[HIGH COURT OF AUSTRALIA.]

INCE BROTHERS . . . . . APPLICANTS;

AGAINST

THE FEDERATED CLOTHING AND ALLIED TRADES UNION . . . . . } RESPONDENT.

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THE CAMBRIDGE MANUFACTURING COMPANY PROPRIETARY LIMITED . } APPLICANT;

AGAINST

THE FEDERATED CLOTHING AND ALLIED TRADES UNION . . . . . } RESPONDENT.

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MELBOURNE, *Mar.* 10.

SYDNEY, *Aug.* 6.

Knox C.J., Isaacs, Gavan Duffy, Powers, Rich and Starke JJ.

*Industrial Arbitration—Industrial dispute—Award—Application to High Court for decision on question of law—Time for making application—Jurisdiction of High Court—Discretion—Commonwealth Conciliation and Arbitration Act* 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 21AA, 31.

*Held*, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs, Powers* and *Rich* JJ. dissenting), that, where an alleged dispute has been submitted to the Commonwealth Court of Conciliation and Arbitration, an application to the High Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 for a decision on "any question of law arising in relation . . . to any award" of the Commonwealth Court of Conciliation and Arbitration may be made either before or after an award has been made in respect of the alleged dispute, and that that award is an award in relation to which a question may be submitted for decision.

*Held*, also by *Isaacs, Powers, Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that an application to the High Court under sec. 21AA for a decision on the question "whether the dispute or any part thereof exists,

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or is threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State," may not be made after an award has been made by the Commonwealth Court of Conciliation and Arbitration in respect of the alleged dispute which has been submitted to that Court.

*Held*, further, by *Knox* C.J., *Isaacs*, *Powers*, *Rich* and *Starke* JJ. (*Gavan Duffy* J. dissenting), that the relevant time for the decision of the last-mentioned question is the time when the application to the High Court is made, and not the time when the alleged dispute was submitted to the Commonwealth Court of Conciliation and Arbitration.

*Held*, also, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ., that on an application under sec. 21AA made after an award, the High Court has not a discretionary power to refuse to adjudicate upon questions which it has jurisdiction to determine.

CASE STATED.

A summons was issued by Ince Brothers for a decision by the High Court, under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, of the questions in reference to an award made by the Commonwealth Court of Conciliation and Arbitration in a dispute in which the Federated Clothing and Allied Trades Union was claimant and H. L. Andrews and others, including the applicants, were respondents, whether the award was confined to and dealt with industrial matters within the meaning of the Act, and whether any industrial dispute existed with respect to the subject matter of certain clauses of the award.

A summons was also issued by the Cambridge Manufacturing Co. Pty. Ltd. for a decision by the High Court, under sec. 21AA, of the same questions in reference to an award made by the Commonwealth Court of Conciliation and Arbitration in a dispute in which the Federated Clothing and Allied Trades Union was claimant and the A.B.Y. Manufacturing Co. and others, including the applicant, were respondents.

Both summonses came on for hearing before *Starke* J., who stated a case, which was substantially as follows, for the consideration of and argument before the Full Court :—

1. Summonses were issued on 22nd January 1924, pursuant to sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*

1904-1921, returnable before a Justice of this Court in Chambers, seeking in substance a decision upon the questions :—

(*a*) Whether an industrial dispute existed as to the matters contained in clauses 95 and 99 of the award of the Commonwealth Court of Conciliation and Arbitration known as the " Andrews' Award " and clauses 104 and 109 of the award of the said Arbitration Court known as the " A.B.Y. Award " ;

(*b*) Whether the said Arbitration Court had jurisdiction to award the matters contained in the said clauses ;

(*c*) Whether the said matters constituted an industrial dispute within the meaning of the Constitution and the *Arbitration Act.*

2. The summonses came on for hearing before me on 13th February 1924.

3. The said awards of the Commonwealth Court of Conciliation and Arbitration were made prior to the issue of the said summonses, namely, on 21st December 1923.

The questions asked by the special case were as follows :—

(1) Whether on the facts stated the High Court or a Justice thereof sitting in Chambers has jurisdiction to hear and determine the questions raised by the said summonses ;

(2) Whether, if the Court or a Justice has such jurisdiction, the Court or a Justice has discretionary power to refuse to adjudicate upon the questions raised by the said summonses after the Commonwealth Court of Conciliation and Arbitration has made an award upon the matters raised by the said questions.

The nature of the arguments sufficiently appears in the judgments hereunder.

*Stanley Lewis*, for the applicants.

*Blackburn*, for the respondent.

*Cur. adv. vult.*

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The following written judgments were delivered :—

KNOX C.J. The questions submitted in this case turn on the meaning to be given to the words of sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, which are as follows, namely :—" (1) When an alleged industrial dispute is submitted to the Court—(*a*) in the case of a dispute submitted to the Court by plaint—the complainant or respondent organization or association ; and (*b*) in any other case—any party to the proceeding or the Registrar, may apply to the High Court, for a decision on the question whether the dispute or any part thereof exists, or is threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State or on any question of law arising in relation to the dispute or to the proceeding or to any award or order of the Court. (2) The High Court shall have jurisdiction to hear and determine the question. (3) The jurisdiction of the High Court under this section may be exercised by any Justice of the High Court sitting in Chambers. (4) The decision of the High Court or the Justice on the question shall be final and conclusive, and shall not be subject to any appeal to the High Court in its appellate jurisdiction, and shall not be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, in any Court on any account whatever."

It is clear that the object of the section is to confer jurisdiction on the High Court to entertain applications made to it in the cases and subject to the conditions specified. The opening words prescribe the occasion on which the right to make an application comes into existence—" When an alleged industrial dispute is submitted to the Court " (that is, the Court of Conciliation and Arbitration) ; and thus mark the commencement of the period during which an application may be made. The words immediately following indicate the persons by whom applications may be made, and may be put aside as irrelevant to the questions raised in the present case. The remaining words of sub-sec. 1 deal with the subject matter of the application, which may be made for a decision (a) on the question whether the dispute (that is, the alleged dispute) or any part thereof exists or is threatened or impending or probable as an industrial dispute extending beyond the limits of any one State, or (b) on any

question of law arising in relation to the dispute, or (c) on any question of law arising in relation to the proceeding or to any award or order of the Court. The section does not specify the duration of the period within which an application may be made, except by providing that the right to apply arises when an alleged industrial dispute is submitted to the Conciliation and Arbitration Court. It is clear that a question of law in relation to the award of the Court of Conciliation and Arbitration cannot arise before the making of the award, and that the occasion for making an application for a decision on such a question may occur at any time while the award continues. It would seem to follow that the period during which such an application may be made must at least extend to a date subsequent to the making of the award. The right to make any application authorized by the section is dependent on the happening of one event only, namely, the submission to the Court of Conciliation and Arbitration of an alleged industrial dispute, and, as some of the applications authorized by the section cannot be made till after the award, it appears to me to follow that the period during which any application authorized by the section may be made must extend to a point of time after the making of the award. But on this construction the use of the present tense in the phrase " whether the dispute or any part thereof *exists*, or *is* threatened," &c., is said to create a difficulty. It is said that if an award of the Court of Conciliation and Arbitration is to be regarded as putting an end to the dispute in relation to which it is made, and if the form of the question for the decision of the High Court as to the existence of the alleged dispute must be whether that dispute or any part of it *exists*, the application, if made after award, can have only one result, namely, an answer that the alleged dispute does not exist. But assuming the existence of this difficulty, it affords, in my opinion, no justification for departing from the literal meaning of the words used, which appear to me to be reasonably plain and free from ambiguity, if considered apart from any preconceived notion as to the expediency of extending or restricting the operation of the section. I think it is clear that under the section an application may be made at any time after the submission to the Court of Conciliation and Arbitration of an alleged industrial dispute so long,

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at any rate, as the award made in relation to that dispute continues in force. It is not necessary in this case to determine whether an application can be made after the award has ceased to operate. But, if the application be for a decision as to the existence of a dispute, I think the question asked must be that indicated by the words of the section, namely, whether such dispute *exists* or *is* threatened, &c. It may be useless to ask this question after an award has been made; but it does not follow that the right given by the section to obtain an authoritative decision on the question whether a dispute exists is wholly ineffective, for the section confers jurisdiction to give an authoritative decision at any time before the award is made on the question whether a dispute exists, and enables the complainant as well as the respondent to obtain such a decision, whereas before the enactment of the section a decision on the question could only be obtained in proceedings for prohibition at the instance of the respondent. Construing the words of the section according to their literal meaning, I am of opinion (1) that an application may be made under the section at any time after an alleged dispute has been submitted to the Commonwealth Court of Conciliation and Arbitration, at least while the award made in relation thereto continues in force; (2) that, if the application be for a decision on the question whether the alleged dispute or any part thereof exists, the only issue that can be raised is as to the existence of the dispute at the date of the application; (3) that an application for a decision on any question of law arising in relation to the dispute or to the proceeding or to any award or order of the Court may be made at any time when such question has arisen.

It was argued for the respondent that the provisions of sec. 31 (1) of the Act afforded a reason for qualifying the ordinary meaning of the words used in sec. 21AA—that, in effect, sec. 21AA should be read subject to the provisions of sec. 31 (1). In my opinion this contention cannot be sustained. Sec. 31 (1) in its present form was enacted in 1911 after the decision in *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.* (1). Subsequently this Court decided in the *Tramways Case* [*No.* 1] (2) that the sub-section, so far as it purported to take away from the

(1) (1910) 11 C.L.R. 1. (2) (1914) 18 C.L.R. 54.

High Court the power to issue prohibition, was invalid. It was in consequence of this decision that sec. 21AA was enacted. In general terms its apparent object was to enable either party to an alleged dispute to obtain from the High Court an authoritative decision on the questions specified in the section, on one of which—the existence of the alleged dispute—such a decision could previously only be obtained by one party, the respondent in the Arbitration Court, on an application for a writ of prohibition. I can find nothing in the words of sec. 21AA, or in the circumstances in which it was enacted, to indicate that Parliament intended that the meaning of the words used should be altered or qualified by reason of the existence of sec. 31 (1). To the extent to which the provisions of sec. 21AA are inconsistent with those of sec. 31 (1), I think sec. 21AA must prevail.

On the question whether the Court or a Justice has a discretionary power to refuse to adjudicate on questions raised after award, I can see no reason for holding that the Court or a Justice has any such discretionary power. When an application conforms to the requirements of the section I think the applicant is entitled *ex debito justitiæ* to a decision thereon.

ISAACS, POWERS AND RICH JJ. Two applications upon summonses issued on 22nd January 1924 were made to a Justice in Chambers, under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, for the decision of certain questions to test the validity of some provisions in two awards which had been made on 21st December 1923, and by which, therefore, the disputes on which they were founded were in point of fact definitely settled. The applications, which came before *Starke* J., were consequently not made in or with reference to any pending submission in the Commonwealth Court of Conciliation and Arbitration of an alleged industrial dispute. The only relevant submissions of such a dispute were, of course, those upon which the awards referred to had been already completed; and those submissions, therefore, had ceased to exist before the applications in Chambers were made. The awards were made upon a reference, not upon plaints—a very important circumstance. These applications are obviously an experiment,

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and a belated one. It is nearly nine years and a half since sec. 21AA was enacted, and this is the first attempt to use it for the purpose of reviving the almost intolerable position of industrial arbitration that existed prior to its introduction.

It is not in the power of the Commonwealth Parliament to cut away the jurisdiction of the High Court in prohibition entirely, as we find that done in State legislation with respect to the Supreme Courts, in order to secure industrial peace and stability. Parliament cannot repeal sec. 75 (v.) of the Constitution. It can, of course, by appropriate legislation limit the cases to which that remedy is applicable (see *R.* v. *Nat Bell Liquors Ltd.* (1) ). Sec. 21AA was an attempt by Parliament to mitigate, so far as it could, the glaring and repeated evil of awards being rendered nugatory after most laboured and expensive investigation. The position was not only unfair and disastrous to the litigants themselves, but it was a distinct and growing menace to the community, encouraging direct action in place of arbitration, a course most destructive to the general welfare. Since October 1920, sec. 21AA has been regarded as a partial and indeed a considerable cure for the evil. It is now, on the contrary, invoked as a parliamentary invitation to renew the evil, in a slightly limited class of cases, it is true, which makes it anomalous as well as unfortunate, but also by a simpler and more attractive method, and, therefore, with aggravated results in the cases where it applies. We refer to this later. It is particularly unfortunate, however, that the law as laid down in this case will apply most distinctly to the very cases where finality is most desirable, namely, those vast public disturbances requiring the direct and initial intervention of the Court. The public importance of this case is consequently very great, though the language in which Parliament has couched the enactment leaves, as we think, little difficulty in deciding it.

The learned Justice stated a case, under sec. 18 of the *Judiciary Act*, in which the material facts were as above mentioned, and two questions were propounded for the determination of the Full Court, namely, (1) whether on the facts stated the High Court or a Justice thereof sitting in Chambers has jurisdiction to hear and

(1) (1922) 2 A.C. 128.

determine the questions raised by the said summonses: (2) whether, if the Court or a Justice has such jurisdiction, the Court or a Justice has discretionary power to refuse to adjudicate upon the questions raised by the said summonses after the Commonwealth Court of Conciliation and Arbitration has made an award upon the matters raised by the said questions. It is obvious that the second question is conditional on an affirmative answer to the first.

The first question depends upon the true construction of sec. 21AA; and the construction of an enactment is simply expounding the real intention of the Legislature. The problem therefore is: Did Parliament intend, in enacting sec. 21AA, to create, *inter alia*, a new jurisdiction, exercisable at any time *after* an award is made, to test its validity, and possibly declare it a nullity? If the language of a statute is in itself explicit, there is not only no need, but also no warrant, to apply any other test for the purpose of ascertaining the legislative will. The text of sec. 21AA, particularly when read with its more immediate context, appears to us sufficiently explicit. The public reason of its introduction, as a remedy for existing evils, though confirming the construction apparent on the face of the section, might therefore, in our view, be for this purpose disregarded. The section was inserted by an amending Act (No. 18 of 1914) in the Principal Act (No. 13 of 1904), and placed in that portion of the earlier statute which bears a significant heading. The portion is Division 3, and is headed "*Cognizance of Disputes and Ordinary Procedure.*" That Division, commencing with sec. 19 and ending with sec. 31, begins with enumerating the disputes of which the Court of Conciliation and Arbitration is to have cognizance, and deals with provisions devoted to the ordinary progress of a submitted dispute from the institution of the proceeding to the making of the award, including provisions as to its duration and binding effect, and unimpeachable nature. The insertion of sec. 21AA in Division 3 is in itself an indication that its function is to assist the Court of Conciliation and Arbitration in the ordinary procedure of that Court, beginning with the submission of a dispute and terminating with the making of an award. Prior to the insertion of sec. 21AA, although the existence of an industrial dispute, that is, one extending beyond the limits of any one State, was by the Act an inherent condition

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precedent of the jurisdiction of the arbitration tribunal to proceed to an award, there were no means provided by which either the complainant or the tribunal could ascertain whether the essential condition was satisfied. The Court was always working in the presence of an impending sword. The ordinary path of procedure was simple enough, once it emerged through this condition. But to come safely through the condition meant, especially up to 1914, passing through a labyrinth of constitutional and other intricacies, an adventure frequently fatal.

Even before 1914 the intention of Parliament was unmistakably evinced by sec. 31 that once made an award should stand unchallenged and unchallengeable. Sec. 31 itself provided for the President obtaining on the way the opinion of the High Court upon any question "arising in the proceeding," and being a question of law. But questions of fact were left untouched by sec. 31, except that awards, so far as Parliament could secure it, were made absolutely unexaminable.

Reading sec. 21AA as it stands by amendment, there was thereby added in Division 3 a new jurisdiction to the power of the High Court. Questions of fact were for the first time brought within the ambit of judicial consideration during the continuance of the arbitration proceedings, and obviously for the purpose of enabling the arbitration tribunal or the complainant and others to know definitely whether the proceeding was on a safe foundation or was resting on sand. In the words of the section itself, "when an alleged industrial dispute is submitted to the Court"—that is, the Arbitration Court—certain persons may apply to the High Court. Pausing there for a moment, it does not seem to admit of serious doubt that the governing introductory words are a condition to the operation of the whole section. If so, the submission of an alleged industrial dispute must itself be an existing fact, that is, a still existing fact. It is not the natural meaning of those governing words that they include, as the applicants contend, a submission that has ceased to exist. The argument for the applicants is that the words "is submitted" mean "has been at some time submitted" even though the submission is in some way put an end to. Those words are exactly similar (taking singular for plural) to the words "are

submitted" in sec. 19 (*b*). Could it be maintained for a moment that sec. 19 (*b*) means that the Court is to have cognizance of industrial disputes which "have at some time been submitted" to the Court, even though the submission has terminated, it may be by withdrawal of the plaint, or by the disappearance of the dispute, or even by award? But if not, it is because the words "are submitted" contemplate, for the purpose of the exercise of jurisdiction, the continuance of the submission. And the same Legislature, carrying forward into sec. 21AA the same form of language, again contemplates for the exercise of jurisdiction the continuance of the submission.

Proceeding with the rest of sec. 21AA, the subject matter of the permitted application is described. It is to obtain a decision on (i.) the question whether the dispute or any part thereof *exists*, or *is* threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State, or on (ii.) any question of *law*, *arising* in relation to *the* dispute, or to *the* proceeding or to any award or order of the Court. The first limb is unmistakably limited, if we are to pay any attention to the common meaning of ordinary words, to the *present* state of things, at the time the application is made to the High Court. Does *the* dispute *exist*? *Is* the dispute threatened, impending or probable? Is it an inter-State dispute? These are questions certainly involving the establishment and elucidation of facts, and probably the first limb is intended to be limited to facts, but all referable to the conditioned submission. "*The* dispute" can have no other meaning. The second limb enables the High Court to determine any questions of law whatever "*arising*"—a word which necessarily connotes some required proceeding antecedent to the application—in relation to "*the* dispute" (that is, the same dispute as is previously mentioned) or to "the proceeding" (that is, the continuously existing proceeding of submission), or to "any award or order of the Court." Those words mean primarily "any award or order" claimed or applied for, and include the effect of any existing award or order which might affect the future award or the power to make the future award, contemplated by the arbitration tribunal in respect of the dispute under submission. The section unquestionably includes a decision not only as to the present existence of the dispute, but also

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as to questions of law arising regarding the power of the Court under the Act to give relief, or to make proposed orders, and so as to the power to vary any award (sec. 24) or order (sec. 40). Included in this phrase would also fall the effect of any existing award or order. For instance, if under sec. 24, which is within Division 3 and part of the ordinary procedure, part of the dispute is settled by a filed agreement, which thereby becomes an "award," or if their whole dispute is so settled between some of the parties, a question may well arise as to whether in respect of the balance of the dispute, or as between the remaining parties, there still remains a jurisdictional power to make a compulsory award as to the remainder. So also a question may arise before an award is made as to the effect of an order under sec. 28 (2). There are other instances, such as the effect of an order of the President under sec. 17 dealt with in sec. 21A, which was inserted in 1910. This, however, is all to assist in clearing the way for the arbitration tribunal as to the course it should finally adopt in relation to the proposed award upon an existing submission.

Still dealing with the section apart from the history of its origin, the true reading of the first sub-section may be thus stated: If, when an alleged industrial dispute *is submitted* to the Court, there arises (1) a question whether the dispute or any part thereof exists or is threatened or impending or probable as an industrial dispute extending beyond the limits of any one State, or (2) any question of law in relation to the dispute or to the proceeding or to any award or order of the Court, then, (a) in the case of a dispute submitted to the Court by plaint, the complainant or respondent organization or association, (b) in any other case, any party to the proceeding or the Registrar, may apply to the High Court for a decision on the question so arising.

The applicants' contention disregards some very important matters relative to the construction of the section. Summarized, they are: (1) The history of the legislation, including in that the evil to be cured; (2) the natural and primary meaning of the governing words of the section; (3) the natural and primary meaning of other parts of the section; (4) the effect of the contention based on sec. 31; (5) the effect of the contention based on the general

scheme of the Act; (6) the effect of another Act *in pari materia*—the *Industrial Peace Act* 1920 (No. 21). We take those in order.

(1) The genesis of the legislation may conveniently be found stated in the *Tramways Case* [*No.* 2] (1). In that case, which was the culmination of the disorganizing effect of prohibitions upon national industries, an award had been made years before, and two matters, clearly outside the scope of arbitration, were unanimously set aside by the High Court. That was then necessary, as the Arbitration Court was assumed, in the existing state of legislation, to be a judicial as well as an arbitral tribunal. But the majority decision of the Court was that the whole award was bad as to the applicants for reasons which, at an early period, before time was lost and expense incurred and *before the actual dispute was settled*, might have been easily ascertained by legal decision had the necessary procedure been provided. Some members of the Court rested their decision not merely on the *existence of a dispute*, but also on *the power to make an award at all on certain points or in certain ways.* That is to say, assuming a dispute, there were still legal reasons why either no award could be made at all respecting certain claims, or, if any award could be made, why it could only be made in a certain way (see, for instance, pp. 80-82).

Parliament was prompt to meet the evil. The judgment was given in October 1914, and the amending legislation was passed in December of the same year. In 1920 *Powers* J., in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2), said of the section: "It was passed to prevent delays and the expense of applications to the Full Court of the High Court for prohibitions by authorizing a Justice of the High Court to decide finally, *before it made an award*, that the Arbitration Court could make *effective awards* in any particular dispute submitted to it in pursuance of the Act." This statement of what led to the legislation shows, when various decisions and the passages in the judgments referred to are carefully read, that the evil to be cured was composite, namely, the suspended doubt as to (a) questions of fact, as to the existence of a dispute, its reality, its genuineness, its

(1) (1914) 19 C.L.R. 43, at pp. 82-84 (*Isaacs* J.), and at p. 153 (*Powers* J.).
(2) (1920) 28 C.L.R. 209, at p. 250.

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extent to particular employers, to particular States, &c., and (b) questions of law, as to the requisite nature of the dispute, whether it was as to an industrial dispute, whether it extended beyond the limits of a State, whether it was such as to form the subject of an award, whether the award claimed was competent to the Court in whole or in part, and any other matter which might invalidate wholly or partly the award if made. The same thing could be said in a minor degree of an "order" after an award, applied for under sec. 40. Sec. 21AA, therefore, would not have met what was perhaps the greatest evil of all—namely, the suspended doubt as to *validity of the proposed award if made*—unless it included the power to decide questions arising on the submission as to "any award or order of the Court." As sec. 31 had already precluded—so far as statutory defects were concerned—any outside interference with "awards and orders," and as this Court had declared in *Whybrow's Case* (1) that Parliament was incompetent to relax sec. 75 (v.) of the Constitution, it only remained for Parliament to enable some tribunal to ascertain *beforehand* whether the proposed award or order would be valid or not. The history of the matter is therefore strongly against the applicant's contention.

(2) The applicants' contention disregards the primary words of the section, because the words "When an alleged industrial dispute is submitted to the Court" primarily and naturally indicate a time and an occasion. True it is that the words import a contingency, in the sense that, unless and until the event happens, the section cannot operate. But, if the event happens, it is not a momentary event, it is a continuing event. "When" primarily indicates time. Its duration is dependent on the occasion to which it is referable. "When a shot is fired" is momentary; "when a voyage is made" is continuous. "When an alleged dispute is submitted to the Court" is continuous while the submission lasts, and no longer. The *Oxford English Dictionary* assigns to "when," in its relative and conjunctive uses, really ten varied significations. The most apposite is 4 (*c*), running thus:—"Indefinitely or generally: At any time, or at the several times, at which; on any occasion that: most commonly with vb. in pres. tense." That is the sense in

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

which it is used in the governing words of sec. 21AA. The meaning in that connection attributed to "when," nearest to the applicants' view, is in 8—"With the notion of time modified by or merged in that of mere connection: In the, or any, case or circumstances in which; sometimes nearly = if." But even there, the continuance of the event is envisaged, as is seen by the examples given, notably from Ruskin and Chamberlain.

(3) Passing to other words in the governing phrase, the applicants read "is submitted" as "has been at some time—say, four years ago—submitted"; they read "exists" as "either exists now or existed at the date of the award, say, four years ago"; they read "is threatened or impending or probable" as "is now or was"—say, four years ago—"threatened impending or probable"; they *read the word "arising" as superfluous*, and treat that word as if the application itself was a sufficient means of making the question "arise," though no controversy has ever taken place with respect to it and the first notion of any contest is the service of the summons, perhaps after years of quiet observance of the award. Further, although on the natural construction of the section all questions both of fact and law are fully provided for, the present applicants' contention leaves, in relation to "award or order," all questions of *fact* entirely unprovided for. Again, it attributes to the Legislature one most extraordinary intention. Since by par. (*b*), which is the provision applicable to the present case, the Registrar equally with a party to the proceeding is enabled to apply, the suggested intention of Parliament is that years after an award is made the Registrar—the Arbitration Court's own officer—may, of his own motion and without any quarrel between the parties themselves, apply to the High Court to declare the award invalid. This is an inescapable result of the applicants' argument, but is in our opinion too preposterous to accept, because *ex hypothesi* the question never was one "arising" until the Registrar served the summons. A use of the English language so fantastic, so surprisingly extensive in some directions and so disappointingly defective in others, is not to be ascribed to the Federal Legislature, when adherence to the natural meaning of simple words gives a harmonious and clear interpretation.

(4) Section 31.—It cannot, we think, be too strongly emphasized

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that sec. 31 is a healing section. So long as it is possible to test legality prior to closing up the proceedings and settling the dispute, so that all parties may resume work or discard differences with a knowledge of their declared rights, Parliament has allowed ample opportunity. But once that stage is past, Parliament has, so far as in its power lies, closed the door upon renewal of the controversy. Unless sec. 31 does that, it does nothing, and is mere declamation. But if it has any substance, it is wholly inconsistent with the present contention of the applicants. Sec. 31 is, as already stated, a firm declaration of intention that an award once made is to stand above question, so far as relates to any prior requirement of the statute. This is quite understandable, when one considers the dreadful evils of economic unrest and the reliance necessary to be placed on the arbitral determination as a final solvent of disputes. But it would be attributing the most incredible vacillation to the Legislature, if, while finding this intention in sec. 31, we were to read sec. 21AA in the way contended for by the applicants. They suggest that in sec. 21AA the Legislature, by a newly created jurisdiction, invites the parties, at any time after the award is made—it may be four years after—when evidence as to the existence of the dispute and its incidents, or as to any other jurisdictional fact, has perhaps faded or disappeared, or if by some ingenuity a legal technicality can be unearthed, to impeach the award, and on the newly discovered flaw to make the decision invalidating it unimpeachable, and thereby throw the whole industry concerned once more into chaos and disorder. And this, as we say, notwithstanding the fullest opportunity to test the matter before the award is made by means of a special case under sec. 31 or by application under sec. 21AA itself. A strange policy to find in an Act consecrated to the prevention and settlement of industrial disputes. Particularly strange is it when it is remembered that it is chiefly directed to awards made in cases of the greatest public import, when compulsory conferences are necessary. And it is a policy in direct antagonism to sec. 31.

(5) The general scheme of the Act is stable "peace"—not momentary peace with volcanic liability to disturbance. What we

have said needs only a brief reference to the path Parliament has pursued, to indicate how steadily it has proceeded to make impossible what the applicants contend it has intentionally done. As sec. 31 originally stood, par. 1 ran thus: "No award of the Court shall be challenged, appealed against, reviewed, quashed, or called in question, in any other Court on any account whatever." At that time, 1904, the Arbitration Court was, as has been said, thought to be also a judicial tribunal. Hence the expression "any other Court." In 1911, by Act No. 6, various additions were made, two of which are now material. One was that sec. 31 was added to in two respects. After the word "award," there were inserted the words "or order," and after the words "called in question" there were inserted the words "or be subject to prohibition or mandamus." The first amendment was to place an "order" made under sec. 40, on the same footing of unchallengeability (if that word may be used) as an award; and the second amendment was to add to the list of excluded remedies (of course, so far only as they could apply to statutory enactments) those of "prohibition" and "mandamus." The second addition was in respect of sec. 25. By substituting for the words "in any proceeding under this Act" (added in 1910 by No. 7) the words "in exercising any duties or powers under or by virtue of this Act," Parliament showed that its intention was to leave the Court of Arbitration—so far as it could—entirely free from the supervision of any other Court, including this Court. Whatever judicial powers, moreover, were to be exercised by that tribunal were to be exercised under sec. 25 untrammelled by ordinary legal technicalities, and adapted to what the Court thought solid justice.

But though Parliament could say that no requirement it had created should stand in the way of this intention, it could not cut down constitutional conditions or the constitutional jurisdiction of this Court. When prohibitions nullifying awards and orders in spite of sec. 31 had made the position industrially intolerable, the judicial suggestions referred to were made. Parliament responded within two months by Act No. 18 of 1914. By that Act sec. 21AA was passed, in effect adopting the suggestions as made. It will be noticed further that the intention to exclude further interference

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was carried out consistently by the concluding words of sub-sec. 4. Sec. 31 was even further strengthened by the addition of the word "injunction."

(6) Secs. 27 and 28 of the *Industrial Peace Act*, passed in 1920, are to our minds the very clearest indication that our view of the general scheme and of the intention to confine sec. 21AA to applications *before* award is correct.

It seems to us, therefore, that the path Parliament has taken is directly inverse to that we are invited to go. It rests, of course, with Parliament to consider whether its intention has been accurately expressed. But we venture to repeat what *Powers* J. said in 1914, in the *Tramways Case* [*No.* 2] (1), that it is for Parliament to consider, if such insecurity is allowed to exist once an award is made, "whether the penalties imposed on those who resort to a strike, instead of to the Court, ought not to be abolished." And we also direct attention to his further words (2): "My time and energies, which belong to the public, are wasted; and the irritated employees are put under a temptation to strike work." An award that is never secure is illusory. If, contrary to our view, it was the intention of Parliament to leave it so, challengeable at any moment by any person bound, it would be illusory. That is important as affecting the interests of the parties immediately concerned, none of whom, employers or employed, could build upon it; or as affecting the energies of the President and the Deputy Presidents of the Arbitration Court, whose public time and efforts are entirely wasted; or as affecting the industrial peace of the people of the whole Commonwealth, whose daily wants are sacrificed to mere technicalities of procedure. It should be observed that sec. 21AA limits possible applicants in such a case to an "organization or association." Such a limitation, we know, is not always possible—as, for instance, in the most stubborn and widespread cases of which we have some recent examples; and it may sometimes prove a misfortune that the intervention of the President in a great public crisis should be attended with the present possibility of his efforts being entirely nullified by this Court.

We think, upon a proper construction of the law as it at present

(1) (1914) 19 C.L.R., at p. 153. (2) (1914) 19 C.L.R., at p. 157.

stands, that this confusion does not exist. For this reason we are of opinion that the Court should hold that Parliament has not created what the applicants claim is an additional method of disturbing industrial peace once it has been established by the Court of Arbitration.

The first question should, in our opinion, be answered in the negative, rendering it unnecessary to answer the second.

GAVAN DUFFY J. After a dispute had been submitted to the Court of Conciliation and Arbitration and an award had been made therein, a summons was taken out under the provisions of sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*. The learned Judge who heard the summons stated two questions for the consideration of and argument before this Court, and on that argument it became necessary to consider the meaning of the section. The relevant part is as follows:—"21AA.—(1.) When an alleged industrial dispute is submitted to the Court—(*a*) in the case of a dispute submitted to the Court by plaint—the complainant or respondent organization or association; and (*b*) in any other case—any party to the proceeding or the Registrar, may apply to the High Court, for a decision on the question whether the dispute or any part thereof exists, or is threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State or on any question of law arising in relation to the dispute or to the proceeding or to any award or order of the Court."

It is conceded that the main object of these provisions is to enable parties, by means of a cheap and expeditious proceeding, to obtain from this Court an authoritative decision as to whether an alleged industrial dispute submitted to the Court of Conciliation and Arbitration is at the time of submission an industrial dispute extending beyond the limits of any one State; but it is said that the decision must be made immediately after the dispute has been submitted to the Court, or at all events before an award has been made in respect of it, and sec. 31 is relied on as supporting this contention. Sec. 21AA itself contains no limitation of time except that which may be implied in the word "when" at the beginning of sub-sec. 1. This word in its conjunctival use generally means

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"at the time that" or "just after the moment that," but it is also frequently used instead of the phrase "as soon as." It is also used to introduce a condition having no relation to time, and this use is very common in legislative enactments; its meaning is then equivalent to that of the word "if" or the phrase "in case." Now, the word "when" must have one and the same meaning with respect to all applications under the section, and it seems to me that with respect to some of these applications it cannot mean "at the time that" or "just after the moment that." A determination on any question of law arising in relation to an award must always, and in relation to an order of the Court must sometimes, be made after the award has been made. It follows from what I have said that an application for a determination under the sub-section may be made after the award, and the protection afforded to awards and orders of the Court by sec. 31 must be read as subject to the powers already conferred by sec. 21AA.

But, if this be so, it was said that it would follow that the all-important question as to whether a dispute of such a nature as to give jurisdiction to the Court of Conciliation and Arbitration existed at the time the industrial dispute was submitted can never arise for determination under the section, because the question to be determined is always whether the dispute or any part thereof exists, and that must mean exists at the time the application is made. It was further said that if the existence of the dispute before the making of the application could not be questioned it was idle to make the application after the award, because the award must be taken to have settled any existing dispute, and that therefore the answer in such a case must be—No. The vice of the first part of this argument is that it would render it impossible to determine whether a dispute existed at the time of submission whatever meaning is given to the word "when." The application cannot be made before the dispute has been submitted to the Court; and if it be made after the dispute has been submitted, the question for determination would still be whether the dispute existed at the time of the application, not at the time of the submission. As to the further argument it would be enough to say that, if the words of the statute in their natural meaning gave a right to apply to this

Court for a determination at any time, we should not be justified in limiting the time to a period during which practical advantage might be obtained by the application. But on the true construction of the sub-section the question to be determined is, not the existence of the dispute at the time of the application, but at the time of the submission. The course of judicial decision and legislation makes it clear that the first object of the section was to supply a summary procedure in substitution for the cumbrous and expensive writ of prohibition which had been in constant use in this Court for the purpose of determining whether the Court of Conciliation and Arbitration was justified in assuming jurisdiction in the case of an alleged industrial dispute, and the words of the section seem to me to attain that object. If we substitute the word "if" for the word "when," the sub-section will in effect run thus:—"If an alleged industrial dispute is submitted to the Court" *the prescribed party* "may apply to the High Court for a decision on the question whether the dispute or any part thereof exists." Surely the meaning of the provision would then be that, if an alleged industrial dispute were submitted, application might be made to the High Court to determine whether at the time of submission the dispute was of such a nature as to give the Court jurisdiction. In my opinion the sub-section enables the High Court to do two distinct things: first, to determine whether the alleged dispute is of such a nature as to give the Court of Conciliation and Arbitration cognizance of it; second, to assist and control that Court by giving an authoritative decision on any question of law arising in relation to the dispute so submitted or to any award or order made in respect of such dispute.

The duty imposed by sec. 21AA must be performed by the Justice to whom application is made if the conditions prescribed by the section have been complied with.

I answer the questions stated thus:—(1) Yes. (2) No.

STARKE J. A Court acting within the limits of its jurisdiction is not subject to prohibition. But, in the case of the Commonwealth Court of Conciliation and Arbitration, jurisdiction, according to a long series of decisions in this Court, is conditional at least upon the existence of an industrial dispute extending beyond the limits of any

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one State (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co.* (1); *Whybrow's Case* (2); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Allen Taylor & Co.* (3)). Further, this Court appears to have held in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (4) that no part of the judicial power of the Commonwealth is vested in the Arbitration Court, and possibly cannot be vested in it as at present constituted. The Arbitration Court should, of course, satisfy itself that it is not exceeding the limits Parliament has set to its jurisdiction, but that is a matter of expediency and not a determination upon a matter within its jurisdiction (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (5); *Felt Hatters' Case* (6)). The result of these decisions was the issue of prohibition to the Arbitration Court in several cases where it had exceeded its jurisdiction. And the practice of the Court has been to issue prohibition as well before as after the making of awards (*Tramways Case* [*No.* 1] (7); *Tramways Case* [*No.* 2] (8); *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* (9)). This position attracted the attention of Parliament, and in 1914 it provided that awards and orders of the Court should not be subject to prohibition (see Acts No. 13 of 1904, sec. 31; No. 6 of 1911, sec. 14; No. 18 of 1914, sec. 11). But Parliament could not interfere with the grant of original jurisdiction to the High Court in all matters in which a writ of mandamus or prohibition, or an injunction, is sought against an officer of the Commonwealth (*Tramways Case* [*No.* 1] (7)). In these circumstances Parliament adopted the expedient found in sec. 21AA of the *Arbitration Act*, and provided a summary and comparatively inexpensive procedure for the exercise of the judicial power of the Commonwealth in relation to industrial disputes. The question here is the proper interpretation of that provision.

The first words of the section state the nature of the case to which the law applies: "When an alleged industrial dispute is submitted . . . ." Now, the word "when" in legislation is frequently

(1) (1909) 8 C.L.R. 419.
(2) (1910) 11 C.L.R. 1.
(3) (1912) 15 C.L.R. 586, at pp. 605-606.
(4) (1918) 25 C.L.R. 434.
(5) (1912) 16 C.L.R. 245.
(6) (1914) 18 C.L.R. 88.
(7) (1914) 18 C.L.R. 54.
(8) (1914) 19 C.L.R. 43.
(9) (1920) 28 C.L.R. 456.

used with the notion of time merged in that of mere connection: thus it is used with the meaning "in the case," or sometimes as nearly equal to "if" (see *New English Dictionary*, edited by Sir James Murray, *sub* "When"). And that, in my opinion, is the meaning of the word "when" in sec. 21AA. These opening words of the section throw no light upon the question whether the Court is to ascertain whether the dispute is an existing fact or a fact that has existed. We must proceed further, and we then find that later words of the section aid us: the prescribed party may, in the case stated, apply to the High Court for a decision on the question whether the dispute or any part thereof *exists* or is threatened or impending or probable. In the present case the alleged dispute had been referred to the Arbitration Court pursuant to the power contained in sec. 19 (*d*) of the *Arbitration Act*, and the summonses issued must be referred to the provisions of sec. 21AA, sub-sec. 1 (*b*), and not to the provisions of sub-sec. 1 (*a*). The words "any party to the proceeding" create no difficulty, to my mind: they are merely descriptive of the persons who may apply, and throw no light upon the question whether the proceeding must be pending or not. The word "exists" involves, in my opinion, an inquiry whether the dispute exists or does not exist at the time of the application. But what dispute? The dispute that was submitted to the Arbitration Court. The inquiry is whether that dispute or any part of it is or is not a living and existing thing at the time of the application. Any other inquiry would be idle, and indeed useless. The purpose of the inquiry is, in my opinion, to ascertain whether the Arbitration Court has seisin of and jurisdiction in the dispute and is in a position to exercise its powers and authorities. But that Court could not acquire cognizance of a dispute or exercise its powers and authorities in respect thereof unless the dispute existed when the matter was submitted or referred to it (see Act, sec. 19). And a decision simply affirming that a dispute existed on a subsequent date would neither affirm nor deny that the Arbitration Court had jurisdiction in the matter: it would be quite consistent with such a decision that the dispute came into being subsequently to the date of submission or reference. Therefore, in my opinion, the provisions of sec. 21AA necessarily involve inquiry into all the facts which will

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enable the Court or a Justice to determine whether, on the date of application to the Court or a Justice, the Arbitration Court has or has not jurisdiction in relation to the suggested dispute. But the section does not warrant such an inquiry after the making of an award. After an award the dispute cannot exist: it is settled. The authority in sec. 21AA to decide whether a dispute "exists" cannot, I think, be extended or so construed as to cover that case. It may be just as necessary, in actual fact, to determine after an award, whether the dispute upon which the award was founded did or did not exist. But the section does not provide for any such determination; and it may be, despite the provisions of sec. 31 of the Act, that the Legislature regarded the provisions of sec. 75 of the Constitution as sufficient for the purpose. The words in sec. 21AA authorizing the Court or a Justice to decide "any question of law arising in relation to the *dispute* or to the *proceeding*" refer, I think, to questions arising whilst the Arbitration Court has cognizance of the matter, and not to questions arising after award. The dispute is treated here, I think, as a living thing and the proceeding as pending.

Lastly, we come to the words of the section providing for questions of law arising in relation to any award or order of the Court. Now, I confess that I was quite unable to appreciate the argument which limited these words to existing awards or orders of the Court, and excluded proposed awards or orders in the dispute and the award or order of the Court which determined or settled the dispute. The words are "any award or order," and sec. 31, leaving aside any question of its validity, supplies a reason, if one be needed, for their insertion. Many questions of law frequently arise on awards of the Arbitration Court. Thus it may be suggested that the Constitution has been contravened, or that the Court has exceeded the powers conferred upon it or has acted contrary to some law. All these questions are of very grave importance. And, if the argument be right that sec. 31 precludes the raising of such matters by means of prohibition or otherwise after an award, then it seems to me clear that sec. 21AA may be reasonably taken as providing, in many respects, a summary and inexpensive substitute for such methods. Of course, the Commonwealth Parliament could not authorize

the Arbitration Court to transcend the Constitution; but, apart from this, it is not to be lightly assumed, in my opinion, that the Legislature intended, so far as lay within its power, to place the awards of the Arbitration Court beyond the review of any judicial organ of the Commonwealth after the making of such awards, and very clear words would be required for that purpose. The combination of the provisions in sec. 21AA with those in sec. 31 does not establish any such intention: in truth, to my mind, they make the opposite intention abundantly clear.

The questions stated in the case should, in my opinion, be answered as follows:—(1) The High Court or a Justice thereof sitting in Chambers has not jurisdiction to hear and determine the question set forth in sub-par. (*a*) of par. 1 of the case, but has jurisdiction to hear and determine the questions set forth in sub-pars. (*b*) and (*c*) of the said par. 1. (2) No, as to questions which the Court or a Justice has jurisdiction to hear and determine.

*Questions answered*:—*Question* 1—*No, as to question* (*a*) *referred to in par.* 1 *of the case*; *Yes, as to questions* (*b*) *and* (*c*) *referred to in the said paragraph. Question* 2—*No, as to such questions* (*b*) *and* (*c*).

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B. L.