[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN WORKERS' UNION . CLAIMANT;

AND

THE ADELAIDE MILLING COMPANY LIMITED AND OTHERS . . RESPONDENTS.

H. C. OF A. 1919.

MELBOURNE, *May* 28, 29; *June* 12.

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Industrial Arbitration—Powers of Commonwealth Parliament—Conciliation and Arbitration—Industrial dispute—Operations of State Governments—Governmental or trading operations—Wheat marketing—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *secs.* 4, 18, 23, 24—*Wheat Marketing Acts* 1915-1918 (*Vict.*) (*Nos.* 2812, 2846, 2917, 2969).

Members of an association of employees were employed by the States of Victoria and New South Wales in wheat lumping and stacking and other operations relating to wheat. The State of Victoria carried on its operations through the Minister for Agriculture under the Victorian *Wheat Marketing Acts* of 1915, 1916, 1917 and 1918, and the State of New South Wales through the Minister for Agriculture and the State Wheat Board but not under any Act or Order in Council. There was a dispute between the association of employees and, amongst other employers, the two States as to the wages, hours and conditions of work of the members of the association so employed.

Held, by *Barton, Isaacs, Gavan Duffy, Powers* and *Rich* JJ. (*Higgins* J. dissenting), that, so far as the two States were concerned, their operations were governmental and not trading, and, therefore, that the Commonwealth Court of Conciliation and Arbitration had no power either under sec. 23 (1) of the *Commonwealth Conciliation and Arbitration Act* to hear, inquire into and investigate the dispute; or under sec. 23 (2) to attempt to reconcile the parties and to induce the settlement of the dispute by amicable agreement; or under sec. 24 (2), if no agreement should be arrived at, to determine the dispute by award.

Per Higgins J.—On the construction of the Constitution, there is no exception from the Federal power under sec. 51 (xxxv.) of such operations as wheat marketing carried on by the State, although there are exceptions

from the Federal power under sec. 51 (XIII.) and (XIV.) of State banking and State insurance. On the construction of the *Commonwealth Conciliation and Arbitration Act* 1904-1915, "industrial dispute" includes a dispute in an industry carried on by a State (sec. 4). It is not necessary for the purposes of jurisdiction that the industry shall involve "trading."

CASE STATED.

On the hearing of a plaint in the Commonwealth Court of Conciliation and Arbitration by the Australian Workers' Union against the Adelaide Milling Co. Ltd. and a large number of other respondents the President stated a case for the opinion of the High Court which, so far as is material, was as follows :—

1. This Court has cognizance for purposes of prevention and settlement of what is (subject to the questions hereinafter stated) an industrial dispute submitted to the Court by the above-named claimant by plaint.

2. The dispute is as to the wages, hours and conditions of labour of members of the claimant Union employed by the respondents in wheat lumping and stacking, and other operations relating to wheat.

3. The respondents are wheat merchants, wheat agents, flour millers and others carrying on operations in the States of South Australia, Western Australia, New South Wales and Victoria, and among the respondents are included the State of New South Wales and the State of Victoria.

4. The State of Victoria carries on its operations through the Minister for Agriculture under the Victorian *Wheat Marketing Act* 1915 (No. 2812), *Wheat Marketing Act* 1916 (No. 2846), *Wheat Marketing Act* 1917 (No. 2917), *Wheat Marketing Act* 1918 (No. 2969).

5. The State of New South Wales carries on similar operations since 1915 through the Minister for Agriculture and the State Wheat Board, but not under any Act or Order in Council.

6. The said States, having become parties to the proceeding by service of the plaint on 27th February 1919, object that they are not amenable to the jurisdiction of this Court.

7. I state this case for the opinion of the High Court upon these questions which, in my opinion, are questions of law :—

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(1) Has this Court power to hear, inquire into and investigate the industrial dispute (sec. 23 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1915) so far as it relates to the said States respectively ?

(2) Has this Court power to attempt to reconcile the parties and to induce the settlement of the dispute by amicable agreement (sec. 23 (2)) so far as it relates to the said States respectively ?

(3) Has this Court power if no agreement be arrived at to determine the dispute by award (sec. 24 (2)) so far as it relates to the said States respectively ?

Blackburn, for the claimant. The Commonwealth Parliament has, under sec. 51 (xxxv.) power to legislate with regard to this dispute. The operations of the Governments of the two States are trading and business operations which are ordinarily carried on by individuals, and the States have no immunity from Commonwealth legislation in respect of such operations, but only in respect of operations which are strictly governmental. The States are not at liberty to destroy the power of the Commonwealth by making operations governmental which are not ordinarily governmental. Apart from operations which prior to 1900 were ordinarily carried on by State Governments, *e.g.*, railways, an operation is not governmental unless it is one which can only be conducted by a Government. That is to say, it must be one done in exercise of the legislative, executive or judicial function of the State. This case cannot come under the defence power of the Commonwealth, for the dominant motive is the protection of the growers of wheat. [Counsel referred to *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (1); *South Carolina* v. *United States* (2); *Flint* v. *Stone Tracy Co.* (3); *Murray* v. *Wilson Distilling Co.* (4).]

[ISAACS J. referred to *Joseph* v. *Colonial Treasurer of New South Wales* (5).]

(1) 12 C.L.R., 398, at p. 426.
(2) 199 U.S., 437, at p. 454.
(3) 220 U.S., 107, at p. 157
(4) 213 U.S., 151, at pp. 157-159.
(5) 25 C.L.R., 32.

Mann (with him *Owen Dixon*), for the State of Victoria. All functions performed by a Government are governmental, and no distinction can be drawn between one set of functions and another. (See *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (1).) The only source of light upon the question of what are governmental functions in Victoria is the authority of that State under its Constitution to make laws for the peace, order and good government of Victoria. The peace, order and good government of Victoria may require the buying and distribution of commodities by the State, just as much as the education of the people. The distinction drawn in American cases between governmental and non-governmental functions is for the purpose of determining whether an individual who is sought to be affected is or is not an instrumentality of government. But here it is admitted that it is the Government itself which is acting, and the cases have no application. The Commonwealth Constitution did not set up the Commonwealth to govern the State Governments, except where express provision is made, but set it up to govern the people of the States, and for that reason, among others, the Parliament of the Commonwealth in enacting the *Commonwealth Conciliation and Arbitration Act* is to be treated as legislating for the people of the Commonwealth as individuals, and not for the States. Even if a distinction is to be drawn between the governmental functions of a State and its trading operations, what was being done by the States here falls within the former class. In face of a real national emergency, namely, the lack of the means of oversea transport, the States entered into an arrangement with the Commonwealth, as the States alone could effectually do, to meet the emergency. The most convenient and thorough means of carrying out the arrangement was determined to be by acquiring the wheat from the farmers, selling it for them and handing back the proceeds to them. Although that involved the buying and selling of wheat by the States, those transactions were merely incidental to the carrying out of the main purpose of meeting the emergency.

(1) 4 C.L.R., 488, at p. 539.

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Blackburn, in reply. The power of the Commonwealth as to conciliation and arbitration would be frustrated unless the States can be brought within it. The relation towards one another of the Commonwealth and the States does not raise the doctrine of the immunity of the Crown. The Commonwealth Constitution contemplates the possibility of the States being subject to Commonwealth laws in respect of some of their operations. That is shown by sec. 51 (XIII.), which expressly exempts State banking from the power to legislate as to banking.

Cur. adv. vult.

June 12. The following judgments were read :—

BARTON J. The claimant Union has filed a plaint in the Arbitration Court against a large number of respondents. The questions on which this Court is asked for its opinion relate to the States of Victoria and New South Wales, which have been included among the respondents. The wages, hours, and conditions of labour are the subjects of the claims of the Union. More favourable conditions are sought by those of its members who are employed by the respondents in wheat lumping and stacking, and other operations relating to wheat. The State of Victoria carries on its operations in this regard through the Minister for Agriculture under the Victorian Wheat Marketing Acts 1915, 1916, 1917 and 1918 (Nos. 2812, 2846, 2917 and 2969). Practically it is sufficient to refer to the first-mentioned Act, as the others continue the same system. The State of New South Wales carries on similar operations since 1915 through the Minister for Agriculture and the State Wheat Board, but not under any Act or Order in Council.

We are asked : (1) whether the Arbitration Court has power to hear, inquire into and investigate the alleged industrial dispute so far as it relates to the two States named ; (2) whether the Arbitration Court has power to attempt to reconcile the parties and to induce a settlement of the alleged dispute by amicable agreement so far as it relates to those States ; and (3) whether that Court has power, if no agreement be arrived at, to determine the dispute by award so far as it relates to those States. We are referred to sec. 23 (1) and (2) and sec. 24 (2) of the *Commonwealth Conciliation and Arbitration Act.*

Shortly described, the Victorian *Wheat Marketing Act* of 1915 was the result of the adoption of a scheme for that purpose at a conference between the Prime Minister of the Commonwealth and certain Ministers of New South Wales, Victoria, South Australia and Western Australia. Its occasion was the great scarcity of the means of transportation as a result of the existence of a state of war, by which the satisfactory marketing of the Australian wheat harvest was endangered. The Government of Victoria was empowered to join with the Government of the Commonwealth and those of the other States named in concerted action for fairly utilizing the available means of transport and for the marketing of the harvest on behalf of the growers. These matters are recited in the preamble, and the sections are adapted for carrying them out. The Minister of Agriculture was empowered to buy or sell or arrange for the purchase or sale of wheat, to employ agents, officers, servants and others, and to arrange with any bank or banks for financial accommodation. Books were to be provided and kept, and accounts entered therein of all money received and paid for or on account of the Act, and of the purposes of the receipts and payments. There is no trace of authority to the Government to carry on the scheme as a trading concern for profit, nor is it alleged that any profit was attempted to be made by any of the Governments concerned. In fact, the whole scheme and its operations were admitted to be free of any such attempt.

The case of *D'Emden* v. *Pedder* (1) has become a settled authority, and this Court only in September last intimated in Full Bench that the majority of the Justices were of opinion that it would be a waste of time to attack the decision of this Court in the *Railway Servants' Case* (2). In the last-named case the Court unanimously decided that the rule laid down in *D'Emden* v. *Pedder* was reciprocal, being equally true of attempted interference by the Commonwealth with State instrumentalities. It was held that a State railway was a State instrumentality within that rule. In the present case the operations attacked are the direct operations of the States concerned, and the position is even stronger than in the case of instrumentalities. In *South Carolina* v. *United States* (3) the

(1) 1 C.L.R., 91. (2) 4 C.L.R., 488. (3) 199 U.S., 437.

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Court laid down that that which is implied is as much a part of the Constitution as that which is expressed, and amongst the implied matters is that the nation may not prevent a State from discharging the ordinary functions of government, just as no State can interfere with the National Government in the free exercise of the powers conferred upon it. To preserve the even balance between the National and State Governments and hold each in its separate sphere is the duty of all Courts, and pre-eminently of the highest Court of the Federation. In this case the State had undertaken the business of solely carrying on the liquor trade for profit, and its agents were held not to be exempt from the licence taxes prescribed by the United States for dealers in intoxicating liquors. But the distinction then drawn does not apply in the present case, because it is not and cannot be contended that the marketing of the wheat harvest has been carried on for profit. The operations carried on by the State of Victoria were authorized by Statutes passed under the constitutional power to legislate for the peace, welfare and good government of the people of Victoria in all cases whatsoever. Those Statutes authorized the doing of things which amounted to governmental operations. By the State of New South Wales, as the case stated tells us, similar operations were carried on without Statute or Order in Council. But they were governmental operations, and I do not think that the Commonwealth, or any authority constituted under it, had a right to interfere, nor was it contended that they were illegal. Indeed, I doubt whether such a contention could be entertained.

For the reasons I have given, questions 1 and 3 should be answered in the negative.

Question 2 asks, as to the two States, whether the Arbitration Court has power to attempt to reconcile the parties and to induce the settlement of the dispute by amicable agreement. The question is framed upon sec. 23 (2) of the *Commonwealth Conciliation and Arbitration Act*, which applies to the investigation and hearing of industrial disputes of which the Court has cognizance, and the action of the Court under the direction of the section applies expressly to the course of the hearing and investigation, and to that only ; that is, to a hearing the natural consequence of which is an award. If

the Court cannot make an award binding these two States, it is equally unable to act under sec. 23 (2).

The result is that I must answer question 2, as well as questions 1 and 2, in the negative.

My brother *Gavan Duffy*, who has been unable to prepare a separate judgment, requests me to state that he also thinks that the three questions should be answered in the negative.

ISAACS AND RICH JJ. The answer to each of the three questions referred to this Court depends on whether the States of New South Wales and Victoria, or either of them, can be regarded as justiciable by the Commonwealth Court of Conciliation and Arbitration in respect to the particular operations mentioned in the case stated.

The contention on the part of the claimant is that those States are justiciable because the operations referred to are trading operations. Whether a State would be justiciable if it carried on really trading operations is a question which does not now arise, because it is clear that what has been so far done cannot in any real sense be called trading. And, further, before a decision can be arrived at which in one event would deny Commonwealth power, the Commonwealth would have to be heard. And this more particularly having regard to the final force of the decision. This decision, therefore, is confined to the facts of this case.

The operations as they appear from the case, read by the light of the Victorian Acts, which, for the ascertaining of the character of the enterprise, apply to both States, are purely political and temporary. To meet the exigencies of the situation created by the War—exigencies of food scarcity in the Mother Country and of transit difficulties in Australia, where the necessary food remained, to the deprivation of those abroad who needed it, and those here who were anxious to supply it—the Commonwealth Government and the various State Governments devised a plan by which each authority exerting its own constitutional powers would assist in overcoming the difficulty. As a necessary incident in the scheme, but as such incident only, the State Governments undertook to purchase here and sell in England the wheat in their several jurisdictions. This incident is now detached, and is said to give the character of trader

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to each of the States. It clearly does not. In *Broken Hill Associated Smelters Proprietary Ltd.* v. *Collector of Imposts (Vict.)* (1) this Court adopted a similar view in relation to the scheme of Imperial insurance of war risks. (See per *Isaacs* and *Rich* JJ. (2) and per *Gavan Duffy* J. (3).) American cases have been relied on, but those cited, whatever may be their ultimate weight when on a proper occasion their reasoning comes to be examined, present one feature which at all events is in fact different from the present case. The persons proceeded against there were not the State, but some one—individual or company—*primâ facie* subject to federal law. What distinction that makes in law need not now be considered, but the fact is noted, particularly in view of the English case now to be cited. In 1813 Sir *William Scott* decided the case of *The Swift* (4), and in the course of the judgment there occur some passages which, in the present case, are singularly apposite. It was sought to condemn the ship for breach of the navigation laws, because the Commissary-General imported into Jamaica from Honduras certain articles of food for the use of the forces in Jamaica. The contention was that the Act bound the Crown, and that there was an importation in fact. The very learned Judge who sat said (5) :—" It has been made a question in argument, whether the King is bound by the *Navigation Act*. This is a very large question, upon a very momentous subject, on which it might not become me to hazard a confident opinion, and the less so, because the principles on which it is laid down in the books, that the King is or is not bound by Statutes, are far from being so precise as to furnish a safe conduct to any such opinion. That he is bound, though not named, by Acts *pro bono publico*—by Acts for prevention of fraud—are descriptions of the royal obligation so wide and so unlimited, that it might be difficult to say what public Statutes do or do not bind the King, if these are taken without any technical limitations applied to them. For it would be difficult to say what public Statutes are not *pro bono publico*, and for the prevention of *fraud*, taking *fraud* in its legal sense, of injury to the rights of others. The

(1) 25 C.L.R., 61.
(2) 25 C.L.R., at p. 67.
(3) 25 C.L.R., at p. 68.
(4) 1 Dods., 320.
(5) 1 Dods., at pp. 338 *et seqq.*

utmost that I can venture to admit is, that, if the King traded, as some sovereigns do, he might fall within the operations of these Statutes. Some sovereigns have a monopoly of certain commodities, in which they traffick on the common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated. But the present question is,—Is this distribution of the public stores for the public use, a trading within the view of the Statute? Looking to authority, as well as principle, and to the public convenience, I conceive, it is not. It is property to be distributed by the Crown for no purpose of pecuniary advantage to itself, either in its personal or political capacity, but solely for the exigencies of the public service. The Crown possesses the constitutional power of directing this distribution; and surely it never could be the intention to constitute the Crown a trader by virtue of the fair exercise of this admitted prerogative conferred upon it, not for its own use or advantage, but for the necessity of the public service. It has one feature of trade, that of the conveyance of commodities, but it has no other. The conveyance is not for lucre, nor for private domestic consumption, but for the maintenance of the public defence. Indeed, it rather seemed to be admitted, that if it had been the immediate act of the Crown, it would not have been liable to much objection, but that it was the act of the Deputy-Commissary. The Crown, however, has approved and confirmed the act of its officer, and it is hardly possible that it should not approve and confirm an act done in the only way that remained practicable to prevent public loss and detriment. The Crown has adopted the act, and stands by its law officers before the Court, maintaining the propriety and legality of the act; and the only party who questions it, is the Customs House officer, who is to derive his own private advantage from the forfeiture. If authority is resorted to, it tends to support the same conclusion. The case of *Bruce* v. *Sir Simon Harcourt* (*vide* Chief Baron *Parker's Report*, 274) tends to establish, at least in the reasonings employed, that an importation of commodities bought with the Crown's money, though for the consumption of the Royal Family, is not to be considered as a trading, which it unquestionably would be.

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in the case of any private individual. It turned upon the application of a particular Act of Parliament (3 & 4 Ann. c. 13) which forbad the importation of French commodities; but the determination of a very preponderating part of the Court (three Judges against one), *after several arguments of counsel and much discussion of the Court*, held that such an importation was not a trading within that Act; and if not a trading within that Act, I do not see how it could be a trading within any other. For I do not perceive that that Act points out any such description of any peculiar species of commerce, as that it should be at all different from the trade that is usually so denominated. And if an importation of goods destined to the domestic consumption of the Royal Family, and purchased with the Crown's money for that purpose, is not a *trading* (which it unquestionably would be in the case of an importation of goods by any other family made and purchased for its own use), I do not see how an importation of the Crown's property destined to the public use can possibly be so considered. It has still less the character of trade. It gives no advantage to the proprietor directly or indirectly; no advantage of private profit, or of private use, which is private profit. It is on all account entitled to higher measures of indulgence."

Now, in this case, the whole scheme is dominated by the ultimate purpose, namely, the defence of the Empire. It must be steadily borne in mind that the acts dealt with in this case are all assumed to be lawful acts, and strictly within the legal powers of the Government concerned. And these legal acts were all aimed at the satisfaction of private needs, but for the one great public purpose. The character of trading being absent and the nature of the power being governmental, each of the questions put should be answered in the negative.

HIGGINS J. There are many employers involved in a dispute which extends to four States, as to the wages, hours and conditions of labour of members of the claimant Union, men employed in wheat lumping, wheat stacking, &c. There are three States among the employers—State Governments carrying on the work of wheat marketing for their people—and two of the States, New South Wales

and Victoria, object that they are not amenable to the jurisdiction of the Court of Conciliation. The State of Western Australia has, in previous cases, welcomed the assistance of the Court; and in this case has raised no objection to being included in the arbitration. The manager of the State wheat marketing scheme is a respondent.

There are three questions asked, so far as the two States are concerned: (1) can the Court investigate the dispute under sec. 23 (1); (2) can it try to reconcile the parties and induce the settlement of the dispute by amicable agreement under sec. 23 (2); and (3) can it determine the dispute by award if no agreement be reached?

The operations at the State stacks are just the same as the operations at the stacks of private employers. The men working see no distinction. If the labour conditions cannot be regulated for the States as well as for the other employers, it is certain—humanly speaking—that there will be trouble. Moreover, the principles applied here will have to be applied in other State industries, wherever the State extends its octopus grasp. I recollect that, when I held a conference a few years ago in the coal industry, it turned out that the State coal mine dominated the position in Victoria; that the other mine-owners in competition could not come to an arrangement with the men unless the State mine became a party to it. But, of course, we have to declare the law as we find it, whatever the consequences; bearing in mind that the objects of sec. 51 (xxxv.) of the Constitution cannot be effectively achieved unless the States in their operations are subject to the procedure for conciliation and arbitration.

The answers to the questions turn, ultimately, on the construction of the Constitution and the Act. So far as the Constitution is concerned, there is certainly nothing expressed in it that indicates an intention to exclude the operations of States from the power to legislate for the "peace, order, and good government" of Australia "with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" (sec. 51 (xxxv.)). The power to legislate with respect to banking excludes State banking if confined to the State that carries on banking business (pl. xiii.); the power to legislate with respect to insurance excludes State insurance if confined to the

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State that carries on the business of insurance (pl. XIV.); but there is no such exclusion expressed as to State operations with respect to any industrial disputes that extend beyond one State. The words of the Constitution are general and without qualification or exception. It is true that the Constitution of each State continues as at the establishment of the Federal Constitution (sec. 106), but it exists "subject to" the Federal "Constitution." The State of Victoria by its Wheat Marketing Acts 1915-1918 has empowered the Minister of Agriculture to buy and sell wheat and to "appoint or employ such agents officers servants and other persons as are necessary" (Act No. 2812, sec. 5 (1)). It can hardly be contended that this provision is inconsistent with the Conciliation Act made by the Federal Parliament under its powers; but, if it is inconsistent, the law of the Federal Parliament prevails (sec. 109). The actual decision in the *Railway Servants' Case* (1) should not bind us in this case; for it turned on the fact that, at the time of the Constitution, the construction and maintenance of railways were to be regarded as "governmental" functions. Care was taken by the Court not to impugn the decision in the *South Carolina Case* (2), in which it was held that a State which had made the liquor trade a State monopoly was subject to the federal excise duty in respect of its liquor. That case has since been recognized and followed in *Flint* v. *Stone Tracy Co.* (3) and in other cases. As a matter of mere construction of the Constitution, therefore, I am of opinion that there is no exception from the federal power under sec. 51 (XXXV.) of such operations as wheat marketing carried on by the State or under its authority. It still remains to be seen whether the Act itself, as distinguished from the Constitution, expressly or by necessary implication, was meant to bind the State—the Crown in right of the State.

Now, under sec. 18 of the Act, the Court has jurisdiction over "*all* industrial disputes," as defined in sec. 4. According to sec. 4 "industrial dispute" includes "any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the

(1) 4 C.L.R., at p. 539. (2) 199 U.S., 437.
(3) 220 U.S., 107.

Commonwealth or a State." Therefore, so far as the intention of the Federal Parliament is concerned, it is clear that the Court was to have power over disputes in relation to any industry carried on by the State directly, as well as any industry carried on by the State indirectly—through a State public authority. On this reasoning it would seem that the three questions should be answered in the affirmative.

Counsel for the Union has applied himself principally to the task of showing—and I think he has shown it—that operations of wheat marketing are not " strictly governmental functions"—not functions such as the legislative, the executive, the judicial functions, functions essential to every State. His contention, as finally stated, was not that the operations are trading operations. But counsel for these two respondents takes higher ground—says that this distinction is relevant only to the case of government agencies, and that we are here dealing with the Government itself. It is urged that all functions performed by Government are governmental functions, and that the State is in no case amenable to the Commonwealth law. Apparently, the theory is that if the State create a board with power to contract and to employ, and with a right to look to the State for indemnity, the board would be subject to the Act; but that if the State contract and employ in its own name, the Act cannot apply. It would be, indeed, absurd if the power of the Court of Conciliation to interfere in the interests of industrial peace were to turn on the question whether the State contracts with the employees directly or through an agency which it indemnifies.

There is, however, the rule to be considered, that the King cannot be sued without his consent—consent generally given by Act of Parliament. There have been Acts in the several Australian States enabling people to sue the King—either in contract (as in Victoria) or both in contract and in tort (as in New South Wales). The Commonwealth law allows a State to be sued either in contract or in tort in the High Court, but only in matters of original jurisdiction of that Court (*Judiciary Act*, sec. 58). There is no express provision as to the Court of Conciliation; and the question is, what right has anyone—claimant or Court—to summon the State to enter an appearance in that Court at all?

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This Court of Conciliation, however, is not a Court in the ordinary sense—a Court where justice is administered according to law. Indeed, it has been held not to be a Court at all, as I understand *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1). The peculiar—(shall I even call it?) tribunal—is devised to prevent and settle industrial disputes, in the interests of all parties and of the public. There is no process *in adversum* involved—no process of party against party, litigant against litigant—in the procuring of an agreement or in the making of an award. Under secs. 23, 24, there is no "suit," but an inquiry for the benefit of all concerned as well as of the community. The old doctrine is that the King is bound by Statutes, even if not named therein, in the case of Statutes passed for the public good, &c. (*Bacon's Abridgment*, 7th ed., vol. VII., p. 461; per *Jessel* M.R., *Ex parte Postmaster-General*; *In re Bonham* (2)). But even if the proceedings under an order made under sec. 19 (*d*) were to be regarded as adverse litigation, the Act itself, by the definition of "industrial dispute" which I have stated, expressly makes the States subject to all the procedure for dealing with industrial disputes; and that Act became law with the assent of the King.

Counsel for the respondents says that, in his opinion, an officer of the State can be summoned to a compulsory conference under sec. 16A; and, as I infer, the officer would be liable to a penalty of £500 if he refused to attend. It is hard to see, then, why secs. 23 and 24 should not apply. There may be a difficulty as to imposing a penalty on the State, but the question as to imposing a penalty does not arise in this case, and a State may perhaps be subject to the procedure for conciliation and arbitration without being liable to procedure for a penalty.

But, as I understand it, the war power is invoked, as justifying the inference that the powers of the Court constituted under sec. 51 (XXXV.) are excluded. I assume—only for the sake of argument—that the interference of the Court is to be treated as an interference with, rather than as an assistance to, the defence of the nation. Yet, even the Victorian Act (No. 2812) is not an exercise of the power of the Commonwealth to make laws for "the naval and

(1) 25 C.L.R., 434.

(2) 10 Ch. D., 595, at p. 601.

military defence of the Commonwealth and of the several States" (sec. 51 (VI.)). This Act is not an Act of the Commonwealth at all; and the State of Victoria has not the war power. Nor is the Act expressed to be for the benefit of the home country and its allies; it is expressed to be enacted "on behalf of the growers thereof"—of the Victorian harvest. The full recital is:—"Whereas owing to the great scarcity of the means of transportation as a result of the existence of a state of war the satisfactory marketing of the Australian wheat harvest of the season 1915-1916 is endangered: And whereas the Prime Minister of the Commonwealth of Australia and certain Ministers of the Crown of the States of New South Wales Victoria South Australia and Western Australia have in a conference held for the purpose outlined a proposed scheme for concerted action by the Governments of the Commonwealth and the said States for utilizing on a fair basis the means of transportation available and for the marketing of the said harvest *on behalf of the growers thereof* at prices based on those obtainable on the London wheat market with certain deductions: And whereas it is expedient to empower the Government of Victoria to join with the said Governments in settling the terms of the said proposed scheme or any modification thereof agreed to by the said Governments or in formulating any other scheme for concerted action for the purposes aforesaid or any modification of any such other scheme and to do all such acts matters and things as on the part of the said Government are necessary or expedient for the due carrying out of the said proposed scheme or of any such modification thereof or of such other scheme or any such modification thereof."

The Victorian draftsman correctly abstained from basing the Act on any war power. It certainly was occasioned by the exigencies of the War, and the consequent difficulties of transport; and the scheme of State handling of the wheat was the result of conferences between the Federal Prime Minister and the State Premiers. But the Act was properly based merely on the power of the State Parliament to legislate for Victoria and its people. There is not one iota of purpose expressed to aid Great Britain or her allies.

I am unable to see how the case of *The Swift* (1) affects this case.

(1) 1 Dods., 320.

H. C. OF A. 1919.

AUSTRALIAN WORKERS' UNION v. ADELAIDE MILLING CO. LTD.

Higgins J.

It was there held that the *Navigation Act* did not bind the Crown, as to a vessel carrying food for troops in Jamaica during the Napoleonic War. Sir *William Scott* said that perhaps such an Act, though not expressly naming the Crown, might bind the Crown, as being an Act for the public benefit, if the King were trading; but he clearly was not trading. He was feeding his troops. In the present case, I should not call the operations of the State Government as to wheat marketing "trading"; but, to my mind, the question as to trading is irrelevant. The problem as to an Act binding the Crown where the Crown is not expressly named does not arise here; for the Crown is expressly named in the Act (sec. 4 "industrial dispute"), and *expressum facit cessare tacitum.*

Unfortunately, the arguments here have not followed the lines of what seem to my mind the greatest difficulties; and I have to give my conclusion without having had the benefit of a full discussion of those difficulties. My diffidence is increased by seeing that my learned colleagues do not look at the subject in the same way as I do. But my opinion is that all three questions should be answered in the affirmative.

POWERS J. I have had the opportunity of reading the judgment of my brothers *Isaacs* and *Rich* in this matter, with which I agree.

The answers to the questions should be:—Question 1—No. Question 2—No. Question 3—No.

Questions answered in the negative.

Solicitor for the claimant, *A. C. Roberts*, Sydney.

Solicitor for the State of Victoria, *J. Weldon Power.*

B. L.