ALLEN.

circumstances as they exist to-day, justify the Court in giving him leave to depart from the *primâ facie* provision of the Regulations. From what I have said, it follows that I refuse the counter-

application of the mortgagor to reduce his rate of interest.

Isaacs J. Each party will bear his own costs.

Motions dismissed.



Solicitors for the mortgagee, Williams & Matthews. Solicitors for the mortgagor, Gavan Duffy & King.

B. L.

Discd Statchbury v Pittwater Council (1999) 105 LGERA 1

[HIGH	COURT	OF	AUSTRALIA.]
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STEMP APPELLANT;
DEFENDANT.

AND

THE AUSTRALIAN GLASS MANUFACTURERS COMPANY LIMITED . RESPONDENTS.

INFORMANTS.

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

H. C. of A. 1917.

Melbourne, June 18, 19, 25.

Barton A.C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ. Constitutional Law—Powers of Commonwealth Parliament—Conciliation and arbitration for settlement of disputes—Prohibition of lock-outs and strikes—The Constitution (63 & 64 Vict. c. 12), secs. 51 (XXXV.), (XXXIX.), 107—Commonwealth Conciliation and Arbitration Act 1904-1915 (No. 13 of 1904—No. 35 of 1915), secs. 4, 6.

The prohibition in sec. 6 (1) of the Commonwealth Conciliation and Arbitration Act 1904-1915 against doing anything in the nature of a "lock-out"

or "strike," as those terms are defined in sec. 4, is within the legislative H. C. of A. powers of the Parliament of the Commonwealth conferred by sec. 51 (xxxv.) 1917. and (xxxxx.) of the Constitution.

So held by Barton A.C.J., Isaacs, Higgins and Powers JJ., Gavan Duffy and Rich JJ. dissenting.

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APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Footscray an information was heard whereby the Australian Glass Manufacturers Co. Ltd. charged that Henry Stemp, being an employee of the informant Company did, on account of an industrial dispute extending beyond the limits of any one State (namely, in the States of New South Wales, Victoria and South Australia), do something in the nature of a strike in that he, acting in combination with other employees of the Company and as a means of enforcing compliance with the demands made on the Company by such employees, did strike and wholly cease to work with the Company. The defendant, having been convicted and fined, now appealed to the High Court by way of order to review. The grounds of appeal stated in the order nisi were that sec. 6 of the Commonwealth Conciliation and Arbitration Act 1904-1915, which created the offence, was ultra vires, and that there was no industrial dispute within the meaning of the section. The second ground was abandoned at the hearing of the appeal.

The material facts are stated in the judgments hereunder.

Mann (with him Owen Dixon), for the appellant. Sec. 6 of the Commonwealth Conciliation and Arbitration Act 1904-1915 cannot be brought within the power conferred by sec. 51 (xxxv.) or (xxxix.) of the Constitution. In form and substance sec. 6 is a prohibition of lock-outs and strikes. A prohibition of strikes is a prohibition of the very thing that conciliation and arbitration are designed to prevent, and sec. 51 (xxxv.) only allows that thing to be prevented by conciliation and arbitration. A distinction must be drawn between the means which the Parliament is authorized to use and the purpose for which those means are to be used. There is no relation per se between conciliation and arbitration on the one hand and forbidding men to cease work. The cessation of work is quite

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H. C. OF A. distinct from the dispute; it is the result of the dispute. If the strike were the same thing as the dispute the case would be stronger, for the dispute could not be prohibited. The widest interpretation of conciliation and arbitration will not, as a matter of language, include a prohibition of strikes as part of the concept of conciliation and arbitration. The one thing is in method the antithesis of the other. The prohibition is not limited to strikes during or pending arbitration. There may be no arbitration in contemplation at the time. The Constitution has given a power under which Parliament may say "You shall arbitrate," but it has given no power under which Parliament may say "You shall not leave your work." The position is the same whether the strike is or is not in reference to a dispute in which the strikers are engaged. Parliament has assumed in this Act that the measure of its legislative power is the settlement of disputes rather than conciliation and arbitration for the prevention and settlement of disputes. Strikes are one of the means of enforcing the claims of employees, and so of settling disputes. The Parliament is given no power to cut off that means of settling disputes. Legislation as to the prevention of disputes by all other means than conciliation and arbitration is reserved to the States. To read sec. 51 (xxxv.) of the Constitution otherwise would be to omit altogether the words conciliation and arbitration. Since arbitration includes compulsory arbitration, employees may be forced into the Commonwealth Court of Conciliation and Arbitration, and, if the prohibition of strikes is part of the arbitration power by which they may be forced into the Court, then any other means may be used for that purpose. That would take away the express limitations of the power. The Parliament is not entitled to say that arbitration shall be the only means of settling disputes. Those other means are a possible subject of legislation by the States. Compulsory arbitration does not mean the prohibition of settlement of disputes by other means. The provisions of sec. 6 operate upon persons who may never come into the Court at all-for example, persons who take part in a sympathetic strike. The Parliament can give the Court a monopoly of settling disputes by arbitration but not a monopoly of settling disputes generally. Compulsory arbitration is quite consistent with the parties to a dispute being

allowed at any time to settle the dispute by mutual agreement, and the Act encourages such agreements. When the parties on one side or the other cease to work or to employ, as the case may be, they are doing that which they lawfully may do to induce the Australian parties on the other side to agree to their demands by putting pressure on those parties. That is not inconsistent with there being an arbitration then pending. The strike does not interfere with the arbitration going on, except that if the strike results in the parties coming to an agreement the object of arbitration will have been attained. When sec. 51 (xxxv.) was framed there was no idea that power was given by it to take away a right which had been lawful for many years. Historically there is nothing inherent in lock-outs or strikes which is inconsistent with the settlement of disputes by conciliation and arbitration. Since 1825, when by 5 Geo. IV. c. 95 all restrictions on combinations of employees were removed, the right of employees to strike has always been lawful. and concurrently there has been legislation for conciliation and arbitration beginning with 5 Geo. IV. c. 96 and including the Acts 30 & 31 Vict. c. 105, 35 & 36 Vict. c. 46 and 59 & 60 Vict. c. 30. [Counsel referred to Dicey's Law and Opinion in England, p. 190.] In Australia up to the date of the Constitution there had been passed the South Australian Conciliation Act 1894, which, by secs. 63 and 64, penalized certain lock-outs and strikes, and in New Zealand there had been passed the Industrial Conciliation and Arbitration Act 1894, which, by sec. 29, prohibited lock-outs and strikes on account of an industrial dispute which had been referred to a Board of Conciliation or to the Court of Arbitration until the Board or Court had come to a final decision.

[Isaacs J. referred to the Western Australian Industrial Conciliation and Arbitration Act 1900, sec. 30.

[Higgins J. referred to the New South Wales Industrial Arbitration Act 1901, sec. 34.7

None of those Acts show that at the time the Constitution was passed the words conciliation and arbitration connoted the prohibition of lock-outs and strikes. Sec. 51 (XXXIX.) of the Constitution does not authorize a prohibition of lock-outs and strikes. In order to say that it does, it would be necessary to show that such a

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H. C. of A. prohibition is effective to the execution of the power conferred by sec. 51 (xxxv.) or that it is a means of carrying out the power. [He referred to Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. (1); Lloyd v. Wallach (2); Jumbunna Coal Mine, No Liability, v. Victorian Coal Miners' Association (3); Australian FACTURERS Boot Trade Employees' Federation v. Whybrow & Co. (4).] The meaning of the words "do anything in the nature of" a lock-out or strike is not clear, but the prohibition may be taken to cover the taking part in a lock-out or strike.

> Schutt (with him Starke), for the respondents. Sec. 6 is within the limits of the constitutional power. It does not prohibit all strikes but prohibits only those which are carried out in combination and which take place on account of an industrial dispute. The section should be construed so as to limit the prohibition to a strike by persons who are themselves disputants. Even if the prohibition is not so limited, the Parliament has power under sec. 51 (xxxv.) of the Constitution to forbid persons who are not parties to a dispute taking part in it by striking sympathetically. Under the power conferred by sec. 51 (xxxv.) the Parliament can prohibit anything which is likely to prevent the settlement of an inter-State dispute by arbitration. Strikes can reasonably be regarded as likely to interfere with a settlement of such a dispute by arbitration. If strikes were permitted, their result might in all probability have the result that the employers would be coerced into acceding to the demands of their employees. If the Parliament can prohibit the doing of things which can interfere with the settlement of disputes by arbitration, the question of what things it will prohibit is for the Parliament to decide. The prevention of strikes is at least incidental to conciliation; for, if conciliation is to be effective, it is reasonable that the parties to the dispute should be left in a position in which conciliation can be brought to bear on them. If there were a strike there would be a consequent bitterness, and conciliation might be impossible. The prohibition of strikes is

^{1) (1914)} A.C., 237; 17 C.L.R., 644. (2) 20 C.L.R., 299.

^{(3) 6} C.L.R., 309, at pp. 333, 339, 346.

^{(4) 10} C.L.R., 266, at p. 291; 11 C.L.R., 311, at pp. 328, 337-338.

within the incidental power. See Cooley's Principles of Constitutional Law, 3rd ed. (1898), pp. 105-107. In the South Australian Conciliation Act 1894 the prohibition of strikes is used as an aid to arbitration, and not as an alternative method of settlement of disputes.

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Weigall K.C. and T.C. Brennan, for the Commonwealth intervening. The prohibition of strikes may reasonably be regarded as having been enacted for the purpose of facilitating the permitted object of bringing about the conciliation and arbitration of disputes, or of allowing conciliation and arbitration to proceed under favourable conditions. Unless satisfied that the means adopted to the permitted end are means which are not permissible, the Court will not declare that those means are ultra vires (The King v. Barger (1)). In Smith v. Oldham (2) it was held that the compulsory signature of articles in newspapers was incidental to the power to legislate as to Federal elections. [Counsel referred to Baxter v. Ah Way (3); R. v. Kidman (4); Farey v. Burvett (5); Harding v. Federal Commissioner of Taxation (6); G. G. Crespin & Son v. Colac Co-operative Farmers Ltd. (7); Federated Saw Mill &c. Employees' Association of Australasia v. James Moore & Sons Proprietary Ltd. (8).

Mann, in reply, referred to Cooley's Constitutional Limitations, 7th ed., p. 98.

BARTON A.C.J. A statutory majority of the Court are of opinion that the appeal should be dismissed. The reasons will be given on a day to be fixed.

Cur. adv. vult.

The following judgments were read:—

BARTON A.C.J. This is an appeal by way of order to review. The appellant, who was prosecuted together with nine other persons by leave of the learned President of the Court of Conciliation and

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^{(1) 6} C.L.R., 41, at p. 135.

^{(2) 15} C.L.R., 355.

^{(3) 8} C.L.R., 626, at p. 637.

^{(4) 20} C.L.R., 425.

^{(5) 21} C.L.R., 433.

^{(6) 23} C.L.R., 119. (7) 21 C.L.R., 205.

^{(8) 8} C.L.R., 465, at p. 526.

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H. C. of A. Arbitration, was, like them, convicted on an information which charged that he, being an employee of the Australian Glass Manufacturers Co. Ltd., "did on account of an industrial dispute extending beyond the limits of any one State (namely in the States of New South Wales, Victoria and South Australia) . . . do FACTURERS something in the nature of a strike in that the said defendant acting in combination with other employees of the said Company and as a means of enforcing compliance with the demands made on the said Company by the said employees did strike and wholly cease work with the said Company" &c.

This information was laid under the Commonwealth Conciliation and Arbitration Act 1904-1915, of which sec. 6 (1) provides that "No person or organization shall, on account of any industrial dispute, do anything in the nature of a lock-out or strike, or continue any lock-out or strike."

The sub-section provides for a penalty, and the appellant and nine others were fined £5 each.

The word "strike," under sec. 4, which is the interpretation clause of the Act in question, "includes the total or partial cessation of work by employees, acting in combination, as a means of enforcing compliance with the demands made by them or other employees on employers."

The appellant and his co-defendants were members of the Amalgamated Glass Bottle-Makers' Union, an organization registered under the Act.

The Court on the present occasion has not to consider the evidence given in the case before the Police Magistrate. The point taken on behalf of the appellant is simply that the section under which he was convicted is ultra vires. There was a ground in the order nisi that there was no industrial dispute within the meaning of the sub-section, that is to say, no industrial dispute extending beyond the limits of any one State; that ground, however, was abandoned before this Court.

A number of authorities were cited to which it is not necessary to refer, since they are familiarly known. The cardinal rule is contained in the oft-cited passage from the judgment of Marshall

C.J. in McCulloch v. Maryland (1): "We admit, as all must admit, H. C. of A. that the powers of the Government are limited, and that its limits are not to be transcended. . . Let the end be legitimate. let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." And in the case of United States v. Fisher (2) that great Chief Justice said, as to a provision there under discussion :- "In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." This criterion has been adopted by the Supreme Court of the United States in many later cases. This Court has on several occasions adopted it. As has been well observed, the Constitution marks the outlines of the powers granted to the national Legislature, but does not undertake, as a code of laws would, to enumerate the sub-divisions of those powers or to specify all the means of executing them. Laws which, in the language of the American Constitution, are "necessary and proper," or, in the language of the Australian Constitution, "incidental" to the execution of the power, are alike constitutional. Their wisdom and expediency is a political question for Parliament.

The extent of the Federal legislative authority was well stated by my learned brother Isaacs in Australian Boot Trade Employees' Federation v. Whybrow & Co. (3) in these terms: - "It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met. . . . The authority must

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^{(1) 4} Wheat., 316, at p. 421. (2) 2 Cranch, 358, at p. 396. (3) 11 C.L.R., 311, at p. 338.

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H. C. OF A. be taken as it is created, taken to the full, and not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted v. Australian power." I adopt that summary for application to the present case. Does this provision complement, or does it supplement, the granted power to make laws "for the peace, order, and good government of the Commonwealth with respect to . . . conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State"?

> Sec. 6 (1) is in Part II. of the Act, which follows immediately the introductory part. It precedes all the Parts which deal with the creation, jurisdiction, and functions of the Court, with the enforcement of orders and awards, the establishment and rights of organizations, the making of industrial agreements, and the miscellaneous provisions. In my view, the provisions of this Part are in the main framed with the object of clearing the ground for the proper execution of the power in sec. 51 (xxxv.) of the Constitution, and the particular enactment now challenged is designed to prevent the parties from proceeding to extremities after the inception of an inter-State industrial dispute, which gives jurisdiction to the Court. The Legislature could not enter on the work of executing the power by means of compulsory conciliation and arbitration without being conscious that strikes and lock-outs were the most frequent and the most favoured means of insisting on industrial demands, whether just or unjust, and without observing their disastrous effects in keeping the parties at arm's length, often in a protracted struggle accompanied with violence and always at great loss both to capital and to labour. Resort to either of these drastic instruments was among the very things which it must be the very object of conciliation and arbitration to prevent or minimize. But more; resort to either of them brought the parties necessarily into such strained relations with each other as rendered it the most difficult thing possible to bring them together for the settlement of their differences. Any strike or any lock-out in an industrial disagreement was calculated greatly to impede the effective execution of the power granted to compose disputes, inasmuch as it rendered the objects of such legislation much more difficult of attainment. The impediments to

effective settlement so caused were not limited to the actual partici- H. C. of A. pants in the dispute when actual dispute had arisen. There were frequent sympathetic strikes by the partisans of strikers and sympathetic lock-outs by partisan employers, and these, like similar conduct on the part of the actors in the main dispute, were in greater or less degree impediments to the success of legislation for settlement. So true are all these things that we find in the legislation of South Australia and of New Zealand, six years before the establishment of Australian Federation, instances of clauses similar to that now in review, of which it is impossible to doubt that they were enacted for the purpose of removing obstacles to satisfactory conciliation and arbitration. I mention these two cases not for purposes of construction on the ground of connotation of the term "conciliation and arbitration" as legislatively applied, but for the purpose of showing that legislators had previously realized the existence and the magnitude of this great obstacle to effective parliamentary dealing with the subject.

Hence, when an industrial dispute had once occurred, it was deemed essential to restrain the parties from proceeding to extremities, and, if they could not agree without the intervention of a Court, to prevent them at any rate from making their struggle more difficult to deal with by the added irritation of a cessation of work or the closing of the factory doors. What, then, was more natural and more reasonable than for Parliament to resolve to deal with strikes and lock-outs so far as they deemed it necessary and advisable to minimize their impediment to the effective execution of the power in question?

That, I conceive, is what Parliament has done in this case, and I find it difficult to imagine a provision more conducive to the success of the legislation, if that success in any degree depends, as it must largely depend, on the removal of such obstacles to its effective operation.

To make this choice of means to an authorized end was to complement, and not to supplement, the power granted.

To my mind the sub-section is well within the authority granted to Parliament, and I hold it valid.

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For these reasons I consider the dismissal of the appeal and the discharge of the order *nisi* to be justified.

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Isaacs J. The one question we are called upon to decide is whether the provision of sec. 6 of the Commonwealth Conciliation and Arbitration Act is valid. Its meaning, so far as material here, is that where there is an inter-State industrial dispute, though it has reached that stage of mutual determination when neither side will yield, no one, whether actual disputant or not, shall do anything in the nature of a strike. Contravention is made an offence and punishable. In my opinion, therefore, it includes strikes in sympathy with one of the parties to an actual inter-State dispute. It is contended by the appellant to be unwarranted by the Constitution, sec. 51, either in sub-sec. xxxv. or sub-sec. xxxix., to make any provision prohibiting a strike, and particularly as to a person who is not one of the actual disputants in the industrial dispute.

Mr. Mann, who argued his case very ably, urged that while power to legislate with respect to conciliation and arbitration in connection with inter-State industrial disputes was given to the Commonwealth Parliament, the power to prohibit strikes and lock-outs in connection with such disputes was reserved for the States, and sec. 6 was an invalid attempt to legislate because beyond Commonwealth limits. The question raised is therefore one of those which call for the greatest care on the part of this Court. Mr. Mann presented the view that arbitration—and even compulsory arbitration, which he admitted was within the power (it was so decided in R. v. Commonwealth Court of Conciliation and Arbitration; Exparte Whybrow & Co. (1))—was quite consistent with the parallel rights of strike and lock-out respectively, and therefore, he maintained, prohibition of strikes and lock-outs could not be regarded as incidental to the granted powers. He referred to English law and practice, and pointed out that while the Imperial Parliament had, in a series of enactments beginning with 5 Geo. IV. c. 96 and coming down to 1896, made provision for arbitration and conciliation, it had never forbidden strikes or lock-outs, but had, on the contrary, recognized by implication that the one method of settlement was perfectly

consistent with the maintenance of the other. But a careful H. C. of A. examination of the position demonstrates where the argument fails. The extent and meaning of industrial conciliation and arbitration are better understood when we recall briefly the history and development of the subject so far as is relevant to the present case.

In 1860 the first English permanent Board of Conciliation and Arbitration was voluntarily established. Mr. Mundella, who was mainly instrumental in establishing it, says it was devised at a conference between three representatives of the Nottingham manufacturers and the leaders of the trades union; he says they discussed the system which included strikes and called it "mutually predatory," and they eventually organized what they called "The Board of Arbitration and Conciliation in the Glove and Hosiery Trade." The idea was "conciliation" before a grievance passed into an acute stage, and "arbitration" if that failed. But the inherent notion was the absolute avoidance of strikes on both sides, because where workmen are dismissed on account of disagreements as to industrial conditions of the trade, it is in essence a strike on the employers' side, though for convenience it is called a "lockout." It is true that the system was voluntary; and it is also true that, notwithstanding repeated labour troubles and consequent legislation, the system has remained in England purely voluntary.

The system of strikes and lock-outs is not inconsistent with a system of conciliation and arbitration so long as the latter remains voluntary. "Voluntary" means you may adopt it or not, as you please, and if you prefer the other system you may have that. And in Australasia the two systems remain co-existent and voluntary until a series of industrial upheavals occurred. In 1890 the Maritime Strike took place which affected Australia and New Zealand: in 1891 the Shearers' Strike; in 1892 the Broken Hill Miners' Strike: in 1893 the second Shearers' Strike. In March 1892 the New South Wales Legislature, by the Act 55 Vict. No. 29, made an attempt to deal systematically with the question, which had become urgent. The Act is called "An Act to provide for the establishment of Councils of Conciliation and of Arbitration for the settlement of Industrial Disputes." Its preamble is noteworthy, and recites the belief of Parliament that the establishment of the

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H. C. OF A. Councils for the settlement of disputes would, among other things. "be of great benefit, in the public interest, by providing simple methods for the prevention of strikes, and other disputes, from the v.

Australian effects of which industrial operations may suffer serious and lasting injury, and the welfare and peaceful government of the country be imperilled." It is evident, therefore, that in New South Wales in the early part of 1892 there was public recognition of the fact that legislative provision of a systematic nature for conciliation and arbitration was to some extent-and even though optional only—a preventive of strikes, and also of the further fact that the public welfare and peaceful government of the country required legislative action in this regard. But it still remained an optional system, and failed; as did the earlier Victorian Act of 1891 (No. 1226), which was of a similar character. Further strikes occurred as already mentioned.

> In 1894 South Australia, by Act No. 598, and New Zealand, by Act No. 14, made a signal departure. The voluntary system was abandoned; and for the protection of the public, dependent for the daily supply of their requirements of life upon the regularity of the working of the complicated modern industrial machine, the compulsory system was introduced. That, in effect, was this: recognizing that industrial disputes are inevitable, and multiply as industrial operations become more complex and diversified, the peace, order and good government of the country called for the abolition of the old system of self-redress, and the substitution of public examination and determination.

> The New Zealand Act under the administration of the late Sir Joshua Williams, who made the precedents, attained what was considered both in New Zealand and Australia a large measure of success. Mr. Aves, in his report of 1908 to the English Home Secretary (see Tramways' Case [No. 2] (1)), points out that the only great strike in which New Zealand was involved was the Maritime Strike of 1890, 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." Its operation was well understood in Australia, and the

prohibition of strikes was recognized as a part of the system of H. C. of A. compulsory conciliation and arbitration.

Now, Mr. Mann rightly said that those two Acts, passed before the Federal Constitution, are only two out of a large number of Acts, Australian English and colonial, dealing with the subject. But their importance depends not on their number, nor even on their provisions per se: it depends on the fact of the vital change of system they introduced, and under the name of conciliation and arbitration, and upon the further fact that by their operation for several years prior to 1900 they had in the minds of the people of Australia, and therefore in the minds of the Convention that framed the Constitution, attached to the notion of compulsory "conciliation and arbitration" a connotation of prevention of strikes as a possible incident of the system, and, indeed, as a necessary incident. Both these Acts treated the compulsory character of arbitration as necessarily supersessive of strikes and lock-outs, and made these punishable where arbitration was initiated.

The Western Australian Act (64 Vict. No. 20), passed in December 1900, took the same view (sec. 30); and although this was passed after the date of the Constitution it is valuable evidence both as to the general understanding of "settlement of industrial disputes by conciliation and arbitration," and its incidents, practically at the time the Constitution came into being. The conception had not changed in the meantime.

A distinction has been sought to be drawn between those Acts and the Commonwealth Act in the fact that in those Acts the prohibition of strikes and lock-outs is made coincident with the beginning of arbitration proceedings. But that is a distinction of detail, and not of principle. The power that can ordain the one can ordain the other. Just as a Bankruptcy Act can punish fraudulent trade dealings entered into before the act of bankruptcy, so a compulsory Arbitration Act can prohibit force anterior to the actual initiation of proceedings. The existence of the dispute is the cardinal fact which attracts the power of the Parliament to apply to it the remedy of conciliation or arbitration as the single remedy consonant with the welfare of the Commonwealth, and to enforce its will in that respect. It is quite consistent with compulsory

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H. C. of A. arbitration in disputes to leave the one door of friendly settlement open, whether it is reached by purely spontaneous and unaided action of the disputants themselves or with the assistance of a conciliator, so that by one or other means reconciliation has ended the dispute, and at the same time to leave open no other door but that leading to the equally peaceful arbitrament of the public arbitrator. should reconciliation be impossible. The parties may mutually agree to end their dispute, and, if so, there is nothing to arbitrate upon; but, if they cannot do that, then, if Parliament so determines, they must resort to law, and, if they are compelled by law to resort to law, it necessarily connotes that they cannot lawfully resort to force. This is not a mere figure of speech: force is the recognized attribute of the remedy by "strike" or "lock-out." Lord Loreburn, when Lord Chancellor of England, called these methods "industrial warfare," and used the expression "weapons," in the well-known case of Conway v. Wade (1).

> It is said that though a thing may be "compulsory" it is not necessarily "exclusive." That all depends on the circumstances. Compulsion to do a given thing excludes everything inconsistent. And the nature of submission to arbitration is inconsistent with self-redress. If the submission is voluntary, no one would doubt that any attempt at self-redress would be inconsistent with the submission. If it is compulsory, the inconsistency must, of course, be as great. Romilly M.R., in Collins v. Collins (2), said: "An arbitration 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." If a party while bound to arbitrate attempts to decide the matter for himself, it is an inconsistent act, and is a breach of his obligation which binds him to abide by the decision of the disinterested third party. It substitutes "might for right," and insists on submission irrespective of justice. And this is specially patent when we remember that the object of an industrial dispute is to create new rights, and not merely to enforce previously existing rights.

> In the highest sense, then, the provision in sec. 6 of the Act is incidental to the power in the Constitution. By "incidental" I

^{(1) (1909)} A.C., 506, at p. 511.

mean in the sense I have explained in the passage quoted by Mr. Mann from my judgment in Australian Boot Trade Employees' Federation v. Whybrow & Co. (1). I do not repeat my words, but the matter is summed up in the concluding phrase, viz., "In the Australian absence of express statement to the contrary, you may complement, but you may not supplement, a granted power." To that passage, and consistently therewith, I add this quotation from Story on the Constitution (par. 1248): "To employ the means necessary to an end, is generally understood, as employing any means calculated to produce the end, and not being confined to those single means without which the end would be entirely unattainable."

Now, what is the "end" with regard to the constitutional provision? It is unmistakably to provide, if necessary by compulsive measures, that industrial disputes, if not ended voluntarily, shall be settled by Federal arbitration, so that the people of the Commonwealth shall not through inter-State disputes have the supply of their requirements interrupted (R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow (2); Australian Journalists Association v. Sydney Daily Newspaper Employers Association (3)). I apply this to both parties to a dispute, and to all forms of attempting to defeat the law, whether by striking or by dismissing employees for attempting to reach the arbitration tribunal. If the power were merely as to voluntary arbitration, of course all that could be done would be to make the tribunal as attractive as possible. But as it includes compulsive powers, it necessarily includes all complemental means of making that compulsion effective. Lord Selborne L.C., in Small v. Smith (4), said: "When you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, prima facie, to follow from the authority for effectuating the main purpose by proper and general means." I have already shown the inherent contrariety between compulsion to submit to arbitration on the one hand, and permission to attempt or to assist in attempting

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^{(1) 11} C.L.R., at pp. 337-338.

^{(2) 11} C.L.R., 1.

^{(3) 11} C.A.R.

^{(4) 10} App. Cas., 119, at p. 129.

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H. C. of A. self-redress on the other. It follows, in my opinion, logically and unanswerably, that a provision fixing a penalty for participating in an attempt at forbidden self-redress—that is, lawlessness—is inciv.
Australian dental within the definitions stated.

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It is contended that this power is reserved to the States. As I have on other occasions pointed out, the Constitution does not use the word "reserved" in that connection. Sec. 107, which is sometimes thought of as so operating, preserves to the State Parliament whatever powers it had before Federation, and which are not by the Constitution either exclusively vested in the Commonwealth Parliament or simply withdrawn from the State Parliament without such vesting. But there are concurrent powers, and in the event of inconsistent concurrent exercise of those powers the Commonwealth law prevails. So that it is possible that in the intersection of the lines of power, Commonwealth and State both may have the right to legislate as to strikes in industrial disputes. But in the true sense of an industrial dispute extending beyond the limits of any one State, it is evident, ex vi termini, that no one State can legislate so as to deal with the "strike" aspect of the dispute. In a sense all the States concerned might cover the ground, but they might not concur, and, if they did, it would still be a number of piecemeal enactments, enforced by judicial tribunals each operating only upon a section of the industrial area affected by the dispute.

From all standpoints, therefore, the result is that the contention that this remains a purely State power, and that the Commonwealth Parliament acted ultra vires of its constitutional authority, fails.

The provision impeached is valid, and, that being the only question argued, the appeal should be dismissed.

HIGGINS J. The appellant Stemp has been convicted of taking part in a strike, as an employee of the Company. This is the first case of a conviction—the first case, I think, of a prosecution—for a strike in a dispute that comes within the jurisdiction of the Commonwealth Court of Conciliation and Arbitration; and the point is at once taken that sec. 6 of the Act, which makes it an offence to strike in such a dispute, is invalid as being beyond the powers of the Federal Parliament.

That Parliament is empowered by sec. 51 of the Constitution to H. C. of A. make laws for the peace, order, and good government of Australia "with respect to" (pl. xxxv.) "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," or "with respect to" (pl. xxxix.) "matters incidental to the execution of" the "power" in pl. xxxv. So far as pl. xxxv. is concerned, the section is invalid if it is not "with respect to "-relevant to-the compound subject of pl. xxxv., which is to be treated as a complete subject, as if hyphenated thus: "conciliation-and-arbitration-for-the-preventionand-settlement-of-industrial-disputes-extending-beyond-the-limitsof-any-one-State." The section is not valid if it be merely relevant to the "peace, order, and good government of the Commonwealth" —the ultimate objective. It is not valid if it be merely relevant to the secondary objective-"the prevention and settlement of industrial disputes extending &c. " To be valid, it must be relevant to the prevention and settlement of industrial disputes by methods of conciliation or arbitration. What, then, has Parliament done by sec. 6? In an Act by which Parliament provides a tribunal to conciliate, and, if necessary, to arbitrate between, industrial disputants on the basis of reason and fair play, Parliament says that the disputants shall not, nor (as I assume the meaning to be) shall others, try to settle the dispute by the method of economic force or pressure—by "strike" or "lock-out." A dispute cannot be settled by two inconsistent methods at the same time; and if the method of reason is to be followed, the method of forceeconomic force — must be prohibited. The method of physical force—violence—is sufficiently prohibited by the ordinary law. The prohibition of strike is therefore clearly relevant to the constitution of a tribunal for industrial disputes. In the everyday practice of Parliaments, it is quite common for the Speaker or the Chairman of Committees to give rulings as to the relevancy of amendments proposed to motions or to clauses, or of new clauses proposed for Bills; and it is impossible for me to conceive of any Speaker or Chairman of Committees ruling that a clause in the words of this section would not be relevant to a proposal to create an industrial tribunal.

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H. C. of A. Now, I do not say that the practice of Parliament affords a necessarily conclusive test of a proposed clause being a clause "with respect to "one of the subjects set out in sec. 51 of the Constitution; but I adhere to the view which I have expressed in previous cases (Attorney-General for New South Wales v. Brewery Employees Union of New South Wales (1); Australian Boot Trade Employees Federation v. Whybrow & Co. (2)) that the form of words used in our Constitution-the power to make laws "with respect to" any given subject—is wider in meaning than the form of words used in the Constitution of the United States—power (e.g.) "to lay and collect taxes," or power "to borrow money on the credit of the United States." In my opinion, the prohibition of strikes is a law "with respect to" the subject of pl. xxxv.

But even if we take a narrower view of the power, if we read the power as if it were merely to make laws "for" conciliation and arbitration for the prevention &c. I am of opinion that the prohibition of strikes comes within pl. XXXIX. as a "matter incidental to the execution of the power" conferred by pl. xxxv. It would be enough to show that Parliament might reasonably regard the prohibition as tending directly to make the tribunal's operations more effective; and in this case no one, I should suppose, can deny that the prohibition actually has this result. Even more—the tribunal's operations would be futile if the party with the superior strategic position for the time being were permitted to retain the weapon of "strike" or of "lock-out."

When one party has a decided advantage over the other, it is very hard to get an agreement by the process of conciliation; what induces the agreement is the knowledge that there is a compulsory power of arbitration in reserve. This is the kind of pressure that the Act contemplates. But if the stronger party feel that he can still use the economic pressure of "strike" or "lock-out," as the case may be, this counter pressure nullifies, or tends to nullify, the pressure of the tribunal. The tribunal must be unconstrained, free to award what seems to be just and right; and it must not be left to fear that if the stronger side do not get what it wants, it will take it-by stoppage of work, or by closing the works. Anyone

^{(1) 6} C.L.R., 469, at pp. 609-616.

^{(2) 11} C.L.R., at p. 339.

who is at all familiar with the working out of problems under H. C. OF A. the Act must know that the two methods of strike and of reason. of might and of right, cannot operate together. Silent leges inter arma; and so, too, if economic pressure is to be used, the processes of the tribunal will generally be futile. By prohibiting attempts to settle a dispute by economic pressure, you clear the ground for settlement by reason, on the lines of what is right and just.

I am not impressed by the difficulty as to a sympathetic strike. Suppose a dispute between the men in wool stores and their employers; and suppose that the wharf labourers refuse to handle the wool from the stores, and leave their job when this wool comes. I assume—and the assumption is probably right—that sec. 6 prohibits the sympathetic strike of the wharf labourers. If it were not prohibited, the fact that other men in addition to storemen directly in dispute might legally stop work in aid of the demands made would add further economic pressure, would cause additional embarrassment to the tribunal, and would tend to spoil its efforts to secure a just peace.

The decision that the provisions for a common rule are invalid (Whybrow's Case (1)), as applied to parties who are not in dispute, either actual or threatened, is quite consistent with this view. The common rule under sec. 38 (f) was to be made after the award settling the dispute; it was an order to be made irrespective of dispute, actual or threatened, and it was directed towards the preventing of unfair competition on the part of parties not bound by the award and towards the general regulation of wages, &c .- not towards the prevention or settlement of industrial disputes.

I am of opinion that the appeal should be dismissed.

GAVAN DUFFY AND RICH JJ. In this case we have to inquire into the validity of sec. 6 of the Commonwealth Conciliation and Arbitration Act. In that section the word "dispute" includes a threatened as well as an existing dispute, and the word "strike" includes what is ordinarily known as a sympathetic strike. It is expressly admitted by counsel that there may be a strike within the meaning of the Act without any breach of contract or other

(1) 11 C.L.R., 311.

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and that the words "do anything in the nature of a strike" include the taking part in a strike. The result is that an offence would be committed under the section if a tanner in Western Australia took part in a purely local strike in his trade in sympathy with a threatened or existing dispute in the boot trade in New South Wales and Victoria, though there was no dispute, either threatened or existing. in that trade in Western Australia. The validity of the section is based on two grounds. It is said to be within the provisions of sec. 51 (xxxv.) of the Constitution or in the alternative to be within the provisions of sec. 51 (xxxix.). In our opinion neither of these contentions is correct. Sec. 51 (xxxv.) enacts that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. We think that these words do not expressly authorize Parliament to take away from men, not engaged or likely to be engaged in any inter-State dispute, their undoubted right to abandon an employment to which they are not bound by contract or otherwise, and to do this not by any process of conciliation or arbitration but by direct enactment. But the words are said to give the necessary authority by implication. It is not clear how far the doctrine of implication as applied to the various sub-sections of sec. 51 preceding sub-sec. xxxix. is affected by the express provisions of that sub-section, and whether any of those sub-sections authorizes the enactment of criminal laws. But if we get over these difficulties there remains a further substantial question. Implication is permissible only where it necessarily arises from what is expressed. It has already been decided by this Court that the arbitration mentioned in sub-section xxxv. includes compulsory arbitration, and if Parliament is given express power to impose compulsory arbitration it may follow that it has implied power to prohibit anything which prevents such arbitration or renders it nugatory, but it does not follow that it has implied power to prohibit anything merely because the continued existence of such thing may, in the opinion of Parliament, be unnecessary or undesirable after the coming into existence of a prescribed scheme of conciliation and arbitration, and that, H. C. of A. we think, is what it has assumed to do here. If the implication sought for be made we see no reason founded on principle for withholding from Parliament the right to regulate the liquor traffic, to prohibit public meetings, and to muzzle the press, with the object of facilitating conciliation and arbitration for the prevention and settlement of inter-State disputes. We now come to sub-sec. XXXIX. That sub-section (inter alia) enables Parliament to make laws for Gavan Duffy J. the peace, order, and good government of the Commonwealth with respect to matters incidental to the execution of the powers vested in Parliament by sec. 51, sub-secs. I. to XXXVIII., of the Constitution, and it is said that the subject matter of the legislation under consideration here is so incidental. It will be observed that the matters with respect to which this legislation is authorized must be incidental not to matters with respect to which Parliament may legislate under the preceding sub-sections, but to the execution or exercise of the power of legislation conferred by any of such subsections. The sub-section enables Parliament to do all that is necessary for the purpose of effectually and completely exercising the powers conferred by the earlier sub-sections, but it does not enlarge those powers so as to enable Parliament to accomplish something not authorized by them. It, therefore, probably does no more than expressly confer powers which in its absence would have been implied, but, whatever be its effect, it cannot be interpreted as authorizing an enactment so far removed from the execution of the power conferred by sub-section xxxv. as is the penalizing of a local striker in the circumstances we have stated. If sec. 6 assisted Parliament in enacting the provisions of the Act which do deal with conciliation and arbitration, if it affirmatively effected the operation of those provisions or negatively prevented their evasion, or if it followed as a necessary or logical consequence of their enactment, it might be justified by sub-sec. XXXIX., but in our opinion it does none of these things. For these reasons we think that the conviction in this case is not warranted and that the order to review should be made absolute.

Powers J. This Court decided in R. v. Commonwealth Court of

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H C. OF A. Conciliation and Arbitration; Ex parte Whybrow & Co. (1) that the power vested in the Commonwealth Parliament by sec. 51, pl. xxxv. and pl. XXXIX., of the Constitution included a power to make laws with respect to the prevention and settlement of industrial disnutes extending beyond the limits of one State—generally called inter-State disputes—by (conciliation and) compulsory arbitration. That decision was not questioned in this case. The Commonwealth exercised that power by passing the Commonwealth Conciliation and Arbitration Act of 1904 (and amendments later on), including sec. 6. prohibiting strikes by combination of employees in inter-State disputes to enforce demands made by them on their employers for higher wages or better conditions. It is admitted that the appellant did strike within the meaning of the Act.

It is contended that the power referred to does not warrant the Commonwealth Parliament to make any provision prohibiting strikes to enforce settlements of inter-State disputes. In Small v. Smith (2), referred to by my brother Isaacs, Lord Selborne L.C. said: "When you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, primâ facie, to follow from the authority for effectuating the main purpose by proper and general means."

Once the power to order parties to settle disputes by compulsory arbitration is conceded, it appears to me the authority to effectuate it by prohibiting strikes is incidental to it. It is also a reasonable and proper exercise of the power to prohibit strikes; to make the power effective. Any other interpretation of the power would leave the parties to an inter-State dispute under a system of socalled compulsory arbitration, as free as they were when voluntary arbitration only was available for the settlement of disputes. It would allow employers in combination to enforce the settlement of disputes by starving employees into accepting low wages; or employees, in combination, to enforce payment of higher wages than were fair or than the industries could stand.

It is said that the power to prohibit strikes has been reserved to

^{(1) 11} C.L.R., 1.

As the States never had the power to deal with H. C. of A. the States. inter-State disputes, that argument cannot prevail. It was because the States were powerless to deal with inter-State disputes, as such. the power was given to the Commonwealth Parliament to do so, Australian and, I assume, to deal with them effectively.

It was also contended that, if all disputes were to be settled by compulsory arbitration, it prevented settlements by agreements, as well as by strike. That argument ignores the recognized meaning of, and purpose of, "arbitration" as a means of settlement only when the parties cannot settle their disputes without the assistance of a third party. The Constitution authorizes the Commonwealth Parliament to take steps to assist parties to agree by "conciliation," and the Commonwealth Conciliation and Arbitration Act contains special provisions to assist parties to come to an agreement. Then, failing an agreement, it enforces compulsory arbitration.

My learned brothers Barton, Isaacs and Higgins have given so many reasons in their judgments why the power to enforce compulsory arbitration includes the power to prevent any body of men rendering the power useless by striking to enforce claims which the Commonwealth law requires both parties to submit to compulsory arbitration, that I do not think it necessary to add anything further to what I have already said.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, Frank Brennan & Rundle. Solicitors for the respondents, Hedderwick, Fookes & Alston. Solicitor for the Commonwealth, Gordon H. Castle, Crown Solicitor for the Commonwealth.

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