[HIGH COURT OF AUSTRALIA.]

CALEDONIAN COLLIERIES LIMITED AND OTHERS . . . . . } APPLICANTS ;

AND

THE AUSTRALASIAN COAL AND SHALE EMPLOYEES' FEDERATION AND OTHERS . . . . . } RESPONDENTS.

[No. 1.]

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MELBOURNE, *Jan.* 7-10, 13-16, 22.

Isaacs, Gavan Duffy, Rich, Starke and Dixon JJ.

Industrial Arbitration—Industrial dispute—Extending beyond limits of any one State—Coal industry—Dispute in New South Wales—Stoppage of work in Queensland and Victoria—Reduction of wages in Victoria and Queensland probable consequence of reduction in New South Wales—No request or demand on employers in either of these States—Whether inter-State dispute existing, threatened, impending or probable—Award—Validity—Conclusiveness—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1928 (*No.* 13 *of* 1904—*No.* 18 *of* 1928), *secs.* 4, 21AA, 31, 38 (*b*).

Held, by *Gavan Duffy*, *Rich*, *Starke* and *Dixon* JJ. :—(1) The words "extending beyond the limits of any one State" as applied to a dispute mean that the dispute is one "existing in two or more States" or, in other words, "covering Australian territory comprised within two or more States" (*Holyman's Case* (1914) 18 C.L.R. 273, at pp. 285 *et seq.*). (2) To constitute an industrial dispute there must be disagreement between people or groups of people who stand in some industrial relation upon some matter which affects or arises out of the relationship. Such a disagreement may cause a strike, a lock-out and disturbance and dislocation of industry, but these are the consequences of the industrial dispute and not the industrial dispute itself, which lies in the disagreement. Upon this conception of an industrial dispute, it cannot

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extend beyond the limits of any one State unless in each of two or more States, at one time, the disagreement exists between people or groups who stand in some industrial relation.

An industrial dispute existed in New South Wales between the proprietors of the northern collieries in New South Wales, who sought a reduction of wages, and members of the miners' organization. The coal from the northern collieries in New South Wales was of such a quality that its selling price was necessarily a factor in determining the maximum price at which coal produced in Queensland and at Wonthaggi in Victoria could be sold, and a reduction of wages in the northern collieries of New South Wales would, therefore, be likely to lead to a reduction or attempted reduction of wages in the mines in Victoria and Queensland. In response to a telegram from the secretary of the employees' organization in New South Wales the men at Wonthaggi ceased work on 17th December and did not resume on the following day, but were ready to resume on 20th December. In Queensland the men at one mine stopped work on 17th December and at two others on 19th December. On 19th December Judge *Beeby* made an interim award.

Held, by *Gavan Duffy*, *Rich*, *Starke* and *Dixon* JJ. (*Isaacs* J. dissenting), upon the facts, that the dispute did not extend actually into Victoria or Queensland because there was no disagreement between the mine-owners in either of those States and their men and its extension was not threatened, impending or probable because no question about wages was likely to arise between men and owners in Queensland or Victoria unless and until the mines resumed in New South Wales at a reduced cost of production, which would mean the settlement of the dispute in New South Wales; and, therefore, that the interim award made on 19th December was invalid.

Held, by the whole Court, that the Legislature has not attempted to confer upon the Court of Conciliation and Arbitration judicial power conclusively to determine the matter upon which its jurisdiction depends.

Held, by *Gavan Duffy*, *Rich*, *Starke* and *Dixon* JJ., that upon proceedings under sec. 21AA and in prohibition sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 does not operate to give validity to an award made without jurisdiction.

SUMMONSES under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 and Rules Nisi for Prohibition.

On 19th December 1929 His Honor Judge *Beeby* made an interim award under sec. 38 (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 by which he ordered and prescribed "that by way of interim award only and without prejudice to the parties on the full hearing of the dispute, the hewing rates and conditions of employment of coal-miners and other workmen now

or hereafter employed in the production of coal shall be those prevailing immediately prior to 2nd March 1929." This award was expressed to operate from 20th December 1929 until 31st January 1930, or until further order, and to bind His Majesty the King in right of the State of New South Wales, eight proprietors of collieries in the northern coalfields of New South Wales, and an organization of which they were members called the Northern Collieries Association, and to bind them as to the employment of members of four industrial organizations of employees. The collieries of the proprietors bound by the award had been closed since 2nd March 1929, and no members of the organizations of employees entitled to the benefit of the award were employed by the Government of New South Wales, which had begun to work a colliery on 16th December 1929. The Attorney-General for New South Wales and the colliery proprietors which it purported to bind, on 23rd and 21st December 1929 respectively issued summonses under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 and applied for writs of prohibition. A summons under sec. 21AA taken out by the colliery proprietors raised substantially similar questions to those raised by the summons taken out by the Attorney-General for New South Wales. The rules nisi for prohibition were obtained on behalf of the colliery proprietors and on behalf of the Attorney-General for New South Wales, and raised similar questions to those asked under the summonses. The summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 taken out by the Attorney-General for New South Wales asked for a decision substantially of the following questions: (1) Whether the alleged industrial dispute in relation to which the interim award purported to have been made by Judge *Beeby* on 19th December 1929 extended beyond the limits of one State or then was threatened or impending or probable as an industrial dispute extending beyond the limits of any one State within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1928; (2) whether his Honor had any jurisdiction to make or promulgate the said interim award; (3) whether the said interim award was bad in law and without the powers conferred by the Commonwealth of Australia Constitution; (4) whether

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the said interim award could be validly made when the only employer parties to the said proceedings before his Honor were employers whose industrial operations were wholly within the State of New South Wales; (5) whether the said interim award could be validly made when it did not purport to affect or bind any employers other than those within the State of New South Wales; (6) whether before making such award his Honor should have taken into consideration the probable economic effects of the award in relation to the community in general or the probable economic effect thereof upon the industry or industries concerned, and whether the award is bad in law in that he did not take such matters into consideration; (7) whether an order of reference is valid which does not specify what dispute is referred into Court; (8) whether sec. 38 (*b*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 is *ultra vires* in so far as it permits an interim award to be made; (9) whether an interim award is invalid as not having been made by arbitration when an opportunity to be heard has not been given to the persons affected; (10) whether an interim award is invalid as not having been made by arbitration if the persons to be affected are not given proper or sufficient opportunity to present their case; (11) whether the Government of New South Wales is bound by the said interim award inasmuch as the said Government did not at any relevant time employ any members of the respondent organizations or any of them.

The amended summonses and the motions were heard by *Rich* J., who heard evidence as to the nature and extent of the dispute and then, under the provisions of sec. 18 of the *Judiciary Act*, directed the whole matter, including all objections as to evidence or otherwise, to be argued before the Full Court.

The Government of New South Wales commenced coal-mining on 16th December, and on the same day the general secretary of the Coal and Shale Employees' Federation sent a telegram to the secretary of the branch at Wonthaggi in the State of Victoria:— "Member killed others wounded by police at Rothbury stop Wonthaggi to-morrow without fail send me urgent wire in the morning that Wonthaggi has stopped." The men at Wonthaggi ceased work on 17th December and did not resume on the following

day. They were ready to resume on the day after the award, 20th December 1929. In Queensland the men at one mine stopped work on 17th December and at two others on 19th December.

Robert Menzies K.C. (with him *J. A. Ferguson*), for the Caledonian Collieries Ltd. and the Northern Colliery Proprietors Association. The evidence does not disclose a dispute extending or likely to extend beyond New South Wales. The stoppages in Victoria and Queensland were in the nature of a sympathetic strike. The Arbitration Court can neither arbitrate nor conciliate until there is an actual dispute. If that be wrong, the doing of either is conditioned upon definite proof of a threatened, impending or probable dispute. The same facts must be proved to invoke the conciliation as the arbitration powers of the Court. There must be dissatisfaction existing in two States, a demand in each State which can be granted by the employers in such State (*Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (1)). There was no lock-out on 2nd March as there was then no award of the Arbitration Court. Here there was (1) no sufficient evidence of an actual industrial dispute extending beyond the limits of any one State ; (2) no sufficient evidence of a threatened or impending or probable industrial dispute so extending ; (3) no constitutional power to provide for the making of an interim award, that is, that sec. 38 (*b*) of the Act is in part invalid to the extent that it deals with interim awards ; further, (4) an interim award cannot be made without giving the persons affected a proper opportunity to be heard, and no such opportunity was given in this case ; and (5) the certificate of the Registrar under sec. 19 (*a*) of the Act and the order of reference by Judge *Beeby* were invalid as not specifying the dispute, either in relation to the parties or the subject matter. [Dealing with the first two propositions together, counsel referred to *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (2) ; *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (3) ; *Metropolitan Coal Co. of Sydney* v. *Australian Coal and Shale Employees' Federation* (4) ; *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (5) ;

(1) (1919) 27 C.L.R. 207.
(2) (1910) 11 C.L.R. 311.
(3) (1913) 16 C.L.R. 591, at pp. 633, 634.
(4) (1917) 24 C.L.R. 85.
(5) (1919) 27 C.L.R., at pp. 208, 212.

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Clyde Engineering Co. v. *Cowburn* (1); *H. V. McKay Pty. Ltd.* v. *Hunt* (2).] Unless there are found in Victoria demands made upon the employee in Victoria by the employer in Victoria of a kind which it is within the power in fact of the other party to concede, unless those demands are in relation to the same subject matter, or unless those demands are the same or strictly related to the demands made in New South Wales, and, finally, unless those demands are persisted in so as to indicate the probability of an industrial dispute in Victoria, there cannot be a dispute extending to Victoria either actual or threatened (*Whybrow's Case* (3); *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane Tramways Co. and Municipal Tramways Trust, Adelaide* [*No.* 2] (4); *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Engineers &c. (State) Conciliation Committee* (5); *Archer's Case* (6); *The King* v. *Commonwealth Court of Conciliation and Arbitration and the President thereof and Australian Builders' Labourers' Federation*; *Ex parte G. P. Jones and W. Cooper & Sons* (7); *Federated Felt Hatting Employees Union of Australasia* v. *Denton Hat Mills Ltd.* (8); *The King* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild of Australasia*; *Ex parte Allan Taylor & Co. and Gulf Steamship Co. and William Holyman & Sons Ltd.* (9); *Australian Workers' Union* v. *Pastoralists' Federal Council* (10); *Metropolitan Coal Co. of Sydney* v. *Australian Coal and Shale Employees' Federation* (11)). As to the remaining three points, the certificate and the order of reference are invalid as an exercise of the power in sec. 19 of the Act. The certificate does not indicate whether the industrial dispute is existing or threatened or impending. If it implies an existing inter-State dispute, that is rebutted by the evidence. Nor does the order define the dispute. There was no log indicating the subject matter or the parties in this case (*The King* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* (12)).

(1) (1926) 37 C.L.R. 466.
(2) (1926) 38 C.L.R. 308.
(3) (1910) 11 C.L.R. 311, at pp. 317, 323, 340.
(4) (1914) 19 C.L.R. 43, at p. 163.
(5) (1926) 38 C.L.R. 563, at p. 572.
(6) (1919) 27 C.L.R. 207.
(7) (1914) 18 C.L.R. 224, at pp. 241, 244, 255.
(8) (1914) 18 C.L.R. 88, at p. 93.
(9) (1912) 15 C.L.R. 586, at p. 609.
(10) (1917) 23 C.L.R. 22, at p. 28.
(11) (1917) 24 C.L.R. 85.
(12) (1921) 29 C.L.R. 290, at p. 304.

[STARKE J. referred to *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (1).]

The interim order is also too indefinite (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (2)). Sec. 38 (*b*) of the Act is *ultra vires*. By sec. 38 (*b*) Parliament has purported to authorize the Court to make an award which will be a source of industrial rights and obligations as between the parties, and not in settlement of the dispute at all, which is beyond the scope of Parliament. The same reasoning applies to this section as to the common rule (see *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (3)). The interim award was made without giving persons to be affected by it an opportunity of being heard in relation to it, and the proceedings violated the ordinary rules of natural justice, and so were not by way of arbitration (*Whybrow's Case* (4) ; *Sydney Corporation* v. *Harris* (5) ; *Weinberger* v. *Inglis* (6) ; *The King* v. *North* ; *Ex parte Oakey* (7)).

Clive Teece K.C. (with him *W. Gee*), for the State of New South Wales. There was no evidence of the existence of an actual or probable inter-State dispute. The interim award indicates that the only dispute that Judge *Beeby* purported to deal with was the actual dispute then existing in New South Wales. That is the dispute which he referred into Court, and that is the only dispute which is before the Court on this application. No miners employed by the New South Wales Government were members of the Coal and Shale Employees' Federation, and there is no evidence that the Government employed any members of any union which was made a party to the award ; consequently there can be no dispute in respect of which an award can be made binding on the New South Wales Government. The area of a dispute cannot be enlarged by adding a party who was not a disputant (*West Australian Timber Workers' Case* (8)). The Government of New South Wales was at no time a party to the dispute which exists between the various unions. No dispute exists as to the employment of free labour by any of the employers.

(1) (1911) 12 C.L.R. 398.
(2) (1912) 16 C.L.R. 245, at p. 284.
(3) (1910) 11 C.L.R. 311.
(4) (1910) 11 C.L.R., at pp. 321, 322.
(5) (1912) 14 C.L.R. 1.
(6) (1919) A.C. 606.
(7) (1927) 1 K.B. 491.
(8) (1929) Unreported.

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The operations of the Government in working the Rothbury mine were to maintain a supply of coal for the services of the Government, and were governmental and not industrial. Judge *Beeby* did not take into consideration the economic effect of his award, which he should have done under sec. 38 (*b*): all he was concerned with was the restoration of the *status quo ante*. The interim award is void and made without jurisdiction as being contrary to natural justice as both parties were not heard. Moreover, an award, whether final or interim, can only be made after a hearing.

J. A. Browne K.C. (with him *W. J. McKell*), for the Australasian Coal and Shale Employees' Federation. There was at the material time an actual industrial dispute extending beyond the limits of New South Wales to Victoria and Queensland. The members of the miners' organization were substantially the whole of the members working in the industry which extends throughout those three States, in which States rates of wages were common to the industry. The almost certain result of a reduction of wages in New South Wales would be a reduction in the mines in Victoria and Queensland. The present claim looked at from the industrial point of view affects the industry throughout all three States. An "inter-State dispute" is defined in *Whybrow's Case* (1).

[DIXON J. In *The King* v. *President of the Commonwealth Court of Conciliation and Arbitration and the Merchant Service Guild of Australasia*; *Ex parte William Holyman & Sons Ltd.* (2), it is said that a dispute must exist in two States at once. There is also the *Builders' Labourers' Case* (3).

[ISAACS J. I stand by what I said in the *Builders' Labourers' Case*.]

That is a case where the narrower view of an industrial dispute was definitely departed from.

[ISAACS J. The whole matter is summed up in the *Builders' Labourers' Case* (4).

[STARKE J. referred to *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (5).]

(1) (1910) 11 C.L.R., at pp. 335, 336.
(2) (1914) 18 C.L.R. 273.
(3) (1914) 18 C.L.R. 224.
(4) (1914) 18 C.L.R., at p. 243
(5) (1925) 35 C.L.R. 528.

If the facts indicated do not of themselves amount to an industrial dispute extending beyond one State, the additional facts and circumstances in relation to the stoppages in Victoria and Queensland show that the miners in each of those States had disputes with their own employers in each of those States. There were not three separate disputes in the three States, but one dispute against reduction of wages. If there was no dispute actually extending beyond New South Wales, there is abundant evidence that an industrial dispute was threatened, impending or probable in Queensland and Victoria and actually existing in New South Wales. This Court has never decided that an impending or threatened dispute can be dealt with only by conciliation (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1)). The order of reference made by Judge *Beeby* sufficiently described the dispute, and the question whether counsel had or had not enough time to present their arguments cannot be dealt with under sec. 21AA.

Evatt K.C. (with him *E. Miller*), for the Commonwealth intervening. (1) The Arbitration Court had jurisdiction, in exercise of the judicial power, to determine for itself the question of the existence of an industrial dispute. (2) If that be so, the prohibition application must necessarily fail, because so far as the question of the existence of an industrial dispute is concerned, the question is *res judicata* for the Court. It also follows that, if this is right, for the purposes of sec. 21AA the decision of the Arbitration Court that a dispute existed or was threatened on 19th December is a decision which binds this Court as to whether a dispute existed on 21st December. (3) In any case sec. 31 compels this Court to decide that the award now being questioned cannot be declared void in these proceedings even on prohibition. The effect of sec. 31 is that although the High Court still retains its jurisdiction, it is jurisdiction in the appropriate cases of prohibition, namely, where there has been an excess of jurisdiction. Sec. 31 prevents parties in the Arbitration Court who are bound by an award from challenging that award even though it is outside the power conferred by the statute. The

(1) (1920) 28 C.L.R. 1.

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object of the power conferred by sec. 51 (xxxv.) of the Constitution is the protection not merely of the persons who are or who may be parties to the dispute, but also of the Australian public (*Australian Tramways Employees' Association* v. *Prahran and Malvern Tramway Trust* (1); *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (2); *Federated Saw Mill, &c., Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (3)). *Archer's Case* (4) cannot be taken as the test of an inter-State industrial dispute. That question was considered in *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (5). The test of an industrial dispute is not what the individual employer can concede, but, in a claim for uniform conditions extending beyond the limits of one State, it is what the employers in those two States acting together can concede (*George Hudson Ltd.* v. *Australian Timber Workers' Union* (6)).

[DIXON J. referred to *Hudson's Case* at pp. 440-441, per *Isaacs* J.]

Metropolitan Coal Co. of Sydney v. *Australian Coal and Shale Employees' Federation* (7) is distinguishable from the present case. Stoppage awards occurred in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (8); *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association*; *Ex parte Commonwealth Steamship Owners' Association* (9). The dispute can be fairly regarded as extending or threatening to extend beyond New South Wales. The Court had power to make an award in this matter even if it were pending only in the other States (*Jumbunna Case* (10); *Whybrow's Case* (11)). If there is only a one-State dispute at present which is likely to become a two-State dispute, although all the applicants and respondents are in one State the Court may deal with it (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association*; *Ex parte Commonwealth Steamship Owners' Association* [*No.* 1] (12); *Jumbunna*

(1) (1913) 17 C.L.R. 680, at pp. 699, 700.
(2) (1919) 26 C.L.R. 508, at p. 580.
(3) (1909) 8 C.L.R. 465, at pp. 503, 504.
(4) (1919) 27 C.L.R. 207.
(5) (1908) 6 C.L.R. 309, at p. 332.
(6) (1923) 32 C.L.R. 413, at p. 453.
(7) (1917) 24 C.L.R. 85.
(8) (1925) 35 C.L.R. 462, at pp. 467, 489.
(9) (1916) 21 C.L.R. 642, at p. 644.
(10) (1908) 6 C.L.R., at pp. 321, 322.
(11) (1910) 11 C.L.R., at pp. 331, 332, 335, 336.
(12) (1916) 10 C.A.R. 431, at pp. 433, 434.

Case (1); *Archer's Case* (2)). The State of New South Wales was rightly made a respondent though it did not employ any persons in the organization (*Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (3)). The statements of the Minister are binding on the Crown (*John Cooke & Co. Pty. Ltd.* v. *Commonwealth* (4)).

[DIXON J. So far as I am aware, since *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (5) this is the first case in which an award professing to bind the Sovereign under this Act has been attacked before this Court. It seems to me the matter is a very important one. The question arises whether this statute is framed in such a way as to make it proper to bind the King by name in an arbitration award.]

An award may be made to bind the Crown but difficulties may arise in enforcing it against the Crown. Two orders are not necessary to refer the dispute actual and threatened into Court (*Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (6)). The parties were heard and this Court will not inquire into the sufficiency of the hearing (*Ex parte Hopwood* (7)). It was admitted at the Bar that there was no change in the position between 19th and 21st December. [Counsel also referred to *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (8); *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (9).]

Robert Menzies K.C., in reply, referred to the *Federated Engine-Drivers' Case* (10); *Monard* v. *H. M. Leggo & Co.* (11); *The King* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild of Australasia* (12); *In re Judiciary and Navigation Acts* (13); *Ince Brothers and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (14).

Cur. adv. vult.

(1) (1908) 6 C.L.R., at p. 333.
(2) (1919) 27 C.L.R., at p. 215.
(3) (1925) 35 C.L.R. 528.
(4) (1924) 34 C.L.R. 269.
(5) (1920) 28 C.L.R. 129.
(6) (1913) 16 C.L.R., at pp. 594, 599.
(7) (1850) 15 Q.B. 121; 117 E.R. 404.
(8) (1918) 25 C.L.R. 434.
(9) (1928) 41 C.L.R. 402.
(10) (1920) 28 C.L.R. 1.
(11) (1923) 33 C.L.R. 155, at pp. 166, 167.
(12) (1912) 15 C.L.R., at p. 606.
(13) (1921) 29 C.L.R. 257, at p. 267.
(14) (1924) 34 C.L.R. 457, at p. 478.

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Jan. 22.

The following written judgments were delivered :—

ISAACS J. On 16th December 1929 the Government of New South Wales reopened the Rothbury coal mine in the northern district of that State. That was the culmination of a series of events that profoundly affected not merely the State of New South Wales but practically all Australia. There had been months of inactivity on that mine field, months of struggle and endurance on both sides, severe privations on one side and great losses on the other, months of vain negotiation between the northern proprietors and their former employees, in which the then Prime Minister and the Premier of New South Wales had taken part. Disorder arose, and life was lost. There can be no question as to the fact that at that time an industrial dispute of a very bitter character existed between the proprietors of the northern collieries and the miners formerly employed by them, in which the respective disputants were maintaining at great sacrifices to themselves what they asserted to be their just rights. But it is also a painful truth that their strife was causing untold injury to the general community, and in every reasonable sense it was of an Australian character. On the day the Rothbury mine opened and the disturbance occurred, the news of what had happened was rapidly known by radio in Victoria and Queensland. It became alarmingly evident that a great industrial conflagration was imminent. No one can possibly doubt that on 16th, 17th and 18th December the emergency, be its legal designation what you will, had assumed proportions in area and general effect entirely beyond the power of any one State to control. At that juncture the machinery of the Federal Arbitration Court was set in motion. It is the only tribunal in Australia armed with the authority of the whole people to preserve or restore industrial peace where a conflict of national extent is imminent or in progress. By direction of Chief Judge *Dethridge*, a compulsory conference was summoned by Judge *Beeby*, and held before him on 17th and 18th December. It was ineffectual to secure agreement. His Honor then, in accordance with the Act, informed his mind by taking judicial notice of events that every rational adult in Australia was aware of, and arrived at the conclusion that " an industrial dispute of which the

Court can take cognizance exists or is threatened and impending," and he referred the dispute into Court for hearing and determination.

That finding has been criticized as vague and fatally indistinct, so as to render all subsequent proceedings void. The objection is, to me, incomprehensible. The law, when it prescribes a duty, does not demand impossibilities. At the stage reached by Judge *Beeby* on 18th December, with the evidence then available to him, it would have been as easy to delimit the precise locality and incidents of an advancing thunderstorm as to mark out with the suggested definiteness the boundaries as to parties and the items of subject matter included or to be included in the dispute. Obviously, the inter-State dispute he found to exist consisted of the uncontroverted dispute in New South Wales and the stoppages of coal-miners in Victoria and Queensland. That is clear from his reference to the affidavits of Davies and Lowden in his order of 19th December. There was manifest urgency to restore working conditions as soon as possible without prejudicing any party. He then made an interim award for New South Wales, temporarily restoring the previously existing rates and wages, and so removing the local cause of disorder in that region of the dispute. He made the New South Wales Government a party to the award so far only as it might employ union labour, and announced his intention of proceeding with the hearing of the whole dispute at an early date. He distinctly stated that the interim award was "without prejudice to the parties on the full hearing of the dispute." The beneficent effect of the interim award was immediately apparent. The effect on the Wonthaggi miners is definitely shown by Mr. McVicar's evidence. He says as to meetings of the miners before the opening of Rothbury: —"The general sentiment and expressions of opinion by members were that if a reduction did take place at any particular colliery in New South Wales, *it would reflect itself on members in Victoria.* Their reason for expressing that opinion was that the awards under which they are working at the present time are practically awards made by various tribunals, and what affected one State affected the whole of the States. They naturally thought that *if New South Wales went to work under a reduction in wages, it would automatically apply to Victoria.*" Acting on this belief, the Wonthaggi miners

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stopped work. But as soon as Judge *Beeby* made his interim award and announced his intention to examine the position further, they were at once instructed to return to work, and they were thoroughly satisfied to do so. At two mines in Queensland work was resumed where the danger of the reduction being operative had also been apprehended. Much stress was laid on instructions from the trusted officials of the miners, but that no more shows want of determination to protect their personal interests, than acting by voters on instructions from party officials at elections shows absence of individual political opinions. Besides, Mr. McVicars swears positively that the stoppage was not exclusively due to the instructions. Obviously the miners' own apprehensions were a contributing factor. No one can reasonably doubt that had Judge *Beeby's* temporary award not been challenged but acted upon, the subsequent deplorable disorder and disorganization that have occurred would have been averted. But his intervention has on many grounds been attacked as unlawful. The present applications are in substance for a decision of this Court nullifying what he has done, forbidding him to proceed further with the work of pacification, and casting the controversy once again into the furnace of open industrial conflict. If that is the inexorable requirement of the law, then the Court must do it regardless of consequences, and leave the reproach with the law: for reproach it would be if the law so demanded.

Viewing the matter for myself, however, from the strictest legal standpoint, the only aspect from which I allow myself to regard it for this purpose, I hold most firmly, and I hope to make it clear why I so hold, that the Court's duty is to refuse to take the course suggested. In my opinion, the circumstances not only justified, but loudly demanded, the intervention of the Arbitration Court. That intervention was the interposition of the national law to save the community from the loss and suffering of a national calamity, and it has been rightfully and properly exercised. Before briefly summarizing the circumstances leading to the necessity of that interposition, I would as pointedly as possible state the decisive factor in this case. Apart from some technical objections which may be altogether disregarded as unsubstantial, the lawfulness or unlawfulness of Judge *Beeby's* interim award and his proposed later

inquiry depends, not on any disputed doctrine of law, nor on any contested independent concrete fact, but entirely on a mere inference from a number of correlated facts. It stands thus :—Is it a right or a wrong inference from what transpired at Wonthaggi or in Queensland from 16th December to 19th December, read by the light of all that preceded and followed, that the men, besides supporting their fellow-miners in New South Wales, were also indicating their determination not to permit any consequent reduction of their own wages, which was feared as a result of what was happening in New South Wales, and did not their respective employers naturally so understand and passively decline to acquiesce ? If that question be answered in the affirmative either as to Victoria or Queensland, then I do not understand it to be denied there was jurisdiction to intervene, because there was the same subject matter or there were at least sufficiently related subject matters in dispute in more than one State at the same time. Merely on the propriety of that inference, at best for the applicants a most disputable one, rests the central and momentous question whether Judge *Beeby* is, in the present matter, to be allowed in any way to bridge the dreadful chasm that has arisen between capital and labour in a fundamental industry. I wish to make it quite plain at this point that as a matter of recognized judicial practice, which is, therefore, in effect, part of the common law, this Court is not justified in deciding that question free from the great weight to be given to the decision of Judge *Beeby*. I shall later refer to some familiar authorities which show that his Honor's decision—for it is regarded as a decision, though not a final one—that there was an inter-State industrial dispute, and therefore impliedly that the inference referred to should be drawn in favour of the respondents here, ought not to be overridden unless he was *clearly* wrong. A doubtful balance of probabilities will not suffice.

Now, the circumstances, so far as material, that had gathered into concentration, for the full understanding of the situation in the middle of December, and as they must have presented themselves to Judge *Beeby*, were shortly these :—For many years the coal-mining industry of New South Wales, Victoria and Queensland had been working under Federal awards made by the Coal Tribunal under

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the *Industrial Peace Act* 1920, in settlement of one or more inter-State industrial disputes affecting them all. In a real sense the rates and wages were uniform, when taken in connection with the commercial selling differences of the product. It was thought by everyone concerned that all these awards made years before, and under which *de facto* the working conditions were observed, were still in legal operation. Certainly the northern collieries proprietors thought so. Mr. Mereweather, one of them, and he is also a barrister, distinctly stated so in evidence. As this was not assented to during the argument, it being considered that he was speaking only for himself, I shall refer to his evidence. Speaking of a period after the mines were closed, he said that there were meetings of the northern collieries proprietors as to reopening them. Then he stated :—" We could not reopen the *mines* unless we wished to run the risk of breaking the law. The only way in which we could get over the difficulty would be subject to the award being amended, and subject to a reduction of wages. We were willing to give re-employment to the men on those conditions." So it is clear the mine-owners all thought the awards were in force, and that the industrial dispute that led to them was so far in existence that the Coal Tribunal could, under its statutory powers, if applied to, vary the award. That opinion was obviously shared by the men. It follows necessarily that a compulsory reduction of wages at any point, unless by the Federal authority that had fixed them, would be regarded by those engaged in the industry as a disturbance of the Federal scheme. The northern collieries owners, feeling unable to meet competition in overseas and inter-State trade unless they could reduce their prices, sought some means of reducing their cost of production. As a result of long consideration and consultation, proposals were made by the Premier of New South Wales to meet the difficulty by the State forgoing 2s. of its charges per ton, the owners giving up 1s. per ton of their profit, and the miners 1s. per ton of their wages. This latter was ultimately reduced to 9d. per ton. The miners objected, asserting it was not necessary. Whoever was right and whoever was wrong, it is not my province to determine. That, in my view, is the question that should be left for Judge *Beeby* to investigate. For present purposes the only thing material is

that it formed the nucleus of a dispute that has spread and has desperately injured, and is still injuring, Australia, and my only function is to express my opinion whether the only tribunal capable of dealing with the matter should now have its hands tied. The question remained technically a purely New South Wales industrial dispute, so long as the contest was confined to the employees and employers there, notwithstanding the injury caused elsewhere. But, unlike any other dispute within my knowledge, there was one special feature of the northern collieries that affected both the commercial and the industrial position elsewhere, and which, in my opinion, dominates the issue here. The selling price of the other coal—like Wonthaggi coal—was regulated by its calorific value in comparison with that of Maitland (northern) coal. Maitland coal was the sterling. If its market price dropped, it compelled a corresponding drop in Wonthaggi and Queensland coal. Until the opening of Rothbury, at stipulated reduced selling price and reduced wages, that drop was only remote. Not only so, the absence of northern coal competition naturally secured an advanced price for Wonthaggi and Queensland coal. But once Rothbury actually opened with the promise of other northern mines opening, the position was radically altered, because Maitland coal was once more in sight in a business sense. The contract made by the Government with the Rothbury mine-owners included not only the winning, but also the merchandising, disposal and delivery of the Rothbury coal in terms that as to place and quantity were unlimited; and, reading the terms of the contract either alone or with the light of the evidence as to the causes operating to require a reduction of wages, the power of the Government on construction of the document extended to selling overseas and inter-State. Further, inasmuch as it is admitted the Government's own needs for railways were already substantially supplied from the western and southern mines, there was the highest probability that the Maitland coal would be distributed to gas companies and others for gas-making and other industrial purposes. The moment had therefore come when Wonthaggi and Queensland coal would presently have not merely to lose the advance in price it had gained by the absence of northern competition, but would also have to face a reduction of its

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former price by reason of the lower price to be charged henceforth for Maitland coal. This was patently imminent to all concerned.

The Victorian and Queensland miners could not help seeing their own wages in real danger, because a drop in selling price meant a drop in wages, at least in all human probability. It matters not if it were merely a possibility. The sworn evidence is that the men then presently feared it, and their opinion must be taken as an impelling factor in judging of the reason of their stoppage. At this point comes the critical consideration. I refer to the central inference already stated. True, the owners did not say to the miners "We intend to reduce your wages when we have cut the price of coal." True, also, the miners did not say, in so many words, to their employers "We see the fall in price coming soon, and the time has come to tell you in unison with our fellow-unionists in New South Wales that we object to a reduction in award wages." But sometimes actions speak louder than words, and their stoppage when it occurred could hardly be misunderstood. An industrial dispute does not always mean a collision. It may arise—and wisely so—to avoid a collision that is feared. If I could think the Victorian and Queensland miners entirely ignored their own personal direct interests, then I would have to regard them either as angels or as lunatics. If I can see, as I plainly do, that they at least included the defence of their own award rates, then I must give credit to their employers for seeing that fact as plainly as myself. And that is what Judge *Beeby*, well experienced in such matters, evidently did. The employers maintained a passive resistance to what, if thought were given at all, must have appeared a determined demand to retain existing award rates in Victoria and Queensland, even if selling prices were forced down, just as the New South Wales miners were contending. And the employers' passive resistance, as silently but as significantly expressed as was the demand, placed the two opposing parties in disagreement. Judge *Beeby* reviewed the whole situation, and taking into account its origin, its progress and its culmination, drew the inference that there was an inter-State dispute. I entirely agree with him. There is nothing to the contrary more substantial than *a mere surmise* that his view is wrong. It is a surmise that treats the positive evidence of Mr.

McVicars above quoted as unworthy of belief; for, if that evidence is accepted as true, there is no reasonable escape from the conclusion that the men were protecting their own interests, that their employers' representatives knew what was taking place at meetings, knew the general situation and fully understood the true significance of the stoppage in the sense now contended for by the respondents. It was urged during the argument that the Wonthaggi and Queensland miners had not made a written demand for the retention of their award wages. I am unable to place the matter on this narrow ledge of formality and technicality, but rest the inference on the broad substantial business meaning of what was done. The reality was as unmistakable as was the Russo-Japanese War, days before the formal declaration. All that is needed to see this matter in its true light is to view it, not with the usual circumscribed vision appropriate to individual controversies, but with the broader outlook necessary to take into account the wider field of operations on which industrial conflicts move. On the accuracy or inaccuracy of the inferential conclusion from the men's action at Wonthaggi and in Queensland in the middle of December, as I have said, rests so far as these proceedings are concerned the whole issue of peaceful determination of the present crisis in the Arbitration Court, or the ordeal by battle outside. True, other attempts may be made to invoke the Arbitration Court, but at what cost and with what eventual result? Legal exhaustion is only one of the ways in which the "process of attrition" —to use a phrase occurring in the course of this case—may be applied to industrial conflicts. Now, as to the proper inference as to whether the Victorian and Queensland miners were acting in defence of their own interests, both principle and precedent, as applied to the circumstances of this case, go to support an answer in the affirmative.

One principle which I regard as indispensable in interpreting the legislation is that stated by Lord *Shaw of Dunfermline* in *Butler (or Black)* v. *Fife Coal Co.* (1) in a passage I have cited in other cases, but which may advantageously be cited again. Lord *Shaw* said:—"The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront

(1) (1912) A.C. 149, at pp. 178-179.

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or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, *the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable.*" There follows from that as a corollary, that since the Legislature intends an award to be effective as a preventive of open war, or as a peaceful restoration of public services, it should not lightly be destroyed. Every reasonable doubt should be resolved in its favour. The arbitrator is not, it is true, by any express provision of the Act, empowered *judicially* to determine the existence or non-existence of the alleged industrial dispute, which is an indispensable condition of his effective arbitral action. When the Arbitration Court was a purely arbitral body, that was an inescapable result. But since the Court is now also a true judicial body, it is a matter worthy of consideration whether every reason of justice and effective operation of the Act does not point to the desirability—I will go so far as to say the practical necessity—of expressly conferring on that Court in its judicial character the authority and the duty of inquiring and determining finally and conclusively at the earliest possible moment whether the alleged dispute exists or not. As in the present case, that is always a question of fact. Whether the facts as found by the tribunal amount constitutionally to an industrial dispute may, of course, well be reserved in some way for this Court. To what I have said on this subject in *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.* (1) I adhere. But though that judicial power does not yet exist in the Court of Arbitration, there remains a very powerful reason why the conclusion of that Court as to the existence or non-existence of a dispute should be regarded as of very considerable weight in the scales of deliberation, and not be discarded without great caution and hesitation. That is a rule, not of strict law, but of prudence, always well understood, though seldom necessary to be applied. In this case, as it seems to me, its application ought to be decisive, if the Court thinks the issue doubtful. It is, of course, the law that a tribunal whose jurisdiction is expressly limited by a condition cannot usurp jurisdiction by acting in the absence of that condition. It may be expressly or by implication authorized

(1) (1928) 41 C.L.R., at pp. 427-428.

to determine that condition, and if it does so, the jurisdiction is satisfied. But even where not so authorized, a superior Court possessing the necessary power of prohibition observes a rule of practice which justice requires. The rule is thus expressed by *Kennedy* L.J. in *The King* v. *Assessment Committee of Metropolitan Borough of Shoreditch*; *Ex parte Morgan* (1) :—" Where the evidence upon which the inferior tribunal has decided in exercising or refusing to exercise jurisdiction, is conflicting, that circumstance, though not conclusive upon the Court so as absolutely to deprive it of the discretionary power of granting the prohibition or the mandamus, *will so far influence the Court that very strong grounds will be required before it interferes with the decision.* That is the language of *Blackburn* J. in *Elston* v. *Rose* (2)." In *R.* v. *Yaldwyn* (3) *Griffith* C.J. said : —" If the decision of justices on a question on which their jurisdiction depends is manifestly wrong, the Court will not pay any attention to their finding ; if it manifestly proceeded upon a wrong notion of the law, the Court would not pay any attention to their finding ; but if the facts upon which their jurisdiction depends were investigated by them, and their finding was not manifestly wrong, the Court will hesitate very much before it will interfere. That does not import that the Court abrogates its right to inquire into the jurisdiction of inferior Courts, but that *it will decline to interfere when it is very doubtful whether the facts are different from what the inferior Courts have found.*" There are numerous cases to the same effect, some of which are collected in *Curlewis, Edwards and Sanderson* on *Prohibition and Orders to Review*, at pp. 163 *et seqq.* That is definitely settled beyond question, and is tacitly recognized by the Privy Council in *Colonial Bank of Australasia* v. *Willan* (4). The essence of that rule, which justice requires the Court for itself, and merely as a matter of prudence, to take into account when weighing the circumstances of the case and before arriving at a final conclusion, is this : It is clear and unquestionable that when, as was the case here, objection is taken before a Judge of limited jurisdiction, " the Judge must not immediately forbear to proceed, but *must inquire into its truth or falsehood, and for the time decide it*, and either proceed

(1) (1910) 2 K.B. 859, at p. 888.
(2) (1868) L.R. 4 Q.B. 4, at p. 8.
(3) (1899) 9 Q.L.J. 242, at p. 244.
(4) (1874) L.R. 5 P.C. 417, at p. 445.

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or not proceed with the principal subject matter according as he finds on that point; but this decision must be open to question," &c. (*Bunbury* v. *Fuller* (1)). But since the law requires him *to decide*, and afterwards to proceed if he should be of an affirmative opinion regarding his jurisdiction, it is not so absurd as to nullify all he does in obedience to his duty unless he makes a manifest error. The duty on an arbitrator and on a Judge as to the existence of jurisdiction is precisely the same. If he errs in law, that is manifest. As to fact, a doubt as to error is resolved in favour of jurisdiction. In a private matter, such is the caution prescribed by established precedent; how much more should it be observed in a case like the present, where the chief matter at stake is not the individual interests of the disputants, but the tranquility of the nation.

In addition to the public considerations that instantly suggest themselves, namely, the necessity of preventing or ending social strife and private suffering, there is the very practical reason that a Judge of the Arbitration Court has in a sense to decide authoritatively the very thing itself. He cannot properly make an award except on subjects in controversy and between parties in controversy, and therefore, in substance, the law requires of him directly to see what is in dispute and as between what parties. But, more than all, the state of dispute or no dispute is frequently, as in this case, a question not determinable by reference to a single fact or a few single facts undisputed and of unmistakable significance, directly or by clear inference proving or disproving the condition of dispute or participation in it. It depends frequently, as in this case, on many circumstances, equivocal in themselves and in isolation, but bringing about, when concentrated and focussed at a particular point, a state of affairs requiring a somewhat special knowledge of the subject to form the most reliable conclusion. In this case many such circumstances concur, some of them immeasurable and only to be properly appreciated and appraised by those familiar with such occurrences and the incidents behind them. They include the current industrial relations of employer and employed, their methods of organization and communication, their mutual understandings, the impulses that ordinarily motivate combined

(1) (1853) 9 Ex. 111, at p. 140; 156 E.R. 47, at p. 60.

action in industry, the multitudinous and constantly changing incidents of trade and occupations, and the effect of the existence or supposed existence of Federal awards on conduct. In respect of all these and similar matters, the Arbitration Judge is in daily contact with the persons associated in industry and their affairs; he is far more familiar with the necessary subject matter than myself as a member of this Court. I cannot deny that the Arbitration Judge occupies a position of advantage over me in this respect. To replace the opinion of Judge *Beeby* with my own as to the existence of an inter-State dispute on 17th, 18th and 19th December would be to substitute the opinion of a general practitioner for that of an expert on his special subject.

It is true that in this Court there were sworn testimony and many exhibits mounting up to hundreds of pages of transcribed evidence. But after all, it only amounted to a formal narration of facts and circumstances that the Act permits and requires the Arbitration Judge to ascertain less formally. It is impossible to eliminate any of the circumstances proved here from the circumstances of which the Judge took notice in addition to the sworn testimony before him. We are bound to assume he was cognizant of them all as they were in fact, as they stood in relation to each other. In the melee of circumstances affecting his decision, it would indeed be a bold assertion to make that Judge *Beeby* could not reasonably have drawn the conclusion at which he arrived. Facts showing he was manifestly wrong are conspicuously absent, while on the other hand there is a heavy balance of probability that he was right. If even I saw less clearly than I do that Judge *Beeby* was absolutely right, if I were in any doubt about it, I should, in accordance with the eminent authorities to which I have referred, be constrained to withhold my hand and not take a course which may leave open hostility unregulated. There are, as stated, other objections to the arbitration proceedings inferior in importance to those I have dealt with. In the circumstances, I content myself with stating my opinion that they are unsustainable, and that the applicants should fail.

So much for the present case. But as the future is always more important than the past or the present, I feel constrained to add a

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few words as to the procedure adopted by the applicants. Their main reliance for the scope of the attack on the interim order, and through that on the whole arbitration proceedings, was placed on sec. 21AA, which has lately played a distinguished part in the extinction of industrial awards. I have not long since expressed my views, with some elaboration, as to the true relation of that section to the general scheme of arbitration. I refer to the case known as *Alderdice's Case* (1), and once more earnestly and respectfully press upon those responsible for the statutory provisions controlling that subject the observations I there made. One thing appears to me to be transparently clear: It is possible to retain sec. 21AA; it is possible to have stability in industrial awards: it is not possible to have both. In the present intricate state of legislation, awards brought into this Court and under cover of that section subjected to the attacks of destructive criticism of all kinds, and sometimes meticulous technicalities suggested by ingenious legal minds, who as the law stands are only doing their duty to those they represent, have very much the same chance of escape as had the victims in the arena of the ancient Roman Colosseum. How is a statute of this nature, so uncertain, contradictory and deceptive, to achieve its declared object? The Act is not occasionally but inherently inconsistent. It creates an important tribunal, both arbitral and judicial, invests it with great powers, even to declare invalid a State Act inconsistent with a Federal award, and enacts that all orders and awards of the Court shall be unchallengeable in any other Court. But it omits to invest the Court with power to decide authoritatively and finally the fact of a dispute, the very foundation of its arbitral proceedings, and, as interpreted, throws all its orders and directions at any distance of time and at any cost into the crucible of this Court, even when evidence may be weakened or lost. It would be rash to assert that any Federal award to-day has any existence except on sufferance. And it must be remembered that for present purposes the power of this Court is destructive only: it can neither rebuild nor amend. Can such a system, giving with one hand and taking back with the other, conserve or promote peace? It invites thousands to a peaceful journey on a *Lusitania*, and then

(1) (1928) 41 C.L.R. 402.

provides the torpedo that destroys the vessel. It is not for me, but for the Legislature, to consider how far such a system conduces to its declared high purpose by inspiring confidence in arbitration as a reliable substitute for the force of strike or lock-out, both of which bring loss and suffering to the combatants themselves and tend to impoverish the community. Before parting with this case, I wish to express my appreciation of the admirable arguments of learned counsel on both sides, and of their illuminating analyses of the vast mass of material they had to deal with.

GAVAN DUFFY, RICH, STARKE AND DIXON JJ. The question for the determination of this Court is whether an interim award of the Commonwealth Court of Conciliation and Arbitration made by his Honor Judge *Beeby* on 19th December 1929 is valid, or was made without jurisdiction. The award was expressed to operate from 20th December 1929 until 31st January 1930, or until further order, and to bind His Majesty the King in right of the State of New South Wales, eight proprietors of collieries in the northern coal-fields of New South Wales, and an organization of which they were members called the Northern Collieries Association, and to bind them as to the employment of members of four industrial organizations of employees. In relation to these persons it awarded, ordered and prescribed "that by way of interim award only and without prejudice to the parties on the full hearing of the dispute, the hewing rates and conditions of employment of coal-miners and other workmen now or hereafter employed in the production of coal shall be those prevailing immediately prior to the 2nd March 1929." The collieries of the proprietors bound by the award had been closed since 2nd March 1929, and no members of the organizations of employees entitled to the benefit of the award appear to have been employed by the Government of New South Wales, which had begun to work a colliery on 16th December 1929. The award therefore seems to have had no direct practical application. But the Attorney-General of New South Wales and the colliery proprietors which it purported to bind at once impeached its validity by the institution of these proceedings, which have been heard by this Court as matters of urgency. Sec. 38 (*b*) of the *Commonwealth Conciliation and*

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Arbitration Act 1904-1928 empowers the Court of Conciliation and Arbitration as regards every industrial dispute of which it has cognizance to make any interim order or award relating to any or all the matters in dispute. A serious industrial dispute existed in the State of New South Wales between the parties to the award, other than the King in right of the State of New South Wales, upon the matters to which the award relates. But the Court of Conciliation and Arbitration can have neither cognizance of that dispute nor jurisdiction over it unless it extended beyond the limits of New South Wales or its extension beyond those limits was threatened, impending or probable. If on 19th December 1929, when the award was made, the dispute did not extend beyond the limits of any one State, and its extension was not threatened, impending or probable, the award is not only beyond the jurisdiction which the Parliament has conferred upon the Court of Conciliation and Arbitration, but it is beyond any jurisdiction which under the Constitution the Parliament could possibly confer upon it.

The power which sec. 51 (xxxv.) of the Constitution confides to the Federal Legislature is to make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. "The words 'extending beyond the limits of any one State' as applied to a dispute mean that the dispute is one 'existing in two or more States' or, in other words, 'covering Australian territory comprised within two or more States.'" This is the fourth of the five propositions which in *Holyman's Case* (1) *Isaacs* J., on behalf of himself, *Gavan Duffy* J., *Powers* J. and *Rich* J., stated as definitely settled. It is equally well established that to constitute an industrial dispute there must be disagreement between people or groups of people who stand in some industrial relation upon some matter which affects or arises out of the relationship. Such a disagreement may cause a strike, a lock-out, and disturbance and dislocation of industry; but these are the consequences of the industrial dispute, and not the industrial dispute itself, which lies in the disagreement. It is only because this meaning of the words "industrial dispute"

(1) (1914) 18 C.L.R., at p. 285.

was adopted that the Court of Conciliation and Arbitration has been able to exercise the function of prescribing rates of wages and conditions of employment at the instance of organizations which have done little more than formulate and deliver logs of demands with which employers have not complied. But upon this conception of an industrial dispute, it cannot extend beyond the limits of any one State unless in each of two or more States, at one time, the disagreement exists between people or groups who stand in some industrial relation.

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The disagreement in New South Wales was clear and definite. The colliery proprietors in the northern field of New South Wales insisted upon a reduction of wages, and the men refused to submit to it. The existing rates had been established by a special tribunal under the *Industrial Peace Act* 1920 by awards which had for the most part expired. Similar awards had been made by the same tribunal in Queensland and for Wonthaggi in Victoria. A well disciplined organization included in its members the miners in New South Wales, Victoria and Queensland. The coal from the northern collieries in New South Wales was of such a quality that its selling price was necessarily a factor in determining the maximum price at which coal produced in Queensland or at Wonthaggi could be sold. A reduction of wages in the northern collieries would, therefore, almost certainly lead to a reduction, or attempted reduction, of wages in the neighbouring States. To this the combined unions of the coal industry were alive as early as September 1928, when they informed the Premier of New South Wales that, while they believed the proposals were intended to apply only to the northern district of New South Wales, they were of the opinion that the effect of the proposed reduction of the workers' wages in that district, would mean within a short time a reduction to the workers in every other coal-producing district of that State and the Commonwealth generally. Partly, no doubt, for this reason, and partly because of the union discipline, the members of the miners' organization in the southern and western districts of New South Wales and in Queensland and in Victoria contributed 12½ per cent of their pay to the sustenance of the men who belonged to the mines which had closed down. As the dispute in New South

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Wales proceeded, various proposals for its settlement were made, and in November 1929 it was arranged, subject to the ratification of the men, that there should be a resumption at a hewing rate reduced by 9d. per ton. Claims were put forward from Queensland and at Wonthaggi to vote upon this proposal and protests were sent against its acceptance. It was, however, rejected early in December by combined meetings of the lodges of the northern field to whom alone it was submitted.

After the New South Wales Government announced its intention of operating a colliery, resolutions in favour of a general stoppage in the coal industry were passed by a meeting of the combined unions in the coal industry, and by the Labour Council: and a conference of lodge delegates and officials from the Coal and Shale Employees' Federation resolved "to recommend all sections of the Union to extend and intensify the present dispute beyond the lengths of this State and to prepare and organize for an all-out policy in the mining industry," a recommendation which was adopted by the Central Council on 17th or 18th December 1929. The Government of New South Wales commenced coal-mining on 16th December, but not without the occurrence of scenes of violence. The general secretary of the Coal and Shale Employees' Federation sent a telegram on the same day to the secretary of the branch at Wonthaggi: "Member killed others wounded by police at Rothbury stop Wonthaggi tomorrow without fail send me urgent wire in the morning that Wonthaggi has stopped." The men at Wonthaggi ceased work on 17th December and did not resume on the following day. They were ready to resume on the day after the award, 20th December 1929. In Queensland the men at one mine stopped work on 17th December and at two others on 19th December. From these facts let it be assumed that the miners in Queensland and Victoria were strongly opposed to any reduction of wages in New South Wales, not only upon principle, but because their own wages would be endangered by such a reduction, and that they were prepared to stop the production of coal in order to aid the general resistance to the attempt in New South Wales to lower wages. But how does all this make the lowering of wages a matter of dispute between miners and mine-owners.

in Queensland or Victoria? The closing of the mines in the northern district of New South Wales greatly increased the selling price of coal, and unless and until these mines resumed production at lower costs no one contemplated a reduction in Victoria or Queensland. It is said that the action of the miners in these States and their leaders there and in New South Wales manifested or imported a demand on all mine-owners jointly throughout the three States that existing wages and conditions should remain unaltered, and that nothing but uniform acceptance by each and all of these owners could prevent a disagreement with all of them which would amount to a dispute, and therefore that the continuance of the mine-owners' demands in New South Wales for a reduction resulted in a dispute. This artificial view of the matter was supported by the contention that if a demand was made upon a number of employers that each and all should give concessions, the refusal of these concessions by one of them created a disagreement or dispute with all, notwithstanding that the rest complied with the demand. Another view relied upon was that the Victorian and Queensland miners impliedly required from their employers an assurance that come what might in New South Wales their wages would not be affected. This view imputes to the miners a demand for an immediate promise or contract that wages should in no event be reduced in future, although events in New South Wales might put the Victorian and Queensland proprietors in the dilemma of reducing wages or closing the mines. But the truth is that the conduct of the men and of their leaders imported no request or demand upon their employers in either of these two States. Their employers would not understand that anything was asked of them, nor would they be understood as either requiring anything of, or refusing anything to, the men. Mr. *Browne*, for the Australian Coal and Shale Employees' Federation, in an endeavour to avoid the consequences of this view, boldly argued that an inter-State dispute existed whenever men in two States combined for the common interest in resisting the demands made in one State. The contention cannot be sustained in view of *Holyman's Case* (1). This dispute in New South Wales did not extend to Victoria or

(1) (1914) 18 C.L.R. 273.

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Queensland. Was its extension threatened, impending or probable? No desire or attempt to reduce wages and no question about wages would arise between men and owners in Queensland or Victoria out of the present situation, unless and until the mines resumed in New South Wales at a reduced cost of production. But this would mean the settlement of the dispute in New South Wales. It would not extend to Queensland or Victoria although its settlement might so affect the trade in coal in those States that new similar disputes might there arise. A limit imposed alike by the Act and by the Constitution upon the jurisdiction of the Court of Conciliation and Arbitration is that it must be exercised by award so as to settle the dispute. (See per *Isaacs* J. and *Rich* J. in *Archer's Case* (1).) On 19th December there was no dispute in relation to wages, whether existing, threatened, impending or probable, which could be so settled, between the men and the proprietors in Victoria or Queensland. For these reasons Judge *Beeby* had no jurisdiction to make his interim award of that date, which is accordingly invalid.

Dr. *Evatt*, for the Commonwealth, contended that even if Judge *Beeby* had no jurisdiction in fact, yet his decision that he had jurisdiction was conclusive because he now exercised the judicial power of the Commonwealth. It is enough to say that, whether it could do so or not, the Legislature has not attempted to confer upon the Court of Conciliation and Arbitration judicial power conclusively to determine the matter upon which its jurisdiction depends. This view has long been entertained and repeatedly acted upon. (See, e.g., *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (2)—*Griffith* C.J. (3), *Barton* J. (4), *O'Connor* J. (5) and *Isaacs* J. (6); *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co.* (7)—*Griffith* C.J. (8), *O'Connor* J. (9) and *Isaacs* J. (10); *The King* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.*—*Isaacs* J. (11); and *Merchant*

(1) (1919) 27 C.L.R., at p. 212.
(2) (1911) 12 C.L.R. 398.
(3) (1911) 12 C.L.R., at p. 415.
(4) (1911) 12 C.L.R., at p. 428.
(5) (1911) 12 C.L.R., at p. 444.
(6) (1911) 12 C.L.R., at pp. 453-454.
(7) (1909) 8 C.L.R. 419.
(8) (1909) 8 C.L.R., at p. 428.
(9) (1909) 8 C.L.R., at pp. 449-450.
(10) (1909) 8 C.L.R., at p. 453.
(11) (1910) 11 C.L.R. 1, at p. 56.

Service Guild of Australasia v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (1).) He further contended that sec. 31 of the Act operated to give validity to the award although made without jurisdiction. This is opposed both to the decisions of this Court and to the Constitution as it has been interpreted.

Some minor points were raised by the applicants in these cases. They contended that the order of reference made by Judge *Beeby* was void because it failed to disclose what dispute he had referred into Court, and that the award could not stand because he had declined to afford the applicants an opportunity of dealing with the allegation that an industrial dispute extended beyond the limits of New South Wales, or with the merits. Although these arguments do not lack a foundation of fact, we do not think they need be discussed, in view of our decision that the award was made without jurisdiction, because there was no dispute actual or threatened.

Gavan Duffy J.
Rich J.
Starke J.
Dixon J.

As to costs, we think that all parties should abide their own—mainly because the arbitration proceedings were initiated by the Court itself and not by the parties, and the error is substantially that of the Court and not of the parties.

On summons under sec. 21AA *of the Caledonian Collieries Ltd. and others*: (1), (2) *and* (3)—*The Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make the interim award of* 19*th December* 1929 *and the same is bad in law and void.*

On summons under sec. 21AA *of His Majesty's Attorney-General for the State of New South Wales*: (1), (2) *and* (3)—*The Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make the interim award of* 19*th December* 1929 *and the same is bad in law and void.*

Questions (4), (5), (6), (7), (8), (9), (10) *and* (11)—*Unnecessary to decide.*

On rules nisi for prohibition: *In view of the decision under the summonses under sec.* 21AA, *these rules are adjourned sine die, with liberty to any of the parties to apply to make them*

(1) (1913) 16 C.L.R., at p. 599.

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absolute in case of need (see Ex parte Motions and Prohibitions, (1916) 21 *C.L.R.* 669).

Solicitors for the Caledonian Collieries Ltd. and the Northern Colliery Proprietors' Association, *Blake & Riggall,* for *Sly & Russell.* Sydney.

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

Solicitors for the Australasian Coal and Shale Employees' Federation, *Marsland & Co.,* Sydney.

Solicitor for the Commonwealth, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

H. D. W.

Appl *R v Ludeke; Ex parte QEC* 159 CLR 178

[HIGH COURT OF AUSTRALIA.]

CALEDONIAN COLLIERIES LTD. AND OTHERS . . . . . } APPLICANTS AND CLAIMANTS;

AND

THE AUSTRALASIAN COAL AND SHALE EMPLOYEES' FEDERATION . . } RESPONDENT.

[No. 2.]

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MELBOURNE, *Feb.* 17-19; *Mar.* 3.

Isaacs, Gavan Duffy, Rich, Starke and Dixon JJ.

Industrial Arbitration—Industrial dispute—Dispute in one State—Employers requiring reduction of wages—Log served in that and other States claiming increase in wages—Genuineness of dispute—Whether service of log sufficient to create inter-State dispute—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (XXXV.)—*Commonwealth Conciliation and Arbitration Act* 1904-1928 (*No.* 13 *of* 1904—*No.* 18 *of* 1928), *sec.* 21AA.

The Commonwealth Court of Conciliation and Arbitration has not jurisdiction over an alleged industrial dispute extending beyond the limits of any one State unless it is real and genuine; and the question whether it is real and genuine, upon proceedings in prohibition, is to be determined by the High Court of Australia on its own independent view of the evidence.