[HIGH COURT OF AUSTRALIA.]

GEORGE HUDSON LIMITED . . . . APPELLANT;
DEFENDANT,

AND

THE AUSTRALIAN TIMBER WORKERS' UNION . . . . . } RESPONDENT.
INFORMANT,

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES TO THE HIGH COURT.

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SYDNEY, *Nov.* 27-29, *Dec.* 7-8, 15, 1922; *Aug.* 23, 1923.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Industrial Arbitration—Agreement in settlement of dispute—Successor of party to agreement—Whether agreement binding on successor—Validity of Commonwealth statute—Retrospective operation of statute—Agreement made, and succession occurring, before amending Act—Commonwealth Conciliation and Arbitration Act 1904-1920 (*No.* 13 *of* 1904—*No.* 31 *of* 1920), *sec.* 24—*Commonwealth Conciliation and Arbitration Act* 1921 (*No.* 29 *of* 1921), *sec.* 3—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.), (xxxix.).

Supreme Court (N.S.W.)—Jurisdiction—Case stated by Court of Petty Sessions—Point of law not raised in Court below—Justices Act 1902 (*N.S.W.*) (*No.* 27), *secs.* 101, 106.

High Court—Jurisdiction—Question as to limits inter se of constitutional powers of Commonwealth and State—"In any cause pending" in Supreme Court of State—Appeal from inferior Court of State—Judiciary Act 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *secs.* 2, 39, 40A.

Sec. 24 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1920 provides that "if an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at, a memorandum of its terms shall be made in writing and certified by the President, and the memorandum when so certified shall be filed in the office of the Registrar, and unless otherwise ordered and subject as may be directed by the Court shall, as between

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the parties to the agreement, have the same effect as, and be deemed to be, an award for all purposes including the purposes of section thirty-eight." By sec. 3 of the *Commonwealth Conciliation and Arbitration Act* 1921 (which was assented to on 16th December 1921) sec. 24 (1) was amended by inserting after the words "parties to the agreement" the words "or any successor, or any assignee or transmittee of the business of a party bound by the agreement, including any corporation which has acquired or taken over the business of such party."

Held, by *Isaacs*, *Higgins* and *Starke* JJ., that sec. 24 (1) as so amended applies as from 16th December 1921 to an agreement made, and to a successor, &c., who has become such, prior to that date.

Held, also, by *Isaacs*, *Higgins* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting) that, so interpreted, sec. 24 (1) as so amended is within the power conferred on the Commonwealth Parliament by sec. 51 (xxxv.) and (xxxix.) of the Constitution.

Australian Boot Trade Employees' Federation v. *Whybrow & Co.*, (1910) 11 C.L.R., 311, distinguished.

Sec. 101 of the *Justices Act* 1902 (N.S.W.) provides that "(1) Any party to the proceedings, if dissatisfied with the determination by any justice or justices in the exercise of their summary jurisdiction of any information or complaint as being erroneous in point of law may . . . apply in writing to the said justice or justices to state and sign a case . . setting forth the facts and grounds of such determination for the opinion thereon of the Supreme Court" &c. Sec. 106 provides that "(1) The Court shall hear and determine the question or questions of law arising on such case;" &c.

Held, by *Isaacs*, *Higgins* and *Starke* JJ., that upon a case stated under sec. 101 the Supreme Court may entertain an objection of law which was not raised before the Court of Petty Sessions if it cannot be cured by evidence.

Knight v. *Halliwell*, (1874) L.R. 9 Q.B., 412, and *Ex parte Anderson*, (1920) 20 S.R. (N.S.W.), 207, followed.

Held, also, by *Isaacs*, *Higgins* and *Starke* JJ., that an appeal to the Supreme Court of a State from an inferior Court of that State is a "cause pending in the Supreme Court of a State" within the meaning of sec. 40A of the *Judiciary Act* 1903-1920.

Per Higgins J.: Under sec. 40A of that Act, as soon as it appears on an appeal to the Supreme Court that the appeal cannot be completely decided without a decision on a question as to the limits of the constitutional powers of the Commonwealth and of the States, it is the duty of the Supreme Court to drop the case and make no order of any sort.

APPEAL removed from the Supreme Court of New South Wales.

On 7th March 1922, before a Stipendiary Magistrate of New South Wales, an information was heard whereby the Australian Timber

Workers' Union, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act*, by its secretary, John Culbert, charged that George Hudson Ltd., being an employer subject to the provisions of an agreement made on 10th November 1920 pursuant to the provisions of the above Act and a memorandum of which certified by the President of the Commonwealth Court of Conciliation and Arbitration had been filed in the office of the Registrar of that Court on 17th December 1920, did commit a breach of such agreement by failing to observe it, in that the defendant did not on 14th February 1922 keep a copy of such agreement posted in a conspicuous place on its works readily accessible to employees. At the hearing it appeared that one of the parties to the agreement as a respondent was George Hudson & Son Ltd., and that George Hudson Ltd. was incorporated on 30th December 1920 and carried on the business until then carried on by George Hudson & Son Ltd. There was evidence that George Hudson Ltd. had failed to post a copy of the agreement as required by the agreement. It was contended on behalf of the defendant that it was not bound by the agreement because the *Commonwealth Conciliation and Arbitration Act* 1921, which was assented to on 16th December 1921, was not retrospective. It was also contended that the agreement was *ultra vires* in relation to the clause as to the posting of a notice of the agreement, since that clause did not deal with an industrial matter as interpreted by the Act. The magistrate having convicted the defendant and imposed a fine, the defendant appealed to the Supreme Court by way of case stated pursuant to sec. 101 of the *Justices Act* 1902 (N.S.W.), the question for the Supreme Court being whether the determination of the Stipendiary Magistrate was erroneous in point of law. On the hearing of the appeal before the Full Court, to which it was referred by *Wade* J., that Court made a rule the substantial portion of which was as follows: "This Court doth, subject to the determination of the constitutional question arising herein, affirm the determination in respect of which the said case was stated": *Australian Timber Workers' Union* v. *George Hudson Ltd.* (1).

The matter now came on for hearing before the High Court.

It was admitted during the argument in the High Court that there

(1) (1922) 22 S.R. (N.S.W.), 534.

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had been an assignment of the business of George Hudson & Son Ltd. to George Hudson Ltd.

Other material facts are stated in the judgments hereunder.

Bavin A.-G. for N.S.W. (with him *Sherwood*), for the appellant. Sec. 24 (1) of the *Commonwealth Conciliation and Arbitration Act* 1904-1920, as amended by sec. 3 of the *Commonwealth Conciliation and Arbitration Act* 1921, should be construed to apply only to agreements made, and to successors who have become such, after the latter Act became law. The Act is penal, and should be strictly construed (*Remmington* v. *Larchin* (1)). The effect of the amendment is to interfere with existing rights, and the presumption is that it is not intended to be retrospective (*In re Athlumney*; *Ex parte Wilson* (2); *R.* v. *Ipswich Union* (3); *In re School Board Election for Parish of Pulborough*; *Bourke* v. *Nutt* (4); *British Broken Hill Proprietary Co.* v. *Simmons* (5)). The amendment made by sec. 3 of the Act of 1921 is beyond the power conferred on the Commonwealth Parliament by sec. 51 (xxxv.) and (xxxix.) of the Constitution; for it purports to impose a liability upon a person who was not a party to the dispute or to the agreement. If the Parliament attempts to bind persons, not because they are parties to a dispute, but because they are engaged in an industry, it goes beyond its powers. This case is governed by the decisions in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (6), and *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (7). Such a provision is not incidental to the power conferred by sec. 51 (xxxv.). The power conferred on the Commonwealth Court of Conciliation is necessarily limited by the subject matter of a particular dispute. Sec. 3 purports to bind employers wholly independently of the subject matter of the dispute, and seeks to impose the obligations of an agreement on successors whether it was or was not in dispute that successors should be bound. The question of the validity of sec. 3 is a question of the limits *inter se* of the constitutional powers of the Commonwealth and the States (*Jones* v.

(1) (1921) 3 K.B., 404, at p. 408.
(2) (1898) 2 Q.B., 547.
(3) (1877) 2 Q.B.D., 269.
(4) (1894) 1 Q.B., 725, at pp. 737, 742.
(5) (1921) 30 C.L.R., 102.
(6) (1910) 11 C.L.R., 1.
(7) (1910) 11 C.L.R., 311.

Commonwealth Court of Conciliation and Arbitration (1)). On a case stated pursuant to sec. 101 of the *Justices Act* 1902 (N.S.W.) the Supreme Court has jurisdiction to entertain a question of law which was not raised in the Court below (*Ex parte Anderson* (2)). If that case is good law, an objection can be taken in the Supreme Court although that objection is one which the Supreme Court has no jurisdiction to decide. The point which was taken as to the validity of sec. 3 of the Act of 1921 was one arising on the case within the meaning of sec. 106 of the *Justices Act*.

[ISAACS J. referred to *Knight* v. *Halliwell* (3); *Kates* v. *Jeffery* (4); *Ex parte Markham* (5).]

The effect of sec. 40A of the *Judiciary Act* is that the whole matter which was in the Supreme Court is removed into the High Court, which can finally decide the rights of the parties in that matter. (See *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co.* (6).) The case stated for the Supreme Court was a "cause pending in the Supreme Court" within the meaning of sec. 40A. Sec. 39 of the *Judiciary Act*, which is a valid enactment (*Lorenzo* v. *Carey* (7)), gave the Court of Petty Sessions original Federal jurisdiction to entertain the information, and gave the Supreme Court appellate Federal jurisdiction to entertain the case stated (*Ah Yick* v. *Lehmert* (8)).

Loxton K.C. and *F. L. Flannery*, for the respondent. The Parliament having power to legislate as to the making an agreement binding on the parties, the question whether it had also power to make the agreement binding on successors of the parties is not a question of the limits *inter se* of the powers of the Commonwealth and the States. When a matter comes before the High Court pursuant to sec. 40A of the *Judiciary Act*, it is before that Court in the exercise of its original jurisdiction, and not of its appellate jurisdiction. Matters which have been decided by the Supreme Court can only come before the High Court by appeal in the ordinary way.

(1) (1917) A.C., 528; 24 C.L.R., 396.
(2) (1920) 20 S.R. (N.S.W.), 207.
(3) (1874) L R. 9 Q.B., 412.
(4) (1914) 3 K.B., 160.
(5) (1869) 34 J.P., 150.
(6) (1919) 27 C.L.R., 249.
(7) (1921) 29 C.L.R., 243.
(8) (1905) 2 C.L.R., 593.

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Sec. 3 of the *Commonwealth Conciliation and Arbitration Act* 1921 applies to agreements made and to successions which take place before the Act was passed. The word "shall" in sec. 24 (1) is mandatory, and does not import futurity (see *Page* v. *Bennett* (1)).

[ISAACS J. referred to *West* v. *Gwynne* (2).]

The *Commonwealth Conciliation and Arbitration Act* is a remedial and not a penal Act, and the rules of construction for penal Acts should not be applied. The amendment made by sec. 3 of the Act of 1921 is not beyond the powers of the Commonwealth Parliament. The framers of the Constitution should be taken to have had in consideration the rules of law. At equity an assignee who purchases a business with knowledge of a decree made in respect of it takes the business subject to the obligations of the decree (*Pratten* v. *Peacock* (3)). The doctrine of *lis pendens* is necessarily implied in the powers of the Commonwealth Parliament. It is incidental to the power as to conciliation and arbitration to enact that persons who take over a business shall take over the agreements as well as the awards which are in force as to that business. The matter is improperly before this Court. If the Supreme Court of New South Wales has, under the *Justices Act* 1902, power to entertain a point of law not taken before the inferior Court, that power extends only to points of law with which the Supreme Court has power to deal. (See *Kates* v. *Jeffery* (4).) The words "any cause pending" in sec. 40A of the *Judiciary Act* refer to any matter pending in the original jurisdiction of the Supreme Court, and not to a matter pending in its appellate jurisdiction. The definition of "cause" in sec. 2 of the *Judiciary Act* does not include this case. The only method in which this matter can be brought before this Court is by an appeal under sec. 39.

[ISAACS J. referred to *Stockton and Darlington Railway* v. *Brown* (5).]

Bavin, A.-G. for N.S.W., in reply.

Cur. adv. vult.

Dec. 15, 1922.

KNOX C.J. The majority of the Court is of opinion that the question asked by the case stated should be answered No, and that the

(1) (1860) 2 Giff., 117.
(2) (1911) 2 Ch., 1, at p. 11.
(3) (1899) 20 N.S.W.L.R. (Eq.), 147.
(4) (1914) 3 K.B., at p. 164.
(5) (1860) 9 H.L.C., 246.

costs in the Supreme Court and in this Court should be paid by the defendant company. The reasons will be given later.

The following written judgments were delivered :—

KNOX C.J. Before 10th November 1920 there was an industrial dispute extending beyond the limits of one State between the respondent Union and a number of employers in the timber trade, including a limited company incorporated as George Hudson & Son Limited. On 10th November 1920 this dispute was settled by an industrial agreement made and certified under sec. 24 of the *Commonwealth Conciliation and Arbitration Act*, and that agreement was on 17th December 1920 filed in the office of the Registrar. It was a term of the agreement that a copy of it should be kept posted in a conspicuous place in the works of the respective employers who were parties to the agreement.

On 30th December 1920 the appellant, which is a limited company incorporated under the name of George Hudson Ltd., became, by assignment, the owner of the business formerly carried on by George Hudson & Son Ltd., and it is not disputed that the former company was the " successor in business " of the latter company. By sec. 3 of the amending Act No. 29 of 1921, which became law on 16th December 1921, it was provided that sec. 24 of the Principal Act should be amended by inserting in sub-sec. 1, after the words " parties to the agreement," the words " or any successor, or any assignee or transmittee of the business of a party bound by the agreement, including any corporation which has acquired or taken over the business of such party." In the month of March 1922 the appellant was charged on information before a Police Magistrate with a breach of the agreement of 10th November 1920 in that it did not on 14th February 1922 keep a copy of the agreement posted in a conspicuous place in its works. The magistrate convicted the appellant, and at its request stated a case for the opinion of the Supreme Court. On the argument before the Supreme Court it was for the first time contended that, if the effect of the amendment introduced by sec. 3 of the Act of 1921 was to impose obligations on persons who were not

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parties to the dispute in settlement of which the agreement was made, that enactment was beyond the powers of the Commonwealth Parliament. On this question being raised, the Supreme Court, being of opinion that on its true construction sec. 3 had this effect, abstained from deciding the question submitted by the case stated by the magistrate, and the matter was set down before this Court under the provisions of sec. 40A of the *Judiciary Act* 1903-1920.

Three questions were argued before us, namely, (1) whether the matter was properly before the High Court; (2) whether on its true construction sec. 3 of the amending Act of 1921 extended to cases in which the agreement was made and the succession took place before the passing of that Act; (3) whether sec. 3 of the amending Act of 1921 was within the powers of the Commonwealth Parliament.

On the first and second of these questions I do not propose to say more than that while my mind is not free from doubt I do not dissent from the conclusions arrived at by the majority of the members of the Court.

The remaining question is whether it was within the power of the Commonwealth Parliament to enact that an agreement made between parties to an industrial dispute should be binding not only on those parties, but also on the successor in business or the assignee of the business of any party to the agreement. In effect, sec. 3 of the amending Act provides that an agreement made, certified and filed in accordance with sec. 24 of the Principal Act, shall be binding on the successor in business of any party to such agreement even though such successor was not a party to the industrial dispute in settlement of which the agreement was made or, as in the present case, was not even in existence while the dispute existed or when the agreement settling the dispute was made. The question may be stated thus: Has Parliament power, for the purposes of preventing or settling an industrial dispute, apprehended or existing, between A and B, to enact that any agreement made by them in settlement of the dispute or part of it shall be binding on C, a person who while the dispute exists has no connection with either of the disputants or their businesses? In my opinion this question can, consistently with the

decision in *Whybrow's Case* (1), only be answered in the negative. In that case the Court decided unanimously that it was beyond the power of Parliament to enact that persons not parties to an industrial dispute might, by means of an order of the Court of Arbitration, be bound by an award of that Court duly made for the purpose of preventing or settling that dispute. The Court held also that the fact that a dispute could not be effectively prevented or settled except by making the award binding on persons not parties to the dispute did not warrant the enactment as being incidental to the exercise of the power to legislate for the prevention or settlement of the dispute. Different reasons were given by the members of the Court in support of these conclusions. *Griffith* C.J. thought that there could be no dispute unless there were ascertainable parties or an ascertainable difference capable of being composed. *Barton* J. said at pp. 323-324 :—" To empower the Court to declare that any condition of employment, or the like, prescribed by its award shall be a common rule binding the whole industry and all engaged in it, is plainly to extend the authority of the Court beyond the ambit of the dispute and to bind persons other than the disputants by the decisions of the Court. This can by no means be considered as in its nature incidental to the settlement of a dispute which only the disputants brought or could bring before the Court. The award itself is the means prescribed for the settlement of the dispute as between the actual parties. If the award did more it would be an excess of jurisdiction to that extent, even if expressly confined in its operation to the immediate parties and their industrial affairs. If it not only included more than the subject matter of the dispute but involved others than the parties, the case would be worse. How then can it be bettered, if the attempt is made to produce any such effect either as to parties or subject matter by nominally separating the operations and giving the name of a common rule to the excess ? The process cannot possibly be merely incidental to that which depends for its validity upon the limitation of the adjudication to the subject matter of the dispute and the parties thereto. And the mere citing of persons not parties to the dispute, even by serving process on them

(1) (1910) 11 C.L.R., 311.

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instead of calling upon them, generally and not even by name, in an advertisement, would not make that lawful which previously lacked constitutional warrant." *O'Connor* J. said at p. 329:—"But whatever incidents or attributes these various legislatures may, in framing their arbitral systems, have added to, or taken from, the system of adjudication previously known to the common law as arbitration, neither in that legislation nor elsewhere is there to be found any meaning of the term which would justify its being used to describe a method of adjusting industrial rights, which is wanting in certain elemental incidents and attributes which the word arbitration in itself must necessarily connote. One can have no mental conception of arbitration without parties in difference over some matter capable of judicial adjustment by an arbitrator. The exercise of an authority to impose conditions of employment upon employers and employees between whom there exist no such differences, even though it may be exercised by a standing arbitral tribunal, is not and cannot be an application of arbitral power. No fair reading of sub-sec. xxxv. of sec. 51 of the Constitution can justify the Parliament of the Commonwealth in conferring such an authority on the Federal Arbitration Court." *Isaacs* J. said at p. 335:—"The next contention is this: assuming that arbitration like conciliation applies even to cases of difference not yet matured into disputes where the issues are categorically stated, yet arbitration is not, any more than is conciliation, an intelligible conception except where some difference can be perceived, and expressed in terms, however general, between the parties who are to be affected by the decision. I agree with that. The Constitution leaves to Parliament the most absolute choice as to the form of tribunal and its procedure; the conciliating and arbitrating organ may be a Court, or a layman, a committee of strangers, or a combination of representatives of the parties concerned, its method of action may be voluntary, or compulsory; unanimity or majority of opinions may control its decisions, further there may be light or heavy sanctions for non-compliance, or there may be none at all; notice may be given personally or by advertisement: all this is for the will and discretion of Parliament, but a limit is fixed beyond legislative control—the process must be either conciliation or arbitration or both, and one prime essential both of reconcilement by

persuasion or influence, and of authoritative settlement is that there must be some disagreement, some want of harmony calling for the exercise of those offices." And at p. 337 :—" But the words of the enactment are not reasonably open to such construction. They were plainly intended to confer, and if validly enacted would confer, jurisdiction to establish by official pronouncement a binding rule of conduct extending over the whole industry, not merely over the whole area of the dispute in that industry, and applying to every person engaged in it, although he was in no way involved in any dispute either by personal activity, or as a member of an organization, or as a working unit of one of two opposing classes in actual contest though not formally organized." *Higgins* J. said at p. 339 :—" The difficulty arises from the fact that the persons engaged in the industry, not parties to the award, whom it is sought to bring under the common rule, are not in need of any conciliation and arbitration, as they are not engaged in or threatened with any dispute." And at p. 343 :—" So far, it seems clear enough that the words of the Constitution do not warrant this provision in the Act for extending any regulation in an award to persons who are not in a dispute, and between whom a dispute is not threatened or probable. Such an extension is not within the connotation of conciliation or of arbitration."

Dealing with the argument that the common rule provisions might be supported as " incidental " to the exercise of the main power, *Isaacs* J. said at pp. 337-338 :—" Then it was sought to support the legislation on another ground, namely, that it was incidental to the settlement of the dispute in respect of which the award was made. The view presented was that the Court could act under the subsections, whenever it was found necessary for the effective settlement of the actual dispute. It is true that the grant of a power carries with it the grant of all proper means not expressly prohibited to effectuate the power itself. See the cases cited in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1). No instance of this principle could be stronger than the case of *Attorney-General for Canada* v. *Cain* (2), where the Privy Council held that the legislative power to exclude aliens connoted the power to expel, as a necessary complement of the

(1) (1907) 4 C.L.R., 1087. (2) (1906) A.C., 542.

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power of exclusion. But that was because the power of exclusion could not otherwise, even within its own admitted limits, be effectually exercised and enforced. The case is quite different when it is found that a given power, though fully and completely exercised and enforced, is not effectual to attain all the results desired or expected. The matter is then one for the consideration of the authority in whom resides the right of granting a power more extensive. It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met." And *Higgins* J. said at p. 345: "Nothing is incidental to that power which is not directly aimed at the precise method of dealing with industrial disputes—conciliation and arbitration—which the Constitution contemplates."

The decision in that case appears to me to be an authority for the proposition that Parliament has no power under the Constitution (sec. 51 (XXXV.) and XXXIX.)) to impose, either by direct enactment or through the medium of an arbitrator, obligations on persons who are not parties to an existing or probable industrial dispute.

During the argument it was suggested that if this provision were held to be beyond the power of Parliament it would follow that Parliament had no power to provide, as it did by sec. 29 (*d*) of the Act, that an award should be binding on all members of organizations bound by the award; but, even if this be so, it affords no reason for extending by judicial construction the powers conferred on Parliament by the Constitution.

In my opinion, Parliament had no power to enact the provision of sec. 3 of the amending Act of 1921.

My brother *Gavan Duffy* desires me to say that he agrees with the conclusion at which I have arrived on this question.

ISAACS J. In this case judgment has already been formally pronounced dismissing the appeal; and I now state my reasons.

This case was originally argued on what I may term the merits of the case itself. It was then placed in the list for argument on what may be called, by way of distinction, preliminary points, though these points are in themselves very important. I do not mean to

say that they present to my mind any real difficulty of solution, but that, if the objections raised could be sustained, the consequences would be very serious. I deal with the preliminary points in logical order.

1. *Sec.* 106 *of the Justices Act* 1902.—An objection was taken on the new argument that, if well founded, destroys the basis of our own jurisdiction to hear this case. It was that sec. 106 of the *Justices Act* 1902 did not extend to any point of law on a case stated, unless it had been taken before the Court of Petty Sessions. The words of sub-sec. 1 of that section are : " The Court shall hear and determine the question or questions of law arising on such case ; and shall (*a*) reverse, affirm, or amend the determination in respect of which the case was stated ; or (*b*) remit the matter to the Justice or Justices with the opinion of the Court thereon ; or (*c*) make such other order in relation to the matter as seems fit." I omit the proviso. The objection was rested upon this argument : Sec. 101 provides that the case " may be " in the form in the Third Schedule, setting forth the facts and grounds of the determination for the opinion thereon of the Supreme Court ; it was contended that, inasmuch as " grounds " were to be mentioned, they were all the Supreme Court could pass upon. The language of the provision appears to me entirely opposed to the contention. The Supreme Court's " opinion " is not directly as to the " grounds " any more than as to the " facts," which equally have to be stated. Nor is it as to the " determination," but the " opinion " is to be " thereon," that is, on " the case."

For centuries, as was pointed out in *Merchant Service Guild of Australasia* v. *Newcastle & Hunter River Steamship Co.* [*No.* 1] (1), the two expressions " state a case " and " opinion " have been coupled together and received a definite signification. Some Acts enable definite questions to be put to the superior Court for the authoritative guidance of the primary tribunal, others leave to that Court the complete determination of the controversy by its own judgment ; or these functions may be combined. The legislation in sec. 101 and sec. 106 is substantially and in all relevant respects identical with that in the Imperial Act 20 & 21 Vict. c. 43,

(1) (1913) 16 C.L.R., 591, at p. 621.

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secs. 2 and 6. No schedule is there provided corresponding to the New South Wales Third Schedule; but the latter is not obligatory, and is only a suggested form, following the usual form found in almost any English book of practice dealing with justices' law. For instance, see *Scholefield and Hill's Appeals from Justices of the Peace* (published in 1902), at pp. 329-330. Now, the legislation was introduced into New South Wales by Act 45 Vict. No. 4 of 1881, copying in all relevant respects the language of the English legislation and with the full knowledge by Parliament that a definite interpretation had been attached to that language. That is a clear case of adoption of language as interpreted. The interpretation had been placed upon the English legislation in at least two conspicuous cases. In *Ex parte Markham* (1) the Court of Queen's Bench (*Cockburn* C.J. and *Blackburn*, *Mellor* and *Lush* JJ.) held that a fatal objection in law may be taken in the appellate Court, though not noticed before the justices, the condition being that it could not be cured by further evidence. The basis of that decision obviously is that in law the whole matter is open to the appellate Court on the law with respect to the facts, but, that being open, the ordinary dictates of justice require that neither party shall be prejudiced by the late discovery of the new point. If it is incurable, he is not prejudiced, except perhaps as to costs; but, if curable by evidence, he may be prejudiced, and, therefore, on grounds of natural justice the party taking it must bear his own misfortune rather than pass it on to the other party. This is a course followed in all appellate jurisdiction where no statutory provision prevents it. It is the rule in this Court and in the Privy Council; and is exemplified in numerous cases. In 1874, in *Knight* v. *Halliwell* (2), the principle was reaffirmed. The question arose very neatly. A notice to have a child vaccinated, dated 10th March 1872, had been given, and on this the appellant had been convicted previously. He contended before the justices that the same notice was insufficient for the then present proceedings, because it had been exhausted by the prior conviction. The magistrates ruled against that contention, and it was set out in the case. But in the Court of Queen's Bench a new point was stated, namely, that, whether there had been a prior conviction or not, the

(1) (1869) 34 J.P., 150. (2) (1874) L.R. 9 Q.B., 412.

notice was more than twelve months old when the prosecution was instituted. The objection was taken that the point had not been raised before the justices. The Court overruled the objection, and considered the point—two Judges not even limiting it to incurability, but the third (*Blackburn* J.) so limiting it. They unanimously upheld the new contention and allowed the appeal.

That was the settled law nearly fifty years ago; and in 1881 the New South Wales Legislature, with the full knowledge of that interpretation repeated and settled, adopted the same language. In *Ex parte Anderson* (1) the Supreme Court took the same view. A mandamus was granted to compel justices to state a case so as to enable the appellant to argue before the Supreme Court a point that had not been taken before the magistrates. Obviously, unless the Court was of opinion that it could entertain, however it might ultimately decide, the new point, the mandamus would have been refused. I have no doubt that, both from the intrinsic meaning of the words and from the interpretations put upon them, the present objection should be overruled.

I should like to add another observation before parting with this point. The Court of Petty Sessions is *par excellence* the poor man's Court, and is intended rather for a broad and speedy decision on facts than for any ruling on a difficult point of law. Sec. 101 is perhaps, as to parties in civil cases at all events, the most extensive and least expensive method of appeal so as to obtain a Supreme Court decision on the legal obligations of the parties. Whether represented by counsel or not or, being represented by counsel, whether or not he is habitually accustomed to the recondite intricacies of scientific jurisprudence, if a litigant, merely because some decisive but unusual point escapes attention, were to be debarred from the benefit of the Supreme Court's ruling on the point, Parliament would have failed to meet an obvious necessity. The decisions I have quoted show that, in the opinion of the Judges who gave them, that failure did not exist; and I agree with them. That establishes, in my opinion, that, so far as the State Act operates, the case stated was open to the Supreme Court to decide every point of law that was relevant to the facts stated. Unless, therefore, some competent law intervenes to

(1) (1920) 20 S.R. (N.S.W.), 207.

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cut down that jurisdiction, it could and should be exercised whatever the point of law may be, subject only to recognized principles guarding that exercise, as, for instance, curability already mentioned.

2. *Cause Pending.*—First, when the matter was in the Supreme Court, was it a "cause" within the meaning of the *Judiciary Act*? Next to "matter," "cause" is the most comprehensive of terms in this connection. "Matter" is independent of parties, "cause" is not: "matter" includes an incidental proceeding; "cause" refers to the main controversy between the parties. But, given a subject of litigation and contesting parties, then any lawful process instituted for the determination of the controversy is a "cause." The *Oxford Dictionary* gives even a wider connotation to the word than I, having regard to the specific provisions of the *Judiciary Act*, think necessary. I do not fail to observe that the Act employs the word "includes" and not "means," and I do not say it would not be possible to gather a larger meaning of the word "cause" if requisite to carry out the main intention of Parliament. But, accepting for this purpose the limited meaning of "cause" that I have ascribed to it, the next question is what is included in the word "pending." Is that expression restricted to a "cause" which is still in the Court in which it originated? Or is it applicable to the cause when it has reached a higher Court by way of appeal or removal? One very noticeable use of the word "pending" occurs in sec. 45 which shows that the Legislature understood that a cause might be "pending" in the High Court though not originally commenced there. And, if remitted under that section, would the cause be pending in the Court to which it was remitted? Clearly it would. This indicates that the ordinary meaning of "cause pending" is meant to be adhered to. That a cause is "pending" in the Court which it has reached on appeal is demonstrable. In *South Australian Land Mortgage and Agency Co* v. *The King* (1) I quoted a passage from the judgment of *Ellsworth* C.J. in *Wiscart* v. *Dauchy* (2), beginning:—"An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and retrial." The House of Lords so regards it. Two instances taken at random will illustrate this—*Stockton and Darlington Railway* v.

(1) (1922) 30 C.L.R., 523, at p. 552.

(2) (1796) 3 Dall., 321, at p. 327.

Brown (1), in 1860, and *Williams Bros.* v. *E. T. Agius Ltd.* (2), in 1914. The Imperial Legislature so regards it (see *Judicature Act* 1873, sec. 24, sub-sec. 5).

3. *Sec.* 40A *of the Judiciary Act.*—The case has reached this Court, and it is so argued, via sec. 40A of the *Judiciary Act*. The first problem as to that is whether it was at any time a "cause pending in the Supreme Court." I leave aside for a moment the words "there arises any question as to the limits *inter se*," &c. Assuming my view as to secs. 101 and 106 of the *Justices Act* to be correct, the case, so far as the provisions of the State law were concerned, was properly brought into the Supreme Court on appeal. What Federal law prevented that? Not sec. 38A, because that section assumes that an appeal may be properly instituted in the Supreme Court and that in the course of the appeal the question *inter se* arises. When that does arise, and not before, the hand of the Supreme Court is stayed so as to deprive it of all power thenceforth to "entertain or determine" the matter. From that moment the "matter"—whether a "cause" or not—though unchanged in itself so far as sec. 38A is concerned, is taken out of the hands of the Supreme Court altogether. What becomes of it? It may have been up to that moment a purely State matter—as, for instance, under a State income tax law, or a State stamp law, or a liquor law; or it may have been under a Federal law. But, whatever its previous nature, it becomes at the moment the constitutional question arises, and not before, a Federal matter of which the State Court is, by virtue of sec. 77 (II.) of the Constitution, completely divested. But it is still a living "cause"; and, as to what is then to be done, the section (sec. 38A) says: "The jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Court." That is in express terms defining *pro tanto* under sec. 77 (II.) "the extent to which the jurisdiction of any Federal Court shall be exclusive of that which" (1) "belongs to" (State jurisdiction) "or" (2) "is invested in" (Federal jurisdiction) "the Courts of the States." And, as it relates to Courts both "of first instance" and "of appeal," it follows that the High Court jurisdiction spoken of is both original and appellate. That double inclusion is obviously intended so as to

(1) (1860) 9 H.L.C., at p. 262.

(2) (1914) A.C., 510, at p. 534.

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make sec. 38A accord with the terms of sec. 74 of the Constitution. But, having deprived all State Supreme Courts of jurisdiction either original or appellate to deal with the matter and having said that the High Court's jurisdiction to deal with it shall be exclusive, the next question is, what is meant by the High Court's jurisdiction? It cannot be limited to appellate jurisdiction, for a very simple and conclusive reason. Since "matters involving any question, *however arising*, as to the limits *inter se*," may originate as a purely State matter of jurisdiction, let us suppose it originates in the Supreme Court and proceeds half way through a trial (not for indictable offence). The Supreme Court is seised of the matter, but at a given moment the question postulated by sec. 38A arises. At that moment the Supreme Court is stripped of jurisdiction and the High Court's "jurisdiction" is exclusive. What jurisdiction? Not appellate; for there is as yet nothing to satisfy the provisions of sec. 73 of the Constitution, and these cannot be enlarged. Clearly, then, sec. 38A includes *original* High Court jurisdiction to be exercised by virtue of sec. 30. Carry the matter further:—Suppose the trial ends and judgment is given by the Supreme Court as a Court of first instance, without any suggestion of a Federal question; and suppose on appeal to the Supreme Court, that Court exercising appellate jurisdiction, there arises in the course of argument the necessary question of limits *inter se*: again the hands of the Supreme Court on appeal are stayed. Is the cause a "cause pending" in the Supreme Court? I should say, indubitably yes. Is it then pending in original jurisdiction? I should say, indubitably no. Then comes the crucial inquiry: Is it "a cause pending in the Supreme Court" within the meaning of sec. 40A? Can that question be reasonably answered except affirmatively? In my opinion it cannot. But if so, it is, though in the appellate jurisdiction of the Supreme Court, "removed" to the High Court just as before. It is thrust out of the Supreme Court, and, unless it is homeless or a legal outcast for the time being, its home is by force of the statute in this Court. And what is true of the appellate jurisdiction of the Supreme Court in one case is true in all. Let us see what the section says. Sec. 40A says: "When, in any cause pending in the Supreme Court of a State, there arises any question as to the limits *inter se*" &c., then it shall be the duty of the

Court to proceed no further in the cause and the "cause shall be by virtue of this Act, and without any order of the High Court, *removed* to the High Court." "Cause pending" being, as I have said, a term applicable to both original and appellate jurisdiction of the Supreme Court, the "cause," whatever it is, is "removed" by the self-operating provisions of the section to this Court, which by later words is directed to hear it as in its original jurisdiction. The theory of the legislation is plain. The original jurisdiction of the High Court can only exist in certain matters. One of these is the class mentioned in sec. 30 as involving the interpretation of the Constitution. The "matter" never comes into existence *as such* for the purpose of sec. 40A until a certain event happens, namely, the *arising of the question* postulated by sec. 38A or sec. 40A. The moment that arises the jurisdiction of the Supreme Court vanishes and the cause passes by force of the statute to the High Court to be dealt with under its original jurisdiction. All the rest is procedure. This case was a cause pending in the Supreme Court up to the instant the fatal point arose, and then the law removed it into this Court. It is in our hands, ready to be determined.

The main question has then to be considered.

4. *Construction of Sec. 3 of the Act of* 1921.—I now proceed to the matters of substance of the case itself—construction of sec. 3 of Act No. 29 of 1921. The first question of substance is as to the construction of the amending enactment. The Attorney-General of New South Wales took up two positions. His first and main position was that the amending Act was to be read prospectively so as to apply only to such successors or assignees or transmittees of the business of a party bound by the agreement as became such successors, &c., after 16th December 1921—when the amending Act was passed. That is a well-known form of argument as to the non-retrospective operation of an Act. Then, in the course of the argument, he developed a further contention, which appears to be novel. And before dealing with retrospectivity on the ordinary basis I shall consider this second contention. He said that, not only does the new Act require the "successors," &c.,—the new feature in the legislation—to be prospective, but it also requires, for the purpose of binding successors, that the "agreement"—one of the old features in the legislation—must be

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prospective. Obviously, if he is right as to the "agreement," the same reasoning must apply to make the other former features prospective, that is, the "dispute" and the "business"—especially the "business," because that is mentioned for the first time in the new Act, in connection with agreements, though clearly implied in the former legislation. The contention was that "agreement" now in sec. 24 (1) must be read "distributively." In one sense that is always so—in the sense, I mean, that every agreement that comes up for consideration must be tested to see whether it answers the description and conforms with the conditions of the section. But on that basis there is no need to go beyond the Attorney-General's first ground. If "distributively" goes further, as he secondly contends, it means, if I gather his argument aright, that, when the word "agreement" is considered in relation to the words "the parties to the agreement" simply, it means any agreement within the section made after 15th December 1904, the date of the Principal Act; but, when the word "agreement" is considered in relation to the phrase "the parties to the agreement or any successor, or any assignee or transmittee of the business of a party bound by the agreement," then it means only such an agreement as is made after 16th December 1921, the date of the amending Act. This, it was suggested, was the proper outcome of the language of futurity found in the sub-section, namely, (1) a memorandum of its terms *shall be made* in writing, &c.; (2) the memorandum when so certified *shall be filed*; (3) "and unless otherwise ordered . . . *shall*, as between the parties to the agreement, *have* the same effect as, and *be deemed* to be, an award," &c. Sub-sec. 2 continues where no agreement is arrived at, and says: "The Court *shall*, by an award, *determine* the dispute," &c. All these instances where "shall" is used were said to indicate futurity. So they do in one sense: the sense in which every command indicates it—because it is always something to be done or observed in the future. But the expressions referred to are like the expression "to be provided" in *Batt* v. *Metropolitan Water Board* (1). That phrase was expanded by Lord *Wrenbury* (then *Buckley* L.J.) as equivalent to "shall be provided" (2). The argument was that "to be provided" was at least

(1) (1911) 2 K.B., 965.

(2) (1911) 2 K.B., at p. 980.

not so absolutely clear as to compel the Court to construe it prospectively. Now, *in arguendo*, Lord *Wrenbury* said (1) :—" The operation of a statute is correctly said to be retrospective when it enacts that something which was not the law at a date anterior to its passing shall be treated as having been the law at that date. An enactment which provides that in future the liability to repair certain existing pipes shall rest upon certain persons upon whom it did not rest before is not retrospective in that sense." That was, in effect, what he had said in *West* v. *Gwynne* (2) a few months before. During the argument I quoted that case, and will not now do more than say that the words " all leases " in that case are precisely similar for present purposes to " any successor " in this case. Reverting to *Batt's Case*, Lord *Moulton* (then *Fletcher Moulton* L.J.) said (3) that the Court below " take the phrase ' to be provided ' as applying only to pipes not existing at the date of the passing of the Act. To my mind the words ' to be ' in the phrase ' to be provided ' have no relation to futurity, but to obligation. The supply of water to which the section relates is, of course, a future one, i.e., one which takes place subsequently to the passing of the Act." Lord *Wrenbury* said the same (4). So far as one case can assist another in construction, that case is greatly in point. In principle there is no distinction. And, applying the principle so clearly stated by Lord *Moulton*, I am unable to read the enactment that the agreement " *shall have the same effect* as an award " and shall be deemed to be an award, as anything but a legislative command *how* the agreement is to be regarded in law. So as to the other phrases *in pari materia* : " A memorandum of its terms shall be made " and " shall be filed." Those are not simple futurity as if they were " will be " made and filed. They indicate the imperative conditions of legal vigour ; and, if complied with, then the next two phrases indicate the imperative nature of that legal vigour. I therefore hold that the Attorney-General's " distributive " contention is not sound.

I deal with his first contention that, assuming " agreement " to continue to have the meaning it had immediately before the amendment, the words " successor, assignee or transmittee " refer to persons

(1) (1911) 2 K.B., at p. 970.
(2) (1911) 2 Ch., at pp. 11-12.
(3) (1911) 2 K.B., at p. 978.
(4) (1911) 2 K.B., at p. 980.

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who became such after the passing of the Act. Much of what I have said, and notably the reference to *West* v. *Gwynne* (1) and *Batt's Case* (2), apply with equal force to this contention. But there are additional considerations on both sides. The Attorney-General relied on cases which relate to impairment of existing rights or obligations or the legality of past transactions. He quoted *In re Athlumney* ; *Ex parte Wilson* (3), and *Bourke* v. *Nutt* (4), and he relied on the principle that, unless the language was so plain as to admit of but one reasonable construction, the enactment ought, like a penal act, to be construed as not imposing a burden on successors who became such prior to its passing.

In presence of decisions and judicial utterances apparently of varying aspect, it behoves the Court to find the basic principle by which to test any given case. That principle is stated in *Maxwell on Statutes*, 6th ed., at p. 381, on the authority of the *Institutes* (2 *Inst.*, 292) in these terms: "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation." That is the universal touchstone for the Court to apply to any given case. But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.

The *Commonwealth Conciliation and Arbitration Act* is not a penal Act; nor is it at all proper to regard it simply as imposing obligations or impairing rights. To regard it so would be to mistake its real import. It is a statute embodying a great public policy. Its purpose—of which the advantages or disadvantages are quite outside the province of a Court to discuss, since its inscription on the Statute Book is the declared national will—is to encourage and maintain industrial peace in the Commonwealth. To this end it establishes

(1) (1911) 2 Ch., 1.
(2) (1911) 2 K.B., 965.
(3) (1898) 2 Q.B., at pp. 551-552.
(4) (1894) 1 Q.B., 725.

a high public authority, which by conciliation and arbitration may prevent or settle disputes which menace the industries of the Commonwealth. Industrial disputes of course involve wages, hours of labour, safety, sanitation and other incidents of industry. The modification of legal relations between employers and employees in relation to these matters in respect of those subjects is of course involved, and that means alteration of rights and obligations. But that is not the prime purpose of the legislation ; it is the necessary means of achieving the great object in view—the elimination of stoppage in industries that serve the people of the Commonwealth as a whole. The interests of the disputants are great ; but it is because struggles over their individual interests are detrimental to the great general interests of the Commonwealth that the incidental alteration of legal relations of those engaged in industry is undertaken. What resemblance has an enactment with that vast scope, charged with the welfare of a whole community, to an Act imposing a penalty on an individual, or altering the rights of a bankrupt ? The Legislature was well aware that in various industries awards and agreements in the nature of awards had been made and were in operation over vast portions of this continent. The timber industry was an example ; and Parliament must be taken to have known prior to its amending Act that in this very industry with which we are now concerned a dispute had arisen and was settled, partly by an award and partly by agreement regulating the mutual rights and interests of a large number of employers and employees in every State but Queensland. Parliament knew that to let some employers escape from the adjusted obligations would or might be grossly unfair to others, both in the same State and in other States, and grossly unfair to the employees who had been led to make an agreement on the assumption that it was as stable as a compulsive award. Parliament knew, moreover, that a successor to a business could not become so without knowing the statutory obligations of his predecessor to his employees. Parliament does not act in such a case without a comprehensive view of the situation. Let us suppose the settled rights of those employees, and the rights of competing employers under the same or a corresponding statutory obligation, and also the general rights of the public to a maintenance of industrial peace, to be placed by Parliament in one

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scale of justice, and the claims of the successor of the business to disregard individually the declared right of the employees to settled remuneration and other industrial conditions in the other scale: which can we suppose to weigh the heavier? In other words, applying the test as stated in *Maxwell*, on which side is justice? What case is made for restricting the application of the statute to the smallest ambit consistent with any possible construction of its words? To my mind the very opposite construction should be given to it as a remedial statute—as a statute which endeavours to replace strikes and lockouts with public examination and decision and to remove industrial discontent by abolishing industrial injustice. The effort may or may not be successful, it may or may not be attended with difficulty and error, its policy may be right or wrong—that is for the Legislature to decide; but, as long as it is the legislative will to maintain it, and, as the recent amendment shows, to confirm and to strengthen it where judicial decisions have declared it weak, it is, I apprehend, the function of this Court to construe it in the spirit of its manifest purpose.

I find this to be the acknowledged principle enunciated by the highest judicial authorities. In *The Pieve Superiore: Giovanni Dapueto* v. *Wyllie & Co.* (1), the Privy Council, speaking of the statute then under consideration, said: "The statute being remedial of a grievance . . . ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow." In *Bist* v. *London and South-Western Railway Co.* (2) Lord *Loreburn* L.C. (speaking of the *Workmen's Compensation Act* 1897, which, like the *Arbitration Act*, certainly in a sense imposed obligations on employers) said: "It is quite true that this Act is a remedial Act, and, like all such Acts, should be construed beneficially." For the purpose of giving effect to the manifest intention of Parliament in a remedial statute, even the literalism of the Act may be departed from. The House of Lords did so in *McDermott* v. *Owners of Steamship Tintoretto* (3) (see per Lord *Loreburn* L.C. (4) and Lord *Atkinson* (5)). Lord *Shaw* (6) made a valuable contribution when he observed: "I

(1) (1874) L.R. 5 P.C., 482, at p. 492.
(2) (1907) A.C., 209, at p. 211.
(3) (1911) A.C., 35.
(4) (1911) A.C., at p. 38.
(5) (1911) A.C., at p. 43.
(6) (1911) A.C., at p. 46.

reckon it to be quite unsound, and to be productive of wrong and mischief, to interpret a remedial statute in the spirit of meticulous literalism."

Upon these considerations I reject also the first contention of the Attorney-General, and hold that the words "successors," &c., apply to the same "agreements" as to the words "the parties," &c., previously found in the section.

To summarize my view, I state in connected form the legal effect of sub-sec. 1 of sec. 24 as amended:—"If an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at (at any time after 15th December 1904), a memorandum of its terms shall be made in writing and certified by the President, and the memorandum when so certified shall be filed in the office of the Registrar and unless ordered and subject as may be directed by the Court shall, as between the parties to the agreement or (as from 16th December 1921) any successor or any assignee or transmittee of the business of a party bound by the agreement, including any corporation which has acquired or taken over the business of such party, have the same effect as and be deemed to be an award for all purposes, including the purposes of section thirty-eight."

5. *The Validity of the Amendment.*—This was a question left over in *Carter* v. *E. W. Roach & J. B. Milton Pty. Ltd.* (1). I cannot entertain any doubt that the amendment is valid. There is a constant danger of overlooking the true meaning of "industrial disputes" and of confusing them with individual disputes. There is also a danger of limiting one's vision by conscious or unconscious reference to the previous words of the statute, as distinguished from the broader words of the Constitution. It is true that Parliament has not legislated to the full extent of its powers; especially was that so at first. But the present amendment must be tested by the breadth of the terms of the Constitution itself, namely, "industrial disputes." Industries cannot, of course, be carried on except by individuals, natural or artificial, and a dispute that extends beyond the limits of any one State can be identified at any given moment by reference to certain ascertained employers and employees—if that is the character of the dispute. Nevertheless, the essential nature of an

(1) (1921) 29 C.L.R., 515.

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"industrial dispute" is quite distinguishable from that of an individual dispute. The former concerns an individual employer affected in his industrial character. It does not assume to say anything about his obligations to any specific individual employee, but is concerned with his obligations towards a class of employees—of which the individuals may yet be unknown. When those general obligations of the employer towards the class of employees are settled, it is not beyond the essential nature of an industrial dispute that they should be settled for his present and his future industrial operations of the nature involved in the dispute. He might consistently be bound for the duration of the industrial bargain, both in respect of his present and of any future business of the class concerned in the dispute. It is within the competence of Parliament to say how far this obligation shall extend; whether, the rights of employees once accrued, the employer, regarding him in his capacity of owner of a particular business, can rid that business of those accrued rights by transferring it, or whether he can rid himself of the obligations towards the class of employees by engaging in another house of business of precisely the same nature.

In the present instance Parliament has thought it expedient, in order to prevent injustice or even a defect of the scheme of industrial peace intended by the statute, to enact that the employees' rights shall not be disturbed by the mere fact that the owner of the business happens to be another individual. In this case the only difference, so far as appears, is a mere change in name. It may or may not be substantial. It is "George Hudson Limited" instead of "George Hudson and Son Limited"; and the change was effected in less than a fortnight after the agreement was registered. In my opinion it was not *ultra vires* of Parliament to enact that the new company should be bound by the obligations of the business. If it was not, neither can new employees in a business, though members of the same organization, be bound or benefited by an award; and the whole fabric of the constitutional power may be, and in actual practice must be, utterly ineffective and useless.

My brother, the Chief Justice, thinks this view is contrary to the unanimous decision in *Whybrow's Case* (1), in which it was held

(1) (1910) 11 C.L.R., 311.

that the common rule as enacted by Parliament was beyond its constitutional powers. Some passages are cited from the judgments in that case. The decision in that case was not "that it was beyond the power of Parliament to enact that persons not parties to an industrial dispute might, by means of an order of the Court of Arbitration, be bound by an award of that Court duly made for the purpose of preventing or settling that dispute." It may be confidently said that the Court that decided that case had no notion that it was holding that where an organization got an award, whether by conciliation agreement or compulsorily, say for five years, no member of the organization who became so after the date of the *dispute*, could derive any benefit from it, or be bound by it under sec. 29 (*d*), but was excluded from its operation. Such a notion is contrary to every award that has been made for nearly twenty years, without challenge. The decision was that it was beyond the power of Parliament to enact that the Arbitration Court could award "a common rule," that is, to impose obligations on those engaged in the industry but altogether outside the area of the dispute. *Barton* J. says (1) that the law "cannot overpass the area of the dispute as to subject matter or as to disputants." That, I think, is also the view of *O'Connor* J. For myself I referred to "the whole area of the dispute in that industry" (2). It is true that it was held that an award can only be made as between the formal disputants; and this is right because they necessarily delimit the area of the dispute, and therefore an enactment which assumed to give power to make an award as to persons outside the area, that is, as between persons other than the formal disputants, was invalid, because inherently inconsistent with arbitration. But while the award can only be made as between the formal disputants, it no more follows that the subject matter of their dispute is limited to them personally than it follows that a contract is necessarily limited at common law to the persons actually entering into the contract. The judgment of Lord *Halsbury* L.C. in *Don Jose Ramos Yzquierdo y Castaneda* v. *Clydebank Engineering and Shipbuilding Co.* (3) is instructive as to this, with respect to "successors." Whether the word "assigns" can be read into a

(1) (1910) 11 C.L.R., at p. 322. (2) (1910) 11 C.L.R., at p. 337.
(3) (1902) A.C., 524, at p. 530.

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document is a matter of construction (*Anglo-Newfoundland Development Co.* v. *Newfoundland Pine and Pulp Co.* (1)). The principle is familiar in equity that a third person not named as a party may sue either of the contracting parties if possessed of an actual beneficial right which places him in the position of cestui que trust under the contract (*Gandy* v. *Gandy* (2)). This principle, also in certain cases a common law principle, was applied by this Court to Commonwealth arbitration in *Mallinson* v. *Scottish Australian Investment Co.* (3). There a person who was not one of the "disputants," and as to whom *nominatim* no award could possibly have been made, was held entitled to sue a respondent to the award. If "disputants" only can be affected by an award, under the Constitution, the Court was clearly wrong in saying (4) : "The new right created *in the employee by the Act operating on the award.*" That was the precise point on which this Court differed from the Supreme Court of New South Wales (see *Mallinson* v. *Scottish Australian Investment Co.* in the *State Reports* (5)). But if persons other than the formal disputants—say, members of organizations, and particularly those who become so after the date of the award—can *by Parliamentary enactment be granted rights* because they are within the contemplated area of the dispute, they can equally be *required to bear burdens*, provided again they are within "the area of the industrial dispute." That all raises the necessity of considering what is the true interpretation of an "industrial dispute." I have so often stated my view as to the inevitable result of overlooking the fundamental difference between such a "dispute" and an ordinary "individual" dispute which concerns primarily only the mutual rights and liabilities of the actual litigants, that I content myself primarily with a reference to *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild of Australasia* (6), at pp. 607 *et seqq.*, and the references there given. The real principle applicable to the present case is this :—Given the area of dispute limited by reference to disputants, *that is, limited so to speak in superficial extent*, the question is *what is the subject* of their dispute, and what persons are contemplated

(1) (1913) 83 L.J. P.C., 50, at p. 52.
(2) (1885) 30 Ch. D., 57.
(3) (1920) 28 C.L.R., 66.
(4) (1920) 28 C.L.R., at p. 72.
(5) (1920) 20 S.R. (N.S.W.), 251, at pp. 257-258.
(6) (1912) 15 C.L.R., 586.

by that dispute to be affected ; that is to say, *while preserving the superficial area of the dispute, how deep does the dispute extend*—in other words, what *persons* are intended to be affected as represented by the formal disputants, as well as what *conditions* are to affect them and for what period of time. This at once avoids the "common rule," which is an extension of the *superficial area* of the dispute, and gives full effect to an award in respect of the "industrial dispute" by making it effective throughout the *whole period* of the operation of the award for and against those who during that period are or voluntarily *come within the area of the dispute.*

The very nature of an "industrial dispute," as distinguished from an individual dispute, is to obtain new industrial conditions, not merely for the specific individuals then working from the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers limited by the ambit of disturbance or dislocation of public services which has arisen or which might arise if the demand were not acceded to and observed *for a period really indefinite.* The concept looks entirely beyond the individuals who are actually fighting the battle. It is a battle by the claimants, not for themselves alone and not as against the respondents alone, but by the claimants so far as they represent their class, against the respondents so far as they represent their class. "Successors" in the employer's business are in exactly the same position as "successors" in *Yzquierdo's Case* (1). *If Parliament therefore chooses to include "successors," it may.* I requote a passage from the judgment of Lord *Shaw* in *Butler* v. *Fife Coal Co.* (2) :—"The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable." Applying those words to the constitutional provision which was designed to secure to the people of the Commonwealth a means of averting or ending industrial disturbance or dislocation by inducing

(1) (1902) A.C., at p. 530. (2) (1912) A.C., 149, at pp. 178-179.

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or awarding fair conditions, I am utterly unable to give the words "industrial dispute" a connotation that would not merely fail to secure the end aimed at, but would even introduce additional evils by discriminating between employees who became such after the dispute and those who were employees before, and would enable employers, by a mere technical transfer of a business or a mine to a different legal entity, to defeat any award whatsoever. That has not hitherto been the understanding of the Australian people; and I am not prepared to introduce it.

In my opinion the decision of the Stipendiary Magistrate was correct, and should be affirmed.

HIGGINS J. The appellant company has been convicted by a Stipendiary Magistrate of a breach of an agreement certified and filed under sec. 24 of the *Commonwealth Conciliation and Arbitration Act* 1904-1920. The breach consisted of failure to carry out clause 34—"Employers shall keep a copy of this agreement posted in a conspicuous place on each works, readily accessible to employees." There are two objections of substance taken to the conviction—(1) that on the true construction of sec. 24, as amended in 1921, the appellant is not bound by the agreement; (2) that if the section as amended purports to bind the appellant, it is beyond the powers of the Federal Parliament. Objection 2 was not taken before the magistrate or mentioned in the special case stated by the magistrate under the *Justices Act* of New South Wales for the opinion of the Supreme Court of the State.

It appears that during the course of proceedings in a dispute before the Commonwealth Conciliation and Arbitration Court one of the respondents, a company called "George Hudson *and Son* Limited" made an agreement with the Union as to the matters in dispute. The agreement was made on 10th November 1920; and, having been certified by the President, it was filed on 17th December 1920. But on 30th December 1920 a new company was incorporated called "George *Hudson* Limited." It is not disclosed whether the new company had or had not the same shareholders holding the same proportion of shares as in the former company; but it has been admitted before us that there was not a mere change of name by

special resolution under the New South Wales *Companies Act*, and that the whole business and assets were assigned to the new company.

At the time of the new company being incorporated and taking the assignment, sec. 29 (*ba*) of the Act provided that an award of the Court should be binding on "any successor, or any assignee or transmittee of the business of a party bound by the award, including any corporation which has acquired or taken over the business of such a party"; and sec. 24 (1) provided that agreements are to "have the same effect as, and to be deemed to be, an award for all purposes." But on 17th November 1921 the High Court decided, by a majority, that sec. 29 (*ba*) did not apply to agreements (*Carter* v. *E. W. Roach & J. B. Milton Pty. Ltd.* (1)). Parliament promptly took steps to alter the law as declared in *Carter's Case*, and on 16th December 1921 an Act was passed (No. 29 of 1921) which inserted in sec. 24 (1), the section as to agreements, after the words "parties to the agreement," the words "or any successor, or any assignee or transmittee of the business of a party bound by the agreement, including any corporation which has acquired or taken over the business of such party." That is to say, not only were awards to be binding on assignees, but agreements were to be binding. This position is not disputed, but it is contended by the appellant that the amendment applies only to agreements made *after* the amending Act. The alleged offence took place on 14th February 1922, after that Act.

But before dealing with the two points of substance, this Court is met, as well as the appellant, by an objection as to procedure—the objection that there is no appeal before the Court. There has been no notice of appeal, no security for costs, &c. The appellant comes before this Court relying solely on the provisions of sec. 40A of the *Judiciary Act*—"When, in any cause pending in the Supreme Court of a State, there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States . . . it shall be the duty of the Court to proceed no further in the cause, and the cause shall be by virtue of this Act, and without any order of the High Court, removed to the High Court."

(1) (1921) 29 C.L.R., 515.

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The company was convicted of the offence on 7th March 1922; and, in accordance with sec. 101 (1) of the *Justices Act* 1902, the magistrate stated a case for the opinion of the New South Wales Supreme Court. The Supreme Court gave its decision on 18th August 1922, purporting to affirm the determination of the magistrate, but "subject to the determination of the constitutional question arising herein." I concur with my learned colleagues in the view that if sec. 40A applies at all to the case, at all events if the appeal to the Supreme Court could not be completely decided without a decision on the constitutional point, the Supreme Court should have dropped the case, and made no order of any sort; for, under sec. 40A, it becomes "the duty of that Court to proceed no further in the cause," and all the proceedings are to be transmitted to the registry of the High Court.

But it is urged for the Union that sec. 40A does not apply to the case at all—that the words "*cause* pending in the Supreme Court" does not include an *appeal* pending in that Court. If this view is right, Parliament has failed in achieving the manifest object of the *Judiciary Act* 1907—the Act amending the *Judiciary Act* 1903 containing sections which are now sec. 38A, the amendments of sec. 39 and sec. 40, sec. 40A, sec. 41, and the amendment of sec. 43. The manifest object was to get rid of the awkward position created by the decision of *Webb* v. *Outrim* (1) given in 1906. The Constitution had not abolished the right to appeal direct from the Supreme Courts of the States to the Privy Council; and, on such an appeal from a Supreme Court, the Privy Council had decided that Federal officers were subject to State income tax, whereas the High Court had decided to the contrary. The object of the Act of 1907 was to prevent the recurrence of such a position, by depriving the Supreme Courts of jurisdiction to decide constitutional questions as to the limits *inter se* of the powers of the Commonwealth and the powers of any State. Sec. 38A therefore provided that on such questions the jurisdiction of the High Court shall be "exclusive of the jurisdiction of the Supreme Courts" so that the Supreme Court "shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance *or as a Court of appeal from an inferior Court*"; and

(1) (1907) A.C., 81; 4 C.L.R., 356.

sec. 40A (sec. 5 of the Act 1907) fills the gap created by sec. 38A. At all events, if sec. 40A does not relate to appeals when such a question arises in the Supreme Court, there are no means provided for having such a question determined at all; and it is our duty to presume that Parliament did not intend such an absurdity, and to treat the word "cause" in sec. 40A as including an appeal cause unless there is a clear provision to the contrary. There is nothing in the word "cause" in itself to prevent us from treating "cause pending in the Supreme Court" as including a special case stated for the opinion of the Supreme Court; but it is said that we are precluded from so treating it by sec. 2 of the Principal Act of 1903. Under sec. 2—"unless the contrary intention appears"—"cause" *includes* (not *means*) any suit, and also includes criminal proceedings; and "suit" *includes* any action or original proceeding between parties; and "matter" *includes* any proceeding in a Court whether between parties or not; and "appeal" *includes* an application for a new trial, &c. To say, however, that a word "includes" A is not to say that the word *excludes* B; and sec. 2 contains nothing to negative that application of "cause" in sec. 40A to which, but for it, the words of secs. 38A and 40A would obviously point.

It is further urged for the Union that no question arises here as to the limits of powers of State and Commonwealth *inter se*. But the decision of the Judicial Committee in the Builders' Labourers' Case (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1)) compels us to hold that objection 2 involves a question as to the limits *inter se*.

Then it is urged that the question as to the limits *inter se* did not arise in a "cause pending in the Supreme Court"; for the question was neither raised before the magistrate nor referred to in the special case stated by him for the Supreme Court. As I read the special case, it does not contemplate this question at all. The case states that two points were taken—(1) that the Act of 1921, sec. 3, amending the *Conciliation Act*, has no retrospective effect, does not apply to agreements made before the Act of 1921; and (2) that the agreement as to posting (clause 34) does not deal with an "industrial matter." Then he states: "I determined that the matter" (*sic*)

(1) (1917) A. C., 528; 24 C.L.R., 396.

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"hereinbefore stated afforded no ground of answer or defence to the said information. The question for the opinion of the Court is whether *my said determination* was erroneous in point of law." I confess that but for certain decisions in England, and the decision of the Supreme Court in *Ex parte Anderson* (1), I might have been inclined to the view that the question as to the limits *inter se* did not arise for determination in the Supreme Court at all. But the Court of King's Bench, in dealing with the Act from which the *Justices Act* 1902, Part V., is copied, treated the special case as enabling the higher Court to entertain all objections to the conviction whether mentioned in the special case or not (*Knight* v. *Halliwell* (2)). This view has been accepted as the true view in other cases (*Ex parte Markham* (3) ; *Kates* v. *Jeffery* (4)) ; and I think that where an Act (such as the Act 20 and 21 Vict. c. 43) has been copied by one of our legislatures from an English Act, it should, prima facie, be construed in the same way, taken with the interpretation accepted in the English Courts. At all events, as the English cases have not been attacked, I do not feel free to examine the position as if it involved a novel and unsettled point ; and my conclusion is that sec. 40A enables us to deal with the objections of substance now, although there has been no formal appeal or security.

In support of objection 1, the appellant relies on the well-known presumption against treating a statute as retrospective. It is, of course, a mere presumption, which must yield to express words. But, in my opinion, it is an abuse of language to call the amending Act of 1921 retrospective if it merely imposes a future duty on existing persons as to existing agreements. On the magistrate's decision, sec. 3 of the amending Act of 1921 does not impose any duty other than a duty for the future—after 16th December 1921. Sec. 3 says that sec. 24 of the Principal Act "is amended"—that is to say, amended as from that date. From that date onwards, it is to be an offence for a successor or assignee of a business not to keep an award posted. The assignee of a business is not to be treated as an offender because of not posting the award before 16th December 1921, for there is no duty imposed on him until that date. Then, when the

(1) (1920) 20 S.R. (N.S.W.), 207.
(2) (1874) L.R. 9 Q.B., 412.
(3) (1869) 34 J.P., 150.
(4) (1914) 3 K B., 160.

new words are inserted in sec. 24, they clearly apply to *any* agreement made, certified and filed under the original Act; for sec. 24 applies to any such agreement, and there is not a vestige of intention shown in the amending Act to alter the previous meaning of "agreement." It is a mistake to suppose that because the duty imposed is future, all the words of the Act or section to which the duty is to be applied are to be treated as future also. The Chief Justice of New South Wales, in his judgment, has aptly referred to the case of *R.* v. *Inhabitants of St. Mary, Whitechapel* (1). In that case there was an Act passed, 9 & 10 Vict. c. 66, providing that "no woman residing in any parish with her husband at the time of his death shall be removed . . . for twelve calendar months next after his death." *Before* the Act, a husband had died; and an order had been made for the removal from the parish of his wife, who had resided with him. The order was set aside after the Act; for the section, though prospective as to the removals contemplated, was not retrospective for the mere reason that part of the requisites for the operation of the section was drawn from a time antecedent to the passing of the section. As Lord *Denman* C.J. said (2), "the clause is general, to prevent all removals of the widows described therein after the passing of the Act; the description of the widow does not at all refer to the time when she became widow." So here, the description of "agreement," or of "successor," or of "assignee," does not at all refer to the time when the agreement was made, or the time when the succession or assignment took place. The same principle was adopted in *R.* v. *Inhabitants of Christchurch* (3). *Before* the Act, 9 & 10 Vict. c. 66, five years residence in a parish made paupers irremovable; but that Act excluded from the computation of the five years the time during which a person "shall receive" relief from any parish in which he does not reside; and the Act was held—notwithstanding the word "shall"—to apply to a case where such relief had been received before the passing of the Act. The Court there said that the argument based on retrospectivity was founded on a misconception: "The statute is prospective only: its direct operation is only on removals . . . this space of time may consist in part of time passed before

(1) (1848) 12 Q.B., 120. (2) (1848) 12 Q.B., at p. 127.
(3) (1848) 12 Q.B., 149.

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the statute passed, as is the case with statutes in limitation and prescription; but they are not therefore classed with the retrospective statutes." So in *Ex parte Dawson*; *In re Dawson* (1), it was held that sec. 91 of the *Bankruptcy Act* 1869 applied to settlements made before the passing of the Act. The section provided that "any settlement of property" made by a trader (not for value, &c.) should be void as against the trustee in bankruptcy if the bankruptcy took place within ten years from the settlement, unless it were proved that the bankrupt was, at the time of the settlement, able to pay all his debts. A post-nuptial settlement was made in 1865; the *Bankruptcy Act* with this section was passed in 1869; the bankruptcy took place in 1874; and it was held that the section applied to the settlement. So too, in this case, the provision of the amending Act of 1921, imposing on assignees of a business the burden, as well as the benefit of an agreement made by the assignor, imposes the burden as from 16th December 1921 on "any assignee," whether the assignment took place before or after that date. The appellant here asks us, in effect, to treat the new words in sec. 24 as if they were not "any assignee," but "any assignee under an assignment made after 16th December 1921." If there is a licence fee imposed by Act on hawkers, there is no presumption that the Act does not apply to existing hawkers. See also *Page* v. *Bennett* (2); *Ex parte Pratt*; *In re Pratt* (3); *West* v. *Gwynne* (4). In the case last mentioned the members of the Court of Appeal point out the loose way in which the word "retrospective" is used in argument. A statute is not "retrospective" because it interferes with existing "rights"; "almost every statute affects rights which would have been in existence but for the statute." "If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective." "The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act." "There is . . . a presumption that it" (the Act) "speaks only as to the future. But there is no like presumption

(1) (1875) L.R. 19 Eq., 433.
(2) (1860) 2 Giff., 117.
(3) (1884) 12 Q.B.D., 334.
(4) (1911) 2 Ch., 1.

that an Act is not intended to interfere with existing rights. Most Acts . . . do."

The Attorney-General, however, has placed strong reliance on a a case of *Bourke* v. *Nutt* (1). In my opinion, that case, when closely examined, conflicts in no way with *West* v. *Gwynne* (2). Under the *Elementary Education Act* of 1870, when a member of a school board became bankrupt (under the *Bankruptcy Act* 1869), his office became vacated, but he was eligible for re-election. One N. became bankrupt, and his bankruptcy was still pending when the *Bankruptcy Act* 1883 was passed. That Act had the drastic provision that "where a debtor is adjudged bankrupt he shall . . . be disqualified for *being elected*" to a school board. N. was in fact elected after that Act. Two of the Judges of the Court of Appeal, Lord *Esher* M.R. dissenting, held, overruling two Judges of the Queen's Bench Division, that the provision of the Act of 1883 did not apply to candidates who became bankrupt before the Act. This decision was based on two grounds—(1) on the form of the words, "is adjudged bankrupt," meaning, prima facie, *hereafter* adjudged; (2) on sec. 169 of the Act of 1883, which, in repealing the Act of 1869, provided that all the provisions of the Act of 1869 should apply to pending bankruptcies "as if this Act" of 1883 "had not been passed." The case is really an authority against the Attorney-General; for *Davey* L.J. lays stress on the words used (3), "where a man is adjudged bankrupt," as meaning prima facie "if any man shall or may hereafter be adjudged bankrupt"; and he says that if the words were "where a man is *an adjudicated* bankrupt," they would refer to a "certain quality of the subject which may just as well attach to him by a previous adjudication as by a subsequent one." The case of *In re Athlumney*; *Ex parte Wilson* (4), is also clearly distinguishable. The presumption against retrospectivity was applied by *Wright* J. to the case of a man who had already, before a new Act, a complete vested right under what was equivalent to a judgment of a Court. Under the *Bankruptcy Act* of 1890 it was provided that when a debt has been proved on an estate the interest should be calculated at 5 per cent. only, without prejudice to the right of a creditor to receive out of the

(1) (1894) 1 Q.B., 725.
(2) (1911) 2 Ch., 1.
(3) (1894) 1 Q.B., at p. 740.
(4) (1898) 2 Q.B., 547.

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estate any higher interest which his agreement gave him, after all debts had been paid in full. But, before the Act of 1890, M., a creditor, had proved his debt, and it included interest at a higher rate, than 5 per cent. Then there had been a scheme of arrangement adopted and confirmed, and approved by the Court, under which the net estate was to be distributed among the creditors according to their proofs. It was merely held that the new Act did not divest M. of his rights under his proof, and the scheme of arrangement. That is all.

In my opinion, the decision of the Supreme Court on the construction of the Act is right. Parliament has shown with sufficient clearness that it intends to alter the law as applied in *Carter* v. *E. W. Roach & J. B. Milton Pty. Ltd* (1), and to make agreements, not awards only, binding on assignees of a business.

The second point taken is that the amendment made by sec. 3 of the Act of 1921 is beyond the powers of the Federal Parliament, because it purports to affect persons who were not parties to the dispute in which the agreement or award was made. If the point is right, it follows that sec. 29 (*ba*), as to awards, is beyond the powers of that Parliament, and is beyond the powers of all the State legislatures; for no State legislatures can deal with disputes extending beyond one State. It is urged that the only relevant power conferred on the Federal Parliament is that conferred by sec. 51 (xxxv.)—to make laws for " conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State " ; and that there can be no conciliation or arbitration except as to parties to the dispute. It is usually forgotten that the power in sec. 51 is not to make laws *for* conciliation, &c., but to make laws " with respect to " conciliation, &c. But it is sufficient for my purpose to point to sec. 51 (xxxix.)—Parliament can make laws with respect to " Matters *incidental* to the execution of any power vested by this Constitution in the Parliament."

Now, under the scheme which Parliament had adopted for conciliation and arbitration, the primary duty of the President of the Court is to secure agreement between the disputing parties; and only to make a compulsory award when an agreement cannot be secured

(1) (1921) 29 C.L.R., 515.

(secs. 23 (2), 24). But nothing would be so likely to prevent agreements as the knowledge, on the part of the unions, that the employer could get rid at any time of his obligations under it by assigning his business—even by assigning it to a new company having the same shareholders holding shares in the same proportions as in the former company. It is only by some such provision as the present that the agreement—or the award—can be made effective. In my opinion the provision that assignees of the business shall be bound is " incidental " to the power to make laws for conciliation and arbitration ; just as a provision that executors of a party to the dispute should be bound would be " incidental " to that power. Indeed, the Attorney-General has been driven logically to contend that a provision for binding executors of a party would also be invalid—the executors not having been parties. The Attorney-General has relied on the decision of this Court in the case as to the common-rule provision (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1)). But the distinction between that case and the present is, to my mind, obvious. In that case, the provision enabling the Court to declare by order that any condition of employment, &c., determined by an award shall be a common rule of any industry in connection with which the dispute arises, would empower the Court of Conciliation to compel a condition of employment to be observed by employers who were not in dispute at all with their employees, and who had no relation with those in dispute. The provision did not relate to conciliation or arbitration in any way. But the provision here, that an agreement (or award) made by parties in the course of conciliation (or of arbitration) shall be binding on assignees of the business, relates directly to conciliation and arbitration for the prevention and settlement of industrial disputes. I have read again my judgment in the *Boot Trade Case* (2), in which I concurred with all the other members of the Court in holding that the provision for making a common rule was invalid ; and I am compelled to refer to that judgment as showing the distinction, as it appears to my mind, between " matters incidental " to the power conferred by sec. 51 (xxxix.), and matters which are not incidental. I find that I said (3) :—" We are

(1) (1910) 11 C.L.R., 311.
(2) (1910) 11 C.L.R., at p. 338.
(3) (1910) 11 C.L.R., at p. 345.

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to examine first the express power; and the express power is not a power to prevent or settle industrial disputes, but a power to make laws with respect to conciliation and arbitration (for the prevention, &c.); and any power to be implied must be a power incidental to conciliation and arbitration. It is not enough that it should be incidental to, or appropriate to, or useful in aid of, the prevention or settlement of industrial disputes. . . . Nothing is incidental to that power" (to legislate as to conciliation and arbitration) "which is not directly aimed at the precise method of dealing with industrial disputes—conciliation and arbitration—which the Constitution contemplates." In this case, the provision for binding assignees, &c., is directly aimed at that method, so as to make the provisions for conciliation or arbitration effective. It is a provision directly conducive to the exercise of the power granted by sec. 51 (xxxv.) of the Constitution. Men are not so likely to submit to peaceful methods of settling their disputes, by agreement (conciliation) or award (arbitration) if they feel that those with whom they dispute can evade the obligations imposed by transferring their business to their sons, or by assigning it to a company having a new name and the same shareholders. The Supreme Court of the United States has given a still more liberal construction to the "incidental" power. Under their Constitution, Congress has power "to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers"; and it was held, in *McCulloch* v. *Maryland* (1), that because Congress had the power to levy and collect taxes, to borrow money, to regulate commerce (inter-State and foreign), to declare war, to raise and support armies and navies, it had an incidental power to incorporate a private banking company which the Government might use for the purposes of its business. According to that decision, it is not even essential to show that the Act passed as in exercise of the incidental power is absolutely necessary for the exercise of the express power; it is sufficient to show that it is appropriate, or could fairly be deemed appropriate or suitable (see also *United States* v. *Fisher* (2); *Hepburn* v. *Griswold* (3)). This last principle applies *a fortiori* to sec. 51 (xxxix.) of our Constitution, which uses the words "*matters incidental.*"

(1) (1819) 4 Wheat., 316. (2) (1804) 2 Cranch, 358
(3) (1869) 8 Wall., 603, at p. 615

In my opinion, therefore, sec. 3 of Act No. 29 of 1921 is valid, and the conviction should stand.

STARKE J. George Hudson Limited was charged on information that it did not keep a copy of an industrial agreement posted on its works, contrary to the terms of an agreement certified and filed pursuant to the *Commonwealth Conciliation and Arbitration Act*, and contrary to the provisions of the said Act. A Stipendiary Magistrate, before whom the case was heard, convicted the defendant, and imposed a penalty. He then stated a case pursuant to the *Justices Act* 1902 of New South Wales, sec. 101, for the opinion of the Supreme Court, which purported to affirm the decision of the magistrate, subject to the determination of the constitutional question arising in the case, namely, whether the provisions of sec. 3 of the Act No. 29 of 1921 were within the powers of the Parliament of the Commonwealth. The case was removed to this Court, pursuant, as it was claimed, to the provisions of sec. 40A of the *Judiciary Act*. And this Court on a former day announced that the determination of the magistrate was correct in point of law, and should be affirmed, but that reasons for this conclusion would be given on a later date. Now, I have had the privilege and advantage of reading and considering the reasons prepared by my brother *Isaacs*, and I entirely agree with them. But I would add, in my own words, a few observations upon the validity of the provisions in question here.

The constitutional power to prevent and settle industrial disputes extending beyond the limits of a State by means of arbitration and conciliation, was confined in its application, it was said, to the actual participators in the conflict. In my opinion, however, the real basis of the power is industrial disturbance and disorganisation. No doubt there cannot be an industrial disturbance without some participators, nor could there be conciliation without some person to conciliate, nor arbitration without some parties. But insistence upon absolute definiteness of parties ignores very largely the known character of industrial disturbances. They are not confined to the actual participators; historically, the great industrial fights have been waged by unions, for the benefit of all their members, employed and unemployed, present and future. And in *Jumbunna Coal*

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Mine, No Liability, v. *Victorian Coal Miners' Association* (1) this Court upheld the representation of workmen by means of their associations or unions. As *O'Connor* J. said (2), "any attempt to effectively prevent and settle industrial disputes by either of these means" (conciliation or arbitration) "would be idle if individual workmen and employees only could be dealt with. . . . Some system was therefore essential by which the powers of the Act could be made to operate on representatives of workmen, and on bodies of workmen, instead of on individuals only. But if such representatives were merely chosen for the occasion without any permanent status before the Court, it is difficult to see how the permanency of any settlement of a dispute could be assured. Even when the dispute is at the stage when it may be prevented or settled by conciliation, the representative body must have the right to bind and the power to persuade *not only the individuals with whom the dispute has arisen, but the ever changing body of workmen that constitute the trade.*" On the other side, the *Common Rule Case* (3) was relied upon. There it was decided that the provisions of the Arbitration Act which purported to authorize the Commonwealth Arbitration Court to declare a common rule in any particular industry, was beyond the powers of the Parliament. But the observations of my brother *Isaacs* (4) embody the reasons for that decision and, in truth, the substantial distinction between the *Common Rule Case* and the *Jumbunna Case*: "They" (the common rule provisions) "were plainly intended to confer, and if validly enacted would confer, jurisdiction to establish by official pronouncement a binding rule of conduct extending over the whole industry, not merely over the whole area of the dispute in that industry, and applying to every person engaged in it, although he was in no way involved in any dispute either by personal activity, or as a member of an organization, or as a working unit of one of two opposing classes in actual contest though not formally organized."

In the provisions now under consideration the Parliament keeps within the actual area of the industrial disturbance. As drafted, sec. 24 bound the parties to the dispute who made an agreement;

(1) (1907-08) 6 C.L.R., 309.
(2) (1907-08) 6 C.L.R., at p. 358.
(3) (1910) 11 C.L.R., 311.
(4) (1910) 11 C.L.R., at p. 337.

now, by the amending Act, the successors, &c., of the business of the party who made the agreement are also bound. The constitutional power is not so weak, in my opinion, that it is limited to the settlement of an industrial disturbance between the actual participators therein. If so limited, the power would be practically ineffective: if industrial disturbances are to be settled or prevented, then the power must extend to the ever changing body of persons within the area of such disturbances. (See *Attorney-General for Canada* v. *Cain and Gilhula* (1).)

Question asked by case stated answered No. Costs in Supreme Court and in this Court to be paid by the defendant company.

Solicitors for the appellant, *Norton Smith & Co.*

Solicitor for the respondent, *V. P. Ackerman.*

B. L.

(1) (1906) A.C., 542, at p. 546.

[HIGH COURT OF AUSTRALIA.]

IN RE THE JUDICIARY ACT 1903-1920

AND

IN RE THE NAVIGATION ACT 1912-1920.

Constitutional Law—High Court—Jurisdiction—Original and appellate jurisdictions —The Constitution (63 & 64 *Vict. c.* 12), *sec.* 74.

The statement in *In re Judiciary and Navigation Acts*, (1921) 29 C.L.R., 257, at p. 264, that secs. 73 and 74 of the Constitution deal with the appellate power of the High Court is not an authority for the proposition submitted to the Privy Council in *Minister for Trading Concerns for the State of Western Australia* v. *Amalgamated Society of Engineers*, (1923) A.C., 170, at p. 173, that the High Court has held that sec. 74 does not apply to a decision of the High Court in its original jurisdiction.

Dictum in *In re Judiciary and Navigation Acts*, (1921) 29 C.L.R., 257, at p. 264, explained.