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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.

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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.

Dicta in *The King* v. *Hibble*; *Ex parte Broken Hill Pty. Co. Ltd.*, (1921) 29 C.L.R. 290, at p. 299, and in the *Builders' Labourers' Case*, (1914) 18 C.L.R. 224, at p. 246, applied.

Held, by *Gavan Duffy*, *Rich*, *Starke* and *Dixon* JJ., that in order to give the Commonwealth Court of Conciliation and Arbitration jurisdiction, the two-State dispute must exist between the parties antecedently to the award or agreement which composes it, and the dispute must arise out of their disagreement about the manner in which they shall regulate their own industrial relations.

The council of a Federal industrial organization of employees, who were resisting a threatened reduction of wages in New South Wales, prepared a written log of demands for higher wages and shorter hours when the Commonwealth Court of Conciliation and Arbitration had summoned a compulsory conference and had referred an alleged two-State dispute into Court and, after that Court had, notwithstanding objections to its jurisdiction, made an interim award prescribing existing wages and conditions in New South Wales, the council served the log upon employers in the industry throughout the Commonwealth.

Held, by *Gavan Duffy*, *Rich*, *Starke* and *Dixon* JJ. (*Isaacs* J. dissenting), on the facts, that the log was not sincerely propounded to the employers in New South Wales as a demand upon which the council was resolved to insist, but was regarded by all parties as nothing but a step towards enabling the Commonwealth Court of Conciliation and Arbitration to deal with the trouble in New South Wales, and therefore that non-compliance with the demand did not give rise to a two-State dispute to which the New South Wales employees were parties over which that Court had jurisdiction.

SUMMONSES under sec. 21AA and Motions for Prohibition.

Certain proprietors of collieries in the northern part of New South Wales including the Caledonian Collieries Ltd. and the Northern Collieries Association issued a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 for the purpose of challenging an interim award made by Judge *Beeby* on 23rd January 1930 (*Caledonian Collieries Ltd. and Others* v. *Australasian Coal and Shale Employees' Federation*). The northern colliery proprietors also obtained an order nisi for prohibition against Judge *Beeby* to prohibit him from further proceeding to hear and determine the alleged industrial dispute (*The King* v. *Beeby and Others*; *Ex parte Caledonian Collieries Ltd. and Others*). The Attorney-General for New South Wales caused a summons to be issued under sec. 21AA (*Attorney-General (N.S.W.)* v. *Australasian Coal and Shale Employees' Federation*) and also obtained a similar order nisi for prohibition against the Commonwealth Court of

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Conciliation and Arbitration and Judge *Beeby* for the purpose of having the interim award set aside (*The King* v. *Commonwealth Court of Conciliation and Others; Ex parte Attorney-General (N.S.W.)*). The interim award made by Judge *Beeby* on 23rd January 1930 awarded, ordered and prescribed "(a) that until the 18th February next or further order of this Court, the wages, hewing rates, and conditions of employment set out in the awards of the special tribunal of the 23rd day of October and the 6th day of November 1925, and of any subsequent variations thereof, shall be paid and observed; (b) that this interim award shall be binding on the colliery proprietors who were represented at the compulsory conference . . . as to their employment of members of the Australasian Shale and Coal Employees' Federation, and on the said Federation and its members." The order nisi for prohibition obtained by the Attorney-General for New South Wales against the Commonwealth Court of Conciliation and Arbitration and Judge *Beeby* was granted on the grounds substantially:—(1) That the alleged industrial dispute referred into the Commonwealth Court of Conciliation and Arbitration on 20th January 1930 neither existed nor was threatened, 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 at any relevant date. (2) That his Honor had no jurisdiction to make or promulgate the said alleged interim award. (3) That the said alleged interim award was bad in law and without the powers conferred by the Constitution. (4) That his Honor had no jurisdiction to make or promulgate the said alleged interim award upon the following grounds: (a) that the alleged interim award was not made in respect of a bona fide dispute extending beyond the limits of any one State within the meaning of the Act; (b) that the said alleged interim award is invalid as not having been made by arbitration, it having been made without giving the persons to be affected an opportunity to be heard; (c) that the said alleged interim award is invalid as not having been made by arbitration inasmuch as persons to be affected were not given a proper opportunity to present their case in relation to the said alleged interim award; (d) that the said interim award was not validly

made under the circumstances existing at the time of the making thereof by his Honor Judge *Beeby*; (5) that the said interim award was not an award within the meaning of the said Act having regard to the form thereof. (6) That the Court of Conciliation and Arbitration did not obtain cognizance of the said alleged dispute by any of the methods prescribed by sec. 19 of the said Act inasmuch as no valid order was made referring any dispute within the meaning of the Act into Court. (7) That the Government of New South Wales did not at any relevant time employ any members of the said Australasian Coal and Shale Employees' Federation. (8) That there was not at any relevant time any dispute between the said Australasian Coal and Shale Employees' Federation and the Government of New South Wales existing, threatened, impending or probable.

The facts relating to the dispute and to its history are fully stated in the judgment of the majority of the Court hereunder.

Robert Menzies K.C. (with him *J. A. Ferguson*), for the applicants the Caledonian Collieries Ltd. and other proprietors other than the State of New South Wales. There are two main contentions: (1) that the interim award made by Judge *Beeby* was not validly made, having regard to the facts that the parties were not heard, and that in fact his Honor made the interim award without any warning to the parties, and under circumstances which in fact were calculated to put the parties off their guard; and (2) that the award was not made in an industrial dispute cognizable by the Court. The attack upon the existence of the alleged dispute is an attack upon the genuineness of the log served on the employers in Victoria rather than upon its form. What was asked for in that log was asked for with the sole purpose of establishing, if possible, the jurisdiction of the Arbitration Court in proceedings which had already commenced. The Federation was before Judge *Beeby*, but doubts had arisen as to his jurisdiction to deal with the dispute, and the sole purpose of serving the log was to resolve those doubts in favour of the Federation by giving insufficient time to answer it within the prescribed time, and then say that the failure to answer amounted to a refusal to comply with its terms. The demand did not proceed from any

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real dissatisfaction amongst members of the organization. In the present case Judge *Beeby* made the interim award without reference to the parties. His Honor treated this interim order as one which the Court might make of its own motion, and based it upon the practice of the Court. No arbitrator or Judge of the Arbitration Court is entitled to make an award, whether it be an interim award or a permanent award, without hearing the parties to such an extent as is reasonable under the circumstances on the question of whether an award should be made and as to what that award should contain if made; as no previous award bound the parties the interim award affected the civil rights of the present applicants and they should have been heard (*Sydney Corporation* v. *Harris* (1); *Weinberger* v. *Inglis* (2); *The King* v. *North*; *Ex parte Oakey* (3); *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (4); *In re Brook and Delcomyn* (5); *Board of Education* v. *Rice* (6); *The King* v. *Huntingdon Confirming Authority*; *Ex parte George and Stamford Hotels Ltd.* (7)). [Counsel also referred to *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (8).] The evidence is that the log was posted on 24th December and demanded a reply by 1st January. The shortness of the date shows that the demand made in the log was not a real demand for conditions upon which some real discussion between the parties might have occurred, but was gone through merely as a matter of form in order to bring the matter before the Court. The facts are that the New South Wales Government opened the Rothbury mine on 16th December 1929; the compulsory conference came together on 17th December; it was adjourned after being part heard until 18th; on 18th the matter was referred into Court by Judge *Beeby*, and on 19th Judge *Beeby* made an interim award. At the conference before Judge *Beeby* and in the discussion which preceded the making of his interim award on 19th, objections were taken to the jurisdiction by representatives of the employers. On 20th the Council of the organization, which was then sitting and had commenced its sittings on 17th December, authorized the issue

(1) (1912) 14 C.L.R. 1.
(2) (1919) A.C. 606.
(3) (1927) 1 K.B. 491.
(4) (1910) 11 C.L.R. 311.
(5) (1864) 16 C.B. (N.S.) 403; 143 E.R. 1184.
(6) (1910) 2 K.B. 165; (1911) A.C. 179, at p. 182.
(7) (1929) 1 K.B. 698.
(8) (1924) 35 C.L.R. 349.

of a new log, which was dated 24th and was served on 26th December with a demand for a reply by 1st January. The members of the miners' Federation were not consulted and the position is not covered by *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1). The organization must show that the dispute is genuine in relation to the whole or a substantial number of the members of the class which it represents (*Tramways Case* [*No.* 2] (2); *Builders' Labourers' Case* (3)). The dispute in New South Wales was as to a reduction of wages; the log served in Victoria claimed an increase which shows that there was no reality in the dispute. The *Burwood Cinema Case* throughout assumes a genuinely existing controversy.

[ISAACS J. referred to the *Tramways Case* [*No.* 2] (4).]

If this is to be treated as a dispute about an increase of wages and the Judge is not at liberty to order a decrease, if he thinks a decrease is proper, because of the *A1 Amalgamated Case* (5), all he can do is to refrain from making an award.

[STARKE J. referred to sec. 38B of the *Commonwealth Conciliation and Arbitration Act* 1904-1928.]

The evidence does not disclose an impending or probable dispute extending beyond the limits of one State.

Clive Teece K.C. (with him *W. Gee*), for the applicant the Attorney-General for the State of New South Wales. This applicant adopts the arguments presented on behalf of the Caledonian Collieries Ltd. as to the mode in which Judge *Beeby* conducted the proceedings which resulted in this interim award, and also the argument as to the genuineness of the alleged dispute. The matters raised by questions 5 and 6 of the summons under sec. 21AA corresponding with grounds 7 and 8 of the order nisi for prohibition involve an attack on the *Burwood Cinema Case* (6) and leave should be given to question the correctness of that decision.

[ISAACS J., after consultation with the other members of the Bench: So far as the *Burwood Cinema Case* (6) decides that an

(1) (1925) 35 C.L.R. 528, at pp. 540, 544.
(2) (1914) 19 C.L.R. 43.
(3) (1914) 18 C.L.R. 224.
(4) (1914) 19 C.L.R., at p. 125.
(5) (1924) 35 C.L.R. 349.
(6) (1925) 35 C.L.R. 528.

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employer may be party to a dispute with an organization although he does not at the time employ any union labour, the case cannot be reopened. Consistently with that, argument is open.]

There is no evidence in this case that the Government of New South Wales is in fact in dispute with any of the persons employed by it, and if the Government of New South Wales employs non-union labour it cannot be in dispute with the organization. Either the organization is an independent disputant, or it is the mere agent or the representative of its members, and the *Burwood Cinema Case* (1) decided that an organization can be an independent disputing entity quite apart from the position that may be taken up by its members.

[STARKE J. referred to *Daimler Co.* v. *Continental Tyre and Rubber Co. (Great Britain)* (2).]

The matter comes back to the question whether an organization can be an independent disputant with an employer. If it can, then what its members would do or would have done cannot be considered: the whole test is what has the organization done? If, on the other hand, what the organization has done is to be tested in the light of the feelings and expressions of its members, then the organization cannot be an independent disputant; therefore there would follow logically a position which it is not open to the applicant to argue. If an organization is an independent disputant, it does not represent its members only in the Industrial Arbitration Court, but it is an organization capable of creating a dispute, and not merely representing its members for the purpose of settling the dispute. That is the position that the applicant wishes to attack. If that be argued, the next position is that if the Court is entitled to look behind the organization, it finds as a matter of fact that the members of the organization are not in dispute with any employer, with an employer who does not employ any of them. Then it cannot be a dispute. Unless the reconsideration of the *Burwood Cinema Case* (1) is wholly permitted there is nothing more to add.

Evatt K.C. (with him *E. Miller*), for the Commonwealth intervening. The following principles are established by the cases:—(1) There is

(1) (1925) 35 C.L.R. 528. (2) (1916) 2 A.C. 307.

no need for the organization or its members either to strike or threaten to strike in order to establish the fact of the dispute. In *Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (1) the majority of the Court said, in substance, that little more is required to establish the fact of dispute than the service of a log and its denial by employers over the requisite area. (2) It is irrelevant on that issue to inquire into the question of how the dispute originated (*Builders' Labourers' Case* (2)). (3) The reasonableness or otherwise of the claims made is not a matter for consideration on the issue as to whether the dispute existed. (4) The demand itself made the first step in the dispute (*Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 2] (3)). There need be no prior complaint about conditions: the demand made the first step. (5) The Constitution and the Arbitration Act permit of the creation of a dispute for the purpose of having it settled by the Court (*Tramways Case* [*No.* 2] (4)). (6) It is sufficient for the jurisdiction of the Arbitration Court to attach if an expressed disagreement over the necessary area is proved. That is always treated as prima facie evidence of the dispute, and if it appears that the demand, in the case of a demand, of the organization is bona fide made for the purpose of the advancement or defence of the interests of the organization and its members, that is what all the tests which have been applied to the reality of the dispute amount to. That is, is the organization in asking for what it does ask, doing it for the genuine purpose of advancing the trade interests of its members and the organization itself? And there is a genuine dispute existing in this case. (7) Jurisdiction of the Arbitration Court is established if on the proper date there is the probability of a dispute coming into existence; that is the date when the Arbitration Court assumed jurisdiction. (8) Because of the jurisdiction attaching to the probability as well as to the existence of a dispute, it is now recognized that if the organization or the employees recognize that they will or may gain an advantage by disputing, they will probably dispute (*Builders' Labourers' Case*). (9) The conditions asked for in

(1) *Ante*, 527.
(2) (1914) 18 C.L.R., at p. 256.
(3) (1913) 16 C.L.R. 705.
(4) (1914) 19 C.L.R., at p. 163.

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the log must be reasonable and considered as a proper claim to ask for in the interests of the employees. The primary object in serving the log was to get something for the employees in the various States. Evidence has been given as to the extent and existence of dissatisfaction, and either that feeling was real or it was not. If it was real, that in itself makes the demand contained in the log genuine and not a sham; and the evidence of all the witnesses is that the log did at that time represent the desires of the persons in the industry throughout Australia in regard to their future working conditions. The log is framed to meet the decisions in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (1) and *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2). Reading the log fairly, it is not limited to a mere claim for an increased rate. The Federation could not have done more than it has done in order to show the genuineness of its demands. The employees might strike or do a number of other things to show the genuineness of demands made by them, but the organization had no other course open to it than the one it pursued. The English *Trade Disputes Act* differs in its purpose from the *Commonwealth Conciliation and Arbitration Act* (see *White* v. *Riley* (3)). Where a demand and refusal are found, the question of bona fides is material only if there is some question of collusion between the body of employers on the one hand and the body of employees on the other. The extra evidence necessary to show the reality of the dispute is evidence indicating that behind the demand was the will or the desire or the wish of the members. It is in the discretion of the Judge of the Arbitration Court to decide whether the parties should be heard on the making of an interim award or not.

Robert Menzies K.C., in reply. The Judge of the Arbitration Court should not have made an award, interim or otherwise, without hearing the parties. This question is of importance because the Judge elevated into a rule binding on him an alleged practice of the Court to award existing rates and conditions. This was done

(1) (1919) 27 C.L.R. 72. (2) (1920) 28 C.L.R. 209.
(3) (1921) 1 Ch. 1, at pp. 18, 19.

automatically and without hearing counsel, on the ground that it was what the Court ought to do. A mere paper dispute is not sufficient to give the Court jurisdiction (*Tramways Case* [No. 2] (1)).

Clive Teece K.C., in reply. The Court is not bound to accept the affidavits containing evidence of discontent on the part of the miners as necessarily representing the true position where the same conflict with uncontroverted facts.

Cur. adv. vult.

The following written judgments were delivered:—

Mar. 3.

ISAACS J. This controversy has certainly reached an amazing position. For the second time, in the name of the law of the Commonwealth, the coal-miners and the proprietors have been compulsorily brought into the Arbitration Court to compose by impartial methods a serious national industrial quarrel that has caused, and is still causing, widespread injury in the community; and for the second time, in the name of the same law, they are summarily ejected from that tribunal, with the conflict still active and its consequences unaverted. I am unable to agree that on the facts before us this is the true result of the relevant Australian law, imperfect as it undoubtedly is. I pass by the specific objections to the interim award of 23rd January, because, as my learned brothers have reached the major conclusion that no inter-State industrial dispute exists, the tap-root of the arbitration proceedings is cut, and the branch must fall with the tree. As to that major conclusion I emphatically dissent. I shall not stop to discuss minor legal formalities and technicalities. But there stand at the very threshold of this case two well-known principles of law, so closely allied to each other as to be practically different aspects of the same thing. The present applications are what is known as original jurisdiction, and it of course follows that the Court for the purpose of prohibition must act on its own view of the evidence as to whether there was a dispute or not. But in so doing, and before arriving at its final conclusion, there are the two guiding principles long established by Judges for the elimination of possible error, and to prevent,

(1) (1914) 19 C.L.R., at p. 164.

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so far as may be, the miscarriage of justice. The first is that as to prohibition, "the party asking for it is bound to make out *a clear case.*" This was pointed out in my judgment in the *Tramways Case* [*No.* 2] (1), with citation of authorities. It was affirmed in *The King* v. *President of the Commonwealth Court of Conciliation and Arbitration*; *Ex parte Australian Agricultural Co.* (2), by my brothers *Gavan Duffy* and *Rich* and myself. The second principle is that in circumstances like the present the Court will not interfere with the conclusion of the primary tribunal as to the existence of the jurisdictional fact unless it *is manifestly wrong.* On the previous occasion, a few days ago, I referred to and quoted the eminent judicial authorities for this principle, and, as they include the Privy Council, it is beyond question. I have no hesitation in saying that on those principles or either of them this Court, in accordance with settled practice, should dismiss the application as to the major question. Even the most optimistic view for the applicants could not rise to the height of asserting they had shown "a clear case." And it would, indeed, be a valiant heart that would maintain that Judge *Beeby*, with his special and extensive experience of the subject, was "manifestly wrong." On the contrary, he appears to me to have been manifestly right.

Now, in approaching the question "Was there on 23rd January 1930 an existing or probable inter-State industrial dispute within the meaning of the Constitution and the Act?" it is of the highest importance to bear in mind the essential nature of those enactments. It is, if I may venture to say so, the main essential vice of the contentions put forward against the "reality" or "genuineness" of the dispute, that the matter is regarded as if such a dispute concerned the immediate disputants only. That narrows improperly the conception of what will suffice to constitute a real dispute. I have so often expressed my own view that the public welfare is the governing consideration, and made allusion to skilled authorities, legal and economic, that I shall merely, as to my own expressions, refer to what I said on that subject in the *Tramways Case* [*No.* 2] (3).

(1) (1914) 19 C.L.R., at pp. 84, 85. (2) (1916) 22 C.L.R. 261.
(3) (1914) 19 C.L.R., at p. 85.

But it is desirable to quote the distinct confirmation of that view by Lord *Dunedin*, speaking for a most powerful Board of the Privy Council in *Melbourne Tramway and Omnibus Co.* v. *Tramway Board* (1). The Act there under consideration was not nearly so strong as the present for the purpose I have indicated. It was an Act by which the Tramway Board was empowered to take over property of the Company on paying compensation. The question was as to the meaning and scope of "compensation." The majority of the Supreme Court of Victoria gave the ordinary meaning to the word. *Madden* C.J. agreed with the primary Judge, *Cussen* J., that it there had a larger meaning; and so the Privy Council held. The reasons are relevant here. After pointing out certain features of the Act, Lord *Dunedin* said (2):—"But besides this position of the parties —each in a position to injure the other, neither in a position to compel benefit to himself—there was the position of the public. The more obstinate the parties were as against each other, the more the public would suffer. '*Quidquid delirant reges plectuntur Achivi.*' It was in the interests of the public that the Legislature intervened, and in their Lordships' view the Act must be construed in the light of this position and these considerations." His Lordship went on to point out that the Act expressed the object that there should be no interruption of traffic, just as the Arbitration Act sets itself against interruption of industrial service. And so the word "compensation" had to be read in a large and liberal sense to give effect to the commanding purpose of the Act.

Here the argument for the applicants eliminates the public aspect, looks at the matter as concerning merely the relations of the contestants, and treats it in the narrowest possible way by urging, for instance, that for two years prior to December 1929 there had been no demand made on the proprietors. What does that matter to the public so long as the demand when made in December was intended to be persisted in to the point of insistence in the Arbitration Court, which the law has made the only lawful duelling ground? The reality of an "industrial dispute" in the sense required by the Constitution is satisfied whatever the motives or objects of the demand and whatever its reasonableness or unreasonableness,

(1) (1919) A.C. 667.

(2) (1919) A.C., at p. 674.

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whether it is of long standing or a creation of yesterday, whether there was prior dissatisfaction or not, and whether the defendants expect their claims to be yielded or granted in full or not, so long only as the demandants now insist on their claims and in some way seek to enforce them, even if that way be through the legitimate avenue of the Arbitration Court, which is the constitutional substitute for force. All those and similar considerations are non-essentials, for, whether they are present or absent, the public loss in case of stoppage is just the same. In my opinion we should abandon any attempt to confine industrial disputes by applying technical limitations in order to test reality. Such disputes are hard facts of life, they are not rigid in character, they are of constantly changing form and methods of origin to meet advancing circumstances, and they are easily recognizable as facts—too often by their effects—whenever and however they arise. Judge-made limitations of reality are just as effective to control the existence and extent of industrial disputes as was King Canute's command to stay the waves of the ocean. If only the simple principle, so clearly enunciated by the Privy Council, be applied to the present case—the touchstone of public welfare—and the relevant legislation interpreted with that as a guide, we should at once escape from this labyrinth of confusion. There is, in this connection, a matter which appears to permeate the argument for the applicants and to give it a false colour. It is the artificial doctrine of the "reality" of an industrial dispute. That a dispute must be "real" or "genuine" is in one sense undoubted. We know there are sham-fights, mere simulacra of battles, where everything is in show, and no one intends to strike a blow or fire a bullet. It is possible that industrial demands may be made and refusals given merely for parade, everyone aware that nothing serious is intended and that all is a pretence and a form and never to be pursued. But the "reality" or "genuineness" of that dispute, like that of any other legal relation between citizens, must be determined by the reasonable effect upon each that is to be attributed by what is actually said and done by the other in the given circumstances. According to accepted methods in British Courts, it is not to be attained by a system of thought-reading to the disregard of actual acts and words,

and more especially to the disregard of direct reputable testimony. And when it is seen that the claims are in earnest and are persisted in to the fighting point, notwithstanding firm refusals, we are not to wait for casualties to convince us that the combat is real.

The answer to the question I have formulated for this case depends entirely on the effect which the demands contained in the log and the express refusals to comply had, or can reasonably be assumed to have had, on the respective parties. It was contended before us that there was no real demand for the log claims, and therefore no real dispute, because, for one reason, the object of the claim was to supply a deficiency of jurisdiction in Judge *Beeby* to hear the case then before him, and thereby get a hearing in the Arbitration Court, and therefore was not real. The matter then before him was a dispute as to non-reduction of pre-stoppage wages and rates. The new demands covered a complete series of eighteen sets of working conditions, and a nineteenth clause requiring the terms to be embodied in an award of the Court and to last for three years. The objection taken admits necessarily that the demands of the log *include a claim for pre-stoppage rates*; otherwise it would be meaningless, for otherwise the log could not aid in giving jurisdiction on that subject then before Judge *Beeby*. The objection also admits necessarily that the demandants were in earnest as to going to the Court to get pre-stoppage rates for a period of three years as so much security. If so, does not the very objection itself set up the most cogent reason for permitting Judge *Beeby* to hear and determine the dispute, so far at least as it relates to the pre-stoppage terms? No answer to the contrary seems possible. There are many instances of claims that have been prohibited *quoad hoc*, as it is called, which would mean here that all but the pre-stoppage rates would be eliminated, and, at the very worst, that would still leave a beneficial opportunity to Judge *Beeby* to adjust a very serious contention that has produced, and is still producing, severe loss to the proprietors, dreadful privations to thousands of families and incalculable injury to a long-suffering people. But even going beyond that, it is said that the desire to carry in the whole log was merely to seek entry to the Arbitration Court. Is that not a strong testimony to genuineness? In 1927, when the log was presented

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and refused, it was dropped. The failure to carry it on to the Arbitration Court, it is said, showed the claim was not real. I prefer to believe the sworn explanation that the failure was due to a then policy of avoiding arbitration. But if failure to go to arbitration betokens want of sincerity, surely determination to arbitrate a denied claim, at expenditure of time, money and energy, is a weighty proof of sincerity and reality. Further, if all that was desired was to get pre-stoppage rates, what was there to prevent the claim being limited to them? And if that claim is real, why is not the whole log real? Learned counsel bestowed on the log the epithet of "paper claims." But the evidence shows that they were substantial and represented the dormant claims of 1927 revived and added to, in fact brought up to date.

One of the most cogent pieces of testimony as to the reality of the demands for increased wages and rates is that given by more than one witness to the following effect. For many months thousands of miners have lost their wages altogether, and were suffering privations; other thousands had, in their own defence, contributed out of their own wages $12\frac{1}{2}$ per cent to the support of their fellow-employees out of work, and they thought, together with beliefs they entertained as to owners' profits, that it was a convenient time and a just occasion to renew their claims for higher remuneration. They may have been putting forward just or unjust claims; it is not my province to know or suggest which: that is the function of the Arbitration Court. But that they put forward the log as a real claim to be fought for and obtained so far as they could, seems to me clear beyond the shadow of a doubt. The Council of the organization, it is sworn, by its responsible officers, men whose veracity is, in my opinion, unassailable, were pushed by the general body of men into greater activity, and they formulated the log and sent it out to the various branches for confirmation with a request for expedition. That confirmation was given and the approval conveyed to the Council, and then with the express imprimatur of many thousands of men upon it, the log was in due form presented as the real demand of the miners composing the organization. And yet it is said it was not real.

First, let us see how the Northern Colliery proprietors understood the demand. On 17th January 1930 Mr. McDonald, the chairman of the Associated Northern Collieries, wrote in answer to the demand. He wrote on behalf of twenty-three collieries. Having in view objections to jurisdiction apparently on technical grounds, he first very properly guarded himself against any admissions as to that. Then he dealt with the substance of the demand. He did not treat it as wholly unreal nor as confined to increases. He said: "*Assuming power and jurisdiction, we are of opinion that the whole question of wage rates and conditions of employment is open under the claim made by your organization.*" No such answer would, I am sure, have been made if the proprietors had considered the demand wholly unreal or limited to increases, even though its *voluntary* concession was not to be seriously expected from the Northern Collieries. Equally can this be said of the replies from the owners in Victoria and Queensland and Tasmania, who were well aware of the whole position and whose answers were simple refusals without any suggestion of unreality in the demands. And it is important in this connection that in the *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Al Amalgamated* (1) it was laid down in this Court by the learned Chief Justice that .the important thing in considering a demand is "not what the organization intended to demand, but what it did demand," and that we have to read it "as it would present itself to anyone to whom it was addressed" (2). My own view was similar. I said (3): "I ask myself what would an employer reasonably consider was the demand made upon him?" In that case "reality" was not the issue, but the test stated is just the same, for it is universal. The demands in this case were therefore not only real and covering the whole ground of working conditions, but were made in terms and circumstances that must reasonably have made them understood as put forward in earnest and to be persisted in. When, therefore, the demands were definitely rejected and were clearly persisted in, there was formed a true industrial dispute extending beyond the limits of any one State.

(1) (1924) 35 C.L.R. 349. (2) (1924) 35 C.L.R., at pp. 351-352.
(3) (1924) 35 C.L.R., at p. 352.

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In my opinion Judge *Beeby's* order should stand in its entirety, and these applications should be dismissed.

GAVAN DUFFY, RICH, STARKE AND DIXON JJ. The main question which the applicants, who are the State of New South Wales and certain proprietors of collieries in the northern district, have raised by these proceedings for our decision is whether an alleged industrial dispute between them, among others, and the respondent, the Australasian Coal and Shale Employees' Federation, is an actual or threatened, impending or probable industrial dispute extending beyond the limits of New South Wales.

Upon 20th January 1930 his Honor Judge *Beeby* referred the supposed industrial dispute into the Commonwealth Court of Conciliation and Arbitration. Upon 23rd January 1930 he made an interim award by which he awarded, ordered and prescribed "that until 18th February 1930 or further order of the Commonwealth Court of Conciliation and Arbitration the wages, hewing rates and conditions of employment set out in the awards of the special tribunal" (*scil.*, under the *Industrial Peace Act* 1920) "of 23rd October and 6th November 1925 and . . . any subsequent variations thereof should be paid and observed" and "that this interim award should bind the proprietors who were represented at a compulsory conference" on 20th January "as to their employment of members of" the respondent Federation, and should bind it and its members. In fact the awards of the special tribunal to which Judge *Beeby's* interim award refers do not govern the hewing rates, and they deal with day wages only, but we were told that the interim award was intended to prescribe wages and conditions for coal-miners generally, and that its failure to do so was due to mistake. The order by which Judge *Beeby* referred the alleged dispute into his Court describes its subject matter. The principal items said to be in dispute are claims by the Federation for an increase of 9d. per ton in the hewing rate; for a minimum wage of 25s. 1d. per shift, or £5 10s. per week for contract workers; for an increase of 3s. per day for adult off-hand labourers and wheelers; for 40 hours bank to bank, together with provision by the employers for transporting or conveying employees below ground to and from

their working-places in the mines; for freedom from lock-out and for preference. These claims were made by a formal log of demands which the secretary of the Federation despatched by post on the evening of 24th December 1929 to the principal mine-owners in the Commonwealth requiring compliance by 1st January 1930. It was in fact a new and revised edition of a log which the Federation had formulated and delivered on 2nd September 1927. The employers had then refused the claims, and the Federation had not pursued them. This log had been delivered with a view of obtaining a further award from the Coal Industry Special Tribunal, which for some years had dealt with the coal industry, but its chairman was said to be ill and, whether for that or for other reasons, it was considered wiser not to persist. The claim for a weekly minimum had in fact been refused by the Tribunal in October 1925, with the result that the Tribunal, like the Court of Arbitration itself, fell into disfavour and disuse. Although from time to time dissatisfaction with the course taken by the Council was expressed by, or in, some of the lodges, the Council did not again formulate the demands until they were revived in December 1929. As time went on events appeared less and less propitious. The price of coal was high and the demand for it diminished. The inter-State trade declined as well as the export of coal overseas, and the sale of bunker coal. In July and August 1928 the Premier of New South Wales intervened, and he propounded a scheme for the lessening of the price of coal which involved a reduction of one shilling a ton in the amount paid for wages. It was made clear that the proprietors insisted upon a reduction of wages. After many conferences and much negotiation and discussion the mines of the members of the Northern Collieries Association on 2nd March 1929 were closed and some 12,000 men were dismissed or thrown out of employment. A reduction was steadfastly resisted by the men, and in the course of this protracted dispute it seems not unlikely that some of their leaders reinforced their opposition to a reduction by asserting that the men considered their wages should be increased. But at length the Council of the Federation agreed to submit to combined meetings of the lodges of the closed collieries the question whether they would agree to a reduction equivalent to 9d. per ton. An opinion to which the

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general secretary deposed that, if rates and wages at these collieries were reduced, a reduction in rates and wages in all other collieries in Australia would follow, was very generally held, and lodges elsewhere claimed the right to vote upon this proposal and urged its rejection, and rejected it was at various meetings between 4th and 10th December.

On 16th December the New South Wales Government commenced to work a colliery it had taken over, and employed men who were not members of the Federation at wages representing a reduction of 9d. per ton. Scenes of violence took place, and on the same day the Chief Judge of the Commonwealth Court of Conciliation and Arbitration, by telegram, summoned a compulsory conference before Judge *Beeby* in Sydney for 17th December 1929. On 13th December, at a meeting of the lodges of the Northern District at which the central executive of the Federation and representatives from the Newcastle and Sydney Trades and Labour Councils attended, a resolution was passed recommending a "policy to extend and intensify the present dispute beyond the limit of this State." But, except for this and similar resolutions of other bodies, it is difficult to see what ground there was for supposing at that stage that the dispute actually did or was likely to extend beyond New South Wales so as to fall within the cognizance of the Commonwealth Court. It is not surprising, therefore, that on 16th December the general secretary sent a telegram to the secretary at Wonthaggi in Victoria, in which, after referring to the occurrences at Rothbury, he said: "stop Wonthaggi to-morrow without fail send me urgent wire in the morning that Wonthaggi has stopped." The inference seems irresistible that this instruction was given in order that evidence might be available in Sydney upon which it might be contended that a two-State dispute existed. Upon 17th December those members of the Council who were summoned to the conference went before the Judge. But the others addressed themselves at once to a consideration of the log of September 1927. At the conference on that and the following day, the representatives of the proprietors objected that there was no two-State dispute. On 18th December Judge *Beeby* referred the alleged dispute into Court. On 19th December, in Court, counsel for the proprietors again

objected to the jurisdiction and said the question would be brought before this Court. His Honor, however, at once made an interim award prescribing that existing rates and conditions should be paid and observed, if members of the Federation were employed; whereupon counsel announced that the validity of the award would forthwith be attacked before this Court, which did, in the result, hold that it was made without jurisdiction. On 20th December the Council of the Federation proceeded with the consideration of the log of demands which was adopted. On 22nd December "Mr. Crofts (secretary of the All Australian Trades Union Council) addressed the Council (of the Federation) at length tendering certain advice in regard to procedure to be adopted in serving the claims, which Council had adopted, on the owners," and on 24th December the log was put in the post. On the same day the general secretary sent to each district secretary the following letter:—"Dear Comrade,—Enclosed you will find a copy of the log of claims which has this day been served on the owners, and I desire that, wherever possible, you will have this matter placed before your members *and endorsed prior to 1st January* 1930. At the same time get the meeting to carry a resolution threatening to cease work if the claims and demands are not acceded to within the time specified. Have this done as early as possible, and inform me of the actual resolutions carried by the members not later than the 3rd January 1930. I shall be glad if the northern district delegates will kindly place this urgent matter before the meeting of lodge delegates to be held on 27th December instant. Yours faithfully." These instructions were carefully carried out. In his reply refusing the demands the secretary of the Northern Collieries Association said: "It is difficult to imagine that you are serious in making the claims set out in the document under review so far as they relate to members of this organization."

In *The King* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* (1), *Knox* C.J., *Gavan Duffy* J., *Powers* J., *Rich* J. and *Starke* J. said in their joint judgment:—"It is settled law under the Arbitration Act that a dispute must be real and genuine (*Tramways Case* [No. 2] (2)). Whether it be real and genuine is always a question of fact, and upon proceedings

(1) (1921) 29 C.L.R. 290, at p. 299.

(2) (1914) 19 C.L.R. 43.

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in prohibition the fact must be determined by this Court on its own independent view of the evidence." Nothing in the *Burwood Cinema Case* (1), or in the unreported case of the *Australian Workers' Union* (1926 No. 5) which we were referred to since the argument and have examined, conflicts in any way with this proposition, which is, indeed, only a restatement of the view long held and frequently acted upon by this Court that " in all cases the Court is bound to be satisfied of the existence and reality of the dispute " (per *Isaacs* J. in the *Builders' Labourers' Case* (2)). In this case there was and is a very real and grave dispute between the parties to these proceedings, but, as we have held in our previous judgment, it was, on and up to 19th December, the date of Judge *Beeby's* first award, confined to New South Wales. The matter of the dispute was whether wages should be reduced on the northern coalfields. It was generally believed that if, as a result of such a reduction of wages, the price of coal upon that field fell, wages must be reduced upon all other fields. The question we have to decide is, in substance, whether the formulation, five days later, of a paper demand for increased wages, shorter hours and more advantageous conditions and its refusal could and did operate upon the circumstances which we have attempted briefly to summarize to bring into being a real and genuine dispute, or a real and genuine extension of the existing dispute. We think that it is quite clear that the Council revived and remodelled the demands of 1927 for the purpose of attempting to confer upon Judge *Beeby* authority to deal with the existing dispute upon the northern coalfields of New South Wales. The rejection by the men at the meetings between 4th and 10th December of the terms which their leaders had put before them, and, as the President of the Federation said, " recommended as the best possible terms which could be secured from the proprietors for a resumption of work," the opening of Rothbury by the New South Wales Government with non-union labour, and the excitement and violence displayed on the fields on 16th December, had combined to make the intervention of the Federal Court welcome. The resolution of 13th December to extend and intensify the dispute beyond the limit of this State shows that this intervention was

(1) (1925) 35 C.L.R. 528.

(2) (1914) 18 C.L.R., at p. 246.

already contemplated. The telegram on 16th December to Wonthaggi calling for a stoppage there, and asking for an urgent wire reporting it, leaves no doubt of its purpose and of the plan followed. When next day members of the Council who were not at Court turned to the consideration of a log of demands, can it be doubted that they were animated by the same purpose? The service of a log would be the natural way in which an attempt to give jurisdiction would be made. Indeed, in ordinary circumstances where the remaining materials were at hand for the manufacture of a real inter-State dispute, it might be enough to create one. But in this case particular difficulties were inherent in the situation. A determined struggle had been long in progress in New South Wales for the reduction of wages. The closing of the northern mines had made it possible for other mines to work profitably, but while this in some districts prompted thoughts of increased wages, it was clear to all concerned that ultimately wages on the northern field would determine wages elsewhere. At the same time while the northern mines remained closed there was no question of reduction elsewhere. This made it impossible to extend the real issue in the north beyond the boundaries of the State. Its extension could come about only by the opening of the northern mines under conditions enabling the sale of coal at lower prices, which meant, of course, the settlement of the question there. Accordingly, if an industrial dispute extending beyond New South Wales was to be promoted upon the subject of wages, no course was open but to demand that wages should be raised. But is it credible that at this juncture the Council of the Federation sincerely propounded to the proprietors of the northern collieries for immediate answer a bona fide demand upon which they were resolved to insist that the proprietors should raise wages, shorten hours and afford further advantages? We think that the truth is that all parties regarded the formulation of these demands as nothing but a step towards enabling the Arbitration Court to deal with the trouble in New South Wales.

Much of the argument addressed to us by counsel for the Commonwealth depended upon the proposition that once a real industrial dispute extending beyond the limits of one State existed, it was not material to inquire into its genesis, and in particular it was nothing

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to the point that it arose by reason of the desire of one party to obtain an award of the Court. While this may be so, yet when the existence of a genuine dispute is in question the purpose and object with which paper demands were delivered may be decisive. Again much of the same argument was founded upon the view that the Federation and its members intended to press for a code to be formulated by the Court's award or by an agreement having the force of an award which would regulate future conditions. This contention illustrates some of the confusion which attends a jurisdiction which can be exercised when, and only when, an inter-State dispute exists, but when it does arise enables the arbitrator in some measure to regulate industry. The two-State dispute must exist between the parties antecedently to the award or agreement which composes it, and the dispute must arise out of their disagreement about the manner in which they shall regulate their own industrial relations. Experience has shown that the desire for an award regulating industrial relations has been the cause of the creation and extension of industrial disputes which the Arbitration Court exists to prevent and settle. But in such cases the jurisdiction arises because of the existence of a two-State dispute, and in spite of, and not because of, the motives which generate that dispute. Indeed, the argument may well be said to conceal but to contain the reality of this case, namely, that paper demands were conceived as part of a proceeding requisite to enable the Arbitration Court to regulate an industry in which a serious dispute confined to one State was in progress. In our opinion the log of demands was not effective to create a new dispute with the proprietors nor to extend the existing dispute beyond New South Wales. Nor do we think that there is a threatened, impending or probable industrial dispute extending beyond the limits of one State.

We think the Commonwealth Court of Conciliation and Arbitration had and has no jurisdiction over the alleged dispute, and upon this occasion we think the remedy of prohibition is proper to be applied.

The King v. *Beeby and Others* (*Ex parte Caledonian Collieries Ltd. and Others*) *and The King* v. *Commonwealth Court of Conciliation and Arbitration and Others* (*Ex parte*

the Attorney-General for New South Wales).—Orders nisi made absolute.

Caledonian Collieries Ltd. and Others v. *Australasian Coal and Shale Employees' Federation.—Summons under sec.* 21AA: (1), (2), (3)—*The Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make the interim award of* 23*rd January* 1930 *and the same is bad in law and void.*

The Attorney-General for New South Wales v. *Australasian Coal and Shale Employees' Federation.—Summons under sec.* 21AA: (1) *to* (6)—*The Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make the interim award of* 23*rd January* 1930 *and the same is bad in law and void.*

No orders as to costs.

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.

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

H. D. W.