference between the two may not always be distinctly marked, but in this case it is. Whichever side stops the work of an industry which the public wants to proceed either commits the lock-out or the strike. If employers insist on reducing wages and the men refuse to work for lower wages, they strike; if men insist on wearing a badge and the masters stop them from running the cars, the masters lock out the men. It does not depend on the legal justification for the act. That may create a civil bar to an action, but it does not the less amount to a lock-out.

If I am right in my opinion that an inter-State dispute at that time existed, then as the claim to wear a badge was part of it the Company committed a clear breach of the federal Act;

while on the one hand the men should have awaited the decision of the Court before wearing the badge, so on the other the Company should have awaited the decision of the Court before enforcing its abandonment by means of lock-out, because the law definitely prohibited that particular step. The public interests were ignored, and yet but for them the Company would have no right to exist, and would make no profits. Those interests were entirely subordinated to a strict enforcement of a regulation which, after all—as proved elsewhere—in no way interferes with the practical working of a tramway system.

The result of the lock-out was a general disorganization of traffic in Brisbane, accompanied by disorder of a serious kind. About 80 to 85 men in the Company's employ, many of them belonging to what was called the Company's union—a sort of recreation club receiving from the Company favoured treatment because they did not become members of the employees' union—did not wear the badge, and remained in the service. Others who were members of the employees' union also did not wear the badge, and remained, and resigned from the union. On the 22nd the Company advertised that men might resume, but only if they surrendered the badge. In other words, the lock-out continued, and whatever the merits might be, it is, to my mind, the strongest possible evidence of actual discontent with conditions when men, faced with all the serious consequences of their act to themselves and their families, think it preferable to fight for better conditions rather than yield. The majority did so; they stood together and fell together. But the men did not abandon their occupation or calling. They were still tramway men, though locked out, and they wanted to come back as professed unionists. On 31st January there was a general strike, clearly to try to force the Company to take back the men on the terms they demanded. By order of the Police Commissioner no cars were run till 5th February, when a limited service was restored till the middle of March.

I should personally have thought human reason would be indeed exigent if such protracted argument as we have had were necessary to decide whether the Brisbane men were seriously in

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

dispute or not. In the circumstances, it is clear to me they were still in dispute. There was no abandonment as to them.

On 22nd February, however, a new step was taken by the Brisbane Company. They procured a document (Ex. 122) to be signed by 39 men, authorizing three men—Lightbody, Meyer and Gore—whose real feelings in their new situation may be conjectured, to attend before the Court and represent that it was their wish to abandon the proceedings. The idea of the Company was that, as the other men had been got rid of entirely from the Company's actual service, all that was necessary now was to procure a formal abandonment of the proceedings by those who remained, and the Company would be clear.

In view of the argument that a dispute, however earnestly pressed, is not a real dispute if the men have a mental satisfaction with existing or other conditions, it is inexplicable how it can be argued by the same party that a withdrawal, engineered as this was, can be regarded as a "real withdrawal." The respondents denied that it should be regarded as an abandonment. The process as disclosed by the evidence was that Mr. Thynne, the solicitor of the Company, sent a letter to each of the 39 former unionists giving formal notice to attend a meeting, saying "Your attendance is requested on" date mentioned. They met. Mr. Thynne was present. He drew up resolutions, handed them to the men, asked them to use their own free will in passing them. The alternative may be inferred. They formed themselves into a special group. Meyers, when asked if this body had any name, said: "We were called the 'Twisters,' that is all I know." Lightbody was placed in the chair. They passed the resolutions, of course. They balloted for three out of six to go down to Melbourne, and they signed the document, which Mr. Thynne drew out. So little did Thow understand it, one of the men who was even balloted for as a representative, and was called as a witness by the Company, that he swears: "I understood that these men were to go down to the Court to state that we had no further wish to have any connection with the union," and that it was the only means of getting their clearance from the union, and that was what was represented to him when it was presented to him for signature. Edwards, for instance, says much the same.

Meyers says before *Higgins* J.: "I am here acting on behalf of the Company, secondly for the men. The Company is paying our expenses." He explained that what the men wanted was to get a clearance from the union. Plainly that was a condition of retaining their positions.

A stronger case of moral compulsion can scarcely be imagined. The fact remains, however, that the men themselves in this case did personally before the Court request withdrawal from the plaint.

It was not, as in *Holyman's Case* (1), an application by the employers only, based on a document practically forced from the men, but the application itself is by the men; and consequently I am forced to the conclusion that, as regards these 39 men, the dispute ended when it was announced by their agents in open Court that they no longer desired to proceed—in other words, that they abandoned the dispute. The statement in the document that they were satisfied with their conditions is, in my opinion, a glaring untruth, forced upon them, and if true would convict them, and especially a man like Lightbody, of long-continued conduct, for which the strongest language of reprehension would be not too severe, in the course of which he appeared at all events as the most fiery advocate of redress for grievances. But the inability of disunited individual workers to withstand superior force, especially when wife and children also have to be considered, is a postulate of industrial economics, and even Lightbody may be understood.

On 2nd August 1912 a further batch of 23 were induced to sign a similar authority (Ex. 139). One of the signatories, Edward Hendricksen, called as a witness by the Company, was asked as to this:—"Q. What was your object in signing this Exhibit 139; under what circumstances did you sign this? A. I don't know. Q. Was it ever read over to you? A. No. Q. You were simply asked to sign? A. I don't remember anything at all." He added that he was told by Mr. Stephens to go to the office of Thynne & Macartney; that he had no idea for what purpose till he got there; that when he got there he saw a solicitor, Mr. Thynne; that he signed the document there; that the contents of the docu-

(1) 18 C.L.R., 273.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

ment were never explained to him. This document is put forward as a solemn piece of evidence that Hendricksen, and others like him, seriously meant all the document contains. However, he and his friends have given the authority, have by their agents asked for discontinuance; and whatever be the motives impelling them, they have not, even after knowledge of its contents, disclosed on examination, attempted to withdraw it. If they had, I should have taken a different view. As it is, I feel bound to act upon it as an abandonment.

Now, apart from those men, all the others have pressed their claims to the last. Necessity has forced them to take up in the meantime some other occupation, as necessity may compel a man domiciled at home to reside abroad. But he does not thereby surrender his domicile; and so those men have not ceased to consider themselves as tramway men. Otherwise why would they continue their membership of this organization?

It remains upon these facts to consider the various legal objections raised to the jurisdiction to entertain the plaint.

The first set of objections are formal, and go to the validity of the whole award.

Dispute by Organization.—One formal objection is that, by reason of the definition of "industrial dispute" in sec. 4 of the Act of 1904, an organization as such must be the actual demandant, that in this case the organization was not the demandant because the rules were not complied with. The only alleged failure in this respect is that the demandant employees were not members of this organization.

There are several answers to this, each sufficient:—(*a*) The facts I have narrated show that the employees were in fact members of this organization. (*b*) They were treated as such by the admitted members of the organization, and acted as such, and the cases I have referred to apply. (*c*) The question primarily depends on the construction of rule 10A of the rules of 6th November 1910, and that rule is not exclusive. It is a safeguard against making the organization a close corporation and thereby excluding workers from becoming unionists. It does not impair the general right of the whole body to accept as member any person who desires to join, and whose admission by a

slip is not in strict accordance with the rule. Compare the case of an ordinary company shareholder, and see as to this *Lindley on Companies*, 6th ed., at p. 66. (*d*) The Registrar's certificate of 16th October 1911 is by sec. 21 (A) of the Act conclusive evidence that these men were members of the organization on that date. That fixes the identity of the organization of which they were members, and it is not pretended they were ever members of more than one. The law presumes further that they continued so at the date of the plaint and ever since, in the absence of evidence to the contrary. (*e*) The evidence adduced by the applicants themselves as to the men who resigned in Brisbane from the claimant organization is decisive to show that this organization was the one to which all the Brisbane demandants belonged.

That objection therefore fails, in my opinion, utterly.

Submission by Organization.—Then it is objected, as a further formal objection, that the organization did not submit the plaint as provided by rule 22 of 6th November 1910—that is, by referring it to the decision of the members. This is really a ludicrous objection. Here is an organization formed for the very purpose of submitting disputes to the Court, in fact submitting a dispute (see the affidavit of Stephens, pars. 2 and 11, and the affidavit of O'Halloran, pars. 11 and 20, both made on behalf of the applicants themselves), and in fact doing so with the repeatedly given assent of the members, continuing for months to prosecute the claim with the knowledge and assent and at the expense of all its members, whoever they may be, getting an award after full hearing on both sides, and maintaining that award, still with the full knowledge and assent and at the expense of its members; and yet it is said the organization has not technically submitted the case to the Court. If that is so, the classical reproach of the law is not wholly undeserved.

But the rule in question is simply a rule of internal regulation, not affecting third persons in the least. It limits the committee's authority as between them and their principals. If the defendant to an ordinary action brought in the name of a company were to raise such an objection, then—although the company's regulations are required by statutory provision in precisely the same sense as

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

these—the Court would promptly inform the defendant that was a matter for the shareholders, and not for the third party. So it was held during the hearing by *Higgins* J., and I entirely agree with him. And further, it depends entirely on the true construction of the rule 22, that is, whether what was done in getting the universal assent of the employees was a compliance with the rule, and rule 8A, itself an admitted rule, makes the ruling of the committee in questions of interpretation final subject to reversal by a members' meeting, which has not happened.

Secs. 23 *and* 24.—Yet another formal objection is that when the other eight sets of disputants had agreed to settle their differences the dispute was over, and no jurisdiction remained to make an award as to the present applicants.

It is certainly a whimsical notion that sections intended to promote amicable settlement, as far as that is attainable, should be intended by the legislature—for that is what it comes to—to prevent the settlement by arbitration of what cannot be settled otherwise.

In my opinion, the true meaning of the sections, so far as relevant to the present case, is that the President may make an award to settle the dispute, and may make it in terms agreed upon, so far as they are agreed upon, and according to his own views of justice and propriety, so far as the terms cannot be agreed on. Besides, in the present case the dates of the actual written agreements were subsequent to the award against the applicants.

The formal objections seem to me, therefore, to be clearly bad.

Extension of Dispute.—Having regard to previous decisions of this Court—notably *The Builders' Labourers' Case* (1)—the extension of the dispute beyond the limits of any one State, supposing a dispute exists at all, is beyond controversy. The nature of the claims presents no features of vital difference, and the considerations applicable to other industries which have various forms of motive power apply here. The only question as to this branch of the case, then, is whether there was a dispute.

Dispute.—The first objection of substance is that there was no dispute at all within the meaning of the Constitution or the Act

(1) 18 C.L.R., 224.

between any of the tramway corporations and their respective employees.

This strikes at the root of the whole of the proceedings, not merely the adverse arbitral award in the case of the two present applicants, but also the consensual award in the case of the others. The opinions just expressed by the learned Chief Justice and *Barton* J. show how necessary it is, even after all that has been decided, to examine the matter thoroughly.

It has been, after much controversy, laid down by a majority of this Court that whether there has been a dispute or not in a given case, is entirely a matter of fact—that is, of real hard, solid, practical fact. Nothing artificial, according to that ruling, is allowed to obscure the fact. If a merchant makes a claim against a shipowner, or a retailer against a merchant, or a servant against a master, and the claim is rejected, but persisted in, it is a question of fact in each case. But given these facts, only one answer is possible. And unless that is departed from in the present case, what is there which stands in the way of deciding that the parties were in actual dispute?

Thousands of men, as we have seen, from all parts of Australia, and grouped in branches, first framed their tentative sectional schemes of demand, entrusted their representative to discuss and standardize them in common council as one body, and eventually reconsidered separately the united set of conditions, approved of them, adopted them, and resolved to demand them, and authorized the organization to make that demand for them, which was done. The employers one and all rejected the demands. What were the men then to do? Unless they are required to strike in order to convince the Court that they are in earnest, nothing more than they did is possible, as it seem to me. But for strenuous efforts on the part of the Executive, strikes would have taken place. Discontented the men undoubtedly were, though discontent prior to the demand itself has been held to be unnecessary. And that is consonant with all we know of the subject of trade disputes. The object of trade combinations and trade disputes is not merely to redress grievances; it is to improve conditions. The presence of a grievance, real or fancied, may hasten or harden a movement for better conditions, but it is not, and never has been,

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

considered an indispensable circumstance. Trade unions are combinations of sellers of labour, who, by reason of their union, and that alone, acquire strength in the market, and on a favourable opportunity they do just what other sellers of commodities do, advance their claims. Mr. and Mrs. Webb in their *History of Trade Unionism*—a work referred to by Lord *Macnaghten* in *Osborne* v. *Amalgamated Society of Railway Servants* (1) as "able and exhaustive"—point out (p. 38), that the assumption often made that trade unionism arose as a protest against intolerable industrial oppression is wrong: it was to obtain *better conditions*. And the very impulse to do this is natural. Largely is it bottomed on the instinct of self-preservation, as well as a desire for betterment generally. Howell, speaking in 1890 in his work *The Conflicts of Capital and Labour* (p. 491), adverts to a feature which economists failed to observe, but which is, I think, an obvious consequence, namely, the higher average duration of life attained by members of the unions in recent as compared with former years. He gives statistics. Very recently Sir William Osler in a public address (see *The Times*, 9th July 1914) referred to the influence of a living wage as one of several necessary conditions leading to the practical immunity of the millions from consumption. To say, therefore, that men are only trying to get more, or taking the only steps the law permits them to take on the chance of getting more, is to overlook a very fundamental element of industrial life. Employers have always tried to give less, and employees have always tried to get more, whenever a chance offered on either side. Mr. Mundella, to whose efforts in 1860 British systematic trade arbitration and conciliation owes its definite origin, says that masters and men took advantage of each other at every opportunity, by a system which he describes as "mutually predatory." Speaking as an employer in the Nottingham hosiery and glove trade, he says:—"We pressed down the price as low as we could, and they pressed up the price as high as they could. This often caused a strike in pressing it down, and a strike in getting it up, and these strikes were most ruinous and injurious to all parties." Then the employers suggested a scheme, and, as he says, "We sketched out what we called a Board of Arbitration and Conciliation."

(1) (1910) A.C., 87.

This was the first permanent Board of Arbitration and Conciliation established, and it has led by successive and lineal steps to the elaborate but not entirely compulsory system in England, and the compulsory system of Australia and New Zealand. And see *Schloesser's Trade Unionism*, at p. 78. But the root of the matter is plain to all who follow those steps, that the thing to be settled is a demand persisted in on one side, and determinedly denied on the other, irrespective of any question of prior discontent, or, indeed, of any discontent at all other than that manifested by the determination to get the demand conceded.

As a recent example, showing how the matter is viewed in England, I refer to some passages in the proceedings of Lord Dunedin's Commission on Trade Disputes in 1906 (House of Commons Papers 1906, vol. LVI.).

At p. 170 Mr. Lambert, the managing director of the Union Lighterage Company, and formerly the president of the Employers' Association, in giving evidence, says:—"The strike of 1900 was brought about by a demand, without any notice, for payment of wages on a basis not hitherto charged nor asked for by the men, and upon payment being refused, the men left their employment with my company, the secretary of the Men's Society being present. The men went out, or were called out, from four other firms, . . . it evidently being the intention of the union to take the employers in detail."

At p. 259 Mr. Collinson, the founder and general secretary and manager of the National Free Labour Association, and therefore by no means friendly to unionists, thus describes union objects:—"A trade union may be defined as a number of men in a particular trade, banded together for the purpose of securing from their employers what they consider the best possible terms for themselves."

On the same Commission Mr. Ammon Beasley, the manager of the Taff Vale Railway for thirteen years, at question 1096 refers to the celebrated Taff Vale Dispute of 1900, which led to such extended litigation, and subsequently to corrective legislation. He says:—"For several years, from 1895 up to 1900, we had every reason to believe that the men were perfectly satisfied and perfectly contented to settle down, that the period of unrest had

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2]. Isaacs J.

come to an end, and we were hoping that the men were entirely satisfied with the conditions of their service." At question 1098 he adds:—"We were perfectly satisfied that we were treating our men as well or better than men were treated on other railways; in fact as regards wages and hours and the general conditions of the service, there was no justification of any sort or kind for the strike which unfortunately followed." But although that was so, and although the immediate cause of the strike was the alleged victimization of one of the men's representatives in the movement for improved conditions of employment, no one seemed to doubt that the real dispute, in the recognized sense of trade dispute, was the claim for the "programme of demands," as it was called, formulated by their secretary, Mr. Bell, adopted by the Taff Vale men, and sent by them to the Company. A clearer illustration of the practical understanding of the matter it is impossible to get. An attempt at arbitration failed; the Company adopted the policy of non-recognition. The result was railways were stopped, collieries stopped, 100,000 miners thrown out of work, outrages, trials and punishment.

If the applicants here are right, the experienced persons engaged in that inquiry on every side entirely misunderstood the meaning of the terms they employed. The sole difference of substance between that case and the present is: there a strike, with its attendant horrors, took place; here, it was happily averted, except where stated. But is the Court going to tell the workers of Australia that, notwithstanding all their efforts to maintain the peaceful continuance of industry, they have always to choose between openly striking—for a mere threat to strike could still be challenged as unreal—and running the risk of being told they are not really in dispute? Disguise it as we may, that was, and is, at the root of the argument. Mr. *O'Halloran* said, quite plainly, there was no real dispute as the men did not intend to go to industrial disturbance. He was logical; and, on the facts, he was forced to argue so. I have no hesitation in saying that such a view—and it is the only view on which the applicants here can succeed—entirely defeats the beneficient purpose of the Constitution and the Act based upon it. What I have just said has been clearly and explicitly laid

down in former decisions of *O'Connor*, *Higgins* JJ. and myself, as shown in *The Merchant Service Guild Case* (1).

What I there said, and what I said on the subject in *The Builders' Labourers' Case* (2) may be thus formulated:—

(1) A mere demand upon employers by an organization of employees—the only means known to the Act—for improved industrial conditions if met by a refusal does not necessarily constitute a dispute, but is *primâ facie* evidence of one.

(2) If it be shown that the demand is made without the authority of the men themselves, or that it is abandoned by them, the *primâ facie* conclusion is displaced, however formal the proceedings may be.

(3) But if it be established that the men from first to last themselves directed or authorized to be made the demand which in fact is made by the organization on their behalf, and if they persist in it, so that the *ultimatum*, as I have previously termed it, is theirs, then there is not, in my opinion, any further room for debate—resistance to that demand creates and constitutes a real, an actual dispute in fact.

(4) The justice or reasonableness or propriety of the demand is quite another matter, and must be determined by the arbitration tribunal according to whatever equitable standard it adopts.

In face of the facts I have outlined, only one answer seems to me possible in this case. The men were the real moving force behind the organization, and their claims, although in the form of a programme or code, were the men's demands.

Programmes of demands or codes of working rules, it was argued, were outside the legitimate sphere of industrial disputes. But the literature of the subject shows that they are among the commonest means of insisting on working conditions. See, for instance, the instances mentioned in *The Builders' Labourers' Case* (2). Also the award in *The Building Trade Dispute* (House of Commons Papers 1910, vol. XXI.); *The Railway Servants' Dispute* (*ibid.*); *The Wakefield Painters' Case* (*ibid.*); and *Schloesser's Trade Unionism* (1913), at p. 58. The nature

(1) 15 C.L.R., 586, at pp. 618 *et seqq.* (2) 18 C.L.R., 224.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

of trade dispute, of course, is the same as it was fourteen years ago. Putting aside, then, any objection on the ground of the demands taking the form of a code, there is in the 1906 Commission proceedings a very distinct and authoritative statement as to what is necessary to constitute a trade dispute.

In *The Glamorgan Case* (1) it was recognized there was no trade dispute. The Miners' Federation had called out the men in order to ensure a restriction on the output; the men came out; the employers were, of course, opposed to the step, but yet, as pointed out before the Commission, there was no trade dispute, for the lack of one element. It was this: that no notice had been sent to the employers giving them an opportunity of agreeing or disagreeing. There were only mental uncommunicated desires on each side.

As to *The Glamorgan Case* (1) Lord Dunedin, on the Commission, asked:—"Supposing you began matters by the men acting on the advice of the Federation saying that the output should not be greater than so and so, and the employers saying, 'Well, that will not suit us, and we want the output to be greater;' do you not at once get a dispute?" The learned Lord there added communication of desire to the desire itself. To that the witness, Mr. Kenshole, the solicitor to the Coal Owners' Association, says:—"That would be a trade dispute, but that was not the case there because what was done on this occasion" (*i.e.*, of *The Glamorgan Case*) was done entirely on the initiative of the Federation without consulting the employers." A little further on Lord Dunedin says:—"Is your point this, that even although it might be said that on the facts of this case there was not a trade dispute, it would always, if they wanted to carry out that course of conduct, be excessively easy for them first of all to make a trade dispute and therefore get them within the clause of the Act?" Witness: "Yes, and adopt the same course as they did before." It will be noticed that there are no reservations, such as that the miners "did not want it; it was the Federation who formulated the demand, and the miners only adopted it." Nor is it possible to find such a reservation anywhere. The popular

(1) (1903) 1 K.B., 118.

sense of the term "trade dispute" is found to be precisely that which the legislature and the judiciary have followed.

Legislative Use of the Term "Trade Dispute."—The expressions "dispute" and "trade dispute" are not artificial. They were not created by the legislature, though in some recent English Acts the latter expression has received for the purpose of those enactments a somewhat limited meaning. In other cases it is left to its ordinary signification.

In 1800 the Act 40 Geo. III. c. 90, passed for settling disputes between masters and men in the cotton trade, treated "dispute" as "disagreement," and provided for arbitration, but said "no Justice of the Peace should have power to regulate or prescribe the rate of wages for work." The exception is significant.

In 1824 the Act 5 Geo. IV. c. 96 consolidated the laws relative to the "arbitration of disputes" between masters and workmen, and extended to all trade and manufacture. It also regarded "dispute" and "disagreement" as synonymous, and, except by consent, future wages were excepted as before. It cannot be doubted that those Acts operated where a claim was made and not acceded to.

In 1867 *Lord St. Leonard's Act* first provided for equitable councils of conciliation for adjusting what were called indiscriminately "differences" or "disputes" between masters and workmen. It also excluded future wages.

In 1872 the Act 35 & 36 Vict. c. 46 made provisions for arbitration. This Act is noteworthy because it marked an attempt at a new departure. It extended arbitration to making rules as to the rate of wages to be paid, or the hours and quantities of work to be performed, or the conditions or regulations under which work was to be done, and enabled penalties to be enforced for breach of the rules. "Dispute" is again used as equivalent to "disagreement." It proved useless, because the power of arbitration was dependent on voluntary agreement, and on the whole the men preferred the power of combined unionism which had at the back of it the strike.

In 1890 the Manchester Conference ultimately laid the basis of a workmen's federation so as to make contests "national and not

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

local." The principles affirmed were: conciliation and arbitration, and only if these failed, the strike.

In 1893 the disastrous English miners' strike occurred.

In 1894 the Duke of Devonshire's Commission sat to consider the whole question, and its formulation of principles is important.

It was pointed out in the report by that Commission that there are two classes of "industrial disputes," the first being those which arise out of existing terms of employment, and which can generally be dealt with or "settled" by simple methods, or institutions of a *judicial* kind. These are the "trade disputes" dealt with by the English Acts referred to prior to 1872.

The second class were thus described :—"Those which arise out of *proposals* for the terms of engagement or contract of service to subsist for a future period. These disputes are frequently of wide interest, affect large bodies of men, and are the most general *causes* of strikes and lock-outs on a large scale."

Observe, it is recognized that the second class (the one we are now concerned with) arise out of "proposals" for altered future conditions, and are the recognized "causes" of strikes—that is, from their nature, and not necessarily in any particular instance, a strike may in fact arise, or become imminent, or even be looked forward to. The importance of this is manifest.

Then the report says of this class, it may be compared to the questions which, as between States or individuals, have to be *settled* by treaties or agreement arrived at after negotiations between the contending parties. In other words, strictly *judicial* methods are insufficient because the standard of right is itself in question, and has to be created.

The same distinction is made by the later American Industrial Commission Report (vol. XVII. of 1901-2, H.D. vol. LXXX., pp. lxxv., lxxvi.), and adopted in *Pigou's Principles and Methods of Industrial Peace*, at p. 177. There it is said :—"This distinction is analogous to one familiar to the theory of jurisprudence. *The settlement of such general questions may be likened to an Act of legislation; the interpretation and application of a general contract may be likened to a judicial Act.*"

That is simply the well-expressed statement of self-evident fact, a characteristic inherent in the subject, and it constitutes

one step in determining the main question before us, and also in determining such a question as the effect of the Queensland Act. Another fact it is necessary to recognize in order that the matter may be clear. It is the method by which disputes of the second class have arisen. That method, indeed, is also inherent in the subject. No other could exist, and the proof of this is the universality of the method.

The English report to which I have just referred further recognized and dealt with the great Australian strikes which had recently occurred, and which affected so detrimentally the course of Australian industry, the maritime strike of 1890, the shearers' strike of 1891, the Broken Hill miners' strike of 1892, and the second shearers' strike of 1893. Australian legislation I shall mention presently.

In 1896 the English Parliament continued its legislation on the subject by passing an Act (59 & 60 Vict. c. 30) for the "prevention and settlement of trade disputes." It is sufficient to say that "dispute" and "difference" are still used interchangeably, and the Act applies to all "disputes between employers and workmen," that is, to both classes referred to by the Duke of Devonshire's Commission, and is purely voluntary.

That Act has been in extensive operation, and has had considerable success. But its operation has had to be very much enlarged beyond that which was at first adopted. As it is not compulsory, it has failed to maintain peace in many important instances, as late, indeed, as shown by the Report to the Board of Trade (House of Commons Papers 1912-13, vol. XLVII., pp. 8 and following). But there have been boards of conciliation, and tribunals of arbitration. Such eminent men as Lord Shaw of Dunfermline, Lord James of Hereford, Sir Edward Fry, Sir George Askwith, and others, have sat as arbitrators and awarded. And now there is recently established a very close approach to a Court of Arbitration in the Industrial Council established by the President of the Board of Trade in 1911, for the express purpose of "settling disputes." In doing so, the President, Viscount (then Mr. Sydney) Buxton, used words which for their weight, as well as their relevancy, I quote: "No one surely with a good cause can be averse to having the full facts of the conditions that exist

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

fully investigated." I say "relevancy" to the matter we have to decide for this reason. From the enactment of the Act of 1896 to the present time, throughout the series of reports of disputes that have taken place and been dealt with, when the material facts narrated are considered, it will be found that a claim definitely made on one side and resisted on the other is always regarded as a "dispute." No refinements are indulged in such as we have listened to for three weeks on this occasion and repeatedly before, and that is the class of thing proposed to be dealt with in the way described by Viscount Buxton.

Judicial View of Dispute.—The meaning so attached to the word being inherent, and observed in actual practice, it is only to be expected that where the question arises, Judges should take the same view. And such is the fact, in every possible aspect of arbitration that has come before the Courts.

"An arbitration," says *Romilly* M.R. in *Collins* v. *Collins* (1), "is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties."

In *Winteringham* v. *Robertson* (2) *Watson* B. said: "Non-agreement is disagreement"—that is, of course, where agreement is asked for. *Field* v. *Longden & Sons* (3) shows that a "question" not settled by agreement is a "dispute."

In *Powell* v. *Main Colliery Co.* (4), a case of arbitration under the *Workmen's Compensation Act*, Lord *Halsbury* in words which apply exactly to the present case says (5):—"It appears to me that the Statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the Statute had been enacted, that it contemplated what would be a horror to the mind of a lawyer, that there should not be any lawyers employed at all, and that the man who was injured" (substitute here, "the man who claims from his employer better working conditions") "should be able to go himself and say, 'I claim so much,' and then that he should go to the County Court Judge" (substitute here, "Arbitration Court")

(1) 26 Beav., 306, at p. 312.
(2) 27 L.J. Ex., 301, at p. 304.
(3) (1902) 1 K.B., 47.
(4) (1900) A.C., 366.
(5) (1900) A.C., 366, at pp. 371, 372.

"and say, 'Now please to hear this case, because my employer will not give me what I have claimed.' . . . Is there a *dispute* in the language of the Statute which has commenced? If so, there is no technical phraseology by which the initiation of that dispute is pointed to." Lord *Brampton* said (1):—"No agreement, however, was come to, for the respondents repudiated their liability, and thereupon questions arose between the parties which could only be settled by an arbitration under the Statute." Lord *Robertson* says (2):—"As soon as the claim is sent to the employer, he can, if he disputes it, himself take the difference to arbitration and have it settled."

It matters not, as it seems to me, that the subject matter of claim is different, the principle is the same: one man demands, the other refuses; there is in each case a dispute, though in respect of different things.

The most recent judicial utterance on the point with which I am acquainted is in the case of *Long* v. *Larkin* (3), which came before the Divisional Court, and then before the Appeal Court, where the decision was affirmed. An employers' combination procured dock labourers to break their contracts of employment with the plaintiff, there being previously no dispute between the plaintiff and his men. It was held that the *Trade Disputes Act* did not apply to protect the combination, because the statutory definition of trade dispute did not include a dispute between employers and employers. But at p. 306 are found some very important statements by *Gibson* J., who refers to what he calls the "factitious dispute created by the defendants," which he says was not a genuine trade dispute as regards *them*. But, adds the learned Judge: "On the other hand, *as between the employer and his workmen*, the withdrawal, however artificial and dishonest in origin and cause the dispute may be, may be a trade dispute, or an act done in furtherance of a trade dispute."

New Zealand Meaning of Term before Constitution.—That being the long established English meaning of the word "dispute" and the phrase "trade dispute," how did it stand in Australia in 1900 when the Constitution was adopted?

(1) (1900) A.C., 366, at p. 379. (2) (1900) A.C., 366, at p. 382.
(3) (1914) 2 I.R., 285.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2]

Isaacs J.

In previous cases *O'Connor* J. and I pointed out that it had no special or artificial meaning, but was used in its ordinary and natural signification, as understood at the time the *Constitution Act* was passed. And so it was laid down by the majority of this Court in *Holyman's Case* (1). That, as I understand the expression, is equivalent to saying it was used in the sense already indicated. It is, I believe, very clearly shown in actual operation by the New Zealand practice which preceded the passing of the Constitution, and was closely observed in Australia.

In August 1894 New Zealand, at the instance of Sir Pember Reeves, after prior attempts dating back to 1892, had enacted its *Conciliation and Arbitration Act*, which has been the model for existing Australian enactments of the same kind. In *Australian Tramway Employees Association* v. *Prahran and Malvern Tramway Trust* (2) it is said in the joint judgment of my brother *Rich* and myself that there was no relevant judicial decision prior to the Constitution. That in relation to Australian Courts is true, but, speaking for myself, the then existing New Zealand judicial interpretation was not sufficiently observed. I do not say this in the sense of impressing an artificial meaning on the words, but as being strong evidence as to their ordinary and natural meaning. The New Zealand Act was specifically mentioned by us as a precedent, but the decisions upon it were not present to my mind. They greatly strengthen the views there expressed, and aid the consideration of the present case.

The New Zealand Act of 1894, with three amending Acts down to 1905, has remained in force ever since. In order to see what Australia had before it in determining to incorporate in the Constitution the phrase "industrial disputes," I cannot do better than quote the statement of an able and independent observer—Mr. Ernest Aves, who was commissioned in 1908 by the English Home Secretary to report on industrial conditions in Australia and New Zealand, and who did so (House of Commons Papers 1908, vol. LXXI., Cd. 4167). His statement is valuable because it answers from both the legal and industrial standpoints so many of the objections raised before us.

(1) 18 C.L.R., 273.

(2) 17 C.L.R., 680.

Adverting to the New Zealand Court of Conciliation and Arbitration (p. 99), he refers to the high position the Court has occupied from the first, to the special importance of the awards of Sir *Joshua Williams*, who made the precedents, and after that to the great body of constructive work that has been achieved under *Cooper* J. (February 1901 to September 1907) and since then by *Chapman* and *Sim* JJ.

He points out that the only great strike in which New Zealand was involved was the maritime strike of 1890, which extended over Australia and New Zealand, and that at the time the Act was passed it was a widely accepted view that it was a case of the "Act or strikes." I would respectfully emphasize that here.

Mr. Aves says (at p. 107):—"It is the easy creation of 'disputes' which represents for many the chief failure of the New Zealand Act. The absence of active dispute, in the form either of strike or lock-out, does not necessarily imply the existence of a condition of real industrial peace, any more than in New Zealand does the recognition of a 'dispute' indicate that conditions of active and unrestrained conflict are impending." Then he states this all-important conclusion: "From the beginning a list of demands presented by a union to an employer and refused was held to constitute a 'dispute' within the meaning of the Act." That is a vital statement, and I call special attention to it as showing what it was Australia obviously recognized as the understanding of the words, and what it intended to adopt, when adopting the Constitution and subsequently passing the *Conciliation and Arbitration Act*. The statement assumes, of course, that the men themselves have authorized the union to make the demand. Mr. Aves continues:—"The term, in fact, has not connoted strife or necessarily 'a serious condition of hostility between employers and workers in a particular trade.' There may or may not be such a condition; there may be, as one correspondent—the chairman of one of the chief branches of the Employers' Federation—has expressed it, 'sometimes friendly and sometimes bitter hostilities.' These, he adds, are now general. 'Industrial peace,' he writes, 'no longer exists here.'" I would observe that his meaning obviously is that the real

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

industrial peace is that attained for the public by securing the unbroken continuance of industry.

He goes on to say:—"The number of disputes has been undoubtedly increased directly by the Act. The machinery provided made this, indeed, almost inevitable, and as one result a recognized minimum scale of wages and regulated conditions exist in many trades that, without the assistance of the Act, would almost certainly have had none. In every such case which came before the Court there must have been a technical dispute. The regulation of the industry, or the settlement of the dispute—it can be described with almost equal accuracy in either way—has followed.

"If, however, real friction has been allayed, good may be said to have resulted. If, as has often happened, especially in the early days, recognized wages and recognized conditions were established in trades that needed them, and in which were thus eliminated those very elements of unfair or unequal competition already deprecated by the more reputable section of employers in the trade concerned, again good may be said to have resulted. In this increase of equality in competition consists indeed not only one of the great theoretical advantages of the Act, but one which has in practice been often secured.

"Thus the real trouble does not appear to be found in the fact of regulation, although the extent to which this has been imposed by an authority external to the trade concerned is ominous. The real mischief of the Act in this connection appears to consist not so much in the powers exercised under the Act as in the way in which, and the circumstances under which, these powers are often invoked; a habit of litigious, and therefore non-friendly, 'dispute' has been formed, and a class created of those who make it their business to inculcate the habit where absent. Evidence, says one of those who in New Zealand has had much to do with the working of the Act, and who is not a partizan, 'has been forthcoming of the prominence of the agitator as the organizer of disputes over and over again.'" I would observe, in the first place, that that is simply the price paid for a greater public benefit. And, in the second place, interference by an outsider is no novelty even where the Act does not exist.

Lord *James of Hereford* in *Allen* v. *Flood* (1) says:—"Every organizer of a strike, in order to obtain higher wages 'interferes with' the employer carrying on his business, also every member of an employers' federation who persuades his co-employer to lock-out his workmen must 'interfere with' those workmen."

Now, I have quoted Mr. Aves at length because it seems to me he answers so many objections.

In New South Wales the same meaning has been attached to the words. An Act was passed there in 1901 "promoted," says Mr. Aves (at p. 112), by what was regarded as the great success of the New Zealand measure. The Act followed upon the report of Judge Backhouse, State Special Commissioner. The learned Commissioner, in a most able report, confirms what Mr. Aves says. He pointed out (p. 19 of his report), adopting the view of a New Zealand witness, that under the Act disputes had increased, that the Act "is used as a means of placing the regulation of industries, and indeed all occupations outside professional occupations, under the control of the Arbitration Court, the power of which can be invoked at any time by a body of men calling itself a trade union. . . . It is necessary to put aside altogether the idea that an Act is simply a device for preventing strikes."

Judge Backhouse says that with one of the conclusions he agrees, namely, "that the effect of the Act is that the Court will ultimately regulate industries." At p. 23 he says:—"Undoubtedly differences have increased; and it stands to reason that in the ordinary course of things they would when means are provided for dealing with disputes other than the extreme step of 'striking' or 'locking out.' Many differences are made public, and the Act is set in motion to adjust them, which, under the old state of things, were not of sufficient importance to justify the taking of either of the measures referred to. It is used as a means of fixing the wages and general conditions of labour in many industries, and without doubt will eventually be so used in all." Further on he says:—"Generally, when an accepted recommendation or an award expires, there is a tendency on the part of the men to immediately make a reference, *and demand more than they expect to get* in the hope that some improvement will

(1) (1898) A.C., 1, at p. 180.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

be made in their position." This I may pause to observe, though referred to as characteristic of some recognized industrial disputes, is urged here as proof there is no dispute at all. Judge Backhouse goes on to enlarge on what he calls the multiplication of disputes, but having weighed the evidence he says he saw no bitterness, and concludes that after all "very excellent relations existed between employers and employees," and although the parties fought their hardest in the Arbitration Court, they appeared to be on excellent terms.

This entirely bears out what Mr. Aves said, and this is the meaning the expression "industrial dispute" bore in the minds of the Australian people when the Constitution and then the Act were respectively passed.

The Arbitration Courts in New South Wales from the very first case (*Newcastle Wharf Labourers' Union* (1)) and in Western Australia (see, for instance, *The Coastal Slaughtermen's Case* (2)) have acted on the same lines. Why should we depart from them? Why should we evolve for the first time in industrial history a new definition of "dispute" which is opposed to all practical precedent, and all judicial practice and authority based on that precedent? If we do, what space is left between the "Act and strikes?" The words of *Higgins* J., approved by *O'Connor* J., and adopted by myself in *Allen Taylor's Case* (3), are in point. I draw earnest attention to them, but without repeating them here.

If men are left in doubt whether the absolute refusal of their most strenuous demands is to be treated as no disagreement by reason of one newly discovered scientific test, other tests may be evolved in like manner, and I apply the following words of *Loreburn* L.C., in *Conway* v. *Wade* (4):—"Inasmuch as industrial warfare unhappily takes too often the form of strikes and lock-outs, and inducing other persons to co-operate in them, uncertainty as to the weapons allowed by the law is likely to cause more alarm than perhaps may be justified."

Reality of Dispute.—No certainty whatever, but on the contrary a mass of confusion, has been introduced by the line of

(1) 1 N.S.W.A.R., 1, at p. 8.
(2) 2 W.A.A.R., 13.
(3) 15 C.L.R., 586, at p. 619.
(4) (1909) A.C., 506, at p. 511.

argument we have heard as to the dispute being a "real dispute." In effect the argument is a fight over the word "real." Its root assumption is threefold: first, that a "manufactured" dispute is not real; secondly, that unless the men in fact believe they are badly treated it is not real; and, lastly, if they ask for more in conjunction than they would be prepared to take separately their demand is a sham. Sometimes the three branches are summed up in what is after all a moral censure, that the demand was only advanced for the purpose of making a case for the Arbitration Court, and this amounts to "regulating" the industry.

In the main, these views have already been met, but as this elusive contention has claimed the support of *Conway* v. *Wade* (1), I add a few words as to that case. The case is simplicity itself. Conway was a workman in the employment of a firm. He owed a fine to a trade union, and failed to pay it. Wade was the secretary of the union, and, in order to force Conway to pay the fine, told the manager of the works that unless Conway was dismissed the union men in the firm's employ would leave off work. The manager believed him. Through this Conway, had to leave. He sued Wade, who set up the defence that what he did was in contemplation or furtherance of a trade dispute. The House of Lords held that Wade's defence failed for two reasons. The first was, that the union men themselves had never said they would leave work, and the story that they would had no foundation in anything the men themselves had said, but originated merely in the mind of Wade; it was, in fact, fabricated by him; the alleged dispute, consequently, was merely an imaginary and not a "real dispute." A grumbling or agitation is not sufficient, the men must say distinctly what they want. Nowhere in the case can a word be found to support the view that if the men themselves had actually made the threat and meant it, the House of Lords would have doubted the existence or imminence of a dispute as to them. And implication is the other way. The judgment of *Gibson* J. in *Lord* v. *Larkin* (2), already quoted, is clear on the point. The second reason—immaterial here—was that, assuming a dispute, the act complained of was not genuinely done "in contemplation or furtherance of it." The act is what the Lord Chancellor says, requires

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

(2) (1914) 2 I.R., 285, at p. 306.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

to be " genuinely done "—not the dispute. That is all there is in *Conway* v. *Wade* (1).

It is important, however, to observe that, as Lord *Loreburn* said (2), " trade dispute "is a familiar phrase in earlier Acts of Parliament. The definition of it, said the learned Lord, was not in that case of much assistance because there must be a dispute.

The reference to other Acts of Parliament is a recognition of an important kind, and his Lordship's further specific reference to the *Conspiracy and Protection of Property Act* 1875 (38 & 39 Vict. c. 86, sec. 3), which also contains the words " act done in contemplation or furtherance of a *trade dispute*," is of extreme importance in this connection.

The same provision of the criminal law is in force in Victoria by Act No. 1219 (1891), sec. 16; in South Australia by 41 & 42 Vict. No. 109, sec. 3 (1878); in Western Australia, 64 Vict. No. 19, sec. 2 (1900); and Tasmania, 53 Vict. No. 28 (1889), sec. 2; whether it is in force in the other two States I have not been able to discover.

Is it possible to conceive that if in Victoria, South Australia, Western Australia or Tasmania, men should agree in concert to strike because, under such circumstances as exist in this case, demands for better wages or better health conditions were refused, they could, notwithstanding the protection of those Statutes designed to abolish the cruelty of the law as established by *The Gas Stokers' Case* (3), be convicted under the old law of conspiracy on the ground that there was no " real dispute" ? If the applicants' arguments be accepted this must inevitably follow, and the men might share the gas stokers' fate of imprisonment as criminals, a condition of the law that the English legislature deliberately altered, and up to the present four at least of the States have also repealed. And further, if other employees, say another outside union, knowing of their demands and thinking them just, were to strike in furtherance of the claimants' demands, would they be similarly liable because, notwithstanding all that was said and done, the primary set of employees would if necessary have put up with less than they asked for ? Would they

(1) (1909) A.C., 506.
(2) (1909) A.C., 506, at p. 509.
(3) *Stephen's History of the Criminal Law*, vol. III, p. 225.

be liable because, for instance, it was proved that the New South Wales Tramway Association, as the tempter in the industrial garden of Eden, first suggested the demand, and that the Victorian tramway men and others, who would not have moved but for that suggestion, infected the outside union with their original sin? Or would they be liable because the Court thought the men had in each State originally suggested sixpence a day less, or half an hour a day more, than the ultimate demands formulated at a general conference? To me it is unthinkable, because it is necessarily a relapse into the ancient barbarous law of conspiracy as applied to employees.

And while on the one hand personal liberty, so far as regards the old oppressive law of conspiracy, would be endangered, so on the other hand the declared object of the Commonwealth Arbitration Act to maintain industrial peace would be palpably defeated. Strikes and lock-outs are not entirely forbidden by that Act. They are only forbidden as a means of compulsion where there is "an industrial dispute" (sec. 6), that is, so far as they are replaced by Court action. If the view presented for the applicants is correct, the whole of the tramway employees in five States of Australia might in this instance have gone on strike, or might have been locked out, the traffic brought to a standstill, and the travelling public have suffered all the inconveniences which Brisbane in some measure experienced, and yet there would have been no breach of the statutory prohibition against strikes and lock-outs, because technically there was no "industrial dispute." Yet they would in at least four of the States be indictable for conspiracy. A result so extraordinary, so contrary to what appeals to me as the reason and spirit of the matter, so destructive of the very object of the legislation, cannot in my opinion be supported unless the words of the legislature are compulsive in their terms beyond question. No direct words of the enactments can be found to support it. On the contrary, sec. 8 of the Act seems to look quite the other way. It declares that any organization of employers or employees, which, for the purpose of "enforcing compliance with the *demands*" of employers or employees, orders its members to refuse or accept employment, is guilty of a lock-out or strike, as the case may be.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

There the "demands" are the effective condition. Demands coupled with the refusal of "compliance" which is implied in the "enforcing" forbidden by the section, constitute obviously in the opinion of the legislature an industrial dispute. Can it be doubted for a moment that if this organization had ordered its members not to accept employment because the "demands" actually made in this case were not complied with, sec. 8 would have been applicable? It must be applicable, unless we are to have some artificial *indicia* applied to the plain and simple word "demand" as well as to the well-known word "dispute"; and, if so, must it not follow that persistent refusal of the demand insisted upon constitutes an industrial dispute as intended by the Act?

But the mischief does not stop there. Not only is the Commonwealth Act affected in this way; other State Industrial Acts are similarly affected. In the New South Wales Act (No. 3 of 1908) "lock-out" and "strike" are, of course, limited by their relation to a "dispute" (sec. 4).

Recently *Heydon* J. made some observations in *The Engineers' Case* on the subject of lock-outs and strikes, and threatened to enforce the law with regard to them. But, unless the word "dispute" is to be free from all artificiality, it would be very easy to say, in answer to his Honor, that there was "no strike" because no "dispute," and that there was no dispute because the demand for altered conditions, and the cessation of work to enforce it, was the outcome of the representation of some other union which wanted better terms for itself, or because it was for the purpose of doing the only thing the law countenanced, namely, going to the Court to see if better conditions could not be obtained, or because the men really, if there had been no Act, would have remained quiescent, knowing that no mere request to their employers would have sufficed, and, prepared to endure existing conditions rather than risk loss of situation, would not have actively displayed dissatisfaction with their conditions.

As far as I have been able to form an opinion upon the subject, after a very close and careful examination of many of the available sources of information, I can see no ground for adopting any interpretation of the word "dispute" except the common every-

day meaning which has always been attached to it by the legislature in England and Australasia, and those engaged in industry in all English-speaking countries and conversant with the subject of industrial or trade disputes.

If, then, the consistent sense of the term as so employed up to and since the adoption of the Constitution is to be the test of its meaning in the Constitution and Act, rather than some other meaning dependent on the attempt to frame judicially, and independently of the accepted and conventional sense, what might be considered a desirable definition, I cannot see how the facts in the present case can be regarded otherwise than as a dispute.

Non-recognition of the Union.—One circumstance that seems to me to prove conclusively that both sides fully understood and felt the reality of the dispute is the fact of non-recognition, and the revolt against it. I entirely agree with the view that Mr. *Arthur*, in his very able and well reasoned address, developed with what seemed to me convincing clearness, that no question more fundamental or vital than the recognition of a union can arise between employers and employees, and that this principle lay at the root of the present application.

Unionism or organization is the *sine quâ non* of all possible success on the part of employees. It is not a separate economic demand: it is the primary demand or condition expressly or impliedly bound up with all others. To refuse this, is to strike a blow at all demands, and, if one may apply a term unfortunately familiar on another scene of warfare, to out-flank them, and this for patent reasons.

In order to attain some equality of economic standing, some fair bargaining power, to escape the utter helplessness of isolation, which is always involved in individual contract between master and man, the workers have for over a century and a half, so far as England and its colonies are concerned, followed a system which Mr. and Mrs. Webb have aptly and apparently permanently designated "collective bargaining," It means bargaining by an organization, not for separate contracts of service, but for general rules or provisions which shall control or govern separate individual contracts by fixing standards below which they must not fall.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

But organization of employees calls forth corresponding resistance on the part of the employers, and again renewed effort to maintain it on the part of the employees. It is natural that employers should find that their easiest way to resist demands for better working conditions is to break down the workers' organization. And this has been traditional. "Non-recognition" is the favourite weapon, because if successful it means utter defeat for the employees. It means reversion to individual bargaining and disintegration. Suppression of trade association is a well known device. Howell (at pp. 472 and following) points out that the legislature was once an instrument for the purpose. Then, with peculiar appositeness to the present case, for it is precisely what Mr. Badger has done, he says:—"Not infrequently the wealthier classes attempted to play off the friendly society, or benefit club, against the trade union; the latter was tabooed, whereas the former was patronized and fostered." The most recent effect in England of non-recognition and the proof of its vital character may be seen in Mr. Schloesser's late work (1913) on *Trade Unionism.*

It was stated before the Royal Commission on strikes in New South Wales that the great and primary cause of strikes was the objection on the part of the proprietors to the men forming themselves into a union. The Lithgow Pottery Works was the case referred to. And this statement was noticed and mentioned in the English Commission Report (House of Commons Papers 1892, vol. XXVI.). The great marine strike of 1890, though based fundamentally on substantial grievances, was precipitated by refusal to recognize affiliation with the Trade and Labour Council.

Nor is it less "non-recognition" by the employer saying he merely objects to "non-employees interfering in his business." This is as essentially a reversion to individual bargaining as if it was a total refusal to recognize the organization. Trade unionism implies permanent union of employees as such irrespective of the particular employer with whom they have for the time being individual contracts, and, indeed, irrespective of whether they are individually for the time being employed at all. If there are a dozen firms in a city, the employee of one may be president,

that of another secretary. If the dispute is with the first firm, a refusal to receive the secretary is a clear non-recognition of the society as such, because it would be impossible to maintain it if the objection were allowed. And rejection of the society is the first step in cutting away the standing ground of the men while making their demands; it destroys the character of those demands; from general collective demands answering to the Duke of Devonshire's second class, they become, in essence, mere aggregated individual demands for an alteration of specific personal bargain, which may be altered at any time at the employer's will because there is no force, legal or economic, to prevent it.

The strike of January 1912, and the non-recognition disputes in Brisbane and Adelaide, included necessarily disputes as to the matters in respect of which non-recognition occurred.

There remain some objections which relate only to parts of the award, and are as follow:—

Preference.—This was in actual dispute, and is granted. It is admitted by learned counsel for the applicants that preference, if in dispute and claimed, is an industrial condition, and may be granted.

That admission was properly made. Preference was a recognized subject of industrial dispute in Australia before the Courts of Arbitration were established. This fact and some of the reasons for it are stated in Dr. Clark's work *The Labour Movement in Australasia*, at pp. 175 and following; see also the observations of Lord Dunedin on the 1906 Commission, question 4708, and the American Industrial Commission Report (*supra*), at pp. 49-50. The first objection, however, made here is that preference was not really in dispute, because all that was considered improper treatment was adverse discrimination. But not only might preference be sought as an effectual, and the only effectual, cure for that, but it might be claimed as a matter of principle and so be in actual dispute.

State Prohibition.—Then it is contended that section 34 of the Queensland Act 1912 forbidding preference of any member of an "organization" is a legal bar to any award of preference by the Commonwealth Court of Arbitration. No matter how bitter the

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Isaacs J.

industrial struggle may be, or widespread its extension, no matter how difficult or even impossible it may be to settle the dispute without applying this well recognized industrial condition, it is argued that one State may, as here, interpose at the last moment after the case is closed, with the Court in full possession of jurisdiction, and against the will of the Commonwealth, and even of every other State, divest the existing power from the Commonwealth Court of pacifying the disputants, and securing the necessary peaceful continuance of Australian industry.

This matter has been taken into reconsideration by the present Full Bench; and for the reasons I stated *in extenso* in *The Sawmillers' Case* (1), to which I unhesitatingly adhere, strengthened as they are by the further considerations and authorities above set out as to "regulation," I am distinctly and clearly of opinion, that the federal authority conferred by sub-sec. (xxxv.) of sec. 51 of the Constitution is not capable of being limited or destroyed by any State legislation. The Commonwealth does not hold its power at the will of the States, much less of any one of them acting in antagonism to the rest.

If any State can block the Commonwealth as to preference—as it was argued the State of Queensland deliberately attempted to do in this case—it can block it as to everything else in relation to industrial disputes. If merely making a matter unlawful under State law is sufficient, a State has only to declare that to make any demand whatever on an employer in excess of a wages board log is unlawful, and then there never can be a cognizable dispute. This *bouleversement* of the Constitution is, in my opinion, outside the most extreme limits of reason and possibility.

I think that, notwithstanding any individual intentions, the Queensland Act as actually enacted should be read in a sense which would leave it perfectly valid. The "organization" spoken of in the Statute is one which the Act assumes it is in the power of the State to control, to fine, to deprive of its property (sec. 50), and consequently to destroy.

A State cannot exert these powers over the federal organization as such: if such an authority were permitted, it could

(1) 8 C.L.R., 465, at pp. 519 *et seqq.*

destroy the organization altogether, or make membership an offence. In my opinion, therefore, the word "organization," in order to save the Act in this respect, should be construed to mean a State organization, the word being a generic term applicable and very commonly applied to labour associations. If not so construed, the provision is, in my opinion, invalid, or, at all events, *pro tanto* nugatory.

The next partial objection relates to the Board of Reference. As to this, the particular provision objected to, namely, the judicial determination as to an alleged offence, is, I agree, outside the province of arbitration, and should be simply struck out.

Subject to that, and to the elimination of the 65 men who abandoned the claim, I am clearly of opinion that this application for prohibition should be refused, with costs.

POWERS J. The applicants in this case seek for orders prohibiting the Commonwealth Court of Conciliation and Arbitration and the President thereof from proceeding with an award made by him in the proceedings before the Arbitration Court.

The hearing before the President of the Arbitration Court occupied 93 days; and the learned President of the Court, after examining the written evidence (688 exhibits), hearing all the oral evidence, and seeing the demeanour of the witnesses under examination and cross-examination, came to the conclusion that there was an inter-State industrial dispute with the claimant organization, and that the claimant was entitled to an award, and he accordingly made an award. In his judgment the President said (1):—"I have no doubt that there is in this case a genuine dispute between the claimant and the several respondents, other than Coburg; and I see no reason for saying that the Registrar's certificate to the effect that the dispute extends beyond one State has been rebutted by the evidence. I find on both these facts in favour of the claimant. . . . . In coming to the conclusion that there is a dispute—a real dispute, a dispute of real substance—I do not rely on the mere fact that the Association's log, containing the Association's definite requests, was twice sent, in May and in September, to each of the respondents and rejected; but I

(1) 6 C.A.R., 130, at p. 144.

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2]. Powers J.

decline to accede to the argument to the effect that a fact so important should be coolly ignored. I conceive it to be my duty to examine all the circumstances, including the nature of the work and the conditions, the nature of the requests made, the attitude, character, manner, and explanations of the witnesses, the whole history of the case. The submission and rejection of the log, taken with what appears in the transcript of the shorthand notes, would, in my opinion, be sufficient to establish the existence of a dispute for the bare purpose of founding jurisdiction."

The evidence submitted to the Arbitration Court consisted of 5,300 pages of transcript from the shorthand notes and 688 exhibits. The additional evidence submitted to this Court consisted of 66 affidavits filed on behalf of the applicants and respondents, containing over 200 pages of foolscap, and the oral evidence given by A. G. Warton (of New South Wales) before this Court, which occupied two days. It is, therefore, impracticable from such a mass of evidence to set out all the facts that have led me to come to the conclusion I have arrived at; and it is unnecessary for me to do so, because my learned brother *Isaacs* has dealt so fully with the facts of the case and the law as to disputes. I, therefore, refrain from giving in detail all the facts I rely on for my decision.

At the same time, I think it necessary as a Justice of this Court to mention some of the reasons why I hold there was in this case an inter-State industrial dispute, and as Deputy President of the Arbitration Court to state why I think—as this Court holds (by a majority) that there was not any dispute with the registered organization (the claimants)—Parliament should consider the question whether it is not necessary to amend the Act so as to simplify proceedings, do away with technicalities in the procedure to get to the Arbitration Court, and allow parties to retain the benefits of awards obtained. This appears to me to be necessary, if the good work done by that Court under the Presidency of the late *O'Connor* J. and of the present President of the Court is to be continued.

In this case it has been contended, apparently successfully, that (1) there was no dispute as to 65 employees in Brisbane

because they did not intend to persist in the claim, and wished to withdraw from the plaint after the demand was refused; (2) there was no dispute as to the rest of the members of the organization, although they did persist in their claim before and at the hearing, but they only persisted in their claims before the plaint before the Court, and did not strike.

There was no dispute as to 440 Brisbane employees of the same company, although they did persist in their claim before the plaint and at the hearing, and although they went so far as to insist on part of it, because they ended their employment by striking to enforce one of their demands in the plaint by what it was contended was a strike. None of the three classes of employees mentioned, therefore, apparently have any chance of keeping an award when they get it under the Act as it stands at present.

I understand that the majority of my learned colleagues do not hold that it is necessary to strike to make a dispute, but only that in this case the respondents have not satisfied them that there was a dispute. Personally, I do not see what the organization could possibly have done more than it did, after the log was adopted by the members, to prove a dispute, especially as the applicants for prohibition refused to see its officers or acknowledge any letter sent by the organization or its officers.

Under sec. 19 of the *Commonwealth Conciliation and Arbitration Act* it is clear that the Court has jurisdiction if there is an industrial dispute, and that industrial dispute has been submitted to the Court by an organization by plaint. I do not see how any other question is material if there is an industrial dispute and if any of the conditions set out in sec. 22 of the Act have been complied with. Condition (*a*) of sec. 22 has been complied with. If I am right there was an industrial dispute—it was submitted by a registered organization by plaint—and the necessary condition set out in sec. 22 has been complied with. The Court therefore had jurisdiction.

As to the question whether there was an inter-State industrial dispute, I propose to refer to some important facts to show why, in my opinion, there was a dispute, whether the evidence of the applicants' witnesses, or the evidence given by the witnesses for the claimant organization, is believed. A few facts, which I

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Powers J.

think are clearly proved, stand out like islands in the ocean of disputed facts and contentions.

Before stating those facts I think it as well to mention that this Court, although it has always refused to state what are the necessary *indicia* in every dispute, has held that there was a dispute in every case, so far submitted to it, where there was: (1) prior dissatisfaction of employees with existing industrial conditions known or communicated to the employers before the plaint filed; (2) a real common demand by a registered organization for the employees for new conditions claimed and a reasonable time allowed for compliance with the demands or for a conference; (3) a refusal or neglect by the employers to grant the conditions claimed or to confer; (4) persistence in the demand and refusal.

This Court has also held by the necessary statutory majority that the Arbitration Court has jurisdiction under the "power to prevent disputes" to arbitrate and to make a binding award if there is a threatened, pending or probable dispute; an actual dispute is not necessary. See *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1). That decision has not been questioned, and although I did not agree with it I feel bound to follow it. While that decision remains as a decision of this Court we ought not to grant prohibition even if the Court finds on the facts of this case that there was not a dispute, unless the Court also finds that on the facts there was not even a "probable, threatened or impending dispute."

If the facts proved in this case do not prove even a probable, threatened or impending dispute I confess I do not understand the meaning to be attached to those three words in the *Commonwealth Conciliation and Arbitration Act.*

I hold that the complainant proved (*inter alia*): that there was a registered organization of tramway employees, under the name of the Australian Tramway Employees' Association (registered on 5th January 1911), and only one registered federal organization for tramway employees; that persons were authorized by name by all the employees of all the respondents—as members

(1) 16 C.L.R., 591, at p. 592.

of the Australian Tramway Employees' Association—to make the first demand of 19th May 1911 on the respondents, whether the persons so authorized were or were not technically appointed officers of the registered organization; and that the employees of the respondents, as members of the Australian Tramway Employees' Association, ratified and confirmed in the most complete way possible the action of the officers purporting to act for the registered claimant organization, especially in persisting in the demands on their behalf, in submitting the plaint to the Court, and in persisting with the demands in the plaint before the Court.

Whether the ratification and confirmation by the members were in strict accordance with the rules or not, it is clear that, even if the persons purporting to act as agents of the organization were not legally authorized to lodge the plaint in the first instance, the registered Association adopted the plaint after it was lodged, and appeared in Court in support of the plaint, and of all the claims made in it. The respondents did not concede the demand made, or any part of it, and refused to confer about a settlement, but the majority of the respondents, including the Adelaide Tramway Trust, one of the applicants for the rule *nisi*, met in June 1911 and decided to fight the claims. Even if that demand of May was not technically and legally authorized under the rules of the organization, the solicitors for the registered organization made the second demand on the employers on 11th September (before they lodged the plaint for the registered organization—on 26th October 1911), and the plaint rests on that demand, not on the first demand in May. The second demand was made for claims, set out in the plaint later on, and for a settlement, or conference if no settlement was arrived at, but none of the respondents conceded the claims, or any of them, or agreed to submit them to a conference for settlement.

The *Commonwealth Conciliation and Arbitration Act* recognizes collective bargaining by organizations of employers and employees, and by registered federal organizations conducted by officers.

The two applicants, the Brisbane Tramway Company Limited

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2]. Powers J.

and the Adelaide Tramway Trust, positively declined to recognize the officers of any federal organization—the only persons capable of bargaining for all its members—by refusing to see any officer, or to answer any letter from any officer of any federal organization. They insisted on seeing only their own employees about matters affecting their wages or conditions. The secretary and president could not be employees of every respondent in every State. For this reason all demands made by or on behalf of the federal registered organization were unanswered, and the applicant respondents now contend that there was not any dispute, as no claim which they would recognize had been made on them.

The registered organization applied to the President in September 1911 to call a compulsory conference of the officers of the registered organization and the respondents, to see if the demands could be settled by such a conference. The learned President caused letters to be sent to all the respondents in September 1911 asking whether a conference would be likely to settle the actual or threatened industrial dispute, but all the respondents (except one West Australian company) replied informing the President that a conference would be useless—the claims would not be conceded or settled; and yet there was not any dispute—so it is held. The registered organization after the two demands, one in May and another in September 1911, and after three attempts to obtain conferences, caused the plaint to be filed on 26th October 1911. The solicitors for the registered organization who made the demand in September lodged the plaint on behalf of the registered organization. All the respondents filed answers to the plaint, recognizing the registered organizations as the body who made the demands, and after disputing jurisdiction, disputed (using the word "dispute") every claim made in it as unreasonable and excessive.

After the hearing had proceeded for some time eight of the ten respondents in dispute decided to settle the dispute, and did settle it with the registered organization. Only two of the ten respondents had actually settled the dispute before the award was made by the President; so that eight of the respondents in four States at that time had not settled the dispute. Six of the

eight respondents subsequently to the award being made, namely, between 1st January and 12th August 1912, did settle the dispute by agreements so far as they were concerned. The other two—the present applicants—applied for the orders *nisi* for prohibition now under consideration.

The evidence that there was a dispute at the time the plaint was filed, with the two respondents who did not settle (the Brisbane Tramway Company Limited and the Adelaide Tramway Trust), is undoubtedly very much stronger than the evidence as to a dispute with those who did settle. It is, however, contended that there was no dispute even with the eight respondents who settled; that they only imagined there was a dispute, and that it was with the registered organization, when, in reality, there was not any dispute at all; and that if there was any dispute, it was not (because of a host of technicalities) with the registered organization, but with some supposed association which had never filed any plaint. The imaginary disputes were settled by formal written agreements made with business men, directors of companies or trusts, carrying on important tramway services (cable or electricity) in Melbourne, Hobart, Perth, Fremantle, Ballarat and Bendigo. These business men, in my opinion, knew whether they had a dispute or not, and with whom their dispute was, and what the dispute was about. In each of these written agreements (a separate one for each respondent Company) the parties are the respective respondents and the claimant registered organization (as "The Australian Tramway Employees' Association," registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1911"), and the matters dealt with are referred to as set out in the Association's plaint (No. 16 of 1911), which it is now decided was never filed by or for the registered organization. In some of the agreements referred to I find the following recital:—"And whereas the parties hereto have met in conference and have with the assistance of the President of the Court agreed to a settlement of the matters in dispute as hereinafter appears" &c. The agreements produced under which the disputes were settled were formally presented to the President of the Court by the representatives for both parties for his certificate under sec. 24 of the *Commonwealth Conciliation and*

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Powers J.

Arbitration Act 1904-1911. Agreements under that section are only valid as awards if they are agreements made in settlement of inter-State industrial disputes, and as the majority of the Court finds there was not any dispute at all, the agreements are, I presume, waste paper.

It was contended that there was not any industrial inter-State dispute between the registered organization and the ten respondents, or any of them, notwithstanding the two demands, the persistence in the demands and in refusals before and after the plaint, three attempts to obtain conferences to settle the dispute, and the settlements by eight out of the ten respondents. It appears to me only necessary to refer especially to the two applicants for the rule *nisi*, because I cannot bring myself to find that there was not any inter-State industrial dispute with the other eight respondents, when they admit there was, when they signed agreements settling the dispute and asked the Court for a certificate which only gives to those agreements the effect of an award if there was an inter-State dispute. As to the other two respondents, no formal demand was made by the officers of the Association for the wages and conditions the members required before the demand of May 1911, for the following reasons:— Prior to the registration of the Association the employees of the Brisbane Tramway Company Limited were debarred by discrimination from joining any federal association and from joining any State union not consisting solely of the employees of the Company. In May 1910 the Brisbane employees did not, for that reason, send any representatives to a general conference of tram employees called in Sydney in May 1910. Discrimination against employees joining unions outside the Company's employees was clearly proved. Prior to registration of the Association, the employees of the Adelaide Tramway Trust were also debarred from submitting any requests through any officers of any federal or State association or union if such officers were not employees of the Adelaide Trust. Subsequently to the registration of the Association both these respondents continued the same practice, and any requests for recognition or demands made on behalf of the employees by the officers of the federal organization formed under the authority of federal legislation

were ignored. The President in his judgment in this case, referring to the demands of the organization, said (1):—"A collective demand from a strong and broad union is often the only mode of relief that is open. The agents of such a union do not, in my experience, spread discontent; they generally spread hopes of getting relief from existing grievances, by arbitration instead of strike. If, however, the crude doctrine should ever be established that there can be no 'dispute' for the purposes of the Arbitration Court, unless the men" (personally) "either worry the employer, or resort to a strike, it is easy to see what will happen." Some of the witnesses truly said in this case:—"If two of our fellow employees voiced all our complaints the employers would look upon them as dissatisfied men and agitators, and would soon make some excuse to get rid of them. Outsiders are the only persons who can properly bargain for us with our employers." This refusal to recognize the federal law and to consider any requests made by a registered organization was in a way relied upon by the applicant respondents as a proof that there was not any dispute—on the ground that claims were not made by the only persons recognized by the employers, namely, employees of the local Company or Trust, and therefore there could not be a dispute. As the Company would not receive communications from, or confer with the officers appointed by the federal organization, formal demands by registered letter were therefore necessary before plaint. One was made by the officers, and one by the solicitors of the registered organization. The employees did ask for minor matters such as special concessions on Christmas Day, alterations of time tables, &c., after the plaint, and that was used, not quite fairly I think, to show that the employees asked for what they really wanted, and that the log demanded was not a demand they intended to persist in.

It was then contended that even if there was a dispute with any of the respondent companies it was not with the registered organization: (1) because some of the rules they acted on were not technically passed by the organization; (2) because the employees outside Victoria, although they thought they joined the registered Association, did not do so in fact, and were not

(1) 6 C.A.R., 130, at p. 145.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Powers J.

members of the registered organization, but members of some supposed association—some fairy association no one could locate. This supposed association, apparently, acted on rules passed by the registered Association before it was registered, and not by the fairy association. It was admitted that the "supposed" or "fairy" association was never registered, that there was only one registered association in the Commonwealth for tramway employees, and that association was called the Australian Tramway Employees' Association, and that if the members joined a registered association at all they were members of the claimant Association.

As to No. 1 objection—that is based on the fact that the registered Association did not, after its registration, formally repass rule 28 which it had passed as an association before it was registered, and which rule it had lodged with the Registrar before registration. Days were spent in showing how fatal this technical objection was to all the proceedings before the Arbitration Court. The facts are that the Association before registration passed rules in accordance with the *Commonwealth Conciliation and Arbitration Act*, and lodged them with its application for registration. Sixteen days after, and before registration, the same Association passed rule 28 and lodged that as one of the registered rules with the Registrar. The Registrar, rightly or wrongly, decided that he could only register the Association as one with the rules lodged at the same time as the application for registration, but he registered the Association after rule 28 had been passed and lodged, and his attention had been drawn to it. At the suggestion of the Registrar the additional rules (referred to as rule 28) passed before the registration, and lodged with him, were retained by him as amendments of the rules of the registered organization, and placed with the rules lodged with the application for registration. The registered Association acted on rule 28 afterwards as one of the rules of the registered Association. Rule 28 only added other provisions for carrying into effect the objects set out in the rules lodged with the application.

This Court by a majority, of which I formed one, held that rule 28 did not legally become one of the rules of the registered Association as a corporate body, but I have referred to it for

three reasons: (1) because I think rule 28 only added other provisions for carrying into effect the objects set out in the rules lodged with the application, and was not therefore inconsistent with those rules; (2) because rule 28 was in fact passed by the members of the registered Association before registration, and was acted upon by the registered Association only—(if it did not legally become a rule of that Association, it never became a rule of any other Association); (3) because, I think, even if rule 28 was inconsistent with the registered rules, it does not affect the question—for if a registered Association does act on rules inconsistent with the registered rules, it does not render the Association void or the acts done illegal. The Act specially provides that if a registered association acts contrary to its rules the Arbitration Court shall on application cancel the registration—that is, the registration is voidable, but not void.

In this very case an application was made to the Arbitration Court to cancel the registration of this registered Association, and although the Court stated that there appeared to be a jumble of rules (and rule 28 was specially referred to), it held that the registered Association had not acted contrary to its rules—and the application for cancellation was refused. (See *In re Australian Tramway Employees' Association*; *Ex parte Ryan* (1)). No attempt was made to interfere with that decision.

The Arbitration Court also held that the officers of the registered Association, Messrs. Prendergast and Warton, were properly appointed (2). The President said:—"The president and secretary are, in my opinion, employees within the meaning of the Act, and have been validly appointed." No attempt was made to interfere with that decision. On Warton's oral evidence before this Court (uncontradicted) supported by exhibits verified by him, in addition to the evidence before the President, I hold A. C. Warton was general secretary of the registered organization from 11th February 1911.

As to the objection that the employees outside Victoria were not members of the registered Association, and the Victorian members were the only members, and that the dispute, if any, therefore, was not with the registered Association, I cannot

(1) 6 C.A.R., 49.

(2) 6 C.A.R., 49, at p. 54.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Powers J.

understand how such a contention can be accepted. Take the eight respondents in three of the States who settled the dispute with the registered Association. They recognized their employees as members of the registered organization. The employees as members of the organization adopted the settlement effected for them by the officers of the registered Association. The members in Victoria registered rules differing from the rules of the registered organization as rules of the Victorian branch of the registered Association. The Court held (1):—"The Victorian branch was not a registered Association. . . . The Victorian rules are not applicable to the registered organization." And yet it is now contended that the registered Association consisted of Victorian members only. The Victorian members evidently did not think so, nor did the learned President of the Court in the judgment referred to.

All the evidence given by the members themselves shows that the members of each branch acted as if that branch was a branch of the registered Association. They intended to become members of the registered Association, and of that Association only, after 22nd November 1910. They all personally signed applications to become members of that Association. The general secretary for the time being, before the award, formally accepted their applications in writing. In the meantime they paid entrance fees to the branch secretary and paid capitation fees to the registered Association as members of that Association. They sent representatives to conferences of members of the registered Association. They personally authorized the registered Association to make demands on the employers on their behalf, and to file a plaint asking only for better wages and better conditions for members of the registered Association. Their representatives were recognized by the registered Association. The employees gave evidence as members of the registered Association in support of the plaint filed on their behalf by the solicitors of the registered Association. They persisted as members of the registered Association in demands made on their behalf from May 1911 up to the present date, to be conceded only to members of the registered Association; and yet it is now contended they did

(1) 6 C.A.R., 49, at p. 58.

all that for an association they were never members of, and therefore they cannot get the benefit of the award obtained.

These members are told that they were under a delusion—that they did not really join the registered Association, "but some fairy association, because the registered Association did not legally pass rule 28 after registration, and it was not therefore a rule of the registered Association as a corporate body." To my mind it is clear that they joined the registered Association simply because it was a registered association, and they did not at the time see, or ask to see, the rules of that Association, or care what the rules were. The rules passed on 6th November, recognized as legal rules of the registered Association, as a matter of fact provided for branches and for members in all States to join the registered Association. The evidence shows that the members of the branches did not know what the rules were for some months after they joined. They pressed for copies of the rules for the first time after they became members.

As to the employees of the two applicants for the rule *nisi*, all that I have just mentioned applied to them also; but, in addition, we have the evidence, uncontradicted, that so long as the Tramway Association was not a registered one the employees of the Brisbane Tramway Company Limited dare not join it, because of the discrimination exercised by the Company against those who joined any union but a union of the Company's employees. When the conference before registration was called in Sydney, the Brisbane employees did not send any representative. When they were assured that the Association was registered as a federal organization, and that they were protected from discrimination by the provisions of the *Commonwealth Conciliation and Arbitration Act* because of registration, over 400 members joined within a few days, without seeing any of the rules, and joined the registered Association solely because it was registered. They personally signed applications to join the registered Association by its registered name; they were accepted by the then secretary, Mr. Duke, in accordance with the rules of 6th November 1910; and yet they are now told they only imagined that they were members of the registered Association. The 65 Brisbane members who opposed the registration of the Association (at the

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2]. Powers J.

expense of the Brisbane Tramway Company Limited) opposed the registration because they were members of the Association now registered, not as outsiders. If the 65 were members of the registered organization, so were the other 440 members.

As to the employees of the Adelaide Tramway Trust—in addition to the acts done by the members of the nine branches to which I have referred, they joined the registered Association at a public meeting held in Adelaide, and they passed a resolution declaring themselves to be a branch of the Australian Tramway Employees' Association (the only registered Association of that name), and they also applied later on individually in writing to join the Australian Tramway Employees' Association; they were accepted as members; they paid entrance fees to the branch and capitation fees to the registered Association, and in numerous other ways acted in a way consistent only with the fact that they were members, and accepted members, of the registered Association.

It was contended that the minute submitted of 30th November 1910 showing that the South Australian employees joined the registered Association as a branch was tampered with, and that such a resolution had never been passed in the form it was submitted. Prendergast, an informer, said that it was not passed in the form submitted, and that it had been added to, but he, admittedly, was not present at the meeting when the resolution was alleged to have been passed. To prove the genuineness of the minute the mover and seconder swore to it as a resolution passed at the meeting of 30th November 1910. The president (a member of Parliament), other members of the Association present at the meeting, and the secretary, who was present and wrote out the minute, swore that it was passed on the day the minute recorded it as passed. A great deal of time was spent over this minute, and I think unnecessarily, because I find in minutes (which were admitted to be genuine) between that date and the date of the plaint in this case, several direct references to the fact that the South Australian members formed a branch of the registered Association "The Australian Tramway Employees' Association." One minute particularly, on 12th July 1911, shows that the subordinate position they occupied as a

branch was recognized. In it the following appears:—"Mr. W. S. Holmes asked: 'Has this branch power to accept Mr. Irvine's resignation, he being a federal officer?' The secretary explained that this branch could receive the resignation and forward it to the federal Executive with a recommendation that it be accepted." All the minutes show the South Australian members recognized themselves as a branch of the Association which was registered, and which was engaged on their behalf in pressing the claims and preparing the plaint. There was no need to invent or tamper with the minute of 30th November 1910 (in February 1912), when so many other minutes in 1910 and 1911 proved that the South Australian members joined the registered Association as a branch.

Then hours were spent in showing that the South Australian employees, because they signed the pink forms formerly used by the South Australian Association before it joined as a branch, could not have intended to join the Australian Tramway Employees' Association as the word "South" before Australian had not been crossed out of some of the forms when they signed. This objection was rendered useless when Mr. *Arthur* produced 400 white forms signed by the employees applying to join the Australian Tramway Employees' Association, including the majority of those members who had also signed the pink forms.

One other reference to the objection that the employees were not members of the registered Association. Parliament, in an attempt to avoid technical objections, and to save the time of the Arbitration Court in deciding upon membership, has cast upon the Registrar the duty of satisfying himself (and the Arbitration Court) who are members of the registered Association. (See sec. 21A of the *Commonwealth Conciliation and Arbitration Act.*) He certified under that section to the fact that all the members who now claim to be members of the registered Association were on 16th October 1911 members of the registered Association. Parliament has declared that that certificate is to be conclusive evidence of membership. The certificate referred to was obtained and tendered in evidence. The Registrar, who gave the certificate, knew the circumstances under which rule 28 was passed. Not a particle of evidence was given to show that any members resigned

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Powers J.

between 16th October 1911 and the date the plaint was filed—26th October 1911. The Act further declares that no member can legally be removed or withdraw from his membership while proceedings are pending. The employees of the two applicants are included in the certificate, and were therefore members of the registered organization on 16th October 1911, and have not since resigned (with the exception of 65 of the employees of the Brisbane Tramway Company, but they also continued to be members because the Act prevented members legally withdrawing during proceedings).

That being so, as no resignations were tendered and accepted between 16th and 28th October 1911 the employees of the respondents are still members of the registered organization. On the evidence without the certificate I hold they were members of the registered Association; and, under the Act, I feel bound to accept the certificate of the Registrar as to membership if I had any doubt about it otherwise.

Was there a dispute? All the necessary elements of a dispute previously referred to by me have, in my opinion, been proved under the circumstances mentioned, namely: (1) dissatisfaction of employees with wages and conditions known to the employers; (2) a real common demand on the employers allowing a reasonable time for settlement and conference; (3) refusal or neglect to grant wages or conditions claimed or to confer; (4) persistence in the demand and refusal.

It was contended that there was no real dissatisfaction, and that if there was dissatisfaction it was not known or expressed to the employers. If the *ex parte* statements of Mr. Goodman (Adelaide) and Mr. Stephens (Brisbane) on the application for a rule *nisi*, referred to by the learned Chief Justice, disclosed the real state of affairs between employers and employees, and the employers had not refused to treat with the organization or its officers, I would agree that there was not dissatisfaction known to the Brisbane respondent at the date of the plaint; but in my opinion it was proved to be incorrect, both by evidence given on behalf of the applicants and on behalf of the respondents. The cablegrams and letters from Mr. Stephens to Mr. Badger, the manager, then in the United States, and his replies, and those referred to by

my brother *Isaacs*, show that he (Mr. Stephens) knew that the Company's employees, because of dissatisfaction with their conditions, proposed to join this federal Association to assist in enforcing their claims. The 56 witnesses of the claimant organization, without any exception, swore to dissatisfaction with wages and conditions before plaint, and I do not find any evidence to make me disbelieve all those witnesses for the claimants. Mr. *O'Halloran*, counsel for the Adelaide Trust, said that if the award was upheld it would mean an increased expenditure to the Trust of £20,000 per annum. Accepting counsel's statement as correct, the fact that they were receiving £20,000 per annum less than a Justice of this High Court, as President, found that they ought to be paid in Adelaide was surely sufficient to justify dissatisfaction so far as the Adelaide employees are concerned. The Brisbane Company also informed the President that the claims, if conceded, would greatly add to the cost of the working of the Company's tramways. The evidence, I hold, shows that there was reason for dissatisfaction, that there was dissatisfaction, and that the dissatisfaction was known to the employers before the plaint was filed. The dissatisfaction was not expressed to the Brisbane and Adelaide respondents by the organization before the formal demand in May, because those respondents would neither see nor correspond with the federal representatives of their employees; but it was expressed to the respondents by the officers of the organization in May, and by the solicitors for the organization in September, and for the organization in October 1911 through the president, who asked about a conference to settle the dispute before the plaint was filed.

The real common demands in May and September 1911 allowing reasonable time for settlement have been fully referred to, also the three requests for conferences to settle the dispute. The refusals to grant conditions or to confer have also been dealt with, including the decision of several of the respondents in June 1911 to fight the claims.

Was there an intention to persist in the demand and in the refusals? The evidence of every witness for the claimant organization is definite on that point. They intended to persist

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Powers J.

in the claims, and did so, complaining only of the delay, or pressing the demands by the organization. In the case of the employees of the two applicant respondents, uncontradicted evidence was given that the president of the registered Association was urgently called to Adelaide and to Brisbane to prevent the members striking without waiting for the proceeding. What they intended to strike about at the time is in dispute, but, whatever it was, they intended to persist in it, because of dissatisfaction, to the extent of striking. The intention of the respondents to persist in the refusal to grant the claims is beyond question, and was never denied. It has been said that the members never intended to press for the log of prices and conditions which they demanded. All the witnesses say they did intend to do so; and with eight out of the ten respondents they succeeded in obtaining by their persistence the log of prices and conditions. In each agreement of settlement quite as many items of the log were granted by the eight respondents as the learned President granted in the award against the other two. am not justified in believing against this evidence and the oaths of all the other witnesses for the claimant organization, that the Brisbane and Adelaide members did not intend to persist in the log also. They intended to persist in the demand, and did so to the fullest extent possible (except by an illegal strike in Adelaide) from the date of the first demand up to the present date. I fail to see why an intention to persist in a claim in the only way now authorized by law cannot be accepted as proving a dispute, just as much as a strike proved it before strikes were declared to be illegal and punishable by fine.

If persistence in a claim made with the intention to persist in it before the plaint—and before a Court if necessary—instead of persisting in it by a strike, is not sufficient to prove a dispute under the Act or under the Constitution, it is difficult to conceive how disputes are in future to be proved.

I hold there was an inter-State dispute for a common demand in all the five States, which the members of the registered organization intended to persist in, and did persist in, on their own behalf, with the exception of a few items applicable in one State

only. These local claims did not form part of an inter-State dispute, but they did not prevent the general claim being dealt with by the Arbitration Court. See *Whybrow's Case* (1), to which I refer more fully later on.

Before dealing with the other points to be considered in this particular case I think it my duty, as Deputy President of the Court, to emphasize what has already been said by my learned brother *Isaacs* with reference to an amendment of the Arbitration Act, and, in the absence of the President of the Court, to refer to what he has already said about the necessity for some action to be taken, and to the means he suggested to remedy the difficulties the Arbitration Court has to contend with. The decision of the Court in this case must be loyally followed, and that fact makes it all the more necessary to refer to the matter. In considering this question it must be remembered and recognized that the Arbitration Act was passed to provide a tribunal for the workers to resort to, instead of striking to enforce demands; and if the intention to persist in a demand, and the persistence in a demand for improved wages and conditions later on, before the Arbitration Court—such as there was in this case—does not prove a dispute within the meaning of the Constititution, surely it is a matter for consideration by Parliament whether the penalties imposed on those who resort to a strike, instead of to the Court, ought not to be abolished, or, in the alternative, that the amendments of the Act suggested by my brother *Isaacs*, and also by the President in his judgment in this case and in other cases to which I intend to refer, should be considered by Parliament.

Take this case as an example of what may happen in any case before the Arbitration Court as the law now stands. Because the members generally did not strike, or do something more to enforce their claims—but only persisted in their claim for increased wages and better conditions before the plaint and before the Arbitration Court, and waited for an award—they are held not to be in dispute and cannot hold their award, and those members in Brisbane who persisted in their claims before the Court, and at the Court, and did strike to enforce part of their claim, are also to lose the benefit of the award because they did

(1) 11 C.L.R., 1, at pp. 28, 29.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Powers J.

strike and would not wait for the award. Putting it another way: Those who have persisted in the demands before the plaint, and since then before the Arbitration Court at every stage for nearly three years, to the extent of spending hundreds (if not thousands) of pounds, are assured now by this Court that they really did not intend to persist in their demands sufficiently to prove a dispute; and those who did strike to get part of their demand, and persisted in the rest of their demand before the plaint and before the Court, are told that they thereby ended their employment and deprived themselves of any right to an award.

The two complaints against the Arbitration Court are (1) the delay in obtaining an award, and (2) the difficulty of retaining it when obtained. The first at least is justified. At the rate the work has proceeded in the past, with one President and two Deputies sometimes assisting, the plaints and other applications already filed (one in 1912), without any new work, will—unless the war makes a difference—probably take the Arbitration Court more than a year, with one Judge, to dispose of, although the merits alone could be dealt with in less than half the time. The present case, for instance, was dealt with by the Arbitration Court finally on 21st December 1912. The employees have waited to get the benefit of the award ever since. It is now being finally dealt with, more than one year and nine months after the award was made by the Arbitration Court. Almost every plaint that comes before the Court is greatly delayed by the defence that is raised that there is no inter-State dispute, or no industrial dispute; and as the Arbitration Court cannot decide that question at present, the evidence must be taken at great length to see if the Court is justified in proceeding, and to satisfy this Court also later on that there was a dispute extending beyond the limits of one State. An unsuccessful respondent also knows that, even if he does not succeed on prohibition, he prevents the employees from getting the benefit of the award until it is finally dealt with by this Court; and delay is thereby encouraged.

The President has made many attempts to get some opinion from the High Court as to what are the necessary *indicia* of a dispute, and as to whether facts submitted to the Court in

particular cases constituted a dispute, so as to prevent lengthy inquiry as to the merits if the facts before the Arbitration Court did not, in the opinion of this Court, prove a dispute.

The applications have not been successful, as the High Court holds that it is a question of fact, and not a question of law, whether there is or is not a dispute. Later on, when the same facts are submitted on a motion for prohibition, and then only, the High Court can decide whether there was or was not a dispute in fact. I have had the same experience as the learned President. In the *Felt Hatters' Case* (1) the proceedings were delayed for some months because I thought it necessary, before proceeding to hear the merits, to submit to the Court the question whether there was a dispute on all the facts the claimant organization submitted or intended to submit to prove a dispute. The High Court declined to answer the question on the ground that it was not a question of law, but one of fact, and decided by a majority that I was justified in proceeding to ascertain as a fact whether there was an inter-State dispute, and proceeding to investigate the merits. I am not complaining of the decisions of this Court. I personally was an assenting member of the Court which gave some of the decisions. The decisions I accept as correct under sec. 31 of the Arbitration Act, which only allows the President to submit questions of law arising in the proceedings to the High Court. I am only pointing out that the work of the Arbitration Court is further delayed by the Act as it at present stands.

After the decision in this case, in addition to the evidence to be heard on the question of a dispute, much of the time of the Court must also be taken up in future with lengthy and complicated evidence and legal arguments as to proper registration of organizations—evidence that rules were legally passed by real members and at the proper time—evidence of membership of the organization, and proof that the members legally joined the corporate body as well as the Association—evidence as to legal compliance with the Act and Rules of Court, and proof of strict compliance with the rules of the Association.

In *Keates* v. *Lewis Merthyr Consolidated Collieries Ltd.* (2)

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

(2) (1911) A.C., 641, at p. 643.

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2]. Powers J.

Lord *Atkinson* in delivering judgment said:—"It is obvious that this peculiar quasi-parental jurisdiction was conferred in the interest of industrial peace, and should not be hampered by rules of pleading." It must also be remembered that all these legal technicalities have to be dealt with by an Arbitration Court in which either party to the proceedings has the right—which is generally exercised—to prevent counsel or solicitor or any paid agent from appearing for either party. The danger of preventing the Court from doing useful work because of the difficulty in obtaining an award, and maintaining it when obtained, was pointed out by the President in giving a judgment in August 1911, and again in this case. In his absence I propose to quote what he then said. In giving judgment on 5th August 1911 in the case of the *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1) the learned President said:—"I have given merely one instance out of many that could be adduced to show the increasing difficulties of this Court. At present, the approach to the Court is through a veritable Serbonian bog of technicalities; and the bog is extending. After full consideration, I must state it as my opinion that these decisions as to the limits of the Court's power, with all the corollaries which they involve, will make it impracticable to frame awards that will work—will entail, indeed, a gradual paralysis of the functions of the Court. Yet this Court, if it be trusted—and unless it can be trusted it ought not to exist—shows magnificent promise of usefulness to the public. It is in a position to solve problems which cannot be solved, to settle disputes which cannot be settled, by any tribunal except one that has authority in all parts of Australia. In this very case, in my reasons for award, I showed that in industries as to which there is inter-State competition the State Wages Boards confessedly cannot do justice. It would not be well to go into further detail on this subject, for obvious reasons. But I am clearly entitled—I am even in duty bound—to make known the obstacles and dangers which confront the Court, and before it is too late."

Later on in the judgment in this tramway case on 21st December 1912 the President said (2):—"The position of

(1) 4 C.A.R., 1, at p. 42. (2) 6 C.A.R., 130, at p 146.

the question—Does a dispute exist?—is most unsatisfactory. The Act assumes that the existence of a dispute is the most obvious thing in the world; and, according to the High Court, Parliament has not given me any jurisdiction to decide the question. I understand that my finding on the question is not even to be treated as *primâ facie* right; and yet, when the question comes before the High Court, the High Court takes no evidence on the subject. As actually happened in the *Merchant Service Guild Case* (1), I may spend days and weeks in going into the merits of claims; and, after I have made an award, some dissatisfied party makes an application for prohibition; and the whole proceedings become a nullity, because the High Court cannot find, in the transcript, any sufficient evidence of what it understands by the word 'dispute.' My time and energies, which belong to the public, are wasted; and the irritated employees are put under a temptation to strike work. There are two courses which occur to me that Parliament could adopt to put an end to this position. One is to commit the question of the existence of a dispute to the High Court, and to forbid this Court to arbitrate until the High Court certifies that there is a dispute. The other is—if Parliament think that this Court, having the opportunity of meeting the employers and employees face to face, and of seeing the conditions of labour, should be able to form a better judgment—to commit to this Court jurisdiction to ascertain whether there is a dispute or not. Something must be done to improve the present anomalous position; but it is for Parliament to say what ought to be done." I entirely agree with the second suggestion.

The power to prohibit the Arbitration Court from proceeding when this Court holds that there was no dispute, and therefore that the Arbitration Court had no jurisdiction, is contained in sec. 75 (v.) of the Constitution. If employees are to continue to resort to the Court instead of to strikes, the bog of technicalities which has extended since 1911 must, I think, be cleared out of the way, and a safe and easy method provided of submitting disputes to the Court with some chance of retaining awards when obtained.

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

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2]. Powers J.

Some idea of the extent of the technicalities submitted for consideration in this case may be formed from the fact that the greater part of the time of this Court was occupied in arguing them. The argument before this Court lasted 23 sitting days, and out of that time I estimate 17 days were occupied in arguing technicalities in order to obtain an order for prohibition on technical grounds, even if there was an inter-State industrial dispute. I do not see how the work of the Arbitration Court can be continued on present lines, after the decision in this case, until the Act is amended; and I have felt it my duty, therefore, as Deputy President of the Court, to point out the position at some length.

Other reasons were given why the award should be set aside, even if there was a dispute.

It has been said that the dispute was only manufactured—not real. The dispute between Austria and Servia, it is generally believed, was also manufactured; but the dispute became a real one after demand and refusal. Whatever the intentions of the first promoters were when the Association was first suggested, it developed into a real federal organization, with branches in five States determined on behalf of the employees to make demands on the employers and to persist in them.

Prendergast as original promoter may have started the movement in Melbourne (as he said he did when he became an informer) to secure a good billet as organizer; but the organization later on found it necessary, in order to carry out the objects it had in view, to dispense with the services of its promoter. It did not want a president who thought only of a billet, and not of properly pressing for the claims the members insisted upon. The demand made before plaint was a real demand, and there was a real dispute with a registered federal organization long before the plaint was filed.

It was contended that, although the log contained some items the members intended to persist in, the demand was for a log of prices and conditions the major part of which they did not intend to press for, and therefore the demand as a whole was not one they intended to persist in, and the Court had no jurisdiction. This question has practically been decided by this Court in

Whybrow's Case (1). The learned President in that case held that, out of 23 claims made in the log and in the plaint, he could only make an award as to two claims because some of the claims were not in respect of matters in dispute, and as to other claims the Court had no jurisdiction. The High Court held that under the circumstances the learned President was right in making an award with respect to the only two matters (in the log) in dispute (2). The learned Chief Justice (3), referring to the contention that the demand, taken altogether, did not represent the real dispute (if any) at all, and therefore the jurisdiction failed, said:—"I am unable to accept this contention. If a separable part of the demand represented a real dispute then existing, I do not think that the addition of other demands affected that fact." The learned President was therefore justified in eliminating matters not really in dispute in the plaint (4) and confining the award to matters which he held were really in dispute between the parties.

I do not think the objection raised that there were two awards is fatal. There was one award and one judgment. In the award the claims allowed against the Brisbane Tramway Company Limited were first set out, and then the claims allowed against the Adelaide Tramway Trust, but the main claims allowed in both were exactly the same—some in the same words, and others to the same effect. Items affecting one respondent only were also included. As to these items not included as part of a common claim required by all members, the award would not be valid—that is, where the claim made was only against a respondent or respondents in one State.

It was contended that no award could legally be made against the Brisbane Tramway Company Limited as to preference to unionists, because there was only a dispute as to this matter between the organization and the Brisbane Tramway Company Limited, if there was any dispute at all, although claimed against all the respondents in the log. The claim was, however, persisted in against all the respondents, and undertakings were given by most of the respondents not to discriminate against unionists when

(1) 11 C.L.R., 1.
(2) 11 C.L.R., 1, at pp. 28, 29.
(3) 11 C.L.R., 1, at p. 29.
(4) 6 C.A.R., 130, at p. 142.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Powers J.

they settled the dispute by the agreements. The dispute as to this claim was still in existence in South Australia, in Queensland and in Victoria at the date of the award. On the whole of the evidence, in the President's opinion the organization was not entitled to an award as to preference to unionists against the Adelaide Tramway Trust. The dispute as to preference to unionists was not settled in Victoria until August 1912 (eight months after the award), and it was then settled by an agreement between the organization and the Melbourne Tramway & Omnibus Co. There was therefore clearly an inter-State dispute, and not a Brisbane dispute only, at the date of the award, so that a legal award as to that claim could be made.

Some of the employees (about 440) of the Brisbane Tramway Company Limited (members of the organization) foolishly insisted on wearing a union badge, and thus enforcing the demand as to part of the claim, after the plaint was filed. The employers refused to allow the men to continue to work while wearing a badge, and it was contended that that was a determination of the employment which deprived the members of any right to an award. This Court has already held that the question whether the cessation of work ends the employment so as to prevent a dispute continuing must be decided on the facts in each case (see *Colliery Employees Federation* v. *Brown* (1); *Merchant Service Guild Case* (2), and *Broken Hill Case* (3)). In this case the dispute was with the organization, and the dispute continued although some of the members were not allowed to work under the circumstances mentioned. The uncontradicted evidence of the men shows clearly that they were prepared to go back to work, and wished to go back, as soon as the dispute was settled. Mr. *Mitchell* admitted that if men had not been obtained to take their places the dispute, if any, might have continued, and that the dispute, if there was one, would have continued if they had gone on working. The question whether there is or is not a dispute continuing does not depend on whether the members are or are not working. It is sufficient if at the time the dispute started the men were

(1) 3 C.L.R., 255.

(2) 1 C.A.R., 18.

(3) 8 C.L.R., 419.

employees of the respondents and were members of the organization with which the respondents are in dispute, and were ready and willing to go to work as soon as the dispute was settled. As the dispute with the organization was not settled and the Court had cognizance of it for settlement prior to the cessation of work, up to the date of the award, it cannot properly be said that the dispute with the organization was at an end before the award was given because some of its members were not allowed to work under the circumstances.

It is held that if an organization does not order a strike, or its members do not individually worry their respective employers, it does not intend to insist on its claims, and there is no dispute; and that if it does order a strike, or any of its members strike, it ends the employment, and all the members lose all right to benefits under the Arbitration Act. That is placing on the word "dispute" a construction I do not see my way to agree with.

The point was again raised that as tramways are local in each State and do not compete with each other a dispute cannot extend beyond the limits of one State. I do not wish to add anything to what I have already said on this point in *The Builders' Labourers' Case* (1) and *Holyman's Case* (2), but in this particular case the President said (3):—"The dispute, so far as the troubles and grievances of the employees are concerned, is substantially one all over the tramway systems, and even on the several subjects of dispute the unanimity is striking."

An objection was raised that the award as to preference to unionists in Queensland was bad because the *Industrial Peace Act of* 1912 (Qd.) prevented any such discrimination. I hold the Act does not apply to federal awards in inter-State disputes, but only to associations over which the State has jurisdiction: See decision of this Court in *Whybrow's Case* (4), where the Court held that in a Victorian Act, No. 2241 (which on the face of it apparently intended to prevent federal awards from having any effect), the words "compelled or compellable" must be construed as meaning "compelled or compellable" by any power over which the Victorian legislature had legislative authority.

(1) 18 C.L.R., 224.
(2) 18 C.L.R., 273.
(3) 6 C.A.R., 130, at p. 144.
(4) 10 C.L.R., 266, at pp. 288, 300, 310.

H. C. OF A. 1914. THE TRAMWAYS CASE [No. 2]. Powers J.

The additional evidence submitted to this Court proved that the learned President was misled by the representative of the organization at the hearing. Minutes were put in as genuine minutes made in the ordinary way, when they were, in fact, dictated twelve months after, from memory. Membership cards were put in, altered after they were signed, without informing the Court of the fact. One important minute was written in the minute book while the case was proceeding, between two minutes, and submitted as genuinely entered at the time it was passed (without stating that it was), and in other ways the Court was misled. That was very reprehensible indeed, but the evidence shows that the meetings were actually held, the resolutions were passed, the membership cards were genuine, and the president of the organization (Prendergast), who had the conduct of the proceedings, was the only person who with evil intent misled the Court, and his services were during the proceedings dispensed with by the organization. The Arbitration Court, if all the real facts as now known had been disclosed to it, must therefore have come to the same conclusion as it did on the real questions to be decided in this case.

As to 65 Brisbane members who withdrew from the plaint: This Court has held in *Holyman's Case* (1) that parties to a dispute may, after plaint failed, settle the dispute without the Court's consent or award, or withdraw from the proceedings. I hold that the members referred to made a claim which they did not intend to persist in, because when it was refused they attempted to resign as members, to withdraw from the plaint and to prevent the claim being pressed. There was not, therefore, any existing dispute. These 65 were the only members who did not insist on their claim, and their action helps to confirm me in the view that all the others made the claims with the intention of persisting in them before the Court proceedings and at the hearing, or by a strike if necessary, and that they did persist in them.

I agree that that part of the award dealing with general references to the Board of Reference of matters not specified, and those by which the Board is constituted as a tribunal to decide

(1) 18 C.L.R., 273.

matters the President himself had no power to decide, after the dispute was determined, is *ultra vires*. As to these two matters I agree with my brother *Isaacs*, prohibition should be granted. As to the rest of the award, I hold that prohibition should be refused.

Gavan Duffy J. Rich J.

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

RICH J. Two orders *nisi* for prohibition were argued together, and a number of interesting and difficult points were raised and discussed. These points may arise for determination on another occasion, but we do not think they need be dealt with at present. If no industrial dispute extending beyond the limits of any one State existed in either Queensland or South Australia, both orders should be made absolute. It has been said that the statesmen who designed the Constitution and the Parliament which gave it life wished to settle, not to create, industrial disputes, and that the Commonwealth Parliament, in establishing the Court of Conciliation and Arbitration, did not intend to produce a crop of disputes which would never have existed had there been no such tribunal. Be this as it may, it is now well established that the language of sec. 51 (xxxv.) of the Constitution does permit the creation of a dispute for the special purpose of having it settled by the Court. If the dispute exists, it is nothing to the purpose to inquire how or where it originated, or whether the claims of any of the disputants are reasonable or unreasonable; but the dispute, whether spontaneous or fabricated, must exist, the Court cannot claim jurisdiction merely because the parties on one side or the other would have taken steps for the purpose of producing a dispute had they been aware of the necessity for doing so.

When does such a dispute exist? In *The Builders' Labourers' Case* (1) we said:—"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

(1) 18 C.L.R., 224, at p. 225.

H. C. OF A. 1914.

THE TRAMWAYS CASE [No. 2].

Gavan Duffy J. Rich J.

they are demanded, the words of the sub-section are satisfied. 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."

Did such a dispute exist in Queensland or South Australia? This depends on the facts in each case; and the evidence furnished to us is vague, fragmentary and ill-arranged, and some of it is quite untrustworthy. But it is on this evidence, not the very different evidence which was before the Court of Conciliation and Arbitration, that we must act. Dealing with this evidence as well as we are able, we have come to the conclusion that the employees in both States believed that the trouble and expense of an appeal to the Court of Conciliation and Arbitration would be amply repaid if they could obtain an award, and that the chances of obtaining an award justified the necessary expenditure of time and money. So believing, they were willing and even anxious that the claim should be submitted to the Court on their behalf in such form as would be likely to secure them the most advantageous terms. They were also willing and even anxious that all conditions should be fulfilled in order to enable the Court to adjudicate on their claim. They and those to whom they entrusted the conduct of the proceeding probably thought that the submission of the log and the refusal by the employers constituted a sufficient dispute to give jurisdiction to the Court, and had they not thought so they no doubt would have taken any

further step that was considered necessary to give such jurisdiction, but they were so engrossed in the production of a satisfactory claim and its carriage through the Court that they overlooked the necessity for a substantial dispute, or pretermitted the function of creating one. The service of the log on the employers was no more than a formal step on the road to arbitration, and was not effected with the expectation or even with the desire of obtaining any concession from or conference with the employers, except in so far as they might be obtained as incidents in the arbitration proceedings. The log, as a whole, did not represent the real grievances of any body of employees, what they were determined to get, or even what they thought they were entitled to get as a matter of fair play between themselves and their employers. It was merely the claim which those who had the carriage of the business considered would be likely to obtain the most favourable award from the Court. No doubt it contained some items which employees in all the States considered they were fairly entitled to claim, and many items which the employees in some two or more States thought reasonable, but we do not think that it contained any item about which there could be said to exist in either Queensland or South Australia a "dispute extending beyond the limits of any one State," as described in the words we have already cited from *The Builders' Labourers' Case* (1). That being so, the Court of Conciliation and Arbitration had no jurisdiction to make an award in respect to the applicants in either case, and both orders should be made absolute.

Orders absolute.

Solicitors, for the Brisbane Tramways Co. Ltd., *Blake & Riggall*, for *Thynne & Macartney*, Brisbane.

Solicitors, for the Municipal Tramways Trust, Adelaide, *T. S. O'Halloran.*

Solicitors, for the Australian Tramway Employees' Association, *Brennan & Rundle.*

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

B. L.

(1) 18 C.L.R., 224.