[HIGH COURT OF AUSTRALIA.]

THE WESTERN AUSTRALIAN TIMBER WORKERS' INDUSTRIAL UNION OF WORKERS (SOUTH WEST LAND DIVISION) } APPLICANT;

AGAINST

THE WESTERN AUSTRALIAN SAWMILLERS' ASSOCIATION AND OTHERS . . . } RESPONDENTS.

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SYDNEY, *Aug.* 8, 9.

MELBOURNE, *Oct.* 16.

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

Industrial Arbitration—Industrial dispute—Federal union party to dispute—Resignation of whole of members of State branch of union during hearing and prior to award—Formation by such members, with other persons, of a union registered under State law—Power of Commonwealth Court of Conciliation and Arbitration to reopen award and join State union—Power of Commonwealth Court to restrain State Court from dealing with dispute submitted to it by State union—Orders to restrain—Representation—Commonwealth Conciliation and Arbitration Act 1904-1928 (*No.* 13 *of* 1904—*No.* 18 *of* 1928), *secs.* 19, 20, 21AA, 23, 24, 26, 29, 38.

On 23rd January 1929 an award was made by the Commonwealth Court of Conciliation and Arbitration in certain disputes in respect of which logs had been submitted to the Court between April 1925 and October 1928. The disputes, which were as to hours, wages and working conditions of employees, were between employers engaged in the timber-working and sawmilling industry of the one part and the Australian Timber Workers' Union and its members of the other part. Before the date of the award the whole of the members of the Western Australian branch of the Union resigned from membership thereof and they, together with a number of other employees, formed another union, known as the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division), which was registered under the law of the State. On 9th May 1929, on applications by employers, parties to the award, the Commonwealth Court of Conciliation and Arbitration made an order reopening the award, joining the newly-formed Industrial Union as a party thereto and ordering that it and its members be bound

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by the award; and also an order restraining the Court of Arbitration of Western Australia and its members from dealing with any industrial dispute coming before it or them on a submission by the Industrial Union or otherwise so far as such dispute or part thereof was provided for in the award of the Commonwealth Court of Conciliation and Arbitration. At the hearing it was shown that after the making of the award of 23rd January 1929 the Court of Arbitration of Western Australia had summoned the employers of that State, parties to the award, and the Industrial Union to a conference, and had afterwards referred into the State Court a dispute which was provided for in the award. A summons was issued out of the High Court by the Industrial Union, under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, for the determination of certain questions relevant to the matter.

Held, that the High Court had jurisdiction and authority to determine the questions raised by the summons.

Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd. v. *Federated Clothing and Allied Trades Union*, (1924) 34 C.L.R. 457, and *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.*, (1928) 41 C.L.R. 402, followed.

Held, further, that the Commonwealth Court of Conciliation and Arbitration had neither jurisdiction nor authority to make the order reopening the award of 23rd January 1929, joining the Industrial Union as a party thereto and ordering that it and its members should be bound by the award.

Held, also, that the Commonwealth Court of Conciliation and Arbitration had neither jurisdiction nor authority to make an order under sec. 20 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 or any other section, restraining the Court of Arbitration of Western Australia from dealing with an industrial dispute submitted to it by the Industrial Union.

CASE STATED.

Certain disputes existed between employers engaged in the timber-working and sawmilling industry of the one part and the Australian Timber Workers' Union and its members of the other part, in regard to matters set forth in logs submitted to the Commonwealth Court of Conciliation and Arbitration between April 1925 and October 1928, as to hours, wages and working conditions of employees. The disputes were consolidated and heard together by the Court between 22nd February 1927 and 23rd January 1929, on which latter date an award was made. By the date of the making of the award all the members of the Western Australian branch of the Union had resigned therefrom, and substantially all of them, together with other employees who had not been members of the Union, became members of a union organized under the law of

Western Australia, known as the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division). On 9th May 1929, parties to the award, namely, the Sawmillers' Association of Western Australia and others, applied to the Commonwealth Court of Conciliation and Arbitration to reopen the award and to add the newly-formed State Union as a party thereto. An order, referred to herein as order B, was made by his Honor Judge *Lukin* in the following terms :—" This Court doth order and direct that the said award be and the same is hereby reopened as to the questions of the joinder of parties thereto and of the determination of the conditions of the award to be made in the industrial dispute in regard to Western Australian employers and employees And that the said Western Australian Timber Workers' Industrial Union of Workers (South West Land Division) be joined in the proceeding in this Court No. 55 of 1925 as a respondent party thereto and consequently that the said Industrial Union be joined in the consolidation of the proceedings herein as a co-party with the Australian Timber Workers' Union And that the said Industrial Union be and the same is hereby joined as a party to the said award and be bound thereby And that all persons members of the said Industrial Union on the 28th day of February 1929 be bound by the said award during the currency thereof And this Court doth hereby adjudge prescribe and further order that the said award is an appropriate determination of the matters in dispute between the employers respondents to the said award and employees members of the said Western Australian Timber Workers' Industrial Union of Workers (South West Land Division)." On the same day, on the application of another party of the first part to the dispute referred to above, Judge *Lukin* made an order, referred to herein as order C, in the following terms :—" This Court doth order that the said Court of Arbitration of Western Australia and the members thereof be and the said Court and the members thereof are hereby restrained from dealing with any industrial dispute coming before it or them on a submission by the " Western Australian Timber Workers' Industrial Union of Workers (South West Land Division) " or otherwise so far as such dispute or any part thereof or any matter involved therein is provided for in

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awards of the Commonwealth Court of Conciliation and Arbitration that is to say the awards of the last mentioned Court dated the 18th day of December 1928 and the 23rd day of January 1929 respectively and made in the . . . industrial disputes " previously referred to. At the hearing of the last-mentioned application it was established that after the making of the award of 23rd January 1929 the Court of Arbitration of Western Australia had summoned to a conference the employers of that State, parties to the award, and also the Industrial Union, and afterwards referred into the State Court a dispute, provided for in the award, as set out hereafter in the case stated. On 10th June 1929 on the application of the Industrial Union a summons was issued out of the High Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 for the determination of certain questions.

The summons came on for hearing before *Starke* J., who stated a case for the consideration of the Full Court of the High Court, which was substantially as follows :—

1. On 8th April 1925 the Deputy President of the Commonwealth Court of Conciliation and Arbitration referred to the said Court, pursuant to sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, a dispute existing between the Timber Merchants and Sawmillers' Association, an organization of employers registered under the said Act, and the members thereof, and various other employers engaged in the timber-working and sawmillers' industry, claimants, and the Australian Timber Workers' Union, and its members, employees in the said industry, respondents, as to matters set forth in a log (No. 55 of 1925). The log made various claims as to hours, wages and working conditions of employees in or in connection with the timber-working industry.

2. On 4th December 1925 the Deputy President of the said Court referred to the said Court, pursuant to the said sec. 19 (*d*), a dispute existing between the said Australian Timber Workers' Union and the members thereof employees of certain named employers, claimants, and a large number of named employers in or in connection with the timber-working industry, respondents, as to matters set forth in a log (No. 214 of 1925). The log claims from all employers

that certain hours, wages and working conditions should govern the wages and working conditions of the employees.

3. On 4th August 1926 the Chief Judge of the said Court referred to the said Court, pursuant to the said sec. 19 (*d*), a dispute existing between the said Australian Timber Workers' Union, claimants, and certain named employers, respondents, as to matters set forth in a log (No. 145 of 1926). The log claimed from all employers that certain hours, wages and working conditions should govern the wages and working conditions of their employees throughout the Commonwealth in or in connection with the timber-working industry.

4. On 26th October 1928 one of the Judges of the said Court referred to the said Court pursuant to the said sec. 19 (*d*), an industrial dispute existing between the said Australian Timber Workers' Union and the members thereof, claimants, and certain named employers, respondents, as to matters set forth in a certain log (No. 215 of 1928). The log claimed from all employers that certain hours, wages and working conditions should govern the wages and working conditions of their employees throughout the Commonwealth in or in connection with the timber-working industry.

5. The Australian Timber Workers' Union is a Federal organization registered under the said Act, and it had branches in various States. The Australian Timber Workers' Union in No. 5 Branch Western Australia was a branch of the said Union in Western Australia.

6. All the said disputes so referred into Court were consolidated and heard together by the Commonwealth Court of Conciliation and Arbitration on and between 22nd February 1927 and 23rd January 1929.

7. At the hearing of the said disputes the Australian Timber Workers' Union No. 5 Branch and the members thereof were represented before the Court, in that a member or officer of the Australian Timber Workers' Union appeared before the Court, called evidence in respect of the hours, wages and conditions of labour of the members of the said Branch, and urged their claim in the said disputes. Further, at the request of the parties and particularly at the request of the Western Australian Branch, the Judge who heard the disputes visited Western Australia, travelled many miles inspecting sawmills, accompanied by representatives of

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all parties, and took a large amount of evidence on the conditions of the industry in Western Australia.

8. Between December 1927 and March 1928 about 2,800 members of the Western Australian branch tendered their resignations of membership in writing as required by the rules of the Union. The resignations were accepted on 28th September 1928.

9. Further resignations also took place. By 23rd January 1929 all the members of Branch No. 5 of the said Federal Union had resigned their membership of the Union, and their resignations had been accepted.

10. Substantially all the said persons who had so resigned their membership of the said Federal Union were members of or joined a union organized under the law of Western Australia, known as the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division) and remained members of the said State Union at all material times. The said State Union has also about 670 members who were not members of the said Federal Union or its said Branch No. 5.

11. On 23rd January 1929 the said Court of Conciliation and Arbitration made an award in the said disputes (hereinafter referred to as A).

12. On 9th May 1929, upon application to the said Court on behalf of parties to the said award, namely, the Sawmillers' Association of Western Australia and others, to reopen the said award, and to add the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division) as a party to the said award, the said Court made an order (hereinafter referred to as B.

13. On 9th May 1929, upon application made for and on behalf of Millars' Timber Trading Co. Ltd., a party to the said disputes, the said Court made an order (hereinafter referred to as C).

14. Upon the hearing of the last-mentioned application, it was established that after the making of the said award of 23rd January 1929, a State industrial authority, namely, the Court of Arbitration of Western Australia and the members thereof, had summoned Western Australian employers, parties to the said Federal award, and the said State Union, to a conference, and afterwards referred

into the State Court the following dispute :—" Applicant's Claim.—Award of the Commonwealth Court of Conciliation and Arbitration made by Mr. Deputy President *Webb* together with variations thereof up to 23rd January 1929. Respondent's Answer.—Award of the Commonwealth Court of Conciliation and Arbitration delivered by his Honor Judge *Lukin* on 23rd January 1929 to apply to the respondents and their employees." The dispute so referred to the State Court is provided for in the said award of 23rd January 1929.

15. On 10th June 1929 a summons was issued out of this Court by the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division) under sec. 21AA of the said *Commonwealth Conciliation and Arbitration Act* for the determination (*inter alia*) of the following questions :—(1) Are those persons who were on 6th April 1925 members of the Australian Timber Workers' Union No. 5 Branch bound by the award of the said Commonwealth Court of Conciliation and Arbitration made on 23rd January 1929 in the said disputes ? (2) Are those persons who were members of the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division) on 28th February 1929 bound by the said award ? (3) Had the said Commonwealth Court of Conciliation and Arbitration power or jurisdiction to make the above-mentioned orders of 9th May 1929 and purporting to be made in the said disputes or any and what part of either and which of the said orders ?

The case or questions stated for the consideration of the Full Court are :—

(1) Has this Court jurisdiction and authority under sec. 21AA to determine the questions or any of them raised by the said summons issued under sec. 21AA and set forth in par. 15 of this case ?

(2) Had the Commonwealth Court of Conciliation and Arbitration jurisdiction and authority to make the order of 9th May (B) or any and what part thereof ?

(3) Had the Commonwealth Court of Conciliation and Arbitration jurisdiction and authority to make the order of 9th May 1929 (C) ?

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Fullagar, for the applicant, the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division). An application can be made to the Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* after an award has been made (*Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (1)). No order can be made under sec. 20 of the Act except in connection with an industrial dispute within the meaning of the Act. This Court has held that that section is within the power conferred by sec. 51 of the Constitution (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers &c.* (*State*) *Conciliation Committee* (2)). Once an award is made, the industrial dispute ceases to exist.

[KNOX C.J. referred to *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (3).]

In that case the dispute was only partly settled. An order under sec. 20 must be with reference to an industrial dispute with which the Federal Court is dealing, has dealt or is going to deal (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers &c.* (*State*) *Conciliation Committee* (2)). If an industrial dispute existed in five States and an award was made to cover those five States, then that dispute is notionally settled. The order made under sec. 20 was not made with respect to an industrial dispute within the meaning of the Act, but was made with respect to a dispute which existed in Western Australia only. If the Western Australian employees were persons bound by the award when made or were subsequently bound by order B, then order C was rightly made; but if such employees were not originally bound by the award and Judge *Lukin* had no power to make order B, then his Honor had no power to make order C. At the date the award was made, no member of the Western Australian Timber Workers' Union was bound by it. Sec. 61 of the Act, which provided that no resignation of membership should have effect during the pendency of any dispute or matter before the Court, was repealed by the Act of 1928. The question as to who is bound by the award must be determined by the Act. The Act imposes the limits. It is

(1) (1924) 34 C.L.R. 457. (2) (1926) 38 C.L.R. 563.
(3) (1920) 28 C.L.R. 1.

clear from par. 7 of the case stated that there was no representation of the Western Australian employees in Court, unless it be said that they were represented by their organization. The fact that a member or officer of the Federal Union appears in Court does not mean that the Western Australian employees were represented in accordance with sec. 29 at the material times. They were not represented. The individuals may have been parties to the dispute, but they were not represented as individuals at Court. The Federal Union did not represent them up to the date of the award (*Burwood Cinema* v. *Australian Theatrical and Amusement Employees' Association* (1)). Even if they were represented at a certain stage, they were entitled to withdraw their authority for such representation. Par. 3 of the case stated does not show that the members of the Union were in dispute. The award purported to settle four disputes. It cannot be taken that all the members of the Union were parties to the dispute, as they were not all parties to all the disputes. The 670 employees referred to in par. 10 were at no time parties to the disputes dealt with by the award. Sec. 38 in no way empowers the Court to join parties to an award after the award has been delivered. The award of 23rd January 1929 was final (*Mackay* v. *Australian Workers' Union* (2); *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (3); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (4); *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (5)). An award may be reopened as between parties, but new parties cannot be brought in. The award cannot go beyond the powers conferred by the Act. Order B is invalid for two reasons: (1) The award being final, new parties cannot be added, and (2) even if the the Court had such power it cannot add a union which has no status under the Act.

Ham K.C. (with him *Fullagar*), for the Court of Arbitration of Western Australia. The Commonwealth Court of Conciliation and Arbitration can only prohibit a State Industrial Authority from

(1) (1925) 35 C.L.R. 528.
(2) (1920) 14 C.A.R. 364, at p. 368.
(3) (1919) 27 C.L.R. 72.
(4) (1920) 28 C.L.R. 1.
(5) (1920) 28 C.L.R. 209.

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dealing with an industrial dispute or matter under sec. 20 of the Act, which section does not entitle the Court to declare a common rule. The industrial dispute implies disputants as well as a matter. Wages, &c., are not "matters" within the meaning of the section. Before the Federal Court can act under that section, it must find that the matter the State Authority is dealing with is an industrial matter affecting the same parties, bound by a Federal award. It cannot be said that an organization is bound because some of its members are. As regards representation the cardinal error was that his Honor treated sec. 29 (*a*) as meaning any person who himself appears or for whom anyone else appears. There is a distinction between "parties" and "other parties interested" (see sec. 29, pars. (*a*) and (*b*)). The "member or officer of the Australian Timber Workers' Union" referred to in par. 7 of the case stated represented the Union only and not the members. The whole purpose of sec. 61 was to prevent people making a farce of awards. There was no retainer by the individual members of the Western Australian Union; even if there were, the resignations of such members operated in each case as a withdrawal of such retainer. Representation here means that the Union was represented as a disputant by an officer who indirectly represented the interests of the members, only to that extent. Sec. 20 merely gives jurisdiction to restrain a particular matter; therefore order C, as it stands, is incorrect.

Brissenden K.C. (with him *Wickham*), for the respondent. There is no authority on the point as to whether the Court had jurisdiction as regards order C. Sec. 21AA was intended to devise means for settling the question as to whether there was or was not a dispute originally. In order to ascertain the governing intention of the section as a whole, the main part of the section must be looked at. The key is provided by the words "alleged industrial dispute." Order C is undoubtedly good. It is something which is ancillary to the award and is intended as a preventive measure to secure to the Federal Court exclusive jurisdiction over the matters mentioned therein. The Court had jurisdiction to make order B. It is an order directed to an association of employees in an industry that had initiated a dispute which is entirely covered by an award of

the Federal Court. The Association is a " party " within the meaning of sec. 21AA. Although a complaint is initiated by an organization, an association can, nevertheless, be a party by virtue of sec. 19 (*d*). An award of the Federal Court is binding on all parties who appear or are represented (sec. 29). Although sec. 26 is silent as to parties other than organizations represented before the Court, it is obvious there must be other parties, and it was intended by the Legislature to include them under sec. 29 (*b*). Order B is good by virtue of the jurisdiction conferred on the Federal Court by that section. It is also good because of the identity of the dispute. The subject matter of the dispute in the State Court was identical with the subject matter of the dispute in the Federal Court. The State Association was properly made a party, inasmuch as it included a number of persons who at material times were members of the Federal organization. A dispute before a State Authority is not necessarily outside the provisions of sec. 20 because of different parties. A determination by a State Court on a like subject matter is a determination in a matter which is before the Federal Court.

Ham K.C., in reply. Sec. 29 (*b*) only refers to persons who are parties to the dispute, that is to say, before the award is made and while the Court is inquiring into the matter. In this case it is shown that no effort was made to summon the State Union until after proceedings had concluded and after the award was made. It was done by reopening the award (sec. 38 (*o*)) ; but this is not a power to reopen the dispute. Where the dispute and the proceeding have been concluded, the only power to reopen is to reopen the question, not the dispute.

[KNOX C.J. referred to *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Pty. Ltd.* (1), on the question of arbitral functions and judicial functions.]

Cur. adv. vult.

Oct. 16.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The first question stated in the case should be answered in the affirmative. *Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing*

(1) (1907) 5 C.L.R. 33.

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&c. Union (1) and *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.* (2) are decisive authorities upon the question—except, perhaps, as to the order of 9th May 1929 restraining the Court of Arbitration of Western Australia from dealing with any dispute coming before it so far as such dispute, or any part thereof, or any matter involved therein, is provided for in the awards of the Commonwealth Court of Conciliation and Arbitration dated 18th December 1928 and 23rd January 1929. This order purports to have been made under the powers conferred by sec. 20 of the *Commonwealth Conciliation and Arbitration Act* in protection and maintenance of awards made by the Commonwealth Court of Conciliation and Arbitration. The order is, however, so connected with the disputes in which those awards were made that it falls within the case founding the jurisdiction of this Court under sec. 21AA.

The second question stated in the case should be answered in the negative. The order of 9th May 1929 therein referred to purports to join the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division) as a respondent party to the proceedings the subject of the award of 23rd January 1929, and as a party to the award, and to bind it by the award. This Western Australian Union is registered as an industrial union under the *Industrial Arbitration Act* of Western Australia, and is not registered as an organization under the *Commonwealth Conciliation and Arbitration Act*. The Union, upon registration, became, for the purposes of the *Industrial Arbitration Act* of Western Australia, a body corporate, having a perpetual succession and a common seal, and the members thereof for the time being are subject to the jurisdiction of the Court of Arbitration constituted under the Western Australian Act, and to all the provisions of that Act. But, in its corporate capacity, this Union was never a party to the disputes before the Commonwealth Court of Conciliation and Arbitration, and took no part in those disputes. True, most of its members—but not all—had been members of a Federal organization, and appear as members of that organization—and perhaps individually—to have been parties to and taken part in the disputes before the Commonwealth Court of Conciliation and Arbitration. But neither

(1) (1924) 34 C.L.R. 457. (2) (1928) 41 C.L.R. 402.

the Commonwealth Act nor the Western Australian Act gives this Industrial Union, registered under the Western Australian Act, any capacity, power or authority to represent and bind its members in proceedings under the *Commonwealth Conciliation and Arbitration Act*.

The third question should also be answered in the negative. The *Commonwealth Conciliation and Arbitration Act* itself, in sec. 29, provides upon what bodies and persons the awards of the Commonwealth Conciliation and Arbitration Court shall be binding. The award of 23rd January 1929 goes far beyond the limits so provided: it reserves power to join as parties to the proceedings and the award, the Western Australian Timber Workers' Union of Workers (South West Land Division), or any other organization or association containing persons who at any time since 6th April 1925 were members of the organizations parties to the proceedings therein or parties to any of the disputes therein. (See Award, "Parties," cl. 1, and "Reservations," cl. 39.) Ultimately, on 9th May 1929, as we have seen, the Commonwealth Court of Conciliation and Arbitration did join the Western Australian Timber Workers' Union of Workers (South West Land Division) as a party to the proceedings, and bound it by the award. Again, the award (cl. 1) purports to bind all persons members of organizations parties to the proceedings who were such on 6th April 1925, or became such thereafter, whether they or any one of them have or has ceased to be such or not. The provision of sec. 61 of the *Commonwealth Conciliation and Arbitration Act* that during the pendency of any dispute or matter before the Court no resignation of or discharge from the membership of any organization shall have effect, did not, even before its repeal by the Act 1928 No. 18, sec. 50, warrant the terms of the award. The terms of the injunction are wide enough to prohibit the Court of Arbitration of Western Australia from dealing with matters in relation to persons and bodies not lawfully bound by the award, and the Commonwealth Court of Conciliation and Arbitration had no jurisdiction or authority to make such an order.

ISAACS J. The first question, in my opinion, on the now adopted construction of sec. 21AA, should be answered in the affirmative. On that construction, all the conditions predicated by that section

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are satisfied. There are (1) "an alleged industrial dispute" submitted to the Court; (2) a proper applicant, namely, an association which is *de facto* a respondent; (3) a question of law arising in the submission, (4) in relation to an order of the Court. I find it hard to assign any reason for the opposite view which does not do violence to the main words of the section. Perhaps the easiest way to approach the difficulty is to note the word "arising." Given the "alleged industrial dispute" connoting the parties to the dispute; given the submission of the dispute to the Court, then if any award or order whatever of the Court is the cause of a question of law "arising," that is, affecting the dispute submitted or its settlement, then that award or order of the Court, whatever it may be, answers the description in the section. For instance, in *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.* (1) the awards made in the Federated Gas Employees' Union dispute (2) were at the root of the question of law arising on the Amalgamated Engineering Union's dispute. The words should have their literal meaning (see *Knox* C.J. in *Ince's Case* (3)), and the section is a summary and inexpensive substitute for prohibition. (See per *Starke* J. in the same case at p. 480.) Clearly on prohibition the validity of orders B and C could be tested at the instance of the present applicant. Awards and orders that touch only entirely unconnected interests, or have totally disparate operation, do not answer the description in the section. That, however, is not by reason of their inherent classification, but for the very obvious reason that there cannot in that case be said to be any question of law "arising" in relation to the award or order of the Court. Plainly, both the orders B and C give rise to very serious questions of law with reference to the Timber Workers' "alleged industrial dispute": the first, as to the right to join the State Union as a party, and the second, the State Union being joined, as to whether by reason of the Timber Workers' "alleged industrial dispute," the restraining order is validly made.

2. The second question concerns both the "jurisdiction" and the "authority" of the Arbitration Court to make order B. "Authority" is probably something beyond "jurisdiction." I do

(1) (1928) 41 C.L.R. 402. (2) (1919) 27 C.L.R. 72.
(3) (1924) 34 C.L.R., at p. 462.

not, however, find it necessary to consider more than jurisdiction. The Arbitration Court has undoubtedly power under sec. 38, sub-sec. (*p*), to direct parties to be joined. But, apart from any other objection that may exist in the present case, there is one fundamental reason why the Court had no jurisdiction to make order B. It is that such an order cannot be made so as to enlarge the limits of the industrial dispute regarding which it is made, by introducing persons as parties who are not and never were personally or by representation parties to the dispute. The Act, following the Constitution, conditions all arbitral action on the "industrial dispute," which is *ex vi termini* limited both by the disputants and the subject matter. The Court by order B did what, if successful, would enlarge the area of the dispute by adding a disputant. This is not only in violation of the jurisdiction granted by the statute, but also beyond the limits of the relevant constitutional provision.

3. The third question is somewhat more complex. At first I was disposed to think sec. 20 of the Act, under which the restraining order was made, on its proper construction conferred true judicial power within the meaning of the Constitution. If that were so, some difficulties would arise which do not present themselves on the proper construction of the section as, after further consideration, I now regard it. One difficulty would be whether the function so conferred was constitutionally possible in view of the definition of a "matter" in *In re Judiciary and Navigation Acts* (1). But, whatever those difficulties would be, the section, properly read, is clear of them. It creates no rights, and, apart from its legislative operation on the *factum* of a restraining order, it creates no duties. It enables the arbitral tribunal "if it appears"—that is, if it becomes apparent—to that tribunal that any State industrial tribunal is in fact dealing or about to deal (1) with an industrial dispute, that is, a Federal industrial dispute, or (2) with part of such a dispute, or (3) with a matter which is provided for in an award of the Court, or is the subject of proceedings before the Court, to make an order restraining the State Authority from dealing with "*that dispute*" or "*any part thereof*" or with "*that matter*." The law then takes up the *factum* and clothes it with legislative results. It says: "Thereupon

(1) (1921) 29 C.L.R. 257, at p. 266.

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the Authority shall, in accordance with that order, cease to proceed in *the dispute* or *part thereof* or in *that matter*." The legal duty of refraining is not referable to the restraining order, but to the legislative command. The sanction for disobedience is legislative and impersonal. It is not that any penalty ensues, but that action in contravention of an order shall to the extent of contravention be void. The section is thus found on analysis to be wholly unlike true judicial authority, and to be pure executive authority to which Parliament attaches its direct legislative consequences. It would be clear violation of the Constitution if the Federal Parliament declared that a State Authority duly constituted to deal with purely State disputes, and in fact confining itself to those, could be silenced, or its acts directly annulled by the Federal Parliament, merely because the Commonwealth Arbitration Court, in its effort to avert interference with its own arbitral jurisdiction, thought erroneously either that the State dispute was a Federal dispute, or that some matter would in the future be dealt with, and would turn out to be identical with a matter provided for in an award, or the subject of unfinished proceedings before the Court. *Ut magis valeat quam pereat* it should be construed unless sec. 20 said, intractably, that it should not be so construed. If it so "appears" to the Court, then in one sense the Court is authorized to act; just as if it "appears" to the Court that an industrial dispute exists it is authorized to make an award. But in each case the inescapable condition lies behind its action that the necessary facts do exist constitutionally justifying that action. They are examinable, and if they do not exist the arbitral action is unlawful. On this basis it remains to be considered whether order C was an order within the jurisdiction and authority of the Arbitration Court. Again it is not necessary to look beyond the word "jurisdiction." I am of opinion that for two reasons the order C was outside the Court's jurisdiction. The first is apparent from a face comparison of the section and the order. The terms of the section have been already stated. The important words for the present purpose are: "Order restraining the State Industrial Authority from dealing with *that dispute or any part thereof*, or with *that matter*." That is to say, the order must identify the thing which it appears to the Court the State Authority is dealing with, or is about to deal

with, and with which it is to be told not to deal. It is not to be an order restraining the State Authority from dealing with Federal disputes generally, or with the matter of a Federal award generally, leaving the State Authority to conjecture what it is that is forbidden and will be valueless. That would not be fair either to the State Authority or to the numerous parties before it, and, if a more reasonable construction is equally open, the latter should be adopted. The permissible action might mistakenly be refused, and forbidden action entered on because the State Authority wrongly guessed at the Court's intention. The State Authority is entitled, and those before it are entitled, under sec. 20, to be told with substantial precision just what "matter" before that Authority the Commonwealth Court declares shall not be done. In that case it might excise that "matter" and proceed with the rest. But as the only "matter" which the Commonwealth Court is authorized to forbid is one "which is provided for in an award of the Court" or "is the subject of proceedings before the Court," the State Authority or a party interested before it may on examination find that the "matter" specifically prohibited does not answer either condition, and may proceed accordingly to act or to test the question. Now, looking at order C, it radically departs from the structure of sec. 20. There is no prohibition as to "an industrial dispute" *simpliciter*, nor to any designated part of it, nor of any recognizable or identifiable "matter." The words "so far as such dispute or any part thereof or any matter involved therein is provided for in" certain awards, are extremely vague and unenlightening. There is no statement in the order that it appears to the Court that the State Authority "is dealing or about to deal with" any specific "matter." The general recital that "this Court having informed its mind on the subject in such manner as it thought just" is not indicative of the result of such information. The indefinite and all-comprehensive terms of the restraining order are, in my opinion, quite foreign to the order contemplated by sec. 20. To put it shortly, it throws on the State Authority the duty of forming an opinion as to the scope and effect of the Federal awards, and the recognition of the supposedly identical "matter" in the State tribunal which the section imposes on the Commonwealth tribunal before it issues its mandate. That

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is one reason why, in my opinion, order C was made without jurisdiction. The second reason is that, even if a specific "matter" were stated, and if on examination it were identical in point of subject matter with a provision in the Federal awards made respectively on 18th December 1928 and 23rd January 1929, the "matter" is clearly not one which is provided for in those awards, because not between the same parties.

The "matter" assumedly prohibited would be as between the State Union and certain employers. The award is between the State organization and its members, and (assume) the same employers. The State Union, a distinct entity, is not and never was a party. The individual members of the State Union were not, on the facts in the case stated, ever bound by reason of any personal appearance or representation in the Court. It is at least consistent with the case that none of those individual members ever were personally in dispute in the Federal industrial disputes, but were in dispute by reason of their representation through the organization. But there is not a syllable in the case which attributes to them any personal appearance or representation in Court. It is consistent with the case stated that none of them was a member until after 4th August 1926, when the last but one of the disputes was referred to the Court. The hearing of the disputes resulting in the two awards specified in the order, began necessarily on the facts stated at earliest on 26th October 1928. At that date not a single member of the State Union was a member of the Federal organization, and therefore could not possibly be included among its "members" who at the hearing of the disputes are stated to have been represented before the Court, and consequently the individual members of the State Union were not personally bound by the Federal awards when made, either under sub-sec. (*a*) or sub-sec. (*d*) of sec. 29. The third question should, therefore, be answered in the negative.

DIXON J. Sub-sec. 1 of sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 provides that 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 upon questions which the sub-section proceeds to describe. Sec. 19 prescribes the method by which the Court of Conciliation and Arbitration shall obtain cognizance of industrial disputes for the purpose of prevention and settlement; and, in my opinion, the words in sec. 21AA " when an alleged industrial dispute is submitted to the Court " mean when an alleged dispute has come within the cognizance of the Court pursuant to sec. 19.

Sec. 21AA thus begins by making cognizance of a dispute a condition precedent to the procedural right it gives and the jurisdiction it creates. It then specifies the persons who may invoke the jurisdiction, and next describes the questions which shall be determined in the exercise of that jurisdiction. The first of these is whether the alleged dispute exists or is threatened, impending, or probable and is inter-State. This clearly means the dispute of which the Court of Conciliation and Arbitration has cognizance pursuant to sec. 19. The next is any question of law arising in relation to the dispute, which again clearly means the dispute of which the Court has cognizance. Next is—any question of law relating " to the proceeding." The proceeding is, in my opinion, that which is begun by the Court taking cognizance of the dispute. Then is specified—any question relating " to any award or order of the Court." These words considered alone are perfectly general. But they can have no application save when pursuant to sec. 19 the Court takes cognizance of an alleged dispute for the purposes of prevention and settlement and when a party to the proceeding which thus begins, or the Registrar, invokes the High Court.

These are necessary conditions, and it seems obvious that the order or award meant must have some connection with the fact that the Court has taken cognizance and a proceeding has thus begun. When to this consideration is added the fact that the words " or to any order or award " are associated with and follow a description of other questions all of which relate to the dispute of which the Court has cognizance, it appears proper to conclude that the order or award intended must be one made as a consequence of the Court having obtained cognizance of the dispute and a proceeding having thus commenced. This meaning would, in its application, include more than perhaps might at first sight be thought. For the Act

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treats the cognizance of a dispute as the initial step in a proceeding which involves the general superintendence, direction and settlement of the dispute, and the supervision, enforcement and control of that settlement. For instance, all the powers given to the Court by sec. 38 are exercisable "as regards every industrial dispute of which it has cognizance."

The question must now be answered whether sub-sec. 1 of sec. 21AA, so interpreted, applies to an order made by the Court of Conciliation and Arbitration as under sec. 20. Sec. 20 confers power upon the Court to restrain a State Industrial Authority from dealing with a dispute or a matter provided for in an award of the Court. Is such an order made in consequence of an alleged industrial dispute coming within the Court's cognizance? Or does sec. 20 enable the Court to restrain the State Authority from dealing with a dispute whether it has come within its cognizance or not? Sec. 20 does not mention cognizance, and if its terms alone were attended to, it might be thought to enable the Federal Court to restrain the State Authority before the Federal Court obtained cognizance. But at the same time it must be noticed that upon its terms, as interpreted by the definitions in sec. 4, there must be, or appear to be, a definite industrial dispute extending beyond the limits of any one State, and the State Authority must appear to be about to deal with that dispute or a part of it, or there must be, or appear to be, an award or proceeding of the Federal Court (which could only be after cognizance had been taken) and the State Authority must appear to be about to deal with a matter for which the award provides or which is the subject of such proceeding. Sec. 18 gives the Court power "to prevent and settle, pursuant to this Act, all industrial disputes." Sec. 19 begins: "The Court shall have cognizance . . . of the following industrial disputes." Secs. 23 and 24 impose on it the task of settling disputes of which it has cognizance, and enable it to make an award in those disputes only. Sec. 38, which equips the Court with its procedural and general powers, relates only to disputes of which it has cognizance. These provisions show that "cognizance" was considered to be a necessary condition of the exercise of the Court's power of dealing with a dispute. Cognizance is distinguished from jurisdiction. By it the dispute is brought within the contemplation or notice of the Court and becomes a matter requiring the exercise of its powers. In

such a scheme, it would be incongruous to find that an ancillary power could be exercised whether a dispute had come, or ever was to come, within the Court's contemplation or notice so as to become a matter for settlement. It would be strange to find this brought about in the very section which follows the provision which sets out the disputes of which the Court takes cognizance. The validity of sec. 20 has been supported upon the ground that it is ancillary or conducive to the unhampered exercise of the Court's jurisdiction to settle disputes (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers &c.* (*State*) *Conciliation Committee* (1)). Yet, if it includes disputes of which the Court neither has, nor is to take, cognizance, the power to restrain would extend to disputes over which the jurisdiction to settle them neither is, nor is to be, exercised. Further, if it includes disputes not within the Court's cognizance, then the Court, in acting under sec. 20, cannot avail itself of the ordinary procedural powers of a Court conferred by sec. 38 "as regards every industrial dispute." Then sec. 20 is inserted in a division of the Act headed "Cognizance of disputes and ordinary procedure." These considerations combine to show that the general words "industrial dispute" ought not to be understood to include disputes outside the Court's cognizance. It follows that sec. 20 authorizes orders restraining a State Authority when, and only when, the Court has taken cognizance of a dispute in relation to which the order is required. Upon this construction sec. 20 confers a power the exercise of which is consequential upon the Court taking cognizance of a dispute, and an order which the Court purports to make under this section falls within sec. 21AA (1).

The first question in this case stated asks whether three matters, of which an order made as under sec. 20 is one, are within sec. 21AA. The interpretation of sec. 21AA which prevailed in *Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (2), and was applied in *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.* (3), makes it clear that the two remaining matters are within that section.

For these reasons I answer the first question Yes.

(1) (1926) 38 C.L.R. 563.
(2) (1924) 34 C.L.R. 457.
(3) (1928) 41 C.L.R. 402.

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The second question in the summons asks whether the Court of Conciliation and Arbitration had jurisdiction to make an order reopening its award and joining the Western Australian Timber Workers' Industrial Union of Workers (South West Land Division) as a respondent and ordering that this body be bound by the award, and that those persons, who were members on a specified day, be bound thereby. I think that it had not jurisdiction to make this order because sec. 29 exhaustively states the descriptions of persons bound by the award and the body referred to is a corporation aggregate which does not, and whose members in that capacity do not, come within any of those descriptions. The facts show affirmatively that many of its members are not bound and they do not show that any of its members are necessarily bound in any capacity. I think the Court of Conciliation and Arbitration had no jurisdiction to make this order, and the second question in the special case should be answered No.

The third question is, whether an order made by the Court of Conciliation and Arbitration as under sec. 20 was within its jurisdiction? The operative part of the order is as follows: "This Court doth order that the said Court of Arbitration of Western Australia and the members thereof be and the said Court and the members thereof respectively are hereby restrained from dealing with any industrial dispute coming before it or them on a submission by the above-named Union or otherwise so far as such dispute or any part thereof or any matter involved therein is provided for in awards of the Commonwealth Court of Conciliation and Arbitration that is to say the awards of the last mentioned Court dated 18th day of December 1928 and 23rd day of January 1929 respectively and made in the industrial disputes"—then four disputes are mentioned. This order cannot be justified under so much of sec. 20 as enables the Court, if it appears to it that a State Authority is dealing, or about to deal, with an industrial dispute or with part of an industrial dispute, to restrain it from dealing with that dispute or any part thereof. For it purports to restrain it from dealing with any dispute, and not merely a particular one, and, moreover, the disputes forbidden to it are not necessarily inter-State. The order must be justified, if at all, under so much of sec. 20 as enables the Court, if

it appears to it that a State Authority is about to deal with a matter which is provided for in an award of the Court to restrain it from dealing with that matter. The order does not recite what were the matters with which it appeared to the Court the State Authority was about to deal, but it forbids the State Authority to deal with any matter provided for in the awards. This means that to satisfy the terms of the section it must have appeared to the Federal Court that the State Court was about to deal with all the matters provided for in these awards. Having regard, however, to the facts stated in the special case, it is not impossible that this did in fact appear to be the case. What does the order mean by "the matters provided for in the awards"? I think it must be understood to mean those matters in respect of which the document or documents constituting the award purport to regulate the rights and duties of the persons whom those documents are expressed to govern. Cl. 2 of the award is expressed to govern persons who on a given date were, or afterwards became, members of the organization whether they cease to be members or not, irrespective of them being personally in dispute, and irrespective of the time when their membership began or may begin or ends. This is not warranted by sec. 29 or any other provision of the Act, and is void. In addition the documents constituting the award and intended to be referred to included the order, the subject of the second question in this special case, and this order was made without jurisdiction.

It follows, in my opinion, that the order made as under sec. 20 restrains the State Court from dealing with matters provided for in the award in respect of persons to which cl. 2 and the supplementary order ineffectually attempt to extend its operation and therefore with matters not lawfully provided for in the award. I do not think sec. 20 enables the Court to restrain a State Authority from dealing with matters which are not lawfully provided for in the award.

I am of opinion that the restraining order was made without jurisdiction.

No reliance was placed upon sec. 31 and no argument was made as to its effect upon this matter. In these circumstances it would be undesirable to investigate the question whether that section,

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consistently with decided cases and with the Constitution, can operate to protect this order if made without jurisdiction.

I answer the third question No.

Questions answered as follows: (1) *Yes*; (2) *No*; (3) *No*.

Solicitors for the applicant and the Court of Arbitration of Western Australia, *Lawson & Jardine*, Melbourne, by *E. S. Dunhill*.

Solicitors for the respondent, *Gillott, Moir & Ahern*, Melbourne, by *P. L. Williamson & Co.*

J. B.

[HIGH COURT OF AUSTRALIA.]

SHELLEY . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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SYDNEY, *Aug.* 7.

MELBOURNE, *Nov.* 4.

KNOX C.J., ISAACS and DIXON JJ.

Income Tax—"*Co-operative company*"—*Allowances on purchases made by members*—*Rebate or reduction in price*—*Taxable income*—*Income Tax Assessment Act* 1922-1928 (*No.* 37 *of* 1922—*No.* 46 *of* 1928), *secs.* 4, 20 (1A), 23 (1) (*a*).

Sec. 4 of the *Income Tax Assessment Act* 1922-1928 provides that "'Income' . . . does not include (*c*) any rebate received by a member of a co-operative company based on his purchases from that company where the Commissioner is satisfied that ninety per centum of its sales is made to its own members."

Held, that a company which had the following features was not a "co-operative company" within this provision:—(i.) It was composed of merchants whose businesses required that commodities should be bought in large quantities. (ii.) The objects in its memorandum were numerous and together enabled it to do almost anything and to do it on ordinary commercial or capitalist principles, but the leading objects were (a) to carry on the business of a co-operative store and general supply society in all its branches and to transact all