[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION;

Ex parte THE ENGINEERS &c. (STATE) CONCILIATION COMMITTEE.

H. C. of A. 1926.

SYDNEY, *Nov.* 25; *Dec.* 6.

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

Industrial Arbitration—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—State Industrial Authority—Direction not to deal with industrial dispute—Prohibition—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.), (xxxix.)—*Commonwealth Conciliation and Arbitration Act* 1904-1926 (*No.* 13 *of* 1904—*No.* 22 *of* 1926), *secs.* 4, 20, 31, 38—*Industrial Arbitration Act* 1912 (*N.S.W.*) (*No.* 17 *of* 1912), *sec.* 5—*Industrial Arbitration* (*Amendment*) *Act* 1926 (*N.S.W.*) (*No.* 14 *of* 1926), *secs.* 8, 9, 15 (1) (iii.).

Held, by the whole Court, (1) that sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1926 is within the power conferred by sec. 51 (xxxv.) and (xxxix.) of the Constitution upon the Parliament of the Commonwealth; (2) that a Conciliation Committee established under sec. 8 of the *Industrial Arbitration* (*Amendment*) *Act* 1926 (N.S.W.) is a "State Industrial Authority" within the meaning of sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1926.

Held, also, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ., that, where a State Industrial Authority is dealing or is about to deal with persons and subject matters that are within the ambit of an existing industrial dispute extending beyond the limits of any one State of which the Commonwealth Court of Conciliation and Arbitration has cognizance under the *Commonwealth Conciliation and Arbitration Act* 1904-1926, that Court has jurisdiction to act under sec. 20 of that Act; and that the circumstances necessary for that jurisdiction existed in this case.

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Per Higgins J.: The State Industrial Authority is not "dealing with an industrial dispute" within sec. 20 when (as in this case) it is merely inquiring into conditions of labour with a view to laying down a general rule therefor irrespective of dispute.

APPLICATION for writ of prohibition.

An organization of employees, ordinarily known as the Amalgamated Society of Engineers, was registered under the *Commonwealth Conciliation and Arbitration Act* in respect of the engineering industry, under the name of the Amalgamated Engineering Union. At all material times there were in force two awards applying to the engineering industry in New South Wales, namely, (1) an award made by the Industrial Arbitration Court under the *Industrial Arbitration Act* 1912 (N.S.W.) and published in the New South Wales Government *Gazette* on 12th December 1919 (with certain variations); (2) an award of the Commonwealth Court of Conciliation and Arbitration in the matter of certain industrial disputes, No. 309 of 1923 and No. 49 of 1924, in which the Amalgamated Engineering Union was claimant (see *Amalgamated Engineering Union* v. *Adams and Australian Gypsum Ltd.* (1)). The latter award to some extent dealt with conditions of apprenticeship, and was in operation by virtue of sec. 28 of the *Commonwealth Conciliation and Arbitration Act.* The right of officials of the Union to enter the premises of employers for the purpose of interviewing employees had been claimed, but was refused by the Court when making that award.

On 21st December 1925 the Amalgamated Engineering Union served a log of wages and conditions of employment on a number of employers, including the members of the Metal Trades Employers' Association. Included in the claims were claims in respect of apprentices and claims in respect of the right of officials of the Union to enter the premises of employers. The claims in respect of apprentices included claims relating to the trades to which apprentices might be indentured, the number of apprentices to be taken in proportion to journeymen, probationary periods, the term of apprenticeship, minimum rates of wages, the acceptance of premiums, when overtime should be worked, wages for overtime,

(1) (1924) 20 C.A.R. 982.

shift work, technical education and absence therefor. The claim made as to the right of entry was that an accredited official of the Union should be permitted access to the employers' premises during lunch hour for the purpose of interviewing employees on valid Union business. This log was the origin of dispute No. 61 of 1926 in the Commonwealth Court of Conciliation and Arbitration.

On 31st July 1926 the Metal Trades Employers' Association and other employers served a log of wages and conditions of employment together with a letter of demand on a number of employees, including non-unionists. The claims in this log included a claim that no Union official should enter an employer's premises without first obtaining permission from the employer or his official representative, and claims in respect of apprentices relating to many of the matters specified in the log served by the Union on 21st December 1925. The log served on 31st July 1926 was the origin of dispute No. 189 of 1926 in the Commonwealth Court of Conciliation and Arbitration.

After a compulsory conference, which proved abortive, disputes No. 61 and 189 were referred into Court. The parties to these disputes were practically the same, the claimants in the one being respondents in the other.

On 25th August 1926 an application for a variation of the award of the Industrial Arbitration Court already referred to was filed by the Amalgamated Society of Engineers with the Chairman of the Engineers &c. (State) Conciliation Committee, constituted under the *Industrial Arbitration (Amendment) Act* 1926 (N.S.W.), and the application was set down for hearing on 1st September 1926. The schedule of claims which were put forward by that application included claims in respect of apprentices similar to those in dispute No. 61 and also a claim that with the object of policing the award the right of entry into any workshop or works affected by it should be given to an accredited official of the applicant Union.

On 3rd September 1926 a summons was issued by the Metal Trades Employers' Association calling upon the Engineers &c. (State) Conciliation Committee to show cause before the Commonwealth Court of Conciliation and Arbitration why an order should not be made under sec. 20 of the *Commonwealth Conciliation and*

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Arbitration Act 1904-1926 directing that Committee "not to deal in any respect with the application of the Amalgamated Society of Engineers to the said Committee for a variation of an award in reference to apprenticeship matters and the right of access or entry by officials of the said Amalgamated Society of Engineers to the premises of employers, so far as such application affects the respondents to the dispute No. 61 of 1926 who are also claimants to the dispute No. 189 of 1926 and their employees." The summons came on for hearing before the Full Court of the Commonwealth Court of Conciliation and Arbitration; and that Court on 7th October 1926 made an order the material portion of which was as follows: "It appearing to this Court that the said Engineers &c. (State) Conciliation Committee is dealing or about to deal with industrial disputes in this Court No. 61 of 1926 and No. 189 of 1926 in respect of apprenticeship matters and the right of access or entry by officials of the said Amalgamated Society of Engineers, to which disputes the persons firms and companies hereinafter set out are parties, this Court doth direct the said Engineers &c. (State) Conciliation Committee not to deal with the said disputes or either of them so far as any of the following persons firms and companies and of their employees as such are concerned." Then followed a list of the persons, firms and companies referred to.

The Engineers &c. (State) Conciliation Committee now applied to the High Court for an order nisi for a writ of prohibition directed to their Honors the Judges of the Commonwealth Court of Conciliation and Arbitration and the Metal Trades Employers' Association in respect of the above-mentioned order. The grounds of the application were (1) that sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1926 is not within the legislative powers of the Parliament of the Commonwealth of Australia; (2) that the Engineers &c. (State) Conciliation Committee constituted under the provisions of the *Industrial Arbitration Act* 1912 (as amended) of the State of New South Wales is not a "State Industrial Authority" within the meaning of sec. 20 aforesaid; (3) that the Commonwealth Court of Conciliation and Arbitration has no jurisdiction to make an order under the said section.

Flannery K.C. (with him *Cantor*), for the applicant. A Conciliation Committee constituted under secs. 8 and 9 of the *Industrial Arbitration* (*Amendment*) *Act* 1926 (N.S.W.) is not a "State Industrial Authority" within the meaning of secs. 4 and 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1926. The Commonwealth Court of Conciliation and Arbitration cannot give to the *Commonwealth Conciliation and Arbitration Act* such an interpretation as would give that Court jurisdiction in a case where, upon a proper construction of the Act, it would have none. That Court must determine judicially a matter brought before it under sec. 20, and it must find on evidence before it that a State Industrial Authority is dealing or about to deal with an industrial dispute. A Conciliation Committee constituted under secs. 8 and 9 of the *Industrial Arbitration* (*Amendment*) *Act* 1926 (N.S.W.) is not a State Industrial Authority as defined by sec. 4 of the *Commonwealth Conciliation and Arbitration Act*. A Conciliation Committee is a subordinate legislative body which has authority to make an award as to any industrial matter whether there is or is not a dispute. Its duty is not to settle disputes but to settle industrial matters (see *Industrial Arbitration Act* 1912 (N.S.W.), sec. 5, as amended by *Industrial Arbitration* (*Amendment*) *Act* 1926 (N.S.W), sec. 15). The words "industrial dispute" in sec. 20 of the *Commonwealth Conciliation and Arbitration Act* mean an industrial dispute as defined by sec. 4 of that Act, and do not refer to an industrial dispute which is confined to one State: otherwise sec. 20 would be *ultra vires*. A State Industrial Authority does not deal with an industrial dispute if it deals only with some matter which also forms part of the subject matter of an industrial dispute extending beyond one State. In order that the Commonwealth Court of Conciliation and Arbitration may act under sec. 20, there must be a pre-existing industrial dispute extending beyond the limits of one State and a State Industrial Authority must be dealing or be about to deal with that dispute. The provisions of sec. 20 are not within the powers conferred by sec. 51 (xxxv.) and (xxxix.) of the Constitution. [Counsel referred to *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1); *John Mackay*

(1) (1920) 14 C.A.R. 741, at p. 743.

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

v. *Australian Workers' Union* (1); *Musicians' Union of Australia* v. *J. C. Williamson Ltd.* (2).]

E. M. Mitchell K.C. (with him *K. W. Street*), for the Commonwealth Court of Conciliation and Arbitration and the Judges thereof. The Commonwealth Court can act under sec. 20 when there is before a State Industrial Authority a dispute as to the same matters between some of the same parties as in an industrial dispute which is before the Commonwealth Court of Conciliation and Arbitration. There is in this case one composite industrial dispute extending beyond one State, and the State Industrial Authority is dealing or about to deal with that part of it which exists in that State (see per *Higgins* J. in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (3)). Sec. 20 is within the power conferred by sec. 51 (xxxv.) and (xxxix.) (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (4)). If the Commonwealth Court is about to deal with an inter-State dispute, it is reasonable that that Court should be able to prevent the State Courts from interfering.

Ferguson, for the Metal Trades Employers' Association. As to the meaning of "industrial dispute" in sec. 20, sec. 38 (*h*) shows that those words refer to that portion of an industrial dispute, so far as subject matter and parties are concerned, which is within one State. A Conciliation Committee has, under the State Act of 1926, power to deal with every industrial dispute which arises within New South Wales, and therefore it is a State Industrial Authority within secs. 4 and 20 of the *Commonwealth Conciliation and Arbitration Act*. Sec. 20 is within the incidental power as freeing the Commonwealth Court from the embarrassment caused by the State Authority impinging upon what the Commonwealth Court is doing (see *R.* v. *Brisbane Licensing Court*; *Ex parte Daniell* (5); *Farey* v. *Burvett* (6)).

Cur. adv. vult.

(1) (1920) 14 C.A.R. 364, at p. 368.
(2) (1921) 15 C.A.R. 4, at p. 6.
(3) (1920) 14 C.A.R., at p. 743.
(4) (1910) 11 C.L.R. 1, at p. 52.
(5) (1920) 28 C.L.R. 23, at p. 29.
(6) (1916) 21 C.L.R. 433, at p. 441.

The following written judgments were delivered :—

KNOX C.J. This is an application for a writ of prohibition, directed to the Chief Judge and Judges of the Commonwealth Court of Conciliation and Arbitration and to the Metal Trades Employers' Association, to restrain them from proceeding on an order made by the Commonwealth Court of Conciliation and Arbitration under sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1926 directing the Engineers &c. (State) Conciliation Committee not to deal with certain industrial disputes of which the Commonwealth Court has cognizance in respect of apprenticeship matters and the right of access or entry by officials of the Amalgamated Society of Engineers, so far as the persons, firms and companies named in the lists attached to the order and their employees as such are concerned therein.

The grounds of the application are as follows : "(a) that sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1926 is not within the legislative powers of the Parliament of the Commonwealth of Australia ; (b) that the Engineers &c. (State) Conciliation Committee constituted under the provisions of the *Industrial Arbitration Act* 1912 (as amended) of the State of New South Wales is not a 'State Industrial Authority' within the meaning of sec. 20 aforesaid ; (c) that the Commonwealth Court of Conciliation and Arbitration has no jurisdiction to make an order under the said section."

It was upon these grounds that the present applicants opposed the making of the order by the Commonwealth Court of Conciliation and Arbitration when the matter was before that Court, and the arguments then advanced in support of them are fully dealt with in the reasons by their Honors the Chief Judge and Judge *Lukin* for their decision. On this application the sole question is whether the Commonwealth Court of Conciliation and Arbitration acted in excess of the jurisdiction conferred upon it. I agree with the learned Judges of the Court of Conciliation and Arbitration in thinking that that Court had jurisdiction to make the order which is challenged in this proceeding. I find it unnecessary to add anything to the reasons given by them in support of that conclusion, which appears to me to cover completely the questions raised on the argument before this Court.

In my opinion the application should be dismissed.

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Isaacs J.

ISAACS J. That the Commonwealth Court of Conciliation and Arbitration is subject to prohibition under the Constitution is clear. But whether or not prohibition lies in respect of a direction given by the Court under sec. 20 of the Act I do not decide, but I assume for the purposes of this judgment that it does.

The occasion of the application is important enough, but the contentions advanced in its support are not attended with any substantial doubt. When plainly stated and applied to the relevant subject matter, they really answer themselves. The question turns on whether sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1926 is valid, and, if valid, has been complied with. That section is as follows: "If it appears to the Court that any State Industrial Authority is dealing or about to deal with an industrial dispute the Court may in the prescribed manner direct that Authority not to deal with the dispute; and thereupon the Authority shall cease to proceed in the matter of the dispute, which shall be dealt with by the Court."

First, it is urged that the section is beyond the competency of the Commonwealth Parliament to enact. The contention amounts to this:—Although an industrial dispute has gone beyond being a mere State dispute and has become an Australian dispute, requiring the single hand of the Commonwealth Authority so as to settle the matters in dispute on a national basis, having regard to the interests of all the States concerned, the Commonwealth Authority may be impeded by a State Authority. It is said that the Commonwealth Authority is unable to say "Hands off" to a State Authority that is proceeding, in accordance with the separate policy of a single State, to interfere prejudicially with the settlement of the dispute on a Commonwealth basis by compulsorily, and in advance of the Commonwealth tribunal, determining and regulating some or all of the very matters in dispute between some of the very persons disputing. No doubt, apart from the Commonwealth Constitution, the State law would justify the State Authority in proceeding, regardless of any but local interests. But the Commonwealth Constitution, when it created subjects of national concern and entrusted them, with all necessary incidental powers, to a Parliament in which the people of every State were represented, made effective

provision in sec. 109 by which the people of no single State could impede the general welfare. The State law has full force until it comes into collision with the national law, but in that case, as no one can obey two discordant rules, the Commonwealth law prevails. That is both good law and good sense, and is fatal to the first contention.

Then, as to whether sec. 20 has been complied with, three separate points were urged. The first was that the Engineers &c. (State) Conciliation Committee was not a "State Industrial Authority" within the meaning of sec. 20 because it did not conciliate or arbitrate as to industrial disputes, but only as to the industrial conditions involved in those disputes. That is a distinction that conveys nothing of substance to my mind. Every decision on the merits of every tribunal is a decision, not as to the dispute, but as to the matter disputed about. Inspection of the State Act shows that the real function of the Committee is to conciliate and arbitrate between contesting parties regarding industrial conditions claimed and denied. That is neither more nor less than the process involved in the Commonwealth Court. Parties dispute about industrial conditions, and the Court decides about industrial conditions. Then it was said that the State Committee were not dealing with an inter-State dispute. But that is unsustainable. They deal with it by applying to that integral part of it that extends into the State their power of conciliation and arbitration so as to determine, as between the parties concerned and within the State, their mutual legal rights respecting the industrial matters in contest. That the Committee was, in this instance, as found by the Commonwealth Court, dealing or about to deal with two inter-State disputes in the way above described is beyond all question.

There is no foundation for a prohibition, and it should be refused.

HIGGINS J. I regret that I am unable to regard the position in the same light as my learned brothers. With nearly everything that has been said by the learned Judges of the Commonwealth Court, in their judgments, I can heartily agree; and especially with their condemnation of the existing system, or want of system, under which labour conditions can be the subject of official

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Higgins J.

investigation under the State Parliament and under the Commonwealth Parliament, and even at the same time (see *John Mackay* v. *Australian Workers' Union* (1)). But it is not for us in this Court to give effect to the law as we think it ought to be, but to declare the law as it is.

The only power conferred on the Commonwealth Court by sec. 20 of its Act is to direct the State Industrial Authority that is " dealing or about to deal with an industrial dispute " not to deal with that dispute. But there is not the slightest indication that in this case the State Authority is going to deal with any dispute. What it is to deal with is the regulation of certain conditions of labour in the engineering industry, irrespective of dispute—just like a Victorian Special Board under the Factories Acts. The Legislature of Victoria can fix conditions of labour directly, or indirectly through a Special Board ; and so can the Legislature of New South Wales. Officially the Conciliation Committee knows nothing of any dispute ; it does not set itself to settle any dispute ; it does not, in this case, " deal with any industrial dispute " ; it prescribes, after investigation, such conditions as it thinks right, and the Legislature gives to its prescriptions the force of law. I am speaking of " dispute " in the sense so often insisted on by this Court—in the sense of a definite collision of wills of definite persons, of definite disputants. As *Griffith* C.J. said in the *Federated Saw Mill Case* (2), the term " dispute " itself connotes the existence of disputants taking opposite sides. Who are the disputants in an investigation of the conditions of labour in this case ? Further, " an industrial dispute exists where a considerable number of employees engaged in some branch of industry make common cause in *demanding* from . . . their employers . . . some change in the conditions of employment which is denied to them or asked of them." Where is the demand on employers here ; where is the refusal ? The decision of the Committee will be binding, under the principal New South Wales Act of 1912, not on any named persons, but on " all persons engaged in the industries or callings, and within the locality " (secs. 25 (1), 29). So, under the Act No. 14 of 1926, the decision will be binding " on any or all employers and employees in the industry " (sec. 9 (1)).

(1) (1920) 14 C.A.R., at p. 369.

(2) (1909) 8 C.L.R. 465, at p. 488.

In considering whether the Committee is "dealing with any industrial dispute," we must look at the matter from the point of view of the Committee: is there any dispute as such before the Committee, for the Committee to "deal with"? Everyone recognizes that any board or committee or other body that deals with a dispute between definite parties has necessarily to consider aspects (such as competition, &c.) which a body that can legislate directly for *all* employers and employees in a given area has no need to consider, and a body that addresses itself to conditions of labour for one State only has quite a different problem to deal with from a body which addresses itself to conditions of labour under a dispute which extends to two or more States. But to settle any dispute is not the job of the Committee.

I fully concur in the opinion that this sec. 20 is not invalid on the ground submitted by counsel for the Committee. On the principle laid down by this Court in *Stemp* v. *Australian Glass Manufacturers Co.* (1) I think that the Commonwealth Parliament has power to enable the Commonwealth Court to stay the proceedings of a State Industrial Authority when the Court considers that a simultaneous inquiry on the part of the State Authority into the same subject would be prejudicial to the work of the Court. For the Commonwealth Parliament has, under sec. 51 of the Constitution, power to make laws not only *for* conciliation and arbitration, but with "respect to" conciliation and arbitration, and to matters incidental to the execution of that power (sec. 51 (xxxix.)); and, as incidental to that power, it can "clear the ring." But the Commonwealth Parliament has not in fact enabled its Court, by sec. 20 as it stands, to direct a special board, committee or other legislative body (created by the State Legislature) not to pursue its task of inquiry and legislation. An order to such a body not to "deal with a dispute" would meet a ready answer—"We are not dealing with any dispute."

I concur also in the view that this Conciliation Committee is a "State Industrial Authority" within the definition in sec. 4 of the Commonwealth Act. For the Committee has now, under the recent New South Wales Act No. 14 of 1926, authority to exercise any

(1) (1917) 23 C.L.R. 226.

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Higgins J.

power of conciliation or arbitration with reference to "craft or industry disputes," and engineers are a craft; and this provision brings the Committee within the words of the definition. But no dispute has been brought before the Committee in this case; and it is only when there is a *dispute* being dealt with by a State Industrial Authority that sec. 20 of the Commonwealth Act applies.

It appears that on 19th August of this year the Minister for Labour of New South Wales, in pursuance of the Act No. 14 of 1926 (sec. 8), established a Conciliation Committee for all persons employed in the industries and callings of aircraft-engineer, assemblers, &c. (engineering callings). Under sec. 9 of the Act No. 14 the Committee was to have cognizance of and power to inquire into any industrial matter in the industry, and to make an "order or award" binding on any or all employers and employees in the industry; and the "order or award" was to operate in all respects as the award of an industrial board. Under sec. 13 no party appearing on the inquiry can be represented by counsel or solicitor except by consent of all parties and of the Committee. On 25th August following, the Amalgamated Society of Engineers made application for an "award" to apply to apprentices in place of the "award or decision" of the New South Wales Board of Trade which came into operation 2nd May 1924. The fact that in the New South Wales Acts it has long been the practice to call the decisions or determinations or legislation of boards, &c., "awards," even where there has been no dispute, or arbitration, tends to obscure the fact that there is no dispute to be dealt with, no arbitration between disputants to be conducted, under such an application. *The Union here did not ask any employers to accede to the claims* and no employer refused the claims. There was no issue between definite parties to be decided. Under the Constitution of New South Wales (Act No. 32 of 1902) the Legislature of the State has power (subject to the Commonwealth Constitution) to make laws for New South Wales "in all cases whatsoever"; and so the New South Wales Legislature has power to create committees, &c., to determine labour matters even if there be no dispute *inter partes*—a power which the Commonwealth Parliament has not.

Counsel have referred to the fact that I made an order under sec. 20 when I was President of the Commonwealth Court, directing the Industrial Court of Western Australia not to deal with an industrial dispute with which it was dealing. The order was limited by the words "so far as relates to" the West Australian employers *nominatim* who were respondents in the Commonwealth dispute "and all the subjects of claim in the log" in the Commonwealth dispute. But in that case the West Australian Industrial Authority was dealing with an actual industrial dispute of which it was seised —a dispute between definite parties; whereas in this case there is no dispute before the New South Wales Industrial Authority. If a Royal Commission were appointed to consider and report on the best way of promoting immigration, no one would call it a "dispute," although differences of attitude might be foreseen. So, it would not be called a "dispute" if a committee were appointed, by Parliament, to prescribe the proper customs tariff on onions.

I suggest that sufficient attention is not given to the words "deal with" in the expression "deal with an industrial dispute." The jurisdiction conferred by sec. 20 is not conferred unless the State Authority is "dealing or about to deal with an industrial dispute." The words used are not "interfere with" the operations of, or touch on subjects being dealt with by, the Commonwealth Court, though that might have been the motive for the enactment of such a section. What does "deal with" mean? Fortunately, we find that the words are used elsewhere in the Commonwealth Act in a manner which precludes all doubt. In the section next but one preceding (sec. 19), it is provided that the Court shall have cognizance, for purposes of prevention and settlement, of "all industrial disputes which are certified to the Court by the Registrar as proper to be *dealt with* by it in the public interest." So also, in sec. 38 (*h*), the Court is given power to refrain from determining a dispute, or part of the dispute, if it appears that the dispute "has been *dealt with*, or is being *dealt with*, or is proper to be *dealt with*, by a State Industrial Authority." I thought it sufficiently clear that "deal with" means that the tribunal takes up a definite log or a definite part of the log, and addresses itself to the merits with the view of conciliation of the parties, or of making an award, if necessary—as to that whole

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Higgins J.

dispute or that part. A physician "deals with" a patient's case; a parent may interfere with it by giving the patient ice-cream. A tradesman turns a top on his lathe; a bystander who nudges his elbow does not "deal with" the job, but interferes with it. The distinction is obvious. Applying that meaning, sec. 20 prescribes —it is necessary to repeat it again in full: "If it appears to the Court that any State Industrial Authority is dealing or about to deal with an industrial dispute the Court may . . . direct that Authority not to deal with the dispute; and thereupon the Authority shall cease to proceed in the matter of the dispute, which shall be dealt with by the" Commonwealth "Court." The words evidently assume that to proceed would be within the powers of the State Authority (in the absence of the direction); and yet a State Authority would have no power to proceed with a "dispute extending beyond the limits of any one State"—*the prima facie* meaning of "industrial dispute" under sec. 4. A direction not to deal with a dispute extending beyond one State would, therefore, mean nothing; the Constitution already directs the State Authority not to do so. On the other hand, the words "dealing or about to deal with an industrial dispute" cannot refer to the State industrial dispute; for the Commonwealth Court is directed to "deal with" the dispute; and the Commonwealth Court cannot, under the Constitution, deal with a dispute confined to one State. Therefore I was forced, in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1), to find some intermediate or qualified meaning for "industrial dispute." It was my duty to struggle to find some rational meaning for the section; and, rightly or wrongly, I thought I was justified in implying words such as "so far as regards the respondents, if the subjects are common to the State Court and the Commonwealth Court."

Whether this reasoning is right or is wrong, I am glad to find that my conclusions are in substantial accord with those of the learned Judges of the Commonwealth Court of Conciliation and Arbitration —I mean as to the form of the direction, if a direction be given under sec. 20.

The direction recites, however, that it appears to the Court that

(1) (1920) 14 C.A.R. 741.

the Conciliation Committee "is dealing or about to deal with industrial disputes in this" (Commonwealth) "Court No. 61 of 1926 and No. 189 of 1926." The recital shows definitely what the Commonwealth Court regarded as a "dealing with" an industrial dispute; and it should be closely examined. A log of claims was sent out by the Unions to certain employers in different States, in December 1925. This log included some claims as to apprentices as well as many other claims; and the employers refused the claims. This dispute was referred for settlement into Court under the Commonwealth Act (sec. 16A); the date is not stated, but I infer that it was referred at some time in the early part of 1926; and the official number of the dispute is No. 61 of 1926. The claims in this dispute were, in substantial points, different from the claims put before the Committee on 25th August 1926, even as to apprentices and the right of officials to enter; and they were different in arrangement and in language. The claims in the *disputes* were not put before the Committee but the claims of 25th August were. Another log of claims was sent by certain employers—the Metal Trades Employers' Association—to the Union on 31st July 1926; and I take it that the Union refused the claims. At all events, this new dispute—No. 189 of 1926—was referred into Court, but not until 17th September, after the Committee had begun its operations on the application made to it (1st September). The log in dispute, No. 189, included certain claims as to apprentices, but the claims were nearly all different in nature and substance from the claims made before the Committee. Neither *dispute* was put before the Committee, and the Committee did not, and could not, attempt to deal with it. No doubt, the Committee, in carrying out its own investigation, has to consider, from its own point of view, certain subjects which are common to its proceedings and to the proceedings in the disputes; but that is not the condition stated in sec. 20 for the exercise by the Commonwealth Court of its power under that section. Under that section, the State Industrial Authority must be "dealing or about to deal with an industrial dispute." To consider a common subject for a different purpose is not to "deal with" the Commonwealth dispute. The Committee does not set itself to find what shall be the suitable award in either of the disputes; it

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Higgins J.

does not "deal with" any dispute at all. We may have our own views in favour of extending the power of the Court to industrial claims, whether made in a dispute or not, but it is not for the Commonwealth Court to extend its power beyond the limits given by the Act merely because the extension would be desirable. The section was inserted in the Act as it was originally framed in 1904; and if it were now to be framed after the experience of the working of the Court, it would possibly be framed more liberally. The approach of the Committee to the subject of labour conditions is not through the gate of dispute.

I have already said that, in my opinion, sec. 20 is not invalid on the ground urged by counsel for the Committee. But if the gloss which we all concur in putting on that section is not justified, if the section ought to be read literally, then a grave doubt must arise as to the jurisdiction of the Commonwealth Court to make the order under sec. 20. Literally read, there is nothing in the section as to "interference" with or a "hampering" or a "touching" of the Court's operations; although interference or hampering may be probably the motive for the section. The section merely says that if the State Authority is dealing with an industrial dispute (on *any* subject), the Court may direct the State Authority not to deal with it; and then the State Authority must cease to proceed in the matter of the dispute, and the Court must deal with it. It may be that the section was merely meant to confer on the Court a special, statutory power of prohibition, in cases where the State Authority is directly usurping the functions of the Court—as where it sets itself deliberately to deal with a dispute extending beyond one State. The unlikelihood of such an occurrence, and the consequent futility of the section, were a main reason for my refusing to accept such a construction in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1). But the other view of the section is quite possible; and as the Committee certainly never set itself to deal with a dispute extending beyond one State—an "industrial dispute" as defined in sec. 4—the power to direct would not apply, and the direction which has been given would be invalid. On this view of the section, ground 3 of the objection would appear to be clearly

(1) (1920) 14 C.A.R. 741.

applicable—that the Court had no jurisdiction to make the order. The section may even be invalid under ground 1. But this view has neither been argued nor suggested; and as I hold the direction to be invalid on the ground of no dispute before the Committee, and as I have not the guidance of my colleagues or the assistance of counsel as to the point which I have just suggested, I refrain from a decision thereon.

For the reason which I have stated—that the Committee was not "dealing with any industrial dispute"—I am of opinion that an order should be made for prohibition of the Commonwealth Court.

GAVAN DUFFY, RICH AND STARKE JJ. The motion should, in our opinion, be refused. It was founded upon sec. 75 (v.) of the Constitution. The reconstitution of the Commonwealth Court of Conciliation and Arbitration in 1926 by the Act No. 22 of 1926 puts the power of this Court to issue prohibition to the Judges of the Arbitration Court beyond controversy. The provisions of the *Commonwealth Conciliation and Arbitration Act*, sec. 31, do not, in our opinion, affect the jurisdiction by way of prohibition conferred by the Constitution upon this Court (see *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1)).

Gavan Duffy J.
Rich J.
Starke J.

The first ground relied upon in support of the motion was that the Arbitration Court had put an erroneous interpretation upon sec. 20 of the Arbitration Act, and thereby assumed to itself jurisdiction in issuing its directions to the Engineers &c. (State) Conciliation Committee by an erroneous conclusion on a point of law (see *Elston* v. *Rose* (2)). The Conciliation Committee is an industrial authority in the State of New South Wales; but it was insisted that it was not a State Industrial Authority within the meaning of secs. 4 and 20 because its powers and functions were to regulate and control industrial matters within the State, whether disputes existed in connection with those matters or not. No doubt its powers are extensive; and they are so extensive that they may be used in composing controversies between disputants in industrial matters by means of both conciliation and arbitration. So much was conceded in the end, but, if that be so, the Committee is a

(1) (1924) 34 C.L.R. 482. (2) (1868) L.R. 4 Q.B. 4.

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Gavan Duffy J. Rich J. Starke J.

tribunal having authority under the State Act to exercise a power of conciliation or arbitration with reference to industrial disputes within the limits of the State, and it comes within the definition contained in sec. 4.

Next, it was said that the Committee was not dealing or about to deal with an industrial dispute within the meaning of sec. 20. We agree that the industrial dispute there referred to is some industrial dispute within the control of the Federal authority, that is, some industrial dispute extending beyond the limits of any one State; but, if the Committee claims the power to deal with persons and subject matters within the ambit of that dispute and proceeds to exercise that power, then, in our opinion, it is dealing with that dispute.

The third ground challenged the constitutional validity of sec. 20. The Parliament of the Commonwealth, however, has plenary power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, and matters incidental to the execution of that power. Now, the purpose and effect of sec. 20 is to preserve the Federal power from interference and embarrassment in the field of disputes extending beyond the limits of a State when such a dispute actually exists. Such a provision is plainly, in our opinion, within the competence of the Parliament.

POWERS J. This is an application for a writ of prohibition against the Judges of the Commonwealth Court of Conciliation and Arbitration and the Metal Trades Employers' Association, in respect of an order made in the above matter by the said Judges on 7th October 1926. The order in question is one directing the Engineers &c. (State) Conciliation Committee not to deal with industrial disputes No. 61 of 1926 and No. 189 of 1926 in respect of apprenticeship matters and the right of entry by officials of the Amalgamated Society of Engineers so far as certain specified firms and companies and their employees as such are concerned therein. It is admitted and the Federal Court has found that the specified persons are in dispute with the Union as to the two matters mentioned, that the dispute extends beyond the limits of one State, including New South

Wales, and that that inter-State dispute was and is pending in the Federal Arbitration Court.

Sec. 20 of the Federal Act is as follows: "If it appears to the Court that any State Industrial Authority is dealing or about to deal with an industrial dispute the Court may in the prescribed manner direct that Authority not to deal with the dispute; and thereupon the Authority shall cease to proceed in the matter of the dispute, which shall be dealt with by the Court." The grounds on which the application is made to this Court for an order to prohibit the Federal Arbitration Court from proceeding with the direction objected to are (1) that sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1926 is not within the legislative power of the Parliament of the Commonwealth of Australia; (2) that the Engineers &c. (State) Conciliation Committee constituted under the provisions of the *Industrial Arbitration Act* 1912 (as amended) of the State of New South Wales is not a "State Industrial Authority" within the meaning of sec. 20 aforesaid; (3) that the Commonwealth Court of Conciliaton and Arbitration had no jurisdiction to make the order in question under sec. 20.

I agree, for the reasons set out in the judgment of my brother *Isaacs* and in the judgment of my brothers *Gavan Duffy*, *Rich* and *Starke*, that (1) sec. 20 is within the legislative power of the Parliament of the Commonwealth, (2) the Engineers &c. (State) Conciliation Committee is a State Industrial Authority within the meaning of sec. 20 aforesaid. As to ground 2, I only wish to add that "industrial matters" under the State Act includes "any shop, factory, craft or *industry dispute* or any matter which may be a contributory cause of such a dispute"; also that sec. 9 of the State Act provides that "a Committee shall have cognizance of and power to inquire into any industrial matter in the industry for which it is established, and in respect thereof, may exercise the powers and jurisdiction of a Board, and may make an order or award binding on any or all employers and employees in the industry." It has authority to settle disputes by conciliation and arbitration. The State Authority is therefore clearly within the definition of a "State Industrial Authority" within the meaning of the Federal Act.

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Powers J.

As to ground 3, it appears, from the argument submitted, that the applicant contends that, although there is an inter-State dispute pending in the Federal Arbitration Court between the Union and the respondents in question as to the two claims referred to in the order objected to and the State Conciliation Committee is dealing with the subject matters in dispute, the Federal Court had not jurisdiction to make the order complained of for the following reason. The State Industrial Authority, it is contended, was attempting to deal, not with an "industrial dispute" between parties but only with an "industrial matter" affecting all employers in New South Wales, namely, the conditions of apprenticeship in New South Wales and the right of union officials in New South Wales to enter the premises of employers. It is contended that, although the State Authority can deal with industrial disputes, it is not necessary in a proceeding before the Conciliation Committee (as it is in the Federal Arbitration Court) to prove that a dispute as to any matter or claim exists before the Committee has jurisdiction to deal with it; and that the Federal Court, because the Committee is only dealing with an "industrial matter" within the State and not with a dispute, has no jurisdiction to prevent the application before the State Authority being dealt with by the State Industrial Authority. It is also pointed out that the Federal Court could not deal with the present application before the State Authority affecting New South Wales employers only.

The application before the State Authority is as follows: "Application is hereby made by the Amalgamated Society of Engineers Industrial Union of Employees for an award to apply to apprentices in place of the award or decision of the New South Wales Board of Trade so far as they are affected by this claim which appeared in the *New South Wales Industrial Gazette* No. 60 of May 1924 and became operative on the 2nd day of May 1924. Schedule of Claim" &c. The application was amended to enable the State Authority to deal also with the claim for the right of entry of union officials. It is quite true that the Federal Arbitration Court cannot deal with the actual application made to the State Authority for a general award for New South Wales, which will, if made, take the place of the New South Wales Board of Trade Regulations as to

apprentices generally; but it can make an award in the inter-State dispute pending before it, so far as certain respondents are concerned, which will settle the dispute and the conditions as to apprentices and the right of entry now before the State Authority. That award will also take the place of the New South Wales Board of Trade Regulations so far as the respondents in question are concerned and so far only as they are inconsistent with the Federal award. The two applications are for the same thing, and would have the same effect, namely, the determination of the dispute as to conditions of apprentices and the right of entry by union officials, and the substitution of an award in place of the New South Wales Board of Trade Regulations as to apprentices.

One answer to the objections mentioned is that the direction of the Commonwealth Court complained of only directs the State Authorty *not to deal with the inter-State dispute* which it has found exists in New South Wales and other States. It is admitted that the Court can properly make such a direction, as it only applies if the State Authority is dealing with that dispute or part of it. If not, the direction does not affect the State Authority. I fail to see why the application for prohibition should be granted. Another answer is that the Federal Court does not attempt to prevent the State Authority from dealing with the application made by the Union, which is a general one affecting all employers in New South Wales, but only so far as an award would affect certain named employers in New South Wales who are parties to an inter-State dispute with the same Union as to the two matters included in the Union's application to the State Industrial Authority for an award. Reference to sec. 20 will show that it is the Federal Parliament (not the Federal Court) which enacts that the State Authority shall—in case the Federal Court makes a direction —cease to proceed in the matter of the dispute, and that the dispute shall then be dealt with by the Federal Court. The position is, therefore, one in which the Federal law (if the Federal Court makes a direction) directs the Federal Court to deal with the dispute. If the State law authorizes a "State Authority" by any law to do any act inconsistent with that Federal law the Federal law must prevail (see sec. 109 of the Constitution).

H. C. OF A. 1926.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE ENGINEERS &C. (STATE) CONCILIATION COMMITTEE.

Powers J.

Even if it had to be proved that the "subject matter" before the State Authority was in fact *the subject of a dispute in the State proceeding* as well as in the Federal proceeding, it is clear from the following facts before the Court that the two conditions asked for were in dispute before both tribunals:—In the inter-State dispute a compulsory conference of the parties to the dispute was held on 24th August 1926 with a view of settling all or some of the matters in dispute. The Union was represented at the conference and the parties failed to settle the dispute, or the part of it referring to apprentices or the right of entry of Union officials; and the dispute was later on referred into the Federal Court for settlement by that Court. On 25th August 1926, the day after the parties failed to settle the dispute at the Federal compulsory conference, the Union lodged the application in question with the State Authority and applied for an award fixing the conditions mentioned. The Union's proceeding in the Federal Court was for a similar award, and the two matters referred to in the application to the State Authority were two "matters" which the Union has asked the Federal Court to deal with in the Federal dispute. As soon as the application was lodged with the State Authority, notices to the parties to be affected were given in accordance with the State Act, and a day fixed for the hearing, namely, 1st September 1926. On 1st September the employers in New South Wales in question, by their representatives, appeared before the State Authority to dispute the claims, and also objected to the jurisdiction of the State Authority to hear the application so far as they were concerned, as the same matters were the subject of an inter-State dispute pending in the Federal Court to which the New South Wales employers represented were respondents. As the State Authority decided to proceed with the matters in question, an integral part of the inter-State dispute, the direction objected to was applied for and made by the Federal Court. On the facts before the Federal Court it is clear that there was a dispute extending beyond the limits of one State pending in the Federal Arbitration Court as to the two "subject matters" referred to in the order in question, and that an integral part of that dispute between the same respondents and the same Union was before the State Industrial Authority for settlement and an award,

and that the Committee was about to deal with part of the dispute when the direction complained of was made.

I agree with the following statement in the judgment of my brothers *Gavan Duffy*, *Rich* and *Starke* (1): "if the Committee claims the power to deal with persons and subject matters within the ambit of that dispute" (the inter-State dispute) "and proceeds to exercise that power, then . . . it is dealing with that dispute."

The Federal Court had, in the circumstances, power under sec. 20 to make the direction complained of—the direction not to deal with the disputes mentioned in the direction or with any integral part of them.

The order asked for should not, therefore, be granted.

Application dismissed.

Solicitor for the applicant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *Gordon H. Castle*, Crown Solicitor for the Commonwealth; *Salwey & Primrose*.

B. L.

(1) *Ante*, p. 580.