[HIGH COURT OF AUSTRALIA.]

THE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA . . . . . } APPLICANTS;

AND

J. W. ALEXANDER LIMITED . . . RESPONDENTS.

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MELBOURNE, *Sept.* 18, 19, 27.

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

Constitutional Law—Justices of Courts created by the Commonwealth Parliament—Appointment—Life tenure—Appointment for term of years—Commonwealth Court of Conciliation and Arbitration—Power to enforce awards—Judicial power of the Commonwealth—Validity of legislation—Severability—Power of Court of summary jurisdiction to enforce awards—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxv.), 71, 72—*Commonwealth Conciliation and Arbitration Act* 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *secs.* 2, 11, 12, 38, 44, 48.

Held, by *Griffith* C.J. and *Barton*, *Isaacs*, *Powers* and *Rich* JJ. (*Higgins* and *Gavan Duffy* JJ. dissenting), that sec. 72 of the Constitution requires that every Justice of the High Court and every Justice (whether called by that or any other name) of any other Court created by the Parliament of the Commonwealth shall, subject to the power of removal contained in that section, be appointed for life.

Per Higgins and *Gavan Duffy* JJ.: Sec. 72 of the Constitution does not prevent the Crown or Parliament from granting a tenure for a term of years subject to removal by the Governor-General on an address of Parliament.

Held, also, by *Griffith* C.J. and *Barton*, *Isaacs*, *Powers* and *Rich* JJ. (*Higgins* J. doubting), that the power conferred by the *Commonwealth Conciliation and Arbitration Act* 1904-1915 upon the Commonwealth Court of Conciliation and Arbitration to enforce awards made by it is part of "the judicial power of the Commonwealth" within the meaning of sec. 71 of the Constitution, and can only be vested in the Courts mentioned in that section.

Held, further, by *Barton*, *Isaacs*, *Powers* and *Rich* JJ., that inasmuch as by sec. 12 (1) of the *Commonwealth Conciliation and Arbitration Act* the President of the Commonwealth Court of Conciliation and Arbitration is to be appointed

for seven years only, that section is at variance with sec. 72 read with sec. 71 of the Constitution, and the provisions conferring upon it power to enforce its awards are, therefore, invalid.

Per Griffith C.J.: Sec. 12 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 should be read as merely requiring the Governor-General to assign one of the Justices of the High Court to discharge the functions of President of the Commonwealth Court of Conciliation and Arbitration, and, so read, is not an infringement of sec. 72 of the Constitution, and is valid; one of the Justices had been so assigned, and therefore his appointment as President by such assignment was valid; and the President could both make awards and impose penalties.

Held, further, by *Isaacs*, *Higgins*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that the provisions in the *Commonwealth Conciliation and Arbitration Act* conferring upon the Commonwealth Court of Conciliation and Arbitration power to enforce its awards are severable, and, therefore, that the rest of the Act is valid.

Per Barton J.: The Court is constituted by a provision which is beyond the powers of the Parliament so as to vitiate the entire Act, the powers conferred on such invalidly created Court being judicial and not severable, and its awards are therefore invalid and unenforceable.

Held, further, by *Isaacs*, *Higgins*, *Powers and Rich* JJ., that under sec. 44 (1) of the *Commonwealth Conciliation and Arbitration Act* the penalties mentioned in sec. 38 (*d*) of the *Commonwealth Conciliation and Arbitration Act* may be imposed by a Court of summary jurisdiction, notwithstanding that the Commonwealth Court of Conciliation and Arbitration has no power to impose them.

CASE STATED.

On the hearing before the Commonwealth Court of Conciliation and Arbitration of an application by the Waterside Workers' Federation of Australia, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1915, that the Court should impose a penalty on J. W. Alexander Ltd. for the breach of a certain award of the Court, the President stated the following case for the opinion of the High Court:—

1. An award of the Commonwealth Court of Conciliation and Arbitration was made by the President on 1st May 1914 in an industrial dispute between Gilchrist, Watt and Sanderson and others, claimants, and the Waterside Workers' Federation of Australia, respondents.

2. A summons has been issued at the instance of the Waterside Workers' Federation of Australia on 13th August 1918.

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3. The summons alleges that a breach of the said award had been committed by J. W. Alexander Ltd., a party bound by the said award. The summons came on for hearing before the Commonwealth Court of Conciliation and Arbitration on 23rd and 29th August 1918, and was adjourned to Monday, 9th September 1918, for certain affidavits.

4. Objection has been taken at the hearing of the said summons on 9th September by counsel for the said party that the *Commonwealth Conciliation and Arbitration Act* is beyond the powers of the Commonwealth Parliament inasmuch as the President is under sec. 12 of the Act appointed for seven years only.

I submit the following questions for the opinion of the High Court—questions arising in the proceedings which are, in my opinion, questions of law :—

(1) Is the constitution of the Commonwealth Court of Conciliation and Arbitration beyond the powers of the Parliament of the Commonwealth, and in particular as to (*a*) the arbitral provisions; (*b*) the enforcing provisions?

(2) Is the award invalid by reason of the appointment of the President for seven years only?

(3) Is the award enforceable by the said Court?

Owen Dixon, for the applicants.

Starke, for the respondents. Sec. 71 of the Constitution confers the whole judicial power of the Commonwealth upon the Courts therein mentioned, and no other tribunal or body can exercise that power (*Kilbourn* v. *Thompson* (1); *Wong Wing* v. *United States* (2)). Sec. 72 provides for the constitution of the High Court and of the Courts created by the Parliament. Every Court referred to in sec. 71 must be constituted in the manner provided by sec. 72, and the language of sec. 72 makes the tenure of the office of a Justice a freehold. Every Justice must hold his office for life subject only to his being removed for proved misconduct or incapacity. Whatever else the judicial power of the Commonwealth includes, it clearly includes power to decide between parties for the purpose either of

(1) 103 U.S., 168. (2) 163 U.S., 228.

determining their rights or of determining whether one of them has broken the law or an award which has the sanction of law. (See *Miller's Lectures on the American Constitution*, p. 313).

[ISAACS J. referred to *In re Sanborn* (1).]

If those propositions are true, the *Commonwealth Conciliation and Arbitration Act* 1904-1915 attempts to establish a Court of judicature within sec. 71 of the Constitution, and that attempt fails because under sec. 12 (1) the tenure of the office of President is only for seven years instead of for life, as required by sec. 72 of the Constitution. Under sec. 51 (xxxv.) of the Constitution the power to settle disputes by means of arbitration might be conferred upon a Court exercising the judicial power of the Commonwealth. There is no reason why the Commonwealth Parliament should not have authority to impose upon a Court exercising judicial power the performance of other duties (See *United States* v. *Ferreira* (2).) That the *Commonwealth Conciliation and Arbitration Act* attempts to create a Court of judicature in the strict sense is shown by sec. 2, which states that one of the chief objects of the Act is to constitute a Court; by sec. 11, which makes the Court a Court of record and is peculiarly applicable to a Court exercising judicial powers; and by a number of sections which confer on the Court powers which are strictly judicial, for example secs. 38 (*d*), (*da*), (*e*), (*l*), 48, 50. Sec. 31 appears to be only consistent with the Court being a Court of judicature, for that section implies that but for the provisions thereof an appeal would lie to the High Court from its decisions by force of some Statute. The power given by sec. 37 to the Court to issue an order to any person to take evidence on its behalf, and the provision that such person shall have all the powers of the Court as to summoning witnesses, &c., indicate that the Court is intended to be a Court of judicature. The High Court held in *Jumbunna Coal Mine, No Liability*, v. *Victorian Coal Miners' Association* (3) that the Commonwealth Court of Conciliation and Arbitration is a Court of judicature from which an appeal lay to the High Court. In *The Tramways Case* [*No.* 1] (4) and *The Tramways Case* [*No.* 2] (5) the

(1) 148 U.S., 222, at p. 224.
(2) 13 How., 40.
(3) 6 C.L.R., 309.
(4) 18 C.L.R., 54.
(5) 19 C.L.R., 43.

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High Court also held that the Commonwealth Court of Conciliation and Arbitration is a Court of judicature or a Court exercising or claiming to exercise the judicial power of the Commonwealth. The provision in sec. 12 of the *Commonwealth Conciliation and Arbitration Act* that the President is to be "appointed" from among the Justices of the High Court and is to be entitled to hold "office" during good behaviour for seven years, is a contravention of sec. 72 of the Constitution. The word "appointed" is used in the same sense as in sec. 72, and indicates an appointment to an office in the ordinary sense. The section creates a new office, and authorizes the Governor-General to appoint a person to that office. If the Act is not an attempt to create a Court within sec. 71 of the Constitution and to give to that Court powers to settle disputes by conciliation and arbitration, then alternatively the Act has created a tribunal under sec. 51 (xxxv.) and has attempted to confer upon it the judicial power of the Commonwealth. To the extent of that attempt, at least, the Act is *ultra vires*.

Owen Dixon. The Court constituted by the *Commonwealth Conciliation and Arbitration Act* was primarily constituted under sec. 51 (xxxv.) of the Constitution, and sec. 38 (*d*) and (*e*) and sec. 48, so far as they are grants of judicial power, attach to a tribunal created under sec. 51 (xxxv.) for the primary purpose of settling disputes by conciliation and arbitration. Under sec. 51 (xxxv.), which may be used in conjunction with sec. 71 of the Constitution, it is perfectly proper to create a Court, and to arm that Court with the powers incidental to the performance of its purpose of settling disputes. The tribunal so set up is, so far as the machinery provided and the powers conferred on it are concerned, capable of performing either or both of the functions of creating duties and enforcing their performance. That the primary object of the Act is the settling of disputes is shown by sec. 2, which does not mention among the chief objects of the Act the enforcing of awards made by the Court, and by the great bulk of the provisions of the Act. To the powers for settling disputes certain powers admittedly judicial are added upon the assumption that the Court which was created was a Court to which judicial powers could be given without conflicting

with sec. 72 of the Constitution. There is no such conflict, because sec. 72 admits of an appointment of a Justice for a term of years. That section has nothing to do with the length of tenure, but only provides that when the tenure is created it shall not be terminated except in the specified manner. It is a limitation upon the power of the Parliament, and not the creation of a power in the Governor-General or the Parliament. The language of sec. 72 is not the usual language used in creating a life tenure. (See *Act of Settlement*, 12 & 13 Will. III. c. 3, sec. 3; *British North America Act* 1867, sec. 99.) Unless there can be a tenure for a term of years the Parliament cannot create temporary Courts, and if it creates magistrates they must be given life tenures. The word "removed" means putting an end to the tenure before it would otherwise expire, and is not inconsistent with a tenure for a term of years. (See secs. 67 and 103 of the Constitution.) If sec. 72 of the Constitution does require an appointment for life, the powers conferred by sec. 38 (*d*) and (*e*) and sec. 48 of the *Commonwealth Conciliation and Arbitration Act*, which are judicial powers, could not be conferred upon the Commonwealth Court of Conciliation and Arbitration as constituted, and they are invalid. But they are severable from the rest of the Act. All the other provisions of the Act deal with powers for bringing into existence legal rights and obligations, while the judicial powers are for enforcing legal rights already in existence. The former are arbitral powers, and are in a sense legislative. The arbitral powers are distinct from the judicial powers. The main object of the Act was to create a tribunal with arbitral powers, and the judicial powers are subordinate and in no way an essential part of the scheme. Awards can be enforced under sec. 44 (1) by Courts of summary jurisdiction. The words "penalties which the Court has power to impose" are used merely as a short description of the penalties mentioned in sec. 38; and if the Commonwealth Court of Conciliation and Arbitration has not the power to impose penalties, that does not preclude Courts of summary jurisdiction from having the power. As to the argument that the making of the Commonwealth Court of Conciliation and Arbitration a Court of record shows that the intention was primarily to create a Court of judicature, to make it a Court of record was an apt way of giving the tribunal created

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under sec. 51 (xxxv.) of the Constitution power to enforce the duties and rights arising from the exercise of its arbitral functions. (See *Kemp* v. *Neville* (1); *Grenville* v. *College of Physicians* (2).)

Weigall K.C. (with him *Mann*), for the Commonwealth intervening. This Court will not, except in the last resort, declare an Act of the Commonwealth Parliament to be *ultra vires*, and if there is an ambiguity in one of the provisions of the Constitution and one interpretation will uphold the validity of the Statute and the other will destroy it, the Court will lean to the former interpretation. The opening words of sec. 72 of the Constitution should be interpreted as meaning "The Justices of the High Court and such other persons not being Justices of the High Court who are Justices of the other Courts created by the Parliament." The section does not contemplate a Justice of the High Court being also a Justice of another Court created by the Parliament. In that view the provision for the appointment of a person who is already a Justice of the High Court to be President of the Commonwealth Court of Conciliation and Arbitration is not affected by sec. 72 of the Constitution. The word "appointed" in sec. 72 means "designated" —the Justices are to be "instituted in their office" by the Governor-General. The word has no reference to the tenure of the office of Justice, and does not imply a tenure for life. That is shown by sec. 103, where the word "appointed" is used in reference to a tenure for years. That the intention was to allow an appointment of a Justice of the High Court for a term of years is as probable as that it was to insist that the Justices of every Court created by the Parliament, including magistrates, should be appointed for life. The word "Justices" in sec. 72 does not include every person who presides over a Court created by the Parliament. There may be Judges of those Courts who are not "Justices." (See *Stroud's Judicial Dictionary*, 2nd ed., vol. I., p. 424.) The person who presided over a Court Martial, for instance, would not be a "Justice." So the President of the Commonwealth Court of Conciliation and Arbitration is not a "Justice" within the meaning of sec. 72.

(1) 10 C.B. (N.S.), 523. (2) 12 Mod., 386.

Starke, in reply, referred to *Willoughby's Constitutional Law of the United States*, vol. II., pp. 1274, 1276.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. The first question submitted to the Court in this case is : "Is the constitution of the Commonwealth Court of Conciliation and Arbitration beyond the powers of the Commonwealth, and in particular as to (*a*) the arbitral provisions ; (*b*) the enforcing provisions ? " I will say a word later as to the meaning of this language.

The suggested want of jurisdiction arises from the tenure of office of the President of the Court, which I will call the Arbitration Court. This, it is suggested, is inconsistent with the provisions of the Constitution.

Sec. 71 of that instrument declares that "the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction." This does not purport to be in itself a power, although it assumes the existence of a power to create new Federal Courts and to invest existing State Courts with Federal jurisdiction. The power itself is found elsewhere in the Constitution. But any attempt in the execution of that power to vest judicial power in any tribunal that is not such a Court is ineffectual.

The judicial power is a well known attribute of sovereignty. This Court has not hitherto been called upon to make a critical examination of its nature.

The provision of sec. 71 is, indeed, novel in the Empire, since the powers of other British legislatures are not limited by any such restrictions. It is, however, well known in the United States of America. Any inconvenience which may follow from giving effect to the express provisions of the Constitution cannot be considered in determining their meaning.

A few words on the source and nature of the power may not be out of place.

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As soon as man emerged from the savage state and formed settled communities, the necessity became apparent of rules to regulate conduct. It also became necessary to make provision for their enforcement, and for the settlement of private controversies between individuals. In each case the right to do so was assumed by the community at large, and vested in some person or authority representing that community. Hence arose lawgivers and Judges. And as civilization advanced, and persons came to discriminate between the diverse functions of the community, these functions were called "the judicial power" as distinguished from the legislative and executive powers.

The distinction is emphasised in the Constitution in sec. 71 already cited. It is impossible under the Constitution to confer such functions upon any body other than a Court, nor can the difficulty be avoided by designating a body, which is not in its essential character a Court, by that name, or by calling the functions by another name. In short, any attempt to vest any part of the judicial power of the Commonwealth in any body other than a Court is entirely ineffective.

The Constitution also provides (sec. 72) that Justices of the High Court and of the other Courts created by the Parliament shall be appointed by the Governor-General in Council, and shall not be removed except by the same authority on address from both Houses of Parliament praying for such removal on specified grounds. These words, which apply to all Federal Courts alike, have always been assumed, and I think rightly, to mean that the tenure of all Federal Judges shall be for life, subject to the power of removal.

Without attempting an exhaustive definition of the term "judicial power," it may be said that it includes the power to compel the appearance of persons before the tribunal in which it is vested, to adjudicate between adverse parties as to legal claims, rights, and obligations, whatever their origin, and to order right to be done in the matter.

It is suggested that a right must have an origin independent of its enforcement. This is mainly a matter of words, but logically I think it must be so. In my opinion, a law which allows a right to be claimed and at the same time to be declared and ordered to have

effect is, in any view, conclusive as to the existence of the right from the moment of declaration. It must therefore be prior, if only momentarily, to the exercise of the judicial power in respect of it, whether the declaration itself be (as I think it is) or be not a judicial act. The judicial function begins not later than that moment.

The basis of industrial arbitration, so called, is the recognition of the doctrine that employers and workers engaged in an industry have mutual rights and obligations. These rights and obligations must either be incidental to the membership of a civilised community, or based upon positive law. Whether the obligation is regarded as (*a*) created by the Statute, or (*b*)—which I think the better view—implied by the Statute which authorizes its declaration and enforcement, or (*c*) imposed for the first time by the tribunal appointed to declare and give effect to the claims, such giving effect by declaration and order is equally a matter which falls within any possible meaning of the term "judicial power."

The creation of a new legal right of general obligation appears to me to be a matter for legislation. In the case of an award, however, between disputants, the order is not legislative, for it does not lay down any such rule but merely deals with a particular case.

It has been contended that the power of the President of the Arbitration Court as to the mutual obligations of employers and workmen is autocratic, not founded upon any known principles of law, and limited only by his own will, which, when declared, becomes, like the Roman lady's, the law of the land. I do not accept this view, but it does not affect the question of the nature of his subsequent functions.

For, in any view, the duties which are to be declared by a tribunal consequent upon a legal obligation are matters for the exercise of judicial power. For myself, I cannot understand the creation of a tribunal except for declaring and giving effect to some right existing at the time of such declaration and giving effect. If, however, the only powers conferred upon a so-called tribunal are in the nature of calculation, or the mere ascertainment of some physical fact or facts, and not the declaration of or giving effect to a controverted matter of legal right, it may be that they do not appertain, except

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incidentally, to the judicial power. It is not disputed that convictions for offences and the imposition of penalties and punishments are matters appertaining exclusively to that power. The duties and obligations which may be declared and ordered by an industrial tribunal to be performed in virtue of the rule of conduct, however originating, of which it enjoins the performance, are precisely similar in kind, and are not less onerous in effect.

It is hardly necessary to point out that the question whether any specific function does or does not appertain to the judicial power depends upon its nature, and not upon the name by which the authority which exercises it is designated in a Statute, or upon what it is called in argument. The exercise of a function which is in its nature judicial may by agreement between parties be delegated to a specific person, commonly called an arbitrator: but the obligation to obey the directions which a person so designated may give, is, by our law, conventional; that is, it is attributed to the agreement and not to the nature of the function.

The Parliament, basing its action, as I have said, upon the principle of mutual obligation, which it either enacts or (as I think) treats as already recognized by law, provides (sec. 11) that "there shall be a Commonwealth Court of Conciliation and Arbitration, which shall be a Court of record, and shall consist of a President." The jurisdiction of the Court is carefully and fully defined. It has cognizance (sec. 19), for purposes of prevention or settlement, of (*inter alia*) all industrial disputes properly submitted to it by plaint. It has power (sec. 24) to determine the dispute by what is called an award, which is to be in force for a period not exceeding five years (sec. 28), and may impose obligations of the most onerous character on either party. In particular the Court has power (sec. 38) to make any order or give any direction in pursuance of the hearing or determination (sec. 38 (*b*)), to fix maximum penalties (38 (*c*)) for any breach or non-observance of an order or award, and to impose penalties up to such maximum (sec. 38 (*d*)), to order compliance with any order or award (38 (*da*)), to grant mandamuses and injunctions against committing or continuing a contravention of the Act (sec. 38 (*e*)), and in several other respects to exercise the ordinary powers of a Court of justice.

The Court was thus invested, *uno flatu*, with ample and complete jurisdiction to declare and enforce the mutual obligations of the parties.

The exercise of the power to impose penalties is admittedly an exercise of the judicial power. If the Court has no such power the provision is, of course, of no effect. Any penalties which the Court may itself impose, *but no others*, may be imposed by State Magistrates' Courts (sec. 44).

It follows that if the Court itself has no power to impose penalties the power is non-existent, and the attempt to confer this non-existent power by reference must fall with it.

Moreover, sec. 31 provides that no award or order of the Court shall be appealed against. Every appeal is the creature of Statute. Under sec. 73 of the Constitution an appeal lies to the High Court from every Federal Court with such exceptions as the Parliament prescribes. If the Arbitration Court is, as it is called by the Parliament, a Court, it is a Federal Court, and the provision of sec. 31 is necessary to deny the right of appeal which would otherwise exist. If it is not, the provision is superfluous.

But, if any doubt could exist whether the office of President of the Arbitration Court is a judicial office, it seems to be removed by sec. 8 of the *Judiciary Act*, which enacts that a Justice of the High Court (which the President is and must be) shall not be capable of holding any other office within the Commonwealth, except a judicial office conferred on him by a law of the Commonwealth. The fact that the office of President of the Court created by the Arbitration Act was required by the same Act which declares that Court to be a Court to be exercised by such a Justice shows in the plainest manner that the intention of the Parliament was to confer such an office as could lawfully be conferred upon him, that is to say, a judicial office, and that his functions were to be judicial.

I have already pointed out that many, if not all, of these functions are matters appertaining to the judicial power, and that authority to deal with them cannot therefore be committed to any tribunal but a Court. If the Arbitration Court is not such a Court, it cannot impose penalties at all, and, as I have said, the authority of the

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Magistrates' Courts, being coextensive, falls with it, so that the whole Act is, so far, futile.

It might be inferred, indeed, that the Parliament in conferring powers that can only be exercised by a Court intended that the tribunal upon which they were conferred should be a Court. But in this case there is no need, nor indeed room, for inference, since the Parliament has said expressly (sec. 11) that it was establishing a Court of record. In answer to this reasoning it is said that the functions of the Court, or most of them, are "arbitral," whatever that may mean, and not "judicial." This argument is based upon the assumption that the term "judicial power" and the term "arbitral power," used as a counter for the purposes of this case, are mutually exclusive, so that if one term is properly applied to any function the other is necessarily denied. This is an obvious fallacy. The law cannot in any case be altered by the use of a new epithet, or by applying a new meaning to an old one. The question is whether the specific functions, or some of them, do or do not appertain to the judicial power, not whether they, or some of them, may with propriety, *alio intuitu*, be called "arbitral." The epithet "arbitral," which is used as if its use were on some points conclusive, is not a term of art. As used in the English language it merely expresses the idea of an authoritative decision between adverse parties, irrespective of the person who makes it. Such a decision is necessarily given on every occasion of the exercise of the judicial power, including the assessment of value or damages by a jury (which is clearly a judicial act), or by an arbitrator properly and ordinarily so called. The epithet, in short, qualifies the nature of the decision, and is only inferentially or by relation applied to the person who gives it. When a tribunal, by whatever name it is known, is only required to decide quantitative questions, such as questions of amount or value, or in some cases, questions of physical fact, the term "arbitral" may with propriety be applied to it. But whenever the tribunal is required to decide questions of conduct, whether under existing law or under its own decree, its functions are, to that extent at least, judicial. As to their being legislative, I have already pointed out that they are of particular and not of general application. Whether the epithet "arbitral" may or may not be properly

applied to every tribunal in another and larger sense is a different and irrelevant question.

But, as I have said, the meaning of a Statute cannot be altered, or the character of the functions of a tribunal affected, by giving a new meaning to an old word, or by using ambiguous terms in argument.

For these reasons I am of opinion that the Arbitration Court is, as the Parliament thought and intended it to be, a Court created by it.

It follows that the judicial officers of the Court must hold office during good behaviour, and that an appointment for a less period is ineffectual.

What, then, is the tenure of office of the President? The language of sec. 12 is as follows: "The President shall be appointed by the Governor-General from among the Justices of the High Court. He shall be entitled to hold office during good behaviour for seven years . . . ."

The language demands careful examination. It says nothing in express terms about the tenure, *eo nomine*, of the President's office, but it provides that he shall be appointed "from among the Justices of the High Court," that is, that he shall be a person who already as a Justice of the High Court holds judicial office during good behaviour. Again, it is not expressed that he is to be appointed for any definite term, but that he shall "be entitled to hold office" for a period of seven years. The word "appoint," which in modern times is often used to designate an executive act by which an office, old or new, is conferred upon a person, is not in law confined to that meaning. In the common phrase "direct limit and appoint" it is synonymous with "direct" or "assign," and in earlier English legal language it was often used in that sense. It is also used in the sense of "select."

The word does not of itself import any particular duration or tenure of office. Whenever used, its meaning may, and indeed must, be controlled by the subject matter and the context. If the subject matter is an office in the ordinary service of the State the duration connoted is during pleasure. If it is a Federal judicial office the tenure connoted is during the life of the officer, subject

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again to the context. Thus, in sec. 72 of the Constitution the power to appoint is a power to appoint for life. In sec. 103 the power to appoint is a power to appoint for seven years. In sec. 12 of the Arbitration Act the word is used in a new and unusual context. The person to be appointed has already a life tenure of the qualifying office of Justice. No additional remuneration is conferred upon him, and there is nothing in the words used to suggest that any new or additional personal right or advantage is to be given him. On the contrary, the suggested words of limitation are words of additional privilege, and he is not bound, but "entitled," at his own will to discharge the duties of President for seven years. The only sanction for the obligation to discharge the duties of a Federal judicial office is that contained in the power of removal. I do not find any violation of the law as to tenure of office or of that provision in sec. 12 of the Arbitration Act.

I am therefore of opinion that the word "appointed" must in its actual context be read as meaning "assigned," and the provision must, in accordance with what I conceive to be the manifest intention of the Parliament, be construed as the imposition of a new judicial duty, although of imperfect obligation, upon a person who already holds a permanent judicial office under the Constitution. Such a provision is not unfamiliar to English jurisprudence, and has never been considered inconsistent with the *Act of Settlement*.

It is not necessary for this conclusion that the view which I adopt should be the only possible one. It is sufficient that it should be open upon the Statute. There is no doubt that it is in accordance with the intentions of the Parliament.

In my judgment, the enactment may, without doing violence to its language, be read as merely requiring the Governor-General to assign one of the Justices of the High Court to discharge the functions of President. The succeeding words do not offer any serious difficulty.

I do not think that this Court can, consistently with its previous decisions or with common sense, dissect the Arbitration Act, and hold, contrary to the plain intention of Parliament, that the President, a single person, is validly appointed for some of its purposes and not appointed for the others. In my opinion, his appointment

if bad in part is bad altogether. To hold otherwise is to make, not to declare, the law, and to declare a very different law from that enacted by the Parliament.

I presume that the word "arbitral" is used in question 1 in the sense of "non-judicial." I frankly admit my inability to make any intelligible distinction from this point of view between the different provisions of the Act. The question must therefore be answered as a single and indivisible one, either "Yes," or "No."

I therefore answer the first question wholly in the negative.

To the second, which is "Is the award invalid by reason of the appointment of the President for seven years only?" I answer: It is not invalid by reason of the manner of the appointment of the President.

To the third question I answer: The award is enforceable by the Court.

If, however, my view as to the tenure of office of the President is wrong, I answer all the questions in the opposite sense.

BARTON J. This is a case stated by my brother *Higgins* as President of the Commonwealth Court of Conciliation and Arbitration. During the hearing of an industrial dispute under the Arbitration Act between the Waterside Workers' Federation and the firm of J. W. Alexander Ltd. the following questions arose, on which the President requires the opinion of this Court as questions of law:—"(1) Is the constitution of the Commonwealth Court of Conciliation and Arbitration beyond the powers of the Parliament of the Commonwealth, and in particular as to (*a*) the arbitral provisions; (*b*) the enforcing provisions? (2) Is the award invalid by reason of the appointment of the President for seven years only? (3) Is the award enforceable by the said Court?"

The contention of the respondent is that the Act is invalid and inoperative, because the tribunal which it erects is a Court created by the Federal Parliament within the meaning of the judicature provisions (secs. 71 and 72) of the Constitution, and that the head of that Court, the President, is appointed to his office in a manner which is in violation of the requirements of sec. 72. It is urged that part of the judicial power of the Commonwealth is vested in

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the Arbitration Court as such created Court within the meaning of sec. 71, and therefore that the President is the "Justice" of that Court, and should hold his office on the terms ordained by sec. 72 that he "shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity." As a matter of fact he is appointed President on the terms of sec. 12 (1) of the Arbitration Act, which reads thus:—"The President shall be appointed by the Governor-General" (which means the Governor-General in Council) "from among the Justices of the High Court. He shall be entitled to hold office during good behaviour for seven years, and shall be eligible for reappointment, and shall not be liable to removal except on addresses to the Governor-General from both Houses of the Parliament during one session thereof praying for his removal on the ground of proved misbehaviour or incapacity."

It should be noted that by sec. 13 the President is to be paid no other salary in respect of his services under the Act than his salary as Justice of the High Court.

The first matter to be considered is whether the name of "Court," which is used throughout the Act, is correctly applied—that is, whether the tribunal to which it is applied is in law a Court exercising part of the judicial power of the Commonwealth. It is urged that the tribunal is created under the power granted in sec. 51, sub-sec. xxxv., of the Constitution, and is therefore not one of the Courts designated as such by the Constitution in the sections referred to. Outside these sections the Constitution gives no authority to allocate any of the judicial power to other tribunals than those mentioned in sec. 71. If in the execution of its authority under sec. 51, sub-sec. xxxv., the Parliament creates a tribunal having judicial power, that sub-section does not take the tribunal out of the category of Federal Courts created by the Parliament.

Has, then, the Arbitration Court any of the judicial power of the Commonwealth? If that question is answered in the affirmative, its head must be a person appointed as sec. 72 requires. I will inquire what the answer to that question ought to be.

The lectures on the Constitution of the United States delivered

by Mr. Justice *Miller*, of the Supreme Court of the United States, to the law students of the National University at Washington, in 1889 and 1890, include one on "the judicial power." After examining the nature of "judicial power" he gives it the following definition (p. 314): "It is the power of a Court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." I respectfully adopt these words. They were written of judicial power in the United States, but they are equally true of the same power in this Commonwealth. In *Osborn* v. *Bank of the United States* (1) the Court in its judgment said: "Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

It is important to observe that the judicial power includes with the decision and the pronouncement of judgment the power to carry that judgment into effect between the contending parties. Whether the power of enforcement is essential to be conferred or not, when it is conferred as part of the whole the judicial power is undeniably complete.

From the earliest times, when people have associated themselves into settled communities, their interest has dictated to them the adoption of rules of conduct as the alternative to anarchy and as the only means of securing internal peace in the pursuit of their avocations. The making of such rules, by whatever term it may have been known, is the making of laws; that is, it is legislation. But laws of themselves were of little force without bodies which could enforce them—and authorities with power to enforce them were created. These authorities might or might not be called Judges, the tribunals might not be called Courts, and the power which they exercised might or might not be called judicial power. Whether persons were Judges, whether tribunals were Courts, and whether they exercised what is now called judicial power, depended and depends on substance and not on mere name. Enforceable decision by an authority constituted by law at the suit of a party submitting a case to it for decision is in character a judicial function.

(1) 9 Wheat., 738, at p. 866.

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"Court" as the name of a place is merely a secondary meaning. "The Court" is the deciding and enforcing authority, even if it sits under a tree, as sometimes it does in parts of the British Empire.

Besides Courts of compulsory powers for the bringing before them of defendants or delinquents, for deciding the matter with or without assistance of juries and for enforcing the decision, it has at all times been common for individuals or the State to have recourse to tribunals lacking some or all of these compulsive powers, and especially lacking the power of enforcement. An instance is the ordinary proceeding of arbitration. Parties differing on any subject have agreed to submit their differences to some person or persons for decision, it being also agreed that the decision shall be adopted by both sides contractually. The persons invoked have generally been called among English-speaking people arbitrators and umpires, and their conclusions awards. Such proceedings, being without compulsive force in any stage, were, of course, not instances of the judicial power. It has been a common thing for Governments to institute bodies called Commissions, with the temporary function of investigating and pronouncing on questions of fact for the mere information of the public, or as a foundation for executive or legislative action. There are many other instances of the creation of bodies of varying authority, whose work is judicial in the sense of bringing to bear the judicial faculty, but not judicial in the sense of the exercise of power upon the parties in their contention. In these cases of course what is known as such in the Constitution and what is so tersely described by Mr. Justice *Miller* does not exist. In the present case, however, as I shall urge, there is the grant of judicial power over a *lis* or dispute between parties from its beginning to its end.

The judicial power is conferred and exercised by law and coercively; the parties have not power to agree upon the deciding authority, and its decisions are made against the will of at least one side, and are enforced upon that side *in invitum*. An authority of that kind is not invoked by mutual agreement, but exists to be resorted to by any party considering himself aggrieved, whether he be called a claimant, a plaintiff, a petitioner, or the like. In all instances he is in fact a claimant. If a law allows anything to be claimed

by one person against another and grants it to him as a right against that other, the legislature means by its law that that right exists, whether it existed as a right declared by law before the claim, or whether, on the other hand, the claim of it when substantiated is recognized by law as a right. If the legislature sets up a tribunal to summon one side at the call of the other, to adjudicate between them, and to enforce its adjudication, by a determination which may be in favour of either side, then the tribunal is exercising judicial power, and may be a Court in the strict meaning of the term. It is a Court, if the legislature gives it the attributes of one, from the institution down to the determination, and if necessary the enforcement. of the claim. When such intention and attributes are clear it must be also clear that the Court is granted the exercise of judicial power. That power may be granted to an authority which has other functions in addition. But the addition does not detract from its character of a Court when it can exercise the power in question.

Does the tribunal created by the Arbitration Act substantially answer to these tests, so as to be a Court of judicial power? That question can be solved only by the provisions of the Act.

By sec. 19 the tribunal has cognizance, for purposes of settlement as well as prevention, of certain industrial disputes extending beyond the limits of any one State. The disputes are in a category of several sub-sections. It is worthy of note that the category includes disputes submitted by plaint on the part of an organization, or an association registered as an organization (see interpretation clause). By sec. 24, the parties may agree to settle their dispute, and if a written memorandum of the terms is certified by the President and then filed, it has the same effect as between the parties to the agreement as an award, and is deemed to be such. The award, of course, is the determination of the tribunal upon the dispute. If no agreement as to the whole of the dispute is arrived at, the tribunal is to determine it by award, and so as to any part of the dispute not settled by the agreement. In my opinion the Act gives the award the same qualities as a judgment enforceable by subsequent proceedings. By sec. 28 the award is to be framed in such a manner "as to best express the decision of the Court," and, subject

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to any variation which the tribunal may order, is to continue "in force" for a specified period not exceeding five years, and after such period until a new award has been made. During that time it binds the parties. Sec. 38 contains several matters of importance to this question. It specifies many powers granted to the Court as regards industrial disputes of which it has cognizance. Besides (*a*) the power "to hear and determine the dispute in manner prescribed," it has (*d*) power to impose penalties for proved breach or non-observance of "any term of an order or award"; it may (*da*) "order compliance with any term of an order or award" on proved breach or non-observance. It may (*e*) enjoin against contraventions of the Act; it may (*i*) order a party to the dispute to pay another party's costs and expenses; it may (*j*) hear and determine a dispute in the absence of a party summoned or notified to appear (a provision which brings into strong relief the compulsive force of the Act), and (*l*) it may conduct any part of its proceedings in private. Then by sec. 44 (1) any penalties "which the Court has power to impose" on any breach or non-observance of any term of the order or award by any organization or person bound thereby may be imposed by any Police, Stipendiary or Special Magistrate in summary jurisdiction. And by sub-sec. 2 the penalty may be recovered by (*a*) the Registrar, or (*b*) any organization affected or having any member affected, or (*c*) the member affected. By sec. 45 the Court is given power to order the penalty to be paid into the Consolidated Revenue or to an organization or person specified. By the same section the same power is given to any Court of summary jurisdiction imposing any such penalty. As the latter Court is a Court invested with Federal jurisdiction within the meaning of the Constitution, sec. 71, the implication that the Arbitration Court is a created Federal Court is strengthened by this section. The implication that the tribunal is intended to have judicial power is reinforced by sec. 46.

I instance these sections in proof that the intention of the Legislature was that the tribunal it was creating, and which it declared to be a "Court of record," should be a Court in the full sense of a body endowed with judicial power in the spheres of the reception, institution, determination of controversies, and the enforcement of the determination: for the term "industrial dispute" connotes one

kind of controversy, and the term " settlement by award " is another term for an adjudication ; and the power of adjudication is combined with the power of enforcement by penalty for disregard of the adjudication. It is not to the purpose to say that a power of enforcement may also be exercised in Courts of summary jurisdiction ; for those powers are given only in cases where the Court itself has power to impose the penalties. The power to the minor Courts is given presumably because at the time of the disregard the Federal Court may be sitting or otherwise doing duty at some very distant part of the huge area of the Commonwealth. It is always accessible in the sense of being capable of being invoked to use its power of enforcement. The power to other tribunals is given as an alternative because of the inconvenience and delay which may attend an application to the Arbitration Court itself. But the Legislature has clearly indicated that the existence of the power in the Arbitration Court is the condition precedent to the exercise of the concurrent power by the other local tribunals. The complete judicial power entrusted to the created Court is intended to be an inseparable part of its functions, and I cannot for a moment say that an attempt to separate its functions into two parts would not alter the character of the Act. The functions which in the question are called " arbitral " and those which are called " enforcing " are collectively one set of powers in respect of a collective set of functions. Parliament does not appear to have conceived the idea of one of the two spheres of power being severable from the other, so that the one without the other would constitute such a piece of legislation as it had in its mind. In other words, its intention was that the two should coexist in the same tribunal as parts of one whole. In this view, Parliament, in providing by sec. 11 that the tribunal created should be a Court of record, had in mind the powers it was giving as a whole. In its usual acceptation the term " Court of record " indicates a body which has power both to make its determinations and to enforce them. If we turn to sec. 31 (1) the intention to create a " Court " (the name applied to the tribunal throughout the Act) becomes more obvious. Looking at the words " prohibition mandamus or injunction " in sec. 31 (1) and the words " a writ of mandamus or prohibition or an injunction " in sec. 75 (v.) of the Constitution, and looking also

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at the fact that the issue of those writs is given thereby to the High Court and is not given to any other Court of the Commonwealth, it is plain that the words "other Court" in sec. 31 (1) apply to the High Court, and indicate beyond dispute that the two Courts are intended to be regarded as both of them Courts of justice of the Commonwealth, in other words that, like the High Court, though with a different jurisdiction, the Arbitration Court has a grant of judicial power. Again, take the words "appealed against" in the same sub-section of the Arbitration Act. The object of the Legislature was to prevent an appeal which would otherwise have lain against an *award* or order. We are thus driven to sec. 73 of the Constitution, which gives the High Court jurisdiction, "with such exceptions . . . as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences . . . (II.) of any other Federal Court," &c. There could be no appeal to be excepted by Parliament in the case of the Arbitration Court unless it were the appeal to the High Court from the Arbitration Court as coming within the term "other Federal Court." On any other reading sec. 31 (1) of the Arbitration Act would be superfluous and nugatory, and an intention to enact futilities is not to be ascribed to Parliament. It may be said that an award does not come within the term "judgments, decrees, orders, and sentences" in sec. 73. But an award is in essence an order, continuing and binding for the whole of its period. The term "order and award" in the formal awards of the Court properly recognizes this; the more properly because the term "award or order" is frequently used in the Act, indeed in this very section. We see this even in sec. 44, already referred to. Sec. 47 (1) expressly gives the Court another attribute, albeit in this instance a limited one, of a Court of justice. It is a power to issue process for the purpose of enforcing compliance with any "order or award."

I do not think that the conclusion can be escaped that in the Commonwealth Court of Conciliation and Arbitration the Legislature has reposed part of the judicial power as a created Federal Court within the meaning of secs. 71 and 72 of the Constitution. It has reposed that power both in the so-called "arbitral" and in the

enforcing provisions. As to both, the granted powers are compulsory. The defending parties are compellable to attend, witnesses are compellable to testify, the awards are judicial orders (there are few if any awards which do not order payment of specified rates of wages over a period of years, and in this connection sec. 40 (1) (*b*) is instructive); and these orders have a penal sanction.

I am thus of opinion that the tribunal erected by the Act is a Court in the strict sense, that part of the judicial power of the Commonwealth is reposed in it, and that the Act creating it must be held to be referable to, and must be interpreted in the light of, Chapter III. of the Constitution.

It remains to consider whether sec. 12 of the Act and the appointment of the President thereunder are within the legislative powers of the Commonwealth. If they are not so, the Constitution of the Court is wholly beyond the powers of the Parliament, and the award is invalid and not enforceable. Sec. 12 (1) of the Act is set out above. It is a consequence of secs. 71 and 72 of the Constitution that a person substantively appointed as President of this Court, which is a Federal Court created by the Parliament, must hold office on the terms laid down in sec. 72. If it were not required that the President should be appointed from among the Justices of the High Court, and if he were not in fact one of those Justices, it would be clear that the appointment would be invalid. For sub-sec. II. of that section is so framed as to confer a life tenure, subject only to an address from both Houses of Parliament, passed in the same session and grounded on proved misbehaviour or incapacity. Unless upon such proof and the consequent address, he "shall not be removed." Words could not more clearly indicate that unless such an address is adopted he is entitled to hold office so long as he lives. It was indeed argued that a tenure for any defined period, however brief, was compatible with the provision. That view is, I think, completely untenable. There are no words indicating power to limit the tenure in that manner, and, having regard to the whole scheme of Chapter III. and to the fact that an appointment during good behaviour without more has always been construed as being for life, subject to that condition, unless it is coupled with an express limitation of tenure in point of time, I do not think that the argument

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necessitates extended discussion. See *Harcourt* v. *Fox* (1), judgment of *Holt* C.J. (2), where the appointment during good behaviour was that of a clerk of the peace.

The real argument in favour of the appointment is contained in the judgment of the learned Chief Justice of this Court, and it is that as the President, appointed "from among the Justices of the High Court," already holds judicial office during good behaviour, and as the word "appointed" does not necessarily mean appointed to a substantive office, and may be read as "assigned," and moreover as it is not expressed that the President is to be appointed for any definite term, but that he shall be "entitled to hold office" for a period of seven years, the provision in sec. 12 (1) of the Arbitration Act is not in violation of the requirement of the Constitution. His Honor further points out that the meaning of the word "appoint" may, and indeed must, be controlled by the subject matter and the context. I should be glad indeed if I could agree with this construction. The gravest consideration is due to a view expressed by so eminent a Judge, and I should be disposed to agree with it if I could, not only because it is his view but because of the seriousness of the consequences which would follow, if the view which I hold were adopted. If this Court adjudges that the terms of the appointment are not beyond the powers of the Parliament and that the appointment as made by the Executive is valid, that result will be far from a disappointment to me. At the same time I am bound to form and express my opinion to the best of my ability, and without regard to consequences. In the first place I agree that the word "appointed" must be controlled by the subject matter and the context. But the subject matter must be that of the Act itself, and not merely that of the section; and similarly as to the context.

It is first relevant to consider what the word "appointed" means as used in the Constitution, for there is no power to appoint save in the sense which the Constitution attaches to that word. It is true that covering sec. III. uses the same word, but only in reference to the "appointing" of a day on which the Federal Union was to be proclaimed by the Queen. So also in sec. IV. Neither of these sections has to do with appointments to offices. Coming to Chapter

(1) 1 Show., 426; 506. (2) 1 Show., at pp. 527 *et seqq.*

I., sec. 2 provides for the representation of the Sovereign by "a Governor-General appointed by the Queen." That is appointment to an office. Sec. 4 refers to such person as the Queen "may appoint to administer the Government of the Commonwealth"; that is to say, appoint as administrator. Sec. 5 uses the word again, but only with reference to times. Sec. 15 again uses the word "appoint" with regard to a person, namely, "a person to hold the place" of a senator whose place is vacated when the Parliament of the State is not in session. In this section there is a second use of the word "appointed" in reference to the position of senator. Passing to Chapter II., which deals with the Executive Government, sec. 64 gives power to the Governor-General to "appoint" officers to the Departments of State. Sec. 67 vests the "appointment" of all other officers of the Executive Government in the Governor-General in Council, save where the appointment is delegated to some other authority. Then we have Chapter III., relating to the Judicature. By sec. 72 the Justices of the High Court and of the created Federal Courts are to be "appointed" by the Governor-General in Council. That is the only instance of the use of that term in the Chapter, but it relates to the appointment of the head of such a Court as the Arbitration Court. In Chapter IV. (Finance and Trade) the word "appointed" is used twice, namely, in the second paragraph of sec. 84, referring to the appointment to some other office of an officer of a transferred Department not retained in the service of the Commonwealth, and in sec. 103, which (sub-sec. 1.) provides that the members of the Inter-State Commission shall be "appointed" by the Governor-General in Council. The word does not occur in Chapter V. (The States), nor does it occur in Chapter VI. (New States). In Chapter VII. (Miscellaneous) it occurs once. By sec. 126 the Sovereign may authorize the Governor-General to "appoint" a deputy or deputies within any part of the Commonwealth. It also uses the word "assign" thus: "such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies." There is also a later reference in the same section to "the appointment of such deputy or deputies." I think I have mentioned all the instances of the use of the three words "appoint," "appointed" and "appointment" in the Constitution.

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And it will be seen that, with the exception of two instances in which it refers to the fixing of a time, it refers in all cases to the conferring of offices, places, or other positions, upon persons; and it uses the word "assign" only twice, and then with respect only to powers and functions. It is apparent that when the Constitution uses any of the three words with reference to a person, it means that the appointment is substantive and distinct. Still more clearly is it so in sec. 72, and that section must be followed in conferring his office on the head of a created Federal Court.

I turn now to the Arbitration Act itself.

The subject matter of the whole Act is the dealing with conciliation and arbitration by means of a Court. Not only is the tribunal given the attributes of a Court, but it can only be a Federal Court within the meaning of Chapter III. of the Constitution. In these respects I am at one with the learned Chief Justice. But though it is the subject matter of the Act which must control, it is none the less necessary that the appointment of the head of this Court as a created Federal Court must conform to the requirements of the judicature provisions of the Constitution. The subject matter of sec. 12 of the Act is, I submit, not enough to look at. What kind of tenure does this Court, created under the authority of the Constitution, need, as a Court so created, for its head? It needs that the head be appointed in the sense of sec. 72, and the substitution of "assigned" for "appointed" in sec. 12 of the Act, if it could be made, does not alter that need. Indeed it may be that if the word "assigned" had been used, it would, to bring the case within the Constitution, have to be read as "appointed."

Let us turn to the context of the Act. There is the use in secs. 14 and 14A of the word to denote appointment to the office of deputy. It occurs in sec. 35 (1) in the phrase "appoint two assessors." Sec. 40A gives the Court power by award or order to "appoint" or give power to appoint a Board of Reference, and goes on to assign to the board certain functions. By sec. 51 the Governor-General may (*c*) "appoint an Industrial Registrar and Deputy Industrial Registrars." By sec. 82, nothing in the Act is to require any Judge of the Supreme Court of a State "to accept any

appointment under this Act," and no such appointment is to be made without the approval of the State Governor.

It will be seen that throughout the Act there is no instance of the use of either of the words " appoint " or " appointment " except in the ordinary sense in regard to the conferring of offices. The real criterion is the sense in which the Constitution, with and subject to which the Act must be read, uses the word " appointed " as applied to offices or positions. There the sense is always the same, but the point most material is that it is used in sec. 72 with reference to the appointment of the head of a created Federal Court. As the President is evidently intended to be that head, he must be appointed in the sense which the Constitution requires in sec. 72, and that section requires a substantive appointment.

Without saying that by the Constitution the President must not be also a Judge of the High Court, it is necessary that he should hold office by the tenure prescribed in sec. 72, and that whether or not he has also the functions of a Judge of the High Court, who cannot, in the Arbitration Court, exercise the functions of a Judge of the High Court. If the Act required the personages to be identical, it would not be thereby relieved of the necessity of conformity to the Constitution. That necessity cannot be evaded by " selecting " the President from among the Justices of the High Court. I use the word " selecting " because his Honor has thought it may be equivalent to " appointing." But I have always understood that the process of selection is commonly involved as a preliminary to an appointment.

I see no difficulty in the words " entitled to hold office." They merely mean that the person is at liberty to resign his office within the period limited. In whatever way sec. 12 (1) may be read, it must conform to the requirements of the Constitution. That is the condition which cannot be escaped. It must, I think, be conceded to it that it uses the word " appointed " in the sense employed in sec. 72. It may also be conceded that much of its phraseology resembles portions of sec. 72. But it cannot be conceded that the Constitution ever intended or allowed that the head of a created Court—the " Justice " of it, to use the word employed—should perform the duties attached to that office except upon the tenure

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and under the terms prescribed by the fundamental law. That law clearly did not intend that such a judicial officer should be limited in his term of office to seven years. It is to be remarked that the Arbitration Act sets forth in a schedule an oath which the President is to take upon his appointment.

To conclude, I do not separate the provisions of the Act, as I cannot, in reason, sever what are called the "arbitral" from the enforcing provisions, and must therefore look upon the Act as one legislative fabric in its substance. So thinking, I answer the whole of question 1 in the affirmative, question 2 in the same way, and question 3 in the negative.

ISAACS AND RICH JJ. 1.—In our opinion the Constitution of the Commonwealth Court of Conciliation and Arbitration is not beyond the powers of the Parliament of the Commonwealth so far as relates to the arbitral provisions of the Act.

The power conferred by sec. 51 (xxxv.) of the Constitution, like every other power, is complete in itself. But like every other power granted, it needs its own interpretation in order to find the nature and extent of the subject matter. Pl. xxxv. does not give power in general terms to the Commonwealth Parliament to legislate with respect to industrial disputes beyond the limits of the State. The power is limited to legislation with respect to a particular method of dealing with such disputes. The method so specified is "conciliation and arbitration." The reason of the limitation is on the surface. Industrial disputes extending beyond the limits of any one State embrace so many possible divergencies, of industry, of conditions, of claims, of surrounding circumstances at home and abroad, and of constant changes, that direct legislation in advance is incapable of being applied to them. No one can foresee for any appreciable period the legislative requirements of industrial peace in any one industry, much less in all industries of the Commonwealth which are common to more than one State. Any attempt at detailed regulation, applicable to all industries even if suitable to-day—practically an impossible hypothesis,—would certainly be less suitable a month hence. Nevertheless, it was thought necessary that such disputes should not go uncontrolled but that the control

should be exercised only by means of conciliation and arbitration. That is essentially different from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.

An industrial dispute is a claim by one of the disputants that existing relations should be altered, and by the other that the claim should not be conceded. It is therefore a claim for new rights. And the duty of the arbitrator is to determine whether the new rights ought to be conceded in whole or in part. His opinion may take any form the law provides; it may be called an order, or an award. But his declaration of opinion does not make it law. He does not legislate. It is always the Statute which gives the arbitrator's opinion efficacy, and stamps his decision with the character of a legal right or obligation. Parliament legislates, but is compelled by the Constitution to legislate in that way. It cannot form an *à priori* code, and say that shall be obeyed by disputants. A particular method that other Parliaments *may* adopt, it *must* adopt if it legislates at all. It can say, and has said, that an arbitrator shall have power to inquire into the circumstances of each particular dispute, and say what in his opinion ought to be their respective rights and liabilities with respect to the matters in dispute, and that when so declared those shall be their mutual rights and liabilities. That process is very common in legislation. Instances are numerous; and as prominent illustrations, because judicially considered, we may refer to *Powell* v. *Apollo Candle Co.* (1), *R.* v. *Burah* (2), and, in America, to *Prentis* v. *Atlantic Coast Line* (3), *Knoxville* v. *Knoxville Water Co.* (4). The two last mentioned cases are sufficiently

(1) 10 App. Cas., 282.
(2) 3 App. Cas., 889.
(3) 211 U.S., 210, at p. 226.
(4) 212 U.S., 1, at p. 8.

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extracted in *Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (1), where the present subject is dealt with. A later case, *Louisville Railroad Co.* v. *Garrett* (2), follows them both.

It is evident that when the matter has reached that point it stands precisely in the same position as a valid Act enacting the identical mutual rights and liabilities. They exist, and are expected to be observed. Their creation is not the ordinary work of a Court of law. In the New South Wales Report of the Commission on Strikes 1891 (p. 34, par. 28) it is said :—" It should be remembered that a Court of arbitration is not like an ordinary Court of law. There is no fixed code of law which it interprets, and its decision is only a declaratory statement as to what it thinks just and expedient." It will be noticed in that extract that a " Court of arbitration " as distinct from " Court of law " is spoken of as a well known tribunal. The fact that the arbitration is involuntary makes no difference. For instance, see the various Arbitration Acts referred to in *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Whybrow* (3).

A Court of law has no power to give effect to any but rights recognized by law. In *Blackburn* v. *Vigors* (4) Lord *Macnaghten* observed : " I apprehend that it is not the function of a Court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights." In the *Ruabon Steamship Co.* v. *London Assurance* (5) Lord *Halsbury* L.C. said : " It seems to me a very formidable proposition indeed to say that any Court has a right to enforce what may seem to them to be just, apart from common law or Statute." So per Lord *Loreburn* L.C. in *Dewar* v. *Goodman* (6).

The two functions therefore are quite distinct. The arbitral function is ancillary to the legislative function, and provides the *factum* upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to enforce the law. Not only are they different powers, but they spring from different sources in the

(1) 10 C.L.R., 266, at pp. 318-319.
(2) 231 U.S., 298, at p. 305.
(3) 11 C.L.R., 1, at p. 51.
(4) 12 App. Cas., 531, at p. 543.
(5) (1900) A.C., 6, at pp. 9-10.
(6) (1909) A.C., 72, at p. 76.

Constitution. The arbitral power arises under sec. 51 (xxxv.); the judicial power under sec. 71. The latter section contains, in the words "such other Federal Courts as the Parliament creates," the implied grant of power to create Courts other than the High Court. There is no other grant of that power in the Constitution—except as to territories (sec. 122). The two powers being distinct and separate in nature and origin, it follows that, when an award is once made, the dispute is settled and the arbitral function is at an end. Variation of the award is, of course, an act of the same nature. And when the award is made and the right established, the law presumes the parties will obey it. Enforcement by a Court is an entirely separate matter. It arises on breach or threatened breach. But that is the case with every right. A right of property or a contractual right may exist, and, if violated, the law provides for its enforcement. But breach is not presumed. It follows that enforcement is in its nature an entirely separate process from the creation of the right.

But it happens that in the Act both processes are provided for. And it is urged (1) that Parliament has made it a *sine quâ non* that the organ to arbitrate and to enforce shall be a Court of law; (2) that a Court of law can only be created provided the Justice has a life tenure under sec. 72; (3) that Parliament by sec. 12 of the Act openly violated sec. 72 of the Constitution, and so enforcement is unlawful; (4) that Parliament has bound up arbitration and enforcement inseparably, and therefore the whole Act is futile. The mere statement of the chain of reasoning compels the admission that, on the basis contended for, Parliament must have deliberately set to work to destroy the fabric it professed to create. We are unable so to read the legislation.

It is a cardinal rule of construction that all documents are to be construed *ut res valeat magis quam pereat* (per *James* L.J. in *In re Florence Land and Public Works Co.*; *Ex parte Moor* (1)). That is "a rule of common law and common sense" (per Lord *Brougham* L.C. in *Langston* v. *Langston* (2)). More cogent is that rule when we are considering whether the work of Parliament representing the will of the whole people shall be undone. And still

(1) 10 Ch. D., 530, at p. 544.

(2) 2 Cl. & F., 194, at p. 243.

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more cogent is the rule when that work has been so acted on, as in the present case, that many thousands of men and women are to-day pursuing their occupations on the faith of it, and industries all over the Commonwealth, whose progress was threatened, are carrying on in reliance on the awards of the Court the operations necessary for the service, the comfort and even the existence of the nation. So far from finding any ground for annihilating the Statute and everything that has been done under it, we think it plainly good as to the arbitral portion of it.

The simple fact is that when the Parliament legislated in 1904, it had various State models before it. There were the following Acts in existence: The New Zealand Act 1900 (No. 51) (see secs. 59 and 64); the Western Australian Act 1900 (No. 20) (see secs. 53 and 55), and the New South Wales Act 1901 (No. 59) (see secs. 16, 17 and 18). From examination of the Commonwealth Act and those Acts—not only the sections which relate to the constitution of the Court of Arbitration, but also other sections—it becomes evident that those Acts, passed by the State Parliaments as Acts for conciliation and arbitration in industrial disputes, were taken by the Commonwealth Parliament as guides in framing its own enactment on the same subject. The Court, the limited tenure of its presiding officer and the enforcement provisions were all apparently part of the same subject matter. That "conciliation and arbitration" were regarded by Parliament as the primary and dominating object and that "enforcement" was not regarded as a main or essential object can be seen by an inspection of sec. 2 of the Act. Enforcement of awards is not even mentioned in that section. It is included in the Act, but in a separate and distinct part.

That a Court of law was not intended by sec. 11 is shown conclusively (1) by the fact that the Court is described as a Court of Conciliation and Arbitration, the functions of which are incompatible with a Court of law; (2) by the fact that sec. 12, framed with a knowledge of the respective sections in the Constitution as to tenure—sec. 72 for Judges and sec. 103 for members of the Inter-State Commission—took the latter as the model. It is incredible that, knowing the requirements of sec. 72 and knowing—as is clear

in the *Judiciary Act*—that when a Judge is provided for a Court of law, there is no need to repeat the words of the Constitution and that it is suicidal to attempt to alter them, Parliament would have passed sec. 12 had it intended to make the Arbitration Court a Court of law.

It is said that the phrase "Court of record" is conclusive. But the context, Court of Conciliation and Arbitration, combined with sec. 12, shows that "Court of record" is not conclusive. The two State Acts last quoted made the Courts "Courts of record," but their membership and functions made it clear they are not Courts of law. Power to fine and imprison may well be given to maintain authority as arbitrators. Besides, "Court of record" is sometimes used for purposes other than to enable the Court to be an ordinary Court of law. See, for instance, in *Fielding* v. *Thomas* (1), where it appears that the Houses of Legislature called themselves by Statute "Courts of record" though, as the Privy Council held, that did not mean Courts of record in the ordinary sense (see p. 612). If it had so meant, it would have been *ultra vires*.

The arbitral part of the Act, therefore, is quite within the power of pl. xxxv., and is not intended by the Act to be exercised by an ordinary Court of justice, which, it is suggested, Parliament by some strange perversity proceeded to destroy at birth. It is true that enforcement provisions are found: three sub-paragraphs in sec. 38—one of them by amendment—and the rest in Part IV. But all this was in imitation of the State Acts of Arbitration, and not in reliance on the Judicature Chapter of the Federal Constitution. The arbitral portion of the Act is, in our opinion, perfectly good, subject to its severability from any other portion which may be bad.

2.—*The Enforcement Provisions.*—As already pointed out, it was the intention of the Parliament to allow the Arbitration Court to discharge the diverse functions of creating and of enforcing industrial rights, in analogy to the State enactments on the same subject. But the Federal Constitution is specific that judicial power shall be vested in Courts, that is, Courts of law in the strict sense. (See per *Fry* L.J. in *Royal Aquarium &c. Society Ltd.* v. *Parkinson* (2).) And it also requires those Courts to be constituted by "Justices"—

(1) (1896) A.C., 600, at p. 608. (2) (1892) 1 Q.B., 431, at pp. 446-447.

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which means simply the Judges of the Federal Courts—whose tenure and salary rights are governed by the provisions of sec. 72. That section is distinct. The Justices are to be "appointed by the Governor-General." That is the only function of the Governor-General in relation to the matter. Assuming the existence of a Court, and the Parliamentary creation of a certain number of offices of Justice of that Court of named qualification if Parliament thinks fit, and the Parliamentary fixation of salary, all that remains to be done is to appoint, that is, nominate, the occupant of the office. When the Governor-General has done that, the office is filled by the person so appointed or nominated. If Parliament so enacts, the nomination must be by commission. Once the office is filled, if no statutory provision were made, the common law would say that the appointment was at pleasure (*Gould* v. *Stuart* (1)), and the Judge could be displaced, or removed as it is said, at the will of the Executive. If any competent Statute says differently, that Statute must be obeyed. Here the law of the Constitution, inalterable by Parliament or otherwise than as the Constitution itself provides (unless, of course, the Imperial Parliament intervenes), declares explicitly and in *negative terms*—which fact differentiates sec. 72 from corresponding enactments elsewhere—that a Justice so appointed shall not be "removed" except by the Governor-General, and then only in a certain way, for certain reasons proved to exist. "Removed" means "displaced," that is, put out of his "place." "Remove" and "displace" are used in this sense interchangeably. For an early instance see clause 21 of the Royal Instructions to Governor Murray of Quebec (7th December 1763) which was in these terms: "You shall not displace any of the Judges, Justices of Peace, or other Officers or Ministers, without good and sufficient cause, which You shall signify in the fullest and most distinct manner to Our Commissioners for Trade and Plantations, in order to be laid before Us, by the first Opportunity after such Removals" (*Egerton and Grant on Canadian Constitutional Development*, p. 10).

"Appointed," when the whole section is read together, does not include "pleasure" either of Crown or Parliament, for that would give no effect to sub-sec. II. And if "pleasure" is excluded, what

(1) (1896) A.C., 575.

is the true meaning of sub-sec. 1. ? Surely not for as long as the Governor-General pleases in any particular case. If Parliament may fix a term it may fix any term it chooses, as, for instance, until the Houses or either of them shall present an address expressing want of confidence in the Justice, irrespective of misbehaviour. This, of course, would nullify the second clause.

It follows that any law passed under sec. 71 which says that a Justice so appointed shall be displaced or removed from his office in seven years—which is what sec. 12 of the Arbitration Act says—is contrary to the Constitution, and *pro tanto* invalid. If that invalidity carries with it inability to exercise the judicial power of the Commonwealth, any enactment purporting to authorize him to do so is invalid.

An argument *ab inconvenienti* was urged. It was this: The Commonwealth might wish to create inferior Courts, and it would be seriously impeded if all the Justices were necessarily to have a life tenure. There are several answers:—First, whatever the inconvenience to which the power of creating Courts other than the High Court (for the Constitution itself creates the High Court, leaving Parliament the mandate of completing its organization) is subject, the conditions of sec. 72 and the words of sec. 72 are precise. Secondly, there is no real inconvenience, because under the power of investing State Courts with jurisdiction all the existing inferior Courts of Australia can be utilized. Thirdly, the Constitution does not look to the creation of Courts which, though subordinate to this Court, are of such calibre as to be officered by Judges whose tenure is of little importance. Fourthly, the suggestion overlooks the fact that sec. 72 is one of the strongest guarantees in the Constitution for the security of the States. The Constitution places by sec. 74 the whole fate of the State Constitutions, where they compete with the Federal Constitution, in the hands of the High Court. That Court's decision in such a question is final, unless in the exercise of its discretion it grants a certificate permitting an appeal to His Majesty in Council.

It is plain that the independence of the tribunal would be seriously weakened if the Commonwealth Parliament could fix any less permanent tenure than for life, subject to proved misbehaviour or

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incapacity. It is not like the case of a unitary Parliament having one interest only to consider, namely, the one territory. It is the case of a Federation, where the central legislative and executive bodies are largely competitive with, and in a sense adverse to, the State authorities. On the whole, the suggested inconvenience sinks into insignificance when the greater considerations are borne in mind.

The enforcement provisions are we think invalid.

3.—*Separability.*—Are the enforcement provisions distinct and severable from the arbitral provisions so as to enable us to save the latter? On the principle already referred to of preserving as much of the will of Parliament as is possible, we feel no hesitation in upholding the arbitral clauses. The enforcement clauses are not put in as a condition of or compensation for the arbitral power. The arbitral power is not made dependent on the enforcement clauses. We cannot say that it appears to us from an examination of the Act that the two are so bound up that the first set of provisions would not have been enacted unless the latter were. (See *Shaw* C.J. in *Warren* v. *Charleston Corporation* (1).)

The main object of the Act is to obtain an award and settle the dispute. The force of public opinion is very strong in itself as a means of inducing persons whose dispute has been passed upon to adhere to the decision. That, in many countries, is still the only sanction. But here, striking out the enforcing powers of the Court, there is still left so much of sec. 44 as relates to the Courts of summary jurisdiction with regard to penalties. It is suggested that in sec. 44 the words "any penalties which the Court has power to impose" mean that, if it be found the Court is invalidly invested with the power to impose the penalties referred to, the Courts of summary jurisdiction are not to be so invested. We do not so read the words. It cannot be denied that it is not impossible to read them so, but we consider that such a reading is less reasonable and less consonant with the scheme of the Act than another reading which we shall state. In the known circumstances that the Court sits in one place usually and, except for a Deputy, sits at only one place at a time, and that breach of an award may take place thousands of

(1) 2 Gray, 84, at p. 99.

miles away, sec. 44 was designed to utilize the services of State Courts where the Court itself *could not* act, or could not effectively or conveniently act. Their jurisdiction was to provide for the Court not acting. Surely, then, the suggestion that if the Court could not act at all the State Courts could not act at all, is far from reasonable. We read the words in this way :—Sec. 38, sub-sec. (*d*), provides that the Court shall have power " to impose penalties, not exceeding the maximum penalties fixed (or, if maximum penalties have not been fixed, not exceeding the maximum penalties which could have been fixed) under the last preceding paragraph, for any breach or non-observance of any term of an order or award proved to the satisfaction of the Court to have been committed." Those are the penalties referred to compendiously in sec. 44 as " penalties which the Court has power to impose." The Legislature was not thinking of the possibility of the power of the Court being unlawfully given ; and, therefore, it was not making the lawfulness of that power a condition. The words incorporate by reference. Consequently, there remains—if that were necessary—a very important means of enforcement by Courts of summary jurisdiction ; and none of the more serious processes of coercion have ever been found necessary yet.

Again, even if no specific enforcement were provided, it seems the common law would probably supply the defect. Disregard of the command of the Statute would be a wrongful act, and any member of the class for whose especial benefit the right is created has a right to enforce it. " So, in every case, where a Statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same Statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law. Per *Holt* C.J. (1) " (*Com. Dig.*, *sub* Action upon Statute (F)). There are many modern cases illustrating this, as, for instance, *Portsmouth Corporation* v. *Smith* (2).

We therefore answer questions 1 (*a*), 2 and 3 in the negative, and question 1 (*b*) in the affirmative.

HIGGINS J. In pursuance of sec. 12 of the Act, the President has

(1) 6 Mod., 26, at p. 27.

(2) 46 L.T., 552.

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been appointed "during good behaviour for seven years"; and it is urged that the appointment is invalid, the Court invalid, and all its awards invalid, because the appointment is not for life.

The argument is that as the Arbitration Court is a Court "created by the Parliament," no appointment is valid under the Constitution (sec. 72) unless it be for life.

Sec. 72 provides:—The Justices of the High Court and of the other Courts created by the Parliament—(I.) Shall be appointed by the Governor-General in Council: (II.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity: (III.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office." This section has to be interpreted on the same common-sense principles as any other section, and without prepossessions as to what the section means, or ought to mean.

The appointment must be made by the Governor-General, who exercises for the Crown the executive power of the Commonwealth (Constitution, sec. 61), and the Crown, in appointing its servants, judicial or ministerial, can appoint for such term as it pleases—whether at will or for life or for years—unless so far as restrained by law. The section obviously operates as a restraint on the Crown and on Parliament: does it prevent the Crown or Parliament from granting any tenure but a tenure for life to Justices of any Court created by Parliament? If it does so prevent the Crown, then the Parliament could not create a Court with Justices for some temporary purpose—*e.g.*, to try all offences and quarrels of interned aliens during the War.

Now, there is nothing said in the section expressly about life tenure. There is not one word in the section that is not consistent with a tenure for seven years as much as with a tenure for life; but the tenure, whatever it is, must be subject to two provisions: (1) that the person appointed is not to be removed except on an address from both Houses of Parliament, praying for such removal on the ground of proved misbehaviour and incapacity; (2) that Parliament is to fix the remuneration, and the remuneration is not to be

diminished during continuance in office. That the provision for removal is consistent with a term of years, under the Constitution, is shown by sec. 103. This provides, as to members of the Inter-State Commission, that they "shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament . . . praying for such removal on the ground of proved misbehaviour or incapacity."

The only condition that the Parliament imposes on the Crown as to appointment is that the appointment shall be by commission (*Judiciary Act*, sec. 4).

The tenure which the commission purports to grant to the President is a tenure for seven years defeasible during the term on an address from both Houses of Parliament, praying &c. What is there in sec. 72 to forbid such a tenure for any Justices created by the Parliament?

The position is analogous to a lease of land for seven years, with a power of re-entry if the rent should not be paid, or if waste should be committed. "When such a condition is inserted, the estate of the tenant, whether for life or for years, becomes determinable on such re-entry" (*Williams' Real Property*, 14th ed., p. 259).

Sec. 72 has to be contrasted with (1) the *Act of Settlement* (12 & 13 Will III. c. 3)—where the commissions are to be *quam diu se bene gesserint*; but upon the address of both Houses it may be lawful to remove a Judge: (2) the United States Constitution—where the Judges "shall hold their offices during good behaviour" (art. III., sec. 1: (3) the Canadian Constitution—where the Judges are to hold office during good behaviour; but they shall be removable by the Governor-General on the address of both Houses. Similar words, as I understand, are found in the Constitution of all the States of Australia, compelling expressly a tenure "during good behaviour"—that is to say, a tenure for life conditional on good behaviour. Such words are not found in the Australian Constitution, and it is impossible to believe that such words add nothing to the effect of the other Constitutions and of the *Act of Settlement*.

"Removal" during a term is essentially different from leaving at the end of a term; and a power to remove during a term on the

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address of both Houses for proved misbehaviour, &c., if conferred, operates as a qualification of the term, whatever the term may be. The words used in sec. 72 do not even confer a right of removal on an address of both Houses; they are in an unusual negative form—"shall not be removed except" &c. They do not prevent a tenure for life without any power to remove whatever. Sec. 72 does not grant a tenure, but operates to restrain, in some respects, the nature of any grant. It seems to me, in short, that under sec. 72 of our Constitution there is nothing to prevent a tenure for years, if Parliament (or the Government) so decide. A tenure at will is incompatible with sec. 72; for no Justice is to be removed except on an address from both Houses praying for removal on the ground of proved misbehaviour, &c.: but a tenure for years is not incompatible. The Constitution, by sec. 72, does not make a life tenure imperative in all appointments, but provides against that which is the greatest danger—the danger of an offended Government removing a non-compliant Justice, or reducing his remuneration.

As against this view is urged the improbability that the Constitution would leave to the discretion of the Parliament the question of the tenure—for years or for life—for Justices of the High Court as well as for Justices of the other Courts created by Parliament. But it is equally improbable that in any British community any Parliament would provide a tenure for years for Justices of such a Court as the High Court. These arguments as to probabilities, however, must yield to the express words of the Constitution.

So far as the tenure of the High Court Justices hitherto appointed, there is no tenure for years. They hold office until an address from both Houses. The appointment (by commission under sec. 4 of the *Judiciary Act*) is "to be a Justice of the High Court of Australia to have hold exercise and enjoy the said office and the rights and privileges appertaining thereto *subject to the Constitution* aforesaid and the laws of the Commonwealth." That is to say, they hold until an address from both Houses, &c., and their remuneration is not to be diminished. In my opinion, such an appointment is an appointment for life in the technical sense; for the habendum is for a "time incertaine." According to *Altham's Case* (1), "If a man

(1) 8 Rep., 150b, at p. 154b.

grants a rent (and goes no farther), these general words shall create an estate for life, but if the habendum be for years, it shall qualify the general words.' According to *Sheppard's Touchstone*, p. 105—"If one give or grant land to another, to have and to hold . . . to him and his assigns, and say not for how long, nor for what time, and the grantor make livery of seisin according to the deed; by the gift the grantee hath an estate for his own life. . . . If one bargain and sell land to another for money, and limit no time, and express no estate; by this assurance the bargainee shall have only an estate for life." According to *Coke on Littleton*, 42a—"If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay xl. &c. or until the grantee be promoted to a benefice, or for any like incertaine time, which time, as *Bracton* saith, is *tempus indeterminatum*: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law *an estate for life determinable*, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a-like estate for life by the delivery of the deed." But whether the tenure is technically for life is unimportant—these Justices cannot be removed till an address from both Houses. If future commissions be issued in the same form, they will have the same effect.

In my opinion, therefore, sec. 12 of the Act is valid, and the appointment is valid although not for life; and I answer question 1 in the negative (as to both arbitral and enforcing provisions), question 2 in the negative, and question 3 in the affirmative.

As for the other points argued, they do not arise if the view which I have stated of sec. 72 be accepted. But I may say that I am very doubtful as to the President of this exceptional "Court" being a "Justice" of a Court created by Parliament for the exercise of "the judicial power of the Commonwealth," within the meaning of secs. 71 and 72. He certainly is not called a "Justice"; but that fact might not be conclusive if it were clear that he was administering or determining the law as Judges do. In a legal document such as the Constitution, the words "Judge" or "Justice" or "judicial" must be read in this technical sense; not in transferred senses, such

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as in relation to flowers or to pictures or to wine or to the fixing of fair rents—"judicial rents." In the exercise of the President's arbitral functions under the Act, he prevents and settles disputes by dictating industrial conditions if he cannot secure agreements (sec. 24). In addition to his arbitral functions, the Act purports to empower him to impose penalties for breach of the industrial conditions dictated (sec. 38 (*c*)). But he has no power to enforce any law outside the boundaries of this exceptional Act. He cannot even entertain an application for penalty for a strike (sec. 6). If he can be called a "Justice" at all, in carrying out the limited and special duties of the Act, I doubt very much whether he is exercising "the judicial power of the Commonwealth" within the meaning of sec. 71. He has no general jurisdiction for the determination of either civil or criminal controversies. All his duties are referable to the Act made in pursuance of sec. 51 (xxxv.), and matters incidental to that power vested in the Parliament. In enforcing awards, as well as in making awards, he is merely carrying out the object of securing such conditions in industrial matters as will conduce to industrial peace.

In the United States it has been held that Courts created by Congress for the territories, in pursuance of the special power to regulate territories, do not even in enforcing laws exercise "the judicial power of the United States"; and that the tenure of the Justices of such Courts need not be "during good behaviour" (*American Insurance Co.* v. 356 *Bales of Cotton* (1); *Clinton* v. *Englebrecht* (2)). Nor are the Courts of private land claims or the Inter-State Commerce Commission treated as exercising "the judicial power" (*Willoughby on the Constitutional Law of the United States*, vol II., p. 970). The position here seems to be similar to that in the case of the Northern Territory and Papua, according to *R.* v. *Bernasconi* (3).

Assuming, however, that the Act is beyond the power of the Parliament so far as it confers what are called the "enforcing powers" on the Court, and that it is valid so far as it confers the arbitral powers, I am of opinion that the awards can be enforced in Courts of summary jurisdiction, under sec. 44.

(1) 1 Pet., 511. (2) 13 Wall., 434. (3) 19 C.L.R., 629.

It is true that sec. 44 purports to confer on such Courts the power to impose "any penalties which the Court" of Conciliation "has power to impose," and that, according to the assumption, the latter Court is found not to have the power to impose penalties. But the words of sec. 44 are obviously framed so as to fit in with the provisions as to the imposition of penalties contained in sec. 38 (*d*), sec. 49, &c.; they are not framed under any doubt as to the constitutional power to enact the sections; they mean, in effect, any penalties which, *according to the rest of the Act*, the Court (of Conciliation) has power to impose. We must treat these words in sec. 44 as linked with the words of sec. 38, and as a compendious expression to cover all the penalties that are covered by sec. 38. There is no ground for thinking that Parliament knew that it had not the power to enact sec. 38 (*d*), or for thinking that if it had known it would not have given to the summary Courts the power to impose penalties.

The suggestion made by the Chief Justice as to the true effect of secs. 11-13 of the Act is very important, and I have given it anxious consideration. It is favoured by Mr. *Weigall's* reasonable contention as to the construction of the opening words in sec. 72 of the Constitution; it concedes to the President practically all that security and independence which are essential for him in the performance of his invidious functions; and it would relieve all the members of this Court from the duty of declaring an Act of the Parliament to be invalid. Personally, I do not think that the use of the word "judicial" in sec. 8 of the *Judiciary Act* necessarily interferes with this view. But I cannot avoid the conclusion that secs. 11-13 do not merely add functions to a Justice of the High Court, and that they mean to create a second Court and a second office.

If it is necessary to express an opinion on the severability of that part of the Act which confers the "enforcing powers" from the rest of the Act, my view is that it is severable. In *Owners of s.s. Kalibia* v. *Wilson* (1) I took a wider view of severability than my learned colleagues, but, accepting their doctrine as my guide, I think (doubtingly) that there is no sufficient reason for treating all the Act as invalid if the enforcing part is invalid.

(1) 11 C.L.R., 689.

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Gavan Duffy J.

GAVAN DUFFY J. I concur with my brother *Higgins* in thinking that an investigation as to the meaning of sec. 72 of the Constitution will enable us to answer the questions submitted for our consideration in this case. The relevant portions of the section are these:—"72. The Justices of the High Court and of the other Courts created by the Parliament—(I.) Shall be appointed by the Governor-General in Council: (II.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity."

It is said that these words prescribe a tenure or term of office, because the first sub-section provides a starting point for the term and the second sub-section enacts that a Judge appointed under the provisions of the first sub-section shall retain his office unless and until he is removed under the provisions of the second sub-section. If that is the meaning of the second sub-section, a term of office is prescribed; but is that its meaning? It says that the Judge, when appointed, shall not be removed except by the Governor in Council after the fulfilment of certain conditions precedent; but that does not mean that he shall occupy his office until he is removed, but that the right to remove him from his office, which is assumed to exist in some circumstances, shall be exercised only in the circumstances specified in the sub-section. Removal from an office is an expression well understood by lawyers. It does not apply to the natural expiration of a term of office, but connotes the existence of a term and its destruction before it would expire in the ordinary course of events. If the true meaning of the sub-section be what I have stated, no term is prescribed. A term must have a beginning and an end, a *terminus a quo* and a *terminus ad quem*, and here there is no *terminus ad quem* either expressed or to be implied. The second sub-section is identical in its effect with sub-sec. II. of sec. 103 of the Constitution, which deals with the members of the Inter-State Commission, except that that sub-section does prescribe a term (viz., seven years) to which the condition as to removal is attached, and the second sub-section of sec. 72 does not. Authority to fix the term of office of the Justices of the various Commonwealth Courts according to the exigencies of the case is left with the Commonwealth Parliament,

but whatever may be his term of office, a Judge, once appointed, cannot during the term be removed for any cause whatever except as provided by the second sub-section.

Par. 4 of the special case is as follows: "Objection has been taken at the hearing of the said summons on 9th September by counsel for the said party that the *Commonwealth Conciliation and Arbitration Act* is beyond the powers of the Commonwealth Parliament inasmuch as the President is under sec. 12 of the Act appointed for seven years only." Three questions are submitted to us, which I understand we are to answer not at large but as they are affected by the validity or invalidity of the appointment of my brother *Higgins* as President of the Commonwealth Court of Conciliation and Arbitration for a term of seven years only. In that sense I answer them as follows:—(1) No. (2) No. (3) Yes.

POWERS J. In a special case stated by the President of the Commonwealth Court of Conciliation and Arbitration the following questions were submitted for the opinion of this Court:—"(1) Is the constitution of the Commonwealth Court of Conciliation and Arbitration beyond the powers of the Parliament of the Commonwealth, and in particular as to (*a*) the arbitral provisions; (*b*) the enforcing provisions? (2) Is the award invalid by reason of the appointment of the President for seven years only? (3) Is the award enforceable by the said Court?"

I do not think any member of the Court considers that the constitution of a Commonwealth Court of Conciliation and Arbitration, to be presided over by a Judge or Justice duly appointed as Judge of that Court in accordance with sec. 72 of the Constitution, to exercise all the powers given by the present *Commonwealth Conciliation and Arbitration Act*, is beyond the powers of the Parliament of the Commonwealth; but the question has been limited, during the argument, to whether the Commonwealth Court of Conciliation and Arbitration, established by the *Commonwealth Court of Conciliation and Arbitration Act* 1904-1915, with a President (constituting the Court) appointed for seven years only, is beyond the powers of the Commonwealth Parliament, and in particular as to (*a*) and (*b*) of question 1.

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As to the first question:—It was contended (1) that under the Constitution sec. 71 only empowered the Governor in Council to establish Federal Courts, and that the judicial power of the Commonwealth could only be vested in the High Court of Australia and in such Federal Courts as Parliament creates or invests with Federal jurisdiction; and (2) that under sec. 72 of the Constitution Justices of the High Court or Justices of other Federal Courts created by Parliament to exercise judicial power could be appointed by the Governor-General in Council only for life, that is, subject to removal only on the ground of proved misbehaviour or incapacity.

It is admitted as a fact in the special case that the President was *appointed* as President of the Commonwealth Court of Conciliation and Arbitration and for seven years only. Whether that fact alone renders the award in this case invalid depends on the Court's answers to questions 1 (*a*) and (*b*), and will be dealt with in answering question 2.

Two grounds were submitted why an affirmative answer should be given to both (*a*) and (*b*) of question 1: (1) that the *Commonwealth Conciliation and Arbitration Act* 1904-1915 did establish a Federal Court of record, a Court of justice with judicial power to enforce awards by penalties, and otherwise, and that such Court consisted of a President who was appointed, and entitled to hold office, for seven years only, but eligible for *reappointment*; (2) that although the Commonwealth Parliament had power under pl. xxxv. of sec. 51 of the Constitution to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State, and had power to appoint an arbitrator to settle and prevent industrial disputes, and to give the arbitrator arbitral powers and powers of conciliation and powers incidental thereto, it could not, without complying with sec. 72 of the Constitution, appoint a Court of record with judicial powers to carry out the arbitral powers, and to enforce awards by penalties or otherwise, except by a Judge removable from that office only on an address from both Houses of Parliament in the same session on the ground of proved misbehaviour or incapacity.

The first question to be decided is whether the Commonwealth Court of Conciliation and Arbitration established by the Act in

question was authorized to exercise judicial powers in addition to the arbitral and conciliation powers vested in the President by the Act. It was admitted by counsel for the organization, and all members of the Court agreed, that the power to enforce awards by penalties was judicial power, and had been given by the Act.

The second question was whether judicial powers for the enforcement of awards could not legally be given to the President under pl. xxxv. of sec. 51 of the Constitution. Counsel for the organization did not contend in this case that judicial power could be given under that placitum. I agree that only the powers necessary for preventing and settling disputes could be given by that section, and not judicial powers to be enforced *only after the disputes had been prevented and settled, by agreements or awards*. The power did not extend beyond the right to make laws to prevent and settle disputes.

The power to enforce arbitration awards is an entirely different matter, and is not necessary to prevent or settle disputes. I say this after an experience of over four years' work in the Court as a Deputy President, during which time I have settled numerous disputes by awards and effected many settlements of disputes by conciliation without having to use the judicial power to enforce observance of awards to enable me to do so. It is clear that judicial power not authorized by pl. xxxv. has been given to the Commonwealth Conciliation and Arbitration Court to exercise judicial functions not necessary for the purpose of preventing or settling industrial disputes, and so far as question 1 is concerned we have to inquire whether that is sufficient to require the Court to answer the question in the affirmative.

The answer to the question depends, I think, on whether the portions of the Act giving arbitral powers are properly severable from the judicial powers contained in the Act. That question must be considered in the light of the well-known principles laid down by this and other Courts as to "severability" of parts of one Act. This Court has already held that a very important portion of this Act (viz., sub-secs. (*f*) and (*g*) of sec. 38 dealing with a "common rule") was severable. The question is whether the parts of the Act giving judicial powers to enforce awards after disputes are settled, or any other judicial powers not necessary for the purpose of preventing

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or settling the disputes referred to in the Act and Constitution, are severable, or whether the parts are so bound up in the Act that the whole Act must be declared void if the judicial powers are declared invalid.

I agree with the previous decisions of this Court where it was decided more than once that the Commonwealth Court of Conciliation and Arbitration was established under the power given to Parliament by pl. xxxv. of sec. 51, and I agree with what the learned Chief Justice said in his judgment in *The Tramways Case* [*No.* 1] (1), where he said :—" The power conferred by sec. 51 (xxxv.) of the Constitution is to make laws with respect to arbitration. The authority to arbitrate might be conferred upon an individual arbitrator, or board of arbitrators, or a Court ; but in either case the functions would be arbitral, and in so far as an award was made in the exercise of arbitral functions it would not, even without sec. 31 of the Arbitration Act, be appealable under sec. 73. See *National Telephone Co.'s Case* (2). The test whether an appeal would lie in such a case would, as pointed out by Lord *Moulton* (3), be whether the tribunal in giving the decision in question was exercising arbitral powers or acting as a Court. It is true that the Arbitration Act calls the Arbitration Court a ' Court ' and a ' Court of record,' but the nomenclature does not alter the nature of the functions. In the discharge of his arbitral functions the President is not bound by the rules of evidence, but may inform his mind in any manner he thinks fit. A Court of appeal would have no means of reviewing a decision so arrived at (*Moses* v. *Parker* (4)). I am strongly disposed to think that the so-called Court of Arbitration when performing its arbitral functions is not acting as a Court properly so called."

The Act consists of ninety-two sections. Mr. *Starke*, in asking the Court to hold that the Act vested judicial powers in the Court referred to four of the many sub-sections of sec. 38, sec. 44 (2), 48 and 50, as instances of judicial power, in the strictest sense, being vested in the Court. The last three sections are in a separate part of the Act, headed " The Enforcement of Orders and Awards." The sub-sections of sec. 38 objected to, also deal with enforcement of awards,

(1) 18 C.L.R., at pp. 62-63.
(2) (1913) A.C., 546.
(3) (1913) A.C., at p. 559.
(4) (1896) A.C., 245.

and ought to have been included in Part IV. Sec. 11 was also referred to, in which the Court is called a Court of record, but it would surely be admitted that if it had not been vested with judicial power to enforce awards, or to punish, the mere fact of calling it a Court of record did not necessarily make it a Court of justice. One or two other sections were referred to, but were not pressed, as necessarily judicial power only.

To see whether Parliament intended it to be primarily a Court of judicature or a Court of compulsory arbitration only, it is necessary to look at the whole Act and its declared objects. It must also be remembered that at the date the Constitution came into force there were in existence in the Commonwealth and in New Zealand two different classes of Courts, namely, Courts of judicature to settle existing rights between parties, and Courts of compulsory arbitration with legislative power to fix new rates of wages and new conditions to be observed by employers for a fixed term, and not to settle existing rights. In all cases the claims are for better wages or better conditions than persons are entitled to at the time under existing rights.

I find, on looking at the Act to see if it was intended to make it a Court of judicature, six very strong grounds why I am satisfied that it was only intended to make it a Court of compulsory arbitration—and not a Court of judicature: (1) the title of the Act (sec. 1); (2) the declared objects of the Act; (3) the fact that no power has been given to the Court to punish for any breach of *the Act*; (4) the fact that by sec. 25 it declares that "in the hearing and determination of every industrial dispute and in exercising any duties or powers under or by virtue of this Act the Court or the President shall act according to equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its or his mind on any matter in such manner as it or he thinks just"; (5) that the only power given to it as to penalties is to impose penalties for breaches of its awards or orders made as an Arbitration Court—(this power, I assume, was conferred because Parliament considered it incidental to the power to make awards); (6) that no power of execution to *enforce even the power* to impose

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penalties was given to the Arbitration Court—(under sec. 46 orders made by the Arbitration Court imposing penalties are to be enforced by execution only in Federal or State Courts of judicature, not by the Arbitration Court).

Further, apart from the few objectionable sections or sub-sections referred to by Mr. *Starke*, granting judicial power not authorized by pl. xxxv., there remains a very important Act containing about eighty-seven sections dealing fully with conciliation and arbitration for the prevention and settlement of industrial disputes, and one that has worked well and efficiently for the last fourteen years.

The title of the Act itself reads : " An Act relating to *Conciliation and Arbitration* for the Prevention and Settlement of Industrial Disputes extending beyond the Limits of any one State." It may be cited as the *Commonwealth Conciliation and Arbitration Act* 1904 (sec. 1). The chief objects of the Act are stated to be (sec. 2) : "(I.) To prevent lock-outs and strikes in relation to industrial disputes ; (II.) To constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes ; (III.) To provide for the exercise of the jurisdiction of the Court by conciliation with a view to amicable agreement between the parties ; (IV.) In default of amicable agreement between the parties, to provide for the exercise of the jurisdiction of the Court by equitable award ; (V.) To enable States to refer industrial disputes to the Court, and to permit the working of the Court and of State Industrial Authorities in aid of each other ; (VI.) To facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employees to be declared organizations for the purposes of this Act ; (VII.) To provide for the making and enforcement of industrial agreements between employers and employees in relation to industrial disputes."

The whole of the stated objects of the Act can be carried out fully without the sections referred to vesting in the President judicial power to enforce awards. I agree with my brothers *Isaacs* and *Rich* that the portions of the Act giving arbitral powers only and the parts giving judicial powers not arbitral are separable ; and that the

Act without the parts dealing with enforcement of awards will be substantially the Act Parliament had in view when it was passed, and an Act in accordance with the title and the declared objects set out in sec. 2 of the *Commonwealth Conciliation and Arbitration Act* 1904-1915.

A further objection was raised, namely, that the Act cannot be separable because the work of a compulsory arbitration Court requiring the exercise of judicial power is necessarily judicial work within the meaning of sec. 71 of the Constitution. The answer to that objection is, I think, that a Court of judicature is a Court to settle existing rights between parties, but a compulsory arbitration Court is not a Court to settle existing rights. Its powers are more legislative than judicial. It is empowered to fix by an award, which is to have the effect of law, what wages are to be paid and conditions to be observed by employers and employees for a term apart altogether from any existing rights of employers or employees. The award is binding as a declaration of the law on persons who have not had any existing rights prior to the award, for it compels employers to pay the minimum wage fixed by the award to persons employed for the first time after the date of the making of the award, and such persons could not have had any existing rights to submit to the Court. Sec. 40 is surely a delegation of legislative power when it authorizes the arbitrator to make it an offence if, during the term of the award, an employer does not give preference to unionists when he desires to employ anyone to do his work. The Arbitration Court is only asked to make an award when employers or employees are not content with existing rights and would not be content with any declaration as to existing rights.

As to the contention that Parliament cannot delegate to any Court or body any legislative powers, it is only necessary to refer to the Commonwealth Judiciary Act and to all State Judicature Acts in which power is given to the Courts to legislate by making rules as to procedure in the Courts (conditions of appeal, &c.), and to Local Government Acts in all the States in which exclusive legislative powers are delegated to municipal bodies under the authority to make by-laws for the better government of the municipalities and the control of residents in, and even persons passing through, the

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municipal areas. Commonwealth and State Railway Acts also delegate to the Railway Commissioners power to make by-laws for the better management of the railways and the control of traffic, &c. Many other bodies might be mentioned to whom legislative authority has been delegated by Parliament.

For the reasons mentioned, I think the Act is severable, and that the answer to question 1 (*a*) should be No, and the answer to question 1 (*b*) Yes (so far as they are to be enforced by a President appointed for seven years only).

The second question is: "Is the award invalid by reason of the appointment of the President for seven years only?"

It was contended that all the acts done by the Court since its establishment in 1904 were invalid on the ground that the President was only appointed for seven years instead of for "during good behaviour," because (1) the Court established by the Act was a Federal Court of judicature established under sec. 71, exercising judicial power, and (2) sec. 72 of the Constitution only authorized the appointment of persons exercising any of the judicial powers of the Commonwealth who are removable only after an address of both Houses of Parliament on the ground of proved misbehaviour or incapacity.

It was contended by counsel for the organization, and for the Commonwealth, that sec. 72 of the Constitution did not require appointments of Justices of the High Court or Judges of other Courts to be made "during good behaviour," but that they could be made for any term the Governor in Council thought fit—for a month, a year, or seven years; and, therefore, that the appointment of the President, even if the Commonwealth Court of Conciliation and Arbitration is regarded as a Court of judicature, was authorized by the Constitution and by the Act. I cannot agree with that contention, or that at present Justices of any Federal Court vested with judicial powers of a Court can be appointed, except in accordance with sec. 72, namely, subject to removal only after an address of both Houses of Parliament on the ground of proved misbehaviour or incapacity.

The disadvantage of that interpretation being placed on the Constitution was pointed out especially in connection with inferior Courts, but judicial power is the same in all Courts and this Court

is not, I think, justified in amending the Constitution—only in interpreting it as it stands. For nearly eighteen years the condition mentioned has not caused any inconvenience, because the Federal jurisdiction has been vested in the State Courts in accordance with sec. 71 of the Constitution. When that is found inconvenient or impracticable—if it ever is—the Constitution can be amended in the way provided by the Constitution—not by this Court.

Counsel for the Commonwealth also contended that sec. 71 should be read as if the Imperial Parliament had said in sec. 72 : Justices of the High Court and (Justices) of other Courts (not Justices of the High Court), &c. It was claimed that, if the section were read in that way, Justices of the High Court could be assigned judicial work in other Courts without appointment under sec. 72 of the Constitution, and for any term, and on that ground the assignment of the work in question to the President, as a Justice of the High Court, for seven years was valid. I do not agree with the suggested constructions of the section, or that it would have the effect contended if the words mentioned had been inserted in the section. An "appointment" to a new Court would still have to be made, and then only in accordance with the Constitution.

The other point mentioned was that the appointment under the Act was more of an assignment of additional judicial work to a Justice of the High Court duly appointed under sec. 72 of the Constitution, than an appointment of the President as a Judge of a new Federal Court. Looking at sec. 72 and the words used in that section, and in sec. 12 of the *Commonwealth Conciliation and Arbitration Act*, in which the same words are used, I can only come to the conclusion that the *appointment* of the President as President of the Court was a real one in the sense of the term used in the Constitution. It was said that the word "appointed" in sec. 12 could be taken to mean "selected" or something else that Parliament did not say, and not an appointment to an office in the ordinary meaning of the word. The selection under the Act was to be from a class, it is true, namely, "from among the Justices of the High Court"; but no Justice of the High Court could, under the Act, even after one has been selected for the office and the work assigned to him, exercise any of the powers vested in a President by the Act until he was duly

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appointed as President of the Court, or until he took his new oath of office *after his appointment* in the form set out in the Schedule to the Act. Further, it is stated in the special case submitted to the Court, as a fact, that the President was *appointed* for a term of seven years only.

I agree with my learned brothers *Barton*, *Isaacs* and *Rich* that if the Act is not severable the appointment of a President for seven years only, to preside over a Federal Court of judicature established by Parliament, would be contrary to sec. 72 of the Constitution, and invalid; but, as I hold that the Act is severable and valid so far as it vests arbitral powers, set out in the Act, in the President, the appointment of the President for seven years only does not invalidate the award. Sec. 72 deals only with the tenure of Justices of a Court of justice, not with Presidents of an Arbitration Court with arbitral powers only, granted under pl. xxxv. of sec. 51.

It was argued that the President, as a Justice of the High Court, could not be appointed to any position not a Court of judicature because of the provisions of sec. 8 of the *Judiciary Act* 1903. The section reads: "A Justice of the High Court shall not be capable of accepting or holding any other office or any other place of profit within the Commonwealth, except any such judicial office as may be conferred upon him by or under any law of the Commonwealth." The *Judiciary Act* was assented to on 25th August 1903. The *Commonwealth Conciliation and Arbitration Act* was assented to nearly sixteen months later, namely, on 15th December 1904. Parliament by that Act expressly authorized the Governor in Council to *appoint a Justice of the High Court* as President of the Commonwealth Conciliation and Arbitration Court, and expressly declared that *he was entitled* to hold office for seven years. The unusual words "he shall be entitled to hold office," &c., may have been inserted because of the general restriction in sec. 8 of the *Judiciary Act*, and because Parliament recognized that it was not a judicial office but only the office of an arbitrator. The words would have been unnecessary if it were assumed to be a judicial office, for the *Judiciary Act* made provision for other judicial offices being conferred on Justices of the High Court by Commonwealth Acts.

The answer to question 2 should be No.

The third question is: "Is the award enforceable by the said Court?" I do not think it is, because the judicial power to enforce awards could not be granted under pl. xxxv. of sec. 51 of the Constitution, and could only be granted to a Court of justice created under sec. 71 of the Constitution and to a Justice appointed in accordance with sec. 72. The President has not been appointed in accordance with that section. The answer should be No.

I do not think that Parliament intended to create a Court in the ordinary sense of the word, but only to give power to a President to prevent and settle disputes by conciliation and arbitration, and therefore did not appoint him as President "during good behaviour," but for seven years. The awards made by the President can be enforced in State Courts, and there is not any reason why Parliament could not give to the High Court, if it thinks fit, power to enforce arbitration awards made by the President or Deputy President. The President or Deputy President could then, as a High Court Justice, enforce the awards if Parliament thinks fit to give that authority.

A doubt was raised during the argument as to whether State Courts can enforce awards if the Commonwealth Court of Conciliation and Arbitration is held to be unable to do so, because of the words which appear in sec. 44 of the Act, namely, "which the Court has power to impose." It is said the only power given to the State Courts is to impose penalties which the Commonwealth Court of Conciliation and Arbitration can impose, and if it is held that that Court cannot impose penalties a State Court cannot do so. It is not necessary to decide that question, but it might very well be held that the words in sec. 44 are only used as a concise description of the class of penalties or orders that can be enforced by State Courts. The omission of the words in question by an amendment of the Act would clear away the doubt. As awards of the Court are to be enforced by the parties or by Federal Courts in all parts of Australia, Parliament recognized that the assistance of State Courts to enforce them was necessary, and for that reason, I presume, passed sec. 44.

I hold that the following answers should be given to the questions submitted to the Court:—Question 1 (*a*)—No. Question 1 (*b*) —Yes, unless the President is properly appointed under sec. 72 of

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the Constitution, and not for seven years only. Question 2—No. Question 3—No.

Questions answered as follows :—1 (*a*) *No.* (*b*) *Yes.* 2 *No.* 3 *No.*

Solicitors for the applicants, *Farlow & Barker.*

Solicitors for the respondents, *Sly & Russell*, Sydney, by *Hedderwick, Fookes & Alston.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT;
RESPONDENT,

AND

DRAGE . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 14, 15, 17.

Barton, Gavan Duffy and Rich JJ.

Industries Assistance—Advances to settlers—Advance in respect of leased land—Applicant also owner of freehold land—Unauthorized advance—Crop distrained and sold by landlord—Purchase by agent of Government—Refusal by Crown to pay for crop—Property in crop—Charge on crop of settler—Industries Assistance Act 1915 (*W.A.*) (*No.* 27 *of* 1915), *secs.* 9, 10, 12, 15—*Industries Assistance Act Amendment Act* 1915 (*W.A.*) (*No.* 52 *of* 1915), *sec.* 3—*Industries Assistance Act Amendment Act* 1917 (*W.A.*) (*No.* 16 *of* 1917), *secs.* 4, 5, 6, 8, 11—*Wheat Marketing Act* 1916 (*W.A.*) (*No.* 18 *of* 1916).