[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN RAILWAYS UNION . . APPLICANT;

AND

THE VICTORIAN RAILWAYS COMMISSIONERS AND OTHERS . . . } RESPONDENTS.

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MELBOURNE, Oct. 22-24, 31.

SYDNEY, Nov. 19-21; Dec. 1, 8.

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

Industrial Arbitration—Appointment of Conciliation Committees—Validity—Functions and powers—"Arbitration"—Commissioners of State railways—Awards of Commonwealth Court of Conciliation and Arbitration—Salaries, wages and allowances prescribed by awards—Parliamentary appropriation therefor—Constitutional law—State railways—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *secs.* 18C, 21AA, 24, 33, 34, 38 (*oa*)—*Acts Interpretation Act* 1901-1930 (*No.* 2 *of* 1901—*No.* 23 *of* 1930), *sec.* 15A—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51, 98, 102, 104.

Practice—Summons—States interested but not parties thereto—Intervention—Leave to appear refused.

Held, by *Rich*, *Starke* and *Dixon* JJ., (1) that a law which established a body of persons to settle a dispute by issuing a decree arrived at by discussion amongst themselves without any hearing or determination between the disputants as the *Commonwealth Conciliation and Arbitration Act* 1904-1930, by sec. 34 (8-12), purported to do, was not a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes, and was not authorized by sec. 51 (xxxv.) of the Constitution, and therefore such sub-sections were invalid; (2) that, as all material provisions of sec. 34 were invalid, sec. 33, which was inseparable from such provisions, was also invalid; (3) that the provisions of secs. 33 and 34 form a single legislative enactment which must be wholly good or wholly bad, and hence was not affected by the provisions of sec. 15A of the *Acts Interpretation Act* 1901-1930.

Held, by *Isaacs* C.J., (1) that the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 for the appointment of Conciliation Committees were valid because, when properly construed, they constituted the Committees tribunals which were bound to afford the disputants in industrial

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disputes fair opportunity by themselves or their representatives in the sense of agents to be present and present their respective cases before the Committees; (2) that in any event sec. 15A of the *Acts Interpretation Act* 1901-1930 was effective to maintain sufficient valid legislation in sec. 33 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 to deprive the Arbitration Court of jurisdiction to make the awards.

Held, by *Gavan Duffy* J., that although sec. 34 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 attempted to confer on Conciliation Committees powers which it was not within the authority of Parliament to confer, yet sec. 33 was valid by reason of the operation of sec. 15A of the *Acts Interpretation Act* 1901-1930.

Awards had been made by the Commonwealth Court of Conciliation and Arbitration in respect of disputes to which the Railway Commissioners of the various States had been made parties. The question arose as to whether railways owned by the States came within the conciliation and arbitration power contained in sec. 51 (xxxv.) of the Constitution.

Held, by the whole Court, that such awards were validly made and were binding on the respective Commissioners.

Amalgamated Society of Engineers v. *Adelaide Steamship Co.*, (1920) 28 C.L.R. 129, followed.

The Court (*Gavan Duffy*, *Rich*, *Starke* and *Dixon* JJ.; *Isaacs* C.J. dissenting), as a matter of discretion, refused leave to the States of Victoria and South Australia to intervene on the question last referred to.

SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930.

In August 1930 the Railway Commissioners of New South Wales, Victoria, South Australia and Tasmania, on the ground that they desired to make economies in working expenses on account of the financial position of their undertakings, applied to the Commonwealth Court of Conciliation and Arbitration for the variation or setting aside of certain awards of the Court, applicable to such undertakings, made on 25th March 1930, in which they were respectively shown as respondents; the Australian Railways Union and others being shown as claimants. By proclamation in the *Commonwealth Government Gazette* of 8th September 1930 it was notified that, pursuant to sec. 34 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, Conciliation Committees, with a Conciliation Commissioner as chairman of each Committee, had been appointed in relation to (1) industrial disputes in the various branches of such undertakings, and (2) applications for variation

of awards of the Commonwealth Court of Conciliation and Arbitration made in respect of such branches. The application by the Railway Commissioners was heard by the Full Court of the Commonwealth Conciliation and Arbitration Court on 17th September 1930 and subsequent days, and on 4th October 1930 that Court made an order setting aside the awards in question so far as they related to the Railway Commissioners, except so far as the awards prescribed the basic wage and standard hours of work within the meaning of sec. 18A of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 and abrogated other awards of the Court. A summons under sec. 21AA of the Act was thereupon taken out by the Australian Railways Union for the decision substantially of the following questions: (1) whether the Commonwealth Court of Conciliation and Arbitration had power to hear and determine the application made by the Commissioners; (2) whether the order of the Court setting aside the awards was made without jurisdiction; (3) whether in point of law the order made by the Court setting aside the awards was rightly made; (4) whether the said awards were still in force, and (5) whether the Full Court of the Commonwealth Court of Conciliation and Arbitration had jurisdiction to make the order.

Other material facts appear in the judgments hereunder.

Blackburn, for the applicant, the Australian Railways Union. Important alterations and amendments to the law of conciliation and arbitration were made by the amending Act of 1930. Conciliation Committees, with a Conciliation Commissioner for each Committee, were appointed in this matter under sec. 34 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, and by virtue of sec. 33 power to deal with the application to set aside or vary the awards was thereupon removed from the Court to the Committees. No question arises that such Committees or Commissioners were invalidly appointed. Under the amended provisions of sec. 28 (3) of the Act the power to set aside or vary any terms of an award is extended to Conciliation Commissioners. It was decided in *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1) that the Court has power, under

(1) (1925) 36 C.L.R. 442, at p. 446.

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sec. 28 (3), to cancel an award. Now, under sec. 38 (*oa*), inserted by the Act of 1930, the Court, as regards every industrial dispute of which it has cognizance, has power to set aside an award or any of the terms of an award. The order of the Arbitration Court was a variation of the awards in question. There is a distinction between a variation of terms of an award and a variation of an award. A power to vary an award implies a power to set aside some of its terms in order to effect the variation. The effect of a power to set aside is part of the process of settling a dispute. Sec. 38 of the Act does not authorize the Court to set aside an award so as to leave part of the award unsettled. The only other meaning of sec. 38 (*oa*) is that it may be incidental to the power to set aside the award. Sec. 38D was passed in order to confer on the Court power to set aside an award benefiting a party who was not to accept the Court's settlement. When the Court sets aside an award there is no settlement, and the dispute would have to go to the Conciliation Committee. The only power that the Commonwealth Parliament has to enact sec. 38 (*oa*) is the power conferred upon it by sec. 51 (xxxv.) of the Constitution or in conjunction with sec. 51 (xxxix.) thereof. The only power that the Commonwealth Parliament has is to settle disputes, or otherwise as incidental to settling them. Sec. 24 (2) of the Principal Act imposes on the Court the duty to settle, and the only exceptions are secs. 38 (*o*) and 23. The duty of the Court is to provide an uninterrupted service to the people of the Commonwealth (*Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 3] (1)). The case of *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2) shows that sec. 51 (xxxv.) of the Constitution confers on the Commonwealth Parliament power to legislate, but that it cannot itself so direct acts of prevention and settlement. The duty of the Court is to attempt to arrive at a right settlement of the dispute. The public interest which the Court must consider is not the public interest which the Arbitration Court considered in this case, but the public interest in the security of uninterrupted services and industrial peace. The question of national emergency is not for the Arbitration

(1) (1920) 28 C.L.R. 495. (2) (1920) 28 C.L.R. 209.

Court but for the national Legislature to consider (*The Zamora* (1); *Farey* v. *Burvett* (2)). The Legislature has not conferred on the Court power to do what it has done here. The power to set aside an award could only be a power to set aside an existing award as part of the process of arriving at a right settlement of the dispute, or it may be a complemental power imposing a duty on persons who, having got an award from the Court, are not prepared to accept its terms. The Arbitration Court, however constituted, had no jurisdiction to entertain this application after the Conciliation Committee had been appointed, by reason of sec. 33 inserted in the *Conciliation and Arbitration Act* by the Act of 1930 (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (3); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4); *Western Australian Timber Workers' Industrial Union of Workers* (*South West Land Division*) v. *Western Australian Sawmillers' Association* (5)). All the powers conferred are directed towards preventing and settling. The dispute is settled, but still remains within the cognizance of the Court.

Evatt K.C. (with him *Fraser*), for the Commonwealth intervening. The Chief Judge of the Arbitration Court asked counsel for the Railway Commissioners whether it was proposed to contest the validity of the appointment of the Conciliation Committees. The proper construction of sec. 34, as inserted in the Principal Act by the amending Act of 1930, is that it enables the appointment of a standing committee to deal not with one or more specified disputes but with all industrial disputes and all applications to vary. The appointment of the Committee confers power to deal with this matter.

[DIXON J. It is, to my mind, not a question of the validity of the appointment but of the effect of the appointment.]

It comes to a question of the true construction of sec. 34. The question then turns on whether the Order in Council is valid under that section. This is an appointment in relation to all matters.

(1) (1916) 2 A.C. 77.
(2) (1916) 21 C.L.R. 433, at p. 456.
(3) (1910) 11 C.L.R. 1, at p. 27.
(4) (1924) 34 C.L.R. 482, at p. 556.
(5) (1929) 43 C.L.R. 185, at p. 204.

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The limit of jurisdiction under sec. 33, similarly inserted by the Act of 1930, applies only where the Conciliation Committee has been appointed in pursuance of an application made under sec. 34 (2). Though appointed to deal with all disputes, it is appropriate to deal with this dispute. Sec. 34 (18) makes every one of the provisions of sub-secs. 1-17 of that section, so far as they can be applicable, apply in relation to any application to vary an award. The appointment is one to deal with a variation of an award. It is a good application and a good appointment, and they fit the statute in every way it is read. The application must be read as an application to vary an award. The matter could also be considered as though the industrial dispute is one settled by the award. In this case the award settled part of the dispute and therefore could be dealt with by the Conciliation Committee in the same way as would a dispute existing before the appointment of the Committee, and the dispute is wholly settled by the award and susceptible of reconsideration. Under sec. 17 (2) of the Principal Act, where an award purports to vary, it gives power to set aside in part (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1)).

Menzies K.C. (with him *Lewis*), for the Railway Commissioners. It is desirable to distinguish between the question of validity and the question of interpretation. The latter question involves the interpretation of the new sec. 33 in order to determine whether the Arbitration Court was right in holding that the expression "industrial dispute" gives power to vary an award, but does not give power to set it aside. In secs. 18 and 18A, as amended, "vary" connotes a continuance of the award. Sec. 18A contemplates a continuation of the award, but by reason of something being done by the Court that award will have a different effect. Secs. 18C (8) and 25B still postulate the continuance of the award. Powers to make, vary or destroy an award are various functions of the Court. Normally in the Act the word "vary" is used to import the continued existence of the award (secs. 25B, 27, 28). For a number of years "set aside" was used in the legislation in contradistinction to "vary." See sec. 31A (3) (*b*) of the Act as amended—"confirm,

(1) (1920) 28 C.L.R. 129.

quash or vary." There are references to "variation" in secs. 33, 34 (18), 38 (*o*), 38 (*oa*), 39, 79-81, and in sec. 28 (3) to "set aside." This shows that the Court may put an end to an award without setting it aside *ab initio*. The case of *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1) was cited as showing that the power to vary included power to terminate in part or in whole; but the case does not decide that. It does not decide that power to vary gives power to set aside. Sec. 38 (*oa*) attaches no conditions whatever. It simply gives power to set aside an award or any terms of an award. The distinction between setting aside and variation is indicated in sec. 38 (*o*). Variation must be distinguished from setting aside, and must be regarded as leaving the Court's ruling in existence but in a different form. The present award deals with basic wage, margins, and separate conditions of labour. No question is raised as to the validity of the appointment of the Committees. In the absence of express instructions from the Railway Commissioners it was not intended to raise the constitutional question as to the control of State railways by the Arbitration Court. If the Court is of opinion that such question must be decided, I ask for an adjournment in order to obtain specific instructions on the point. It would be necessary to consider not only the constitutional aspect of the case but also all the legislation in the various States governing the control of State railways. The real question in this case is whether the Arbitration Court has power to set aside an award without dealing with the dispute thus reopened. The case of *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* did not decide that power to vary included power to set aside a term in whole or in part, but that under a power to vary the clause prescribing the term might be varied, and that decision related to the expression "set aside" or "vary." The order is a setting aside and not a variation, and therefore is not prohibited by sec. 33 of the Act. There is now a recognized distinction between variation and setting aside. The provision which prescribes the rate of wages is a matter distinct from the part which prescribes the margins, and therefore, where the margins are set aside this does not involve a "variation" of the

(1) (1925) 36 C.L.R. 442.

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award. If the award does go beyond the power of the Arbitration Court this Court may indicate the extent of the excess. If it were the opinion of the Court that in some respects only the order was in violation of sec. 33 the provisions of the order are severable, and it may be sustained so far as it is not such a violation. The Arbitration Court should be taken as of opinion that, save as to basic wage and standard hours, the Court should vacate the field of control in respect of this industry. The margin awarded is quite distinct from the basic wage, and the Arbitration Court has power to set aside one or more of them.

[DIXON J. It may be necessary to consider whether sub-secs. 10 and 11 of sec. 34 do not attempt to authorize settlement of a dispute by decree without arbitration, and, if so, whether the section is valid and how sec. 33 is affected.]

Sec. 34 is not a valid exercise of the power of conciliation and arbitration. The effect of sub-sec. 1 of that section, as inserted by the Act of 1930, is that the parties to a dispute are liable to be bound by a decision of a majority of the members of a Committee without any voice in the appointment of the Committee or opportunity of being heard, and this is neither conciliation nor arbitration. Here, where the majority agree, the terms become operative under sec. 24. The majority impose the terms of the award and the parties are called upon to show cause. Sub-sec. 11 of sec. 34 provides in effect that if there is no agreement an award may still be forced upon the parties. In sub-sec. 10 "parties" means parties represented on the Committee. Sub-sec. 10 may be good, but sub-sec. 11 may be quite bad. There may be agreement on the Committee by parties outside the Committee. The good provisions are not severable from the bad provisions. Sub-sec. 10 does not add anything to the provisions of sub-sec. 11. An agreement made in settlement of an industrial dispute may be made though no plaint has been issued.

[DIXON J. The *Acts Interpretation Act* 1930 does not appear to have been proclaimed up to now (24th October), and is consequently not in force.*]

* By proclamation signed and sealed later on 24th October 1930, and published in the *Government Gazette* on the following day, the date of the commencement of sub-sec. 2 of sec. 3 of the *Acts Interpretation Act* 1930 (No. 23 of 1930) was fixed as Monday, 27th October 1930 (see *Commonwealth Government Gazette*, No. 94 of 1930, p. 2093).

There cannot be read into sub-sec. 11 a condition that before a decision is reached in default of agreement the Committee should hear the matter as arbitrators.

[DIXON J. Is it intended to raise the question of the power of the Arbitration Court to bind State Railways Commissioners ?]

Whether the question should be raised has not been considered, but I do not wish it to be concluded by the answers given to the questions in the summons.

ISAACS C.J. If the Court decides that the question of the constitutionality of the award falls for decision, the Court will not decide the matter without giving counsel for the Railway Commissioners an opportunity of being heard.

Blackburn, in reply. The *Acts Interpretation Act* 1930 has not yet been proclaimed. By virtue of sec. 34, as amended by the Act of 1930, the Governor-General takes into consideration the appointment of the number of the Committee instead of the Chief Judge. In sec. 34 (10) the word " parties " means " parties to a dispute " and not " representatives." The parties have to agree as distinguished from the representatives agreeing. The position raised that representatives may agree on all matters of the dispute though the parties may not, does not create a difficulty. Representatives and parties are different. The appointment of a Conciliation Committee on the application of the parties does not of itself give the Court cognizance of a dispute. A settlement of a dispute can only be made an award of the Court where the Court has cognizance of the matter. The Legislature contemplated (1) that the parties can make an agreement if they like ; (2) if not, that the conciliation representatives should try to make them agree. Under sub-sec. 11 an agreement of the representatives and then of the parties must be obtained before registration of such agreement as an award.

Cur. adv. vult.

Oct. 31.

The following announcements were made :—

ISAACS C.J. I am of opinion that, consistently with the established practice of this Court, and having regard to the views already expressed and on record, there is no need, for the purpose of

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determining the questions submitted to us, for a fresh expression of opinion by the Court in the present case as to the constitutional or statutory validity of the awards. As to the validity of sec. 33, which involves the validity of sec. 34 of the Act, the latter being the Conciliation Committee's section, the majority of my learned brethren consider it permissible at this stage to state their conclusions as to the validity of sec. 33, and, consequently, also as to sec. 34. I therefore feel called upon to state my own. I am clearly and unhesitatingly of opinion that those sections are intrinsically valid, and at the least, by reason of sec. 3 of the *Acts Interpretation Act* of 1930 (recently proclaimed), are valid to a sufficient extent to enable the Court to arrive at a definite determination in this matter. I shall be prepared to state my reasons at the earliest opportunity.

GAVAN DUFFY J. My brothers *Rich*, *Starke* and *Dixon* have reached the definite conclusion that sec. 33 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 is void. I am disposed to adopt the same view, but do not desire to express any final opinion at present. We are all of opinion, however, that the precise questions submitted by the summons cannot be answered without pronouncing upon the questions whether the awards of 25th March 1930, with which the order of the Court of Conciliation and Arbitration deals, were authorized by the *Conciliation and Arbitration Act* 1904-1929 and the Constitution, and are valid. This question the members of the Court, other than the Chief Justice, are not prepared to pronounce upon without argument. Unless one or other of the parties, within ten days, notifies the Principal Registrar of its desire that this question be argued, the Court will dispose of the summons without answering specifically the questions which it contains. The members of the Court will, in the meantime, defer giving reasons for their opinions upon the validity of sec. 33.

The question came on to be argued at Sydney on 19th November 1930 and subsequent days. There was no appearance by or on behalf of the Victorian Railways Commissioners, but an application

for leave to appear was made on behalf of the States of Victoria and South Australia.

Windeyer K.C. (with him *Nicholas*), in support of the application. Although I support the views of the Commonwealth, which are not those of the Commissioners, I desire to express the views of the Governments of the two States in question that it is desirable for the welfare of the activities for which they are responsible that the affairs of the railway servants should be controlled by a uniform code established by the Commonwealth Arbitration Court. To have the benefit of such a uniform code might be regarded as an increase of the rights of the States. Not only have such States a right to the benefit of the arbitration provisions of their own respective tribunals but they contend that they have the right to the uniform code of which it is now sought to deprive them. It is thought that the benefit of a uniform industrial code for the railways is a right to which the States are entitled because it makes for industrial peace. If they have not that right, or if the Court were to hold that they had not that right, the States would then be deprived of a benefit which they regard as a right. The Governments I represent consider they have a right to the benefit of the law as it has been expounded up to the present time. When they ask for that right to be heard they are entitled to have special representation so as to be sure that their particular views are put forward to the Court.

THE COURT retired to consider the application, and, on resuming, the following judgments were delivered :— Nov. 19.

ISAACS C.J. In my opinion the leave asked for by Mr. *Windeyer* and Mr. *Nicholas* for the States of Victoria and South Australia to appear should be granted. My reason, shortly stated, is this :— The question is whether under the Australian Constitution as it stands there is power in the Commonwealth Parliament for the peace, order and good government of the whole of the Commonwealth to make laws whereby, by means of conciliation and arbitration, State railway employees may have their industrial disputes referred to this tribunal. Mr. *Windeyer* has put it, as I understand him,

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on this ground that the States he desires to represent consider that their State interests are involved, because without such a tribunal under the Australian Constitution there is less prospect of the uninterrupted railway services for the people of those States, that there is a desirability, amounting to a necessity for the welfare of those States, that there should be some uniformity of treatment. As he puts it, that seems to me a distinct State interest not distinguished from the power that the Commonwealth claims through its Parliament to legislate upon. For these reasons it seems to me that any State has a right to come into this Court and defend its own personal legal territory, and also any legal territory that it thinks will conduce to its welfare. It is, therefore, my opinion that the leave should be granted. That does not mean that the Court is bound to allow undue repetition of argument. If points are found to be sufficiently stated, and any litigant has had its contentions and arguments sufficiently stated by other persons, then the Court can protect itself, but as to the mere right of the States of South Australia and Victoria to come in and defend what are considered to be their own interests, in my opinion leave should be granted.

GAVAN DUFFY J. In my opinion every question that is at issue in this case can be adequately and completely argued and determined by counsel for the parties, with the assistance they will receive from counsel for the Commonwealth. In those circumstances I see no necessity for granting leave to the States of South Australia and Victoria to intervene.

RICH J. A great number of counsel are before the Court to put the view that the railways are subject to the Commonwealth Arbitration Court, and representation by a State for the same purpose is not necessary. I therefore think leave should be refused.

STARKE J. I agree that leave should be refused. The only question in this case is whether the Commonwealth has constitutional power under the arbitration provisions to affect an organ of the State, namely, the railway service. The States do not wish to

argue that power does not subsist in the Commonwealth. Therefore there is no necessity for them to appear, and no need for us to hear them. There are sufficient representatives here to put that view, and to oppose it. An appearance by the States would be utterly useless.

DIXON J. I agree that leave to intervene should be refused. I think we should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation. But, by a very special practice, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which arise under the Constitution. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise.

ISAACS C.J. Leave is refused. Those who are attacking the constitutional power will commence.

Menzies K.C. (with him *Lewis*), for the respondent the South Australian Railways Commissioner. When the Constitution intends any of the enumerated legislative powers to extend to State railways, it has expressly said so. In support of that view, see and compare secs. 51 (I.), (XXXI.-XXXIII.), 92, 98, 102 and 114. Reference to those sections will show that the Constitution has on each occasion included State railways by express reference in certain of the legislative powers, and the implication from that express reference is clear unless each express reference is treated as being put in for greater caution. The implication from the express inclusion of the railways in certain powers that the railways are excluded from other powers, is not a matter which depends upon some doctrine

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outside the document itself, but depends upon the ordinary principles of statutory interpretation. Although such an interpretation might lead to something that might be called implied prohibition, it would not be the kind of implied prohibition considered by this Court many times. Until the case of *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1) an endeavour was made to exclude, from the operation of Commonwealth laws, States and State instrumentalities on the basis of the view that there was to be implied in the Federal Constitution a doctrine of self-preservation. The very necessity of preserving the interests of the Commonwealth and the States as separate and sovereign entities meant that there was to be attached to every power an implied prohibition in favour of the States. This argument was expressed in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (2). Examination of the judgments in that case shows that reliance was placed upon two distinct lines of argument: (1) that the express reference to State railways in certain parts of the Constitution excluded the implied inclusion of those railways in the other powers; (2) that the rule in *D'Emden* v. *Pedder* (3) was capable of reciprocal application, and that apart altogether from any mention of State railways in the Constitution an implied exception in favour of all direct instrumentalities of the State, one of the first of which in point of time and importance was the State railway system. The second argument only was overruled by the *Engineers' Case*, and the first argument was not affected thereby. The decision in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* is based upon the general doctrine of non-interference, and not upon the particular position in which State railways are put by the Constitution. If the inter-State trade and commerce power covered the State railways in their relation to inter-State trade and commerce, why was it found necessary to include that provision in sec. 98 of the Constitution? Why is it that an express power to legislate with respect to State railways for defence purposes was provided in pl.

(1) (1920) 28 C.L.R. 129.
(2) (1906) 4 C.L.R. 488.
(3) (1904) 1 C.L.R. 91.

xxxii. of sec. 51 although the defence power had already been stated in far more comprehensive phraseology in pl. vi. ? When it is found that the framers of the Constitution expressly included, in certain of their powers, a power to deal with State railways, it must be taken that they intended that the State railways should not be included in other powers in which such railways were not expressly mentioned.

[Isaacs C.J. referred to *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1) with respect to the interpretation of a written Constitution.]

Following the elementary principle that when interpreting a written document the whole of it must be read in order to determine what is meant by any given part of it, I am here taking other parts of the Constitution for the purpose of determining what the affirmative grant means. Having regard to the *Engineers' Case* (2), a contention for an exclusion of State railways as part of the organization of the State cannot now be advanced, but a contention that can be put, and is now put to the Court, is that the State railways have been specially dealt with as such in the Constitution.

Sir Edward Mitchell K.C. and *Lewis*, for the respondent the Tasmanian Railways Commissioners. Throughout the case of *Railway Commissioners for New South Wales* v. *Orton* (3), although the position of the Commissioners—who were the same Commissioners as in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (4)—was very carefully considered, there was not a suggestion that the question of the liability as to railway employees had been determined in the *Engineers' Case* (2), although that decision was only two years earlier. The decision in the *Engineers' Case* cannot be treated as a definitely binding decision which makes either the State or the Commissioners liable to the jurisdiction of the Federal Arbitration Court (*Railway Commissioners for New South Wales* v. *Orton* (5)). The Commissioners are independent statutory bodies, and therefore come within the law laid down as being

(1) (1920) 28 C.L.R., at p. 149.
(2) (1920) 28 C.L.R. 129.
(3) (1922) 30 C.L.R. 422.
(4) (1906) 4 C.L.R. 488.
(5) (1922) 30 C.L.R., at pp. 426, 427.

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statutory bodies to which the general principles of *ultra vires* law apply (*Ashbury Railway Carriage and Iron Co.* v. *Riche* (1); *Attorney-General* v. *Great Eastern Railway Co.* (2)). In the latter case it was laid down that, in the case of a railway company such as was there referred to, any power not given by express words or necessary implication must be prohibited. According to the language of the relevant statutes the Commissioners would have no power to pay wages if a demand were made on them for payment. If they purported to agree, it would be *ultra vires* and a mere nullity (*London County Council* v. *Attorney-General* (3); *Amalgamated Society of Railway Servants* v. *Osborne* (4); *The Queen* v. *Reed* (5); *Corbett* v. *South Eastern and Chatham Railways Managing Committee* (6)). As they cannot agree, they therefore cannot dispute, and cannot be the subject matter of an arbitration award (*Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 1] (7)). As to the effect of an *ultra vires* agreement, see *Sinclair* v. *Brougham* (8). As regards each and all the States no award could be made. In the case of Tasmania, although four independent powers are given the property remains vested in the Crown. On the plain construction of the relevant Acts not one of the States was competent to have an industrial dispute. Payment of salaries, wages and allowances depends entirely upon parliamentary appropriation therefor (*Railway Commissioners of New South Wales* v. *Orton* (9)). It would be *ultra vires* of the Commissioners' powers to make an agreement for somebody to pay whether Parliament appropriated the money or not. The authority of the Commissioners is restricted only to pay, and therefore only to agree to pay so far as Parliament appropriates the money (*Churchward* v. *The Queen* (10)). The employment of the employees is at the will of the Commissioners (*Williames* v. *Victorian Railways Commissioners* (11)), and the Commissioners have no power to consent to something which, if it became the subject matter of an award, would put an end to the condition of employment being held at will. The Commissioners are an incorporated

(1) (1875) L.R. 7 H.L. 653.
(2) (1880) 5 App. Cas. 473.
(3) (1902) A.C. 165, at p. 167.
(4) (1910) A.C. 87, at p. 94.
(5) (1880) 5 Q.B.D. 483.
(6) (1906) 2 Ch. 12, at pp. 18, 19.
(7) (1930) 42 C.L.R. 527.
(8) (1914) A.C. 398, at p. 414.
(9) (1922) 30 C.L.R., at p. 428.
(10) (1865) L.R. 1 Q.B. 173.
(11) (1903) 29 V.L.R. 566; 25 A.L.T. 167.

body given the independent management or control of the railways of Tasmania. They do not in any way resemble the class of thing that was treated as a State enterprise in Western Australia in the *Engineers' Case* (1), nor can they bind themselves by any agreement to pay wages except subject to the condition that Parliament ratifies the agreement by appropriating the money. Power to make compulsory awards is given only in cases where the parties fail to agree, and, if they are incapable of agreeing, it cannot be applied.

[STARKE J. referred to *Fisher* v. *The Queen* (2).]

That principle does not apply, as was held in *Churchward* v. *The Queen* (3), which decision was based on the well-known principles of contract law. If the award is valid, Parliament proceeds to appropriate in the ordinary course. If the award is invalid, what right has Parliament to appropriate the money to pay without having the matter considered by both Houses? The very position would then arise that was referred to in *Commonwealth* v. *Colonial Ammunition Co.* (4). As regards the Victorian Commissioners there is another point of *ultra vires* prominent on the face of the statute, which provides specifically for getting all wages below £400 per annum fixed by a Railways Classification Board. The language is peremptory: there shall be a board and it shall determine certain things. Under the general powers of the Constitution there is no power to legislate with regard to trade and commerce inside a State, and therefore the Commonwealth Parliament has no power to interfere with it. Following the decision in the *Engineers' Case* that the Constitution is to be construed in the same way as any other Act, the recent decision in *Adamson* v. *Melbourne and Metropolitan Board of Works* (5) that, where a word has a legal meaning that legal meaning must be given to it in the construction of a statute, is applicable to the Commonwealth Constitution. The word "arbitrate" had obtained a definite legal meaning before 1900, and, taking that legal meaning, it is necessary to have a dispute and a body of arbitrators acting judicially, also limitations on their powers as to what they can do, and the law they must observe. One of their limitations is that they have no power to make an award even when

(1) (1920) 28 C.L.R. 129.
(2) (1901) 26 V.L.R. 781; 22 A.L.T. 217; (1903) A.C. 158.
(3) (1865) L.R. 1 Q.B. 173.
(4) (1924) 34 C.L.R. 198, at p. 224.
(5) (1929) A.C. 142.

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it is submitted to them by consent in express terms, with respect to something which the party submitting it was not competent to submit. (See also *Strachan* v. *Dougall* (1).) The fact that Commonwealth law can override State law does not entitle the Commonwealth Parliament to give authorities who are incompetent to submit to arbitration the right to submit (*Waterhouse* v. *Deputy Federal Commissioner of Land Tax (S.A.)* (2)). Although the decision in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (3) is regarded as overruled, the correct view of that case is as appears in the judgment of *Knox* C.J. and *Gavan Duffy* J. in *Clyde Engineering Co.* v. *Cowburn* (4), and anything else would have been *obiter dictum* there.

[*Evatt* K.C. referred to *Ex parte McLean* (5).]

That case does not touch upon the point left open in *Cowburn's Case* (6). So far, at least, as regards Tasmania, the law as to *ultra vires* applies also because the Commissioners had no power to agree to the terms of a log which, if it became effective as an award, would prevent the employees holding at will. Another ground of *ultra vires* is that money cannot be taken out of the Treasury except under an authorization of Parliament itself (*Commercial Cable Co.* v. *Government of Newfoundland* (7); *Mackay* v. *Attorney-General for British Columbia* (8); *Auckland Harbour Board* v. *The King* (9); *Commonwealth* v. *Colonial Ammunition Co.* (10)). Sec. 106 of the Constitution gives effect to and preserves that inherent quality of the Constitution of all the States, and, until that is altered by the Constitution of the State itself, that subsists. Even if it is said that there is an agreement to pay wages, &c., amounting to a contract, such a contract must have parliamentary sanction behind it.

[STARKE J. referred to *Commonwealth and Central Wool Committee* v. *Colonial Combing, Spinning and Weaving Co.* (11).]

A conflict between the Constitution of a State and a law of the Commonwealth does not come within sec. 109 of the Commonwealth

(1) (1851) 7 Moo. P.C. 365; 13 E.R. 920.
(2) (1914) 17 C.L.R. 665, at p. 671.
(3) (1910) 10 C.L.R. 266.
(4) (1926) 37 C.L.R. 466, at p. 478.
(5) (1930) 43 C.L.R. 472.
(6) (1926) 37 C.L.R. 466.
(7) (1916) 2 A.C. 610.
(8) (1922) 1 A.C. 457.
(9) (1924) A.C. 318, at p. 326.
(10) (1924) 34 C.L.R., at pp. 222, 224.
(11) (1922) 31 C.L.R. 421.

Constitution. There is a marked distinction in secs. 106 and 109 between the Constitutions of the States and the Constitution of the Commonwealth, and the laws of the States and the laws of the Commonwealth. There is no inter-State dispute here because there was none with New South Wales, Victoria or South Australia. Clear and specific limitations are imposed on the State of Victoria by its Constitution—an Imperial Act—on the way in which money, once it gets into the Consolidated Revenue, can be dealt with; and an award of the Conciliation and Arbitration Court, even if regarded as a Commonwealth law, can have no efficacy, because it cannot substitute a different method for enforcing the payment of money than that prescribed by the Imperial Act. "Arbitration" connotes a dispute between contending parties and a determination of that dispute judicially in the sense that the parties have the right, if they think fit, to call evidence (*Collins* v. *Collins* (1); *Re Hopper* (2); *Chambers* v. *Goldthorpe* (3)). Arbitrators must act judicially and have regard to existing relevant laws. In arbitration matters, whether the arbitrator be an individual or a Court, the general principle of law must be applied and given effect to as in *Railway Commissioners for New South Wales* v. *Orton* (4). The Federal Parliament has no power under the Constitution to authorize the Court to make an award which requires the State to pay out of its funds without parliamentary appropriation, any sum or sums. The award in this case requires, in effect, a State officer to find from State funds, at his own personal risk, without parliamentary appropriation the various sums of money the awards prescribe, and such money would have to be found by the State. The Commonwealth Parliament has no power, directly or indirectly, to take State property, and this is an indirect way of doing that.

Blackburn, for the Australian Railways Union. The contention of Mr. *Menzies* that by inference from the express references to State railways contained in the Constitution they are excluded from the operation of sec. 51 (xxxv.), in which they are not expressly named, was decided in *Federated Amalgamated Government Railway*

(1) (1858) 26 Beav. 306, at pp. 309, 311; 53 E.R. 916, at pp. 917, 918.
(2) (1867) L.R. 2 Q.B. 367, at pp. 372, 373, 376.
(3) (1901) 1 K.B. 624
(4) (1922) 30 C.L.R. 422.

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and Tramway Service Association v. *New South Wales Railway Traffic Employees' Association* (1), and was subsequently expressly overruled by the decision given in the *Engineers' Case* (2). If it was not so expressly overruled the principle on which it is based is inconsistent with the rules of interpretation established in the *Engineers' Case*; and, even if it was not concluded by that case, the point is unsustainable. The references to railways, so far as they occur in the Constitution, are not restrictive of other powers but are additional or to make things which are uncertain clearer. The Constitution, in secs. 102 and 104, recognizes the proprietary rights of the States in railways, and gives the Commonwealth Parliament certain powers over railways which were not given expressly or by necessary implication elsewhere. The power given in sec. 51, pl. XXXII., goes much further than a mere regulation of railways for the purpose of the effective defence of Australia. Pl. XXXIII. and pl. XXXIV. are undoubted extensions of Commonwealth power, which power could not have been derived by the Commonwealth from other provisions of the Constitution. Sec. 98 of the Constitution was dealt with in *Australian Steamships Ltd.* v. *Malcolm* (3), which decided that that section, as regards navigation and shipping, does something more than is done by sec. 51 (I.); that is, it authorized the Commonwealth Parliament to make a law providing for the compensation of seamen injured in the operation of trade and commerce between the States or with foreign countries. The express references either recognize the proprietary rights of the States to the railways, and give the Commonwealth Parliament capacities to deal with them with the consent of the State, or give the Commonwealth Parliament powers over railways which could not, or might not, have been possessed by it under the other provisions of the Constitution. If railways are excluded from pl. XXXV. because they are not mentioned there, then they are excluded from the operation of pl. v. for the same reason. That means that against the will of the State the Commonwealth Parliament could not use the railways or railway servants as means of postal communication. The Commonwealth Parliament has the

(1) (1906) 4 C.L.R. 488. (2) (1920) 28 C.L.R. 129.
(3) (1914) 19 C.L.R. 298.

right under its enumerated powers in sec. 51 to make laws as to subjects contained in those matters without regard to the will of the States or the managers of the State railways. When pl. xxxv. is looked at and construed in the light of the prior history of the matter in Australia and England, the industrial troubles of those countries and the difficulty of the common law to remedy these troubles, pl. xxxv. applies to State railways. The possibility of free railway communication being destroyed by railway disputes with the railway servants was something in contemplation at the time of the framing of the Constitution, and if it had been intended to exclude those disputes from the power conferred by pl. xxxv. it would have been done in direct language.

Evatt K.C. (with him *Fraser*), for the Commonwealth intervening. The Commonwealth can pass a law with respect to any of the powers enumerated in sec. 51 of the Constitution, and there is no valid claim to immunity from the operation of that law simply because the things on which that law might operate, or the persons to whom that law is addressed, might be railway property or persons employed by a State. It is conceivable that the Commonwealth cannot pass legislation founded on property rights in the railways, but other powers may be used although they do affect railways, e.g., the power as to posts and telegraph. The real object of the law in question should be the test as to its validity: its operation and effects are incidental. Here the question is was it a law or award with respect to arbitration or to State railways (*Pirrie* v. *McFarlane* (1)). The property rights of the State railways are recognized by the Constitution in their relation to the Commonwealth, but that does not mean that because their property rights may be affected by some Commonwealth law otherwise valid, that law would not operate on them. The express mention of State railways in some of the powers contained in sec. 51 does not mean that such railways are excluded from the operation of the other powers. Property rights and control of things by a Province or Dominion are still subject to legislative power (*Attorney-General for British Columbia*

(1) (1925) 36 C.L.R. 170.

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v. *Canadian Pacific Railway* (1); *Great West Saddlery Co.* v. *The King* (2); *Attorney-General for Quebec* v. *Nipissing Central Railway Co.* (3); *Pirrie* v. *McFarlane* (4); *Union Colliery Co. of British Columbia* v. *Bryden* (5); *Cunningham* v. *Tomey Homma* (6)). If that view is adopted, looking at each piece of legislation, then discrimination becomes important in order to ascertain what the law really is. There is nothing in the Constitution expressly prohibiting discriminatory laws. Discrimination would alter the nature of the law.

[DIXON J. referred to *Ex parte Walsh and Johnson*; *In re Yates* (7).]

A State Parliament cannot deny to a person who is in fact an employer of labour in the State the capacity to become a party to an industrial dispute within the meaning of sec. 51 (xxxv.) of the Constitution (*Clyde Engineering Co.* v. *Cowburn* (8)). The case of *Railway Commissioners for New South Wales* v. *Orton* (9) does show, in substance, that the employers of the persons under the various awards are the Commissioners. They are the employers on the construction of the railway Acts of the various States. So far as any general rights may be claimed, the Commissioners are in the position of agents of the State. On this aspect of the dual capacity of the employer, see *Sydney Harbour Trust Commissioners* v. *Ryan* (10). With reference to the Railway Commissioners having been incorporated, *inter alia*, to enable employees to obtain rights against them which they might not be able to obtain from the Crown, see *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt and Sanderson* (11). For the purpose of the Commonwealth power, regard must be had to the person employing, controlling and directing. So far as the claim for incapacity is rested upon the necessity for an Appropriation Act, the case is covered by *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (12). As regards pl. xxxv. of sec. 51, if there are present the necessary

(1) (1906) A.C. 204, at pp. 210, 211.
(2) (1921) 2 A.C. 91, at p. 100.
(3) (1926) A.C. 715, at pp. 723, 724.
(4) (1925) 36 C.L.R., at pp. 183, 226-229.
(5) (1899) A.C. 580.
(6) (1903) A.C. 151.
(7) (1925) 37 C.L.R. 36.
(8) (1926) 37 C.L.R. 466.
(9) (1922) 30 C.L.R. 422.
(10) (1911) 13 C.L.R. 358, at pp. 363, 364, 373, 374.
(11) (1924) 34 C.L.R., at pp. 531, 532, 546.
(12) (1920) 28 C.L.R. 129.

relationship of employer and employee, the industry and the discrimination as to what should be paid, that is sufficient to constitute, subject to the other conditions of the Constitution, an industrial dispute. The situation is no different in principle from the position which existed in *The King* v. *Sutton* (1). In order to determine who is the employer of a person, the test is who is controlling and directing him, who engages and has the right to dismiss him (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt and Sanderson Ltd.* (2)). There is no immunity from either the operation or the selected method of enforcement of any Commonwealth law in favour of any State instrumentality or any officer of the State, or any person within the territorial limits of the State. If you have State property and the State is bound by Commonwealth law, there must be some method, on ultimate analysis, of enforcing the will of the paramount power, and that method is to be selected by the Commonwealth. The *Judiciary Act* 1903-1927 in sec. 66 chooses the type of method of enforcement. The *Crown Remedies Act* is substantially the same. The arbitration system in New South Wales, Victoria and South Australia extends, by express words, so as to cover all Crown employees within certain limits. The Commonwealth is entitled to act if there is an industrial dispute in fact, something which should be settled in the interests of the Commonwealth as a whole (*Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (3)). A State may purport to place incapacities on its employers, but for this purpose the Commonwealth can amend or alter those incapacities. Sir *Edward Mitchell's* argument as to *ultra vires* is disposed of in *Clyde Engineering Co.* v. *Cowburn* (4). No distinction can be drawn between the various State Constitutions and the various other provisions in State laws, such Constitutions are completely uncontrolled and have the ordinary character of ordinary laws of the State (*McCawley* v. *The King* (5)). The Constitution of a State is a law of that State within the meaning of sec. 109 of the Commonwealth Constitution.

(1) (1908) 5 C.L.R. 789, at pp. 802, 803, 807, 808, 814.
(2) (1924) 34 C.L.R. 482.
(3) (1908) 6 C.L.R. 309.
(4) (1926) 37 C.L.R. 466.
(5) (1920) 28 C.L.R. 106; (1920) A.C. 691.

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Sir Edward Mitchell K.C., in reply. The Victorian Constitution and the sections set out in the Schedule to the Imperial Act are part of an Act of Parliament extending to the State of Victoria within the meaning of the *Colonial Laws Validity Act* 1865. The conflict here is between the laws of the Commonwealth and limitations upon the powers of dealing with money set out in portion of an Imperial Act, and to the extent of the conflict the Commonwealth law is void (*Union Steamship Co. of New Zealand* v. *Commonwealth* (1)). The Commissioners for the Tasmanian Railways are an independent body under the relevant statute. If it be that they are in the position of agents for the State of Tasmania, the result would be that inasmuch as the State of Tasmania was never served with a log or asked to appear, and the award does not purport to be binding on it, that is an answer (see *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt and Sanderson Ltd.* (2)). The case of *Sydney Harbour Trust Commissioners* v. *Ryan* (3) is inapplicable: it does not depend upon State law. If a demand made in terms for conditions of employment is a nullity, a neglect to give an answer thereto cannot amount to an industrial dispute. According to the general law anything done by a statutory body outside the purposes for which it was created is a nullity.

[ISAACS C.J. referred to *Quick and Garran's Annotated Constitution of the Australian Commonwealth*, p. 356, under notation of covering clause 5.]

Menzies K.C., in reply. The argument that the powers in sec. 51 of the Constitution can only be applied to State railways where expressly referred to, does not necessarily lead to the conclusion that none of the powers in that section are capable of having an effect directly or indirectly upon State railways. The distinction is referred to in *Great West Saddlery Co.* v. *The King* (4).

Cur. adv. vult.

Dec. 1.

ISAACS C.J. made the following written announcement:—

We have already stated our respective views upon the validity of sec. 33 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930.

(1) (1925) 36 C.L.R. 130.
(2) (1924) 34 C.L.R., at pp. 530, 531.
(3) (1911) 13 C.L.R. 358.
(4) (1921) 2 A.C., at p. 100.

and a majority has held that section invalid, an opinion from which I dissented and still dissent. We have now heard the further question argued whether the awards were validly made in the first instance, and we are all of opinion that this question should be answered that they were validly made.

The questions in the summons will accordingly be formally answered as follows:—(1) Yes. (2) No. (3) Such awards were lawfully made. (4) The residue of the awards, namely, so much thereof as the order of the Arbitration Court does not purport to set aside, is in force. (5) Yes. There will be no order as to costs.

The Court will publish its reasons on Monday, 8th December.

Dec. 8.

The following written judgments were delivered:—

ISAACS C.J. Formal judgment in this case was delivered on 1st December, and I have now to state the reasons for my opinion that all the questions should be answered in favour of the applicants.

This is an application by the Australian Railways Union under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, to which the respective Railways Commissioners of Victoria, New South Wales, Tasmania and South Australia are respondents, for a decision on certain questions of law arising in relation to an order of the Commonwealth Court of Conciliation and Arbitration made on 4th October 1930, setting aside portions of a consolidated award made by Deputy-President Sir *John Quick* on 25th March 1930. The consolidated award directed that it should come into operation on 23rd March 1930 and, subject to any order of the Court, should continue until 31st December 1931.

The points of law raised, apart from one abandoned, are: (1) whether the Court had power to hear and determine the application; (2) whether the order made by the Court setting aside the award was made without jurisdiction; (3) whether in point of law the order made by the Court setting aside the award was rightly made; (4) whether the said award is still in force. Many matters of law intended to be argued in support of the grounds stated were notified in the summons, and several of these were argued. In the circumstances, however, it is quite unnecessary for me to enumerate these in detail.

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A brief historical statement of the material events, in order of date, will perhaps conduce to a clearer understanding of the matter. On 18th August 1930, the Commonwealth Parliament passed Act No. 43 of 1930, materially amending the relevant legislation on the subject of industrial disputes. On 21st August 1930, the Australian Railways Union applied under sec. 34 of the *Conciliation and Arbitration Act* as amended, for the appointment by the Governor-General of a Conciliation Committee for the settlement of industrial disputes in the railway industry, and to consider and determine applications for variation of the award of 25th March 1930, to which that Union was a party. On 11th September 1930, there was gazetted the notification that the Governor-General had, in pursuance of sec. 34 of the Act, appointed Conciliation Committees in relation to "(a) industrial disputes; and (b) applications for variations of awards of the Court of Conciliation and Arbitration" in various branches of the railway industry. On 11th September, and therefore after the appointment of the Conciliation Committees, the several Railways Commissioners caused the Australian Railways Union to be summoned by the Court to show cause to the Court why (*inter alia*) the award of 25th March 1930 and every term contained therein, except term 9 of Part I., should not be wholly set aside. On 17th September 1930, the applications were heard together. On 22nd September, the Commonwealth was allowed to intervene. On 4th October, the Court made an order setting aside certain portions of the award, and leaving other portions still operative. This is the order now challenged.

Our function is a strictly limited one. It does not extend to determine whether the setting aside of portions of the award presses justly or unjustly on the present applicants. It does not enable or entitle us, either, to declare or consider whether what the Arbitration Court has done is desirable or undesirable from an economic or ethical standpoint, or whether it is for or against the public interest. All that is in our power and province to ascertain and declare, and the only thing to which I shall direct my attention, is whether what has been done is authorized by the law of Australia. I accept as correct for the purpose of this case—as perforce I must—all the statements of fact made by the learned Judges of the Arbitration

Court, and I approach the questions propounded for our consideration with the single inquiry: Assuming those facts to be accurate, can the order of 4th October 1930 be sustained in point of law? In my statement recently made with reference to this case, I said that, in my opinion, "consistently with the established practice of this Court, and having regard to the views already expressed and on record, there is no need, for the purpose of determining the questions submitted to us, for a fresh expression of opinion by the Court in the present case as to the constitutional . . . validity of the awards" (1). Their compliance with the statute has not been challenged by any party; and also I said I was clearly and unhesitatingly of opinion that secs. 33 and 34 are valid, and that I would give my reasons at the earliest possible opportunity. I propose to state those reasons as clearly and untechnically as I can, because, however valueless my views on this subject are for present purposes, the litigants have a right to know them, and in the present case Parliament has more than the ordinary right to know for its future guidance the reasons which govern our several opinions.

1. *The Constitution.*—The constitutional provision directly under consideration is sub-sec. xxxv. of sec. 51. Read with the introductory words, it runs as follows: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . (xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." The course which this case has taken renders it necessary to consider two expressions in that sub-section, namely, "arbitration" and "industrial disputes." The present validity and force of the whole award of 25th March 1930 depend on the connotation of these two expressions. If the view which I understand is held by my learned brethren as to the meaning of "arbitration" in this sub-section is correct, then sec. 34 is in part, but only in part, beyond the jurisdiction of the Parliament to enact. I refer particularly to sub-sec. 11 of that section. As I shall show hereafter, even this in itself ought not, in my opinion, to disentitle the applicants to the order they seek under sec. 21AA. The other expression, "industrial disputes," raises a deeper question, namely, whether

(1) *Ante*, at pp. 327-328.

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Parliament has any jurisdiction to legislate under sub-sec. XXXV. for industrial disputes extending beyond the limits of any one State, so far as concerns the State railways. Neither of these questions was originally raised by the parties, but, as they were ultimately raised, it is our duty to deal with them. I take the latter expression first, because it goes to the root of all legislative power in this connection.

(A) *State Railways.*—Speaking personally, after the searching examination given to the whole subject of what have been called "State instrumentalities" in connection with the Commonwealth power in respect of industrial disputes in the *Engineers' Case* (1), and the conclusions arrived at by the Court on that occasion, I should have thought the question had been definitely settled. In that case six Justices sat, of whom five concurred that the necessary Federal jurisdiction existed in respect of all State industries, including the railways industry. In the combined judgment of *Knox* C.J., *Rich* J., *Starke* J. and myself, the principles by which to test the Federal jurisdiction were closely examined. After reviewing the various cases as they then stood in this Court, we said (2):—"It is plain, therefore, that the utmost confusion and uncertainty exist as the decisions now stand. The *Railway Servants' Case* (3) is wholly irreconcilable with the *Steel Rails Case* (4). The latter is sustainable on the principles we have enunciated; the former is not. The *Railway Servants' Case*, consequently, cannot any longer be regarded as law." That statement was definite, clear and unqualified. The same result was reached by *Higgins* J. My brother *Gavan Duffy* dissented on the ground, as I understand his judgment, that the railways were a State instrumentality. The majority statement with regard to State railways was obviously made for the guidance of the whole Commonwealth, and until now it has never been challenged. I adhere to that statement, and for the reasons then given. In passing, I should advert to the recognition by the Earl of *Birkenhead* and Lord *Shaw of Dunfermline* in *Food Controller* v. *Cork* (5) as to the difference between the Crown acting regally and acting *in commercio*. There were only three grounds put forward in this

(1) (1920) 28 C.L.R. 129.
(2) (1920) 28 C.L.R., at p. 159.
(3) (1906) 4 C.L.R. 488.
(4) (1908) 5 C.L.R. 818.
(5) (1923) A.C. 647, at p. 657 and pp. 667-668.

case in support of the contention that the industrial dispute upon which the award of 25th March 1930 was founded was beyond the ambit of the constitutional provision referred to. The first was raised by Mr. *Menzies* for the South Australian Railways Commissioner; the other two by Sir *Edward Mitchell* and Mr. *Stanley Lewis* for the Tasmanian Railways Commissioner. Mr. *Menzies* said that he did not challenge the actual decision in the *Engineers' Case* (1), nor, indeed, the views of the Court as to implied prohibition, but he did challenge the statement above quoted as to State railways. He placed his contention as to non-jurisdiction with respect to State railways on the single ground that if sub-sec. XXXV. of sec. 51 of the Constitution be construed in the ordinary manner in which statutes are construed—that is to say, when the sub-section in question is considered in conjunction with other portions of the instrument—there is a necessary implication that industrial disputes as to State railways are excluded from the general and comprehensive terms of sub-sec. XXXV. The two points taken on behalf of the Tasmanian Commissioner were, first, that having regard to the terms of the State legislation controlling the Commissioner, he had no power to agree to the terms demanded by the Tasmanian claimants; and, next, that since the Tasmanian legislation restricted the payment of salaries and wages to moneys appropriated by the Tasmanian Parliament, no Federal award could authorize an award to pay more. Let me deal with these three points in order :—

(*a*) *Construction of sub-sec.* XXXV.—The constitutional provisions upon which Mr. *Menzies* relied were sub-secs. XXXI., XXXII., XXXIII. and XXXIV. of sec. 51, and secs. 98, 102 and 104 of the Constitution, as showing that the generality of the words of sub-sec. XXXV. should be cut down. With the exception of sub-sec. XXXI., those provisions were quoted in full in the *Railway Servants' Case* (2). Their effect, if any, in accordance with the ordinary principles of construction must have been duly appreciated by the three learned Justices who composed the Court on that occasion, and the decision did not rest upon the ground now contended for. In the *Railway Servants' Case* it was decided that the authority of the Commonwealth Legislature in respect of State railways industrial disputes was

(1) (1920) 28 C.L.R. 129.

(2) (1906) 4 C.L.R. 488.

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non-existent, upon the ground of implied prohibition, based on the doctrine of *D'Emden* v. *Pedder* (1), an implication which the Court considered was strengthened by the reference to the specific provisions relied on by Mr. *Menzies* and already referred to. That appears not only from a perusal of the judgment in that case, but also from the statement made by *Barton* J. in *Malcolm's Case* (2). Referring to the *Railway Servants' Case* (3) the learned Justice said:—"In arriving at this conclusion the Court decided two questions, which were both fully argued. The first was whether the State-owned railways were exempt from Federal control as instrumentalities of State government. This the Court answered in the affirmative. For reasons which are not material to the present case, it was held that the provision attacked could not be supported as a valid exercise of the powers conferred by sec. 51 (xxxv.), so as to except State-owned railways from such immunity." The "provision attacked" was a provision in the Conciliation and Arbitration Act for registering an organization. The second question referred to by the learned Justice as having been decided in the *Railway Servants' Case* referred to the trade and commerce power, and is irrelevant to the present case. When the whole position came to be considered in the *Engineers' Case* (4), I do not agree with the suggestion that the members of the Court and learned counsel overlooked the familiar rule of construction that a statute must be considered as a whole, and that, either by express words or necessary implication found elsewhere, any of its provisions may be modified. The truth is that there is no room for the application of that doctrine in the present case. On the contrary, there is affirmative evidence in sec. 51 itself that the generality of sub-sec. xxxv. is not intended to be cut down. First, it has always to be remembered that "an enumerated power" is complete in itself, acknowledging no limitations other than those prescribed by the Constitution. (See the judgment of *White* C.J., for the whole Court, in *Brolan* v. *United States* (5).) This is exactly in line with the judgment of Lord *Selborne* quoted in the *Engineers' Case* (6). What

(1) (1904) 1 C.L.R., at p. 109.
(2) (1914) 19 C.L.R., at p. 319.
(3) (1906) 4 C.L.R. 488.
(4) (1920) 28 C.L.R. 129.
(5) (1915) 236 U.S. 216, at p. 218.
(6) (1920) 28 C.L.R., at p. 149.

has to be done is, as expressed in the *Engineers' Case* (1), " to discover in the actual terms of the instrument their expressed or necessarily implied meaning." The fact " that State railways were specially recognized by the Constitution " was not overlooked in that judgment (see *Engineers' Case* (2)). And still, the Justices, parties to the first judgment, made the statement earlier quoted. I now propose to consider the provisions relied on for restriction. Sub-sec. XXXI. deals not with industrial disputes, but the acquisition of property from State or individual for any purpose in respect of which the Parliament has power to make laws. Under that sub-section it is clear that property might be acquired from a State to erect a Customs House or a Court, even an Arbitration Court, and the property acquired might be the site of a railway station. Sub-sec. XXXII. permits laws to be made by the Commonwealth Parliament for " the control of railways with respect to transport for the naval and military purposes of the Commonwealth." As observed by Dr. *Evatt*, it is noticeable that there all railways are included, not merely State railways, as in sub-sec. XXXIII. or sec. 104. That sub-sec. XXXII. enables the Commonwealth to take over the control of all railways private or public for the purposes of transport in connection with the defence of the country, that is to use them for the given purpose as if they were the property of the Commonwealth. If that sub-section impliedly excludes State railways from sub-sec. XXXV., so it must also exclude any private railways. Sub-sec. XXXIII. is an independent power in the sense of absence of connection with other legislative authority, and in this respect differs from sub-sec. XXXI. Mr. *Blackburn* was right in saying that it really amounts to a capacity to purchase State railways if the State is willing to sell. Sub-sec. XXXIV. is similar to sub-sec. XXXIII. in this respect. But none of the sub-sections quoted in any way touch the question of conciliation or arbitration, for the prevention and settlement of industrial disputes. As for sec. 98, I would quote the opinion of *Barton* J. in *Malcolm's Case* (3). He there said :—" Sec. 98 is not intended to amplify the trade and commerce power beyond the spheres of inter-State and external trade, but to explain it as to the included

(1) (1920) 28 C.L.R., at p. 155. (2) (1920) 28 C.L.R., at p. 157.
(3) (1914) 19 C.L.R., at p. 314.

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subject matter by removing grounds for possible doubts of its extent." I agree with that, and hold that the reference to the railways of a State in sec. 98 does not indicate by implication, necessary or unnecessary, that without sec. 98 trade and commerce on the State railways would have been free from Commonwealth regulation. If the contrary is true, the same must be said of navigation and shipping, which is unthinkable. Secs. 102-104 have no connection whatever with sub-sec. XXXV. and cannot, by any stretch of construction, be considered as limiting its primary meaning. On the other hand, if the argument be sound that is advanced that State railways are excluded from Commonwealth legislation unless expressly referred to, the *Steel Rails Case* (1) above mentioned must have been wrongly decided and wrongly approved of later. The railways would also be exempt from any control under sub-sec. V. of sec. 51, referring to postal, telegraphic, telephonic and other like services. Notwithstanding any Commonwealth legislation under sub-sec. XII., the railway authorities of a State might disregard Commonwealth laws as to legal tender. The State railway authorities similarly could disregard patent laws of the Commonwealth, laws as to employment of aliens, and laws as to immigration. Reference to sub-secs. XIII. and XIV., referred to by Dr. *Evatt*, indicate that while State banking and State insurance *simpliciter* are excluded from Commonwealth legislative jurisdiction as to banking and insurance, yet even State banking extending beyond the limits of the State concerned, are expressly brought within the Federal legislative power. This, to my mind, is a strong indication that sub-sec. XXXV., referring to industrial disputes extending beyond the limits of any one State, and to such disputes only, is not to be cut down by any implication excluding State industries of any kind, railway or otherwise. The truth is that State banking or insurance extending beyond the limits of the State concerned, and State railway disputes or other State disputes extending beyond the limits of any State concerned, are regarded by the Constitution as national matters, and proper to be dealt with, and, indeed, only capable of being dealt with as a whole, by the Commonwealth Parliament. In the *Builders' Labourers' Case* (2)

(1) (1908) 5 C.L.R. 818.

(2) (1914) 18 C.L.R. 224, at p. 243.

I said :—"If a given industrial dispute answers the requisite geographical character, it is *ex vi termini* not a 'State' dispute. It is, when considered in its integrity, neither a single nor a multiple State dispute, nor a *fasciculus* of separate State disputes; it is an *Australian dispute*, and cognizable as such by the Commonwealth authority. It is, when regarded as an entity, as distinct from a State dispute or State disputes as inter-State commerce is distinct from intra-State commerce of one or of several States. An inter-State commercial transaction, such as the carriage of goods across the border, is not a combination of two intra-State transactions of carriage, although it is transparent that, so far as relates to its own limits, each State could deal with the act of transit. The mutual limits of States are referred to in sub-sec. xxxv., not as introducing the political effect of the several State Constitutions, or as collecting separate State industrial disputes, but as providing for this purpose a geographical landmark on the soil of the Commonwealth territory, whereby to indicate the national character of an industrial dispute; that is, whenever in fact it exists on both sides of a boundary of two States, which an industrial dispute may do, paying no attention whatever to their geographical or political separateness." That is true of State railways disputes no less than of disputes in any other industry, public or private. These reasons lead me to reject the contention raised on behalf of the South Australian Commissioner.

(*b*) *Ultra Vires.*—Sir *Edward Mitchell*, using the principles of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), urged that, having regard to the Tasmanian Railways Acts, it would have been *ultra vires* of the Commissioner to agree to the terms demanded by the employees. Therefore, said the learned counsel, since any such agreement, if in fact made, would have been a nullity, the refusal to accede to them must be also a nullity, so far as sub-sec. xxxv. of the Federal Constitution is concerned. Consequently, the award must be invalid, because no legal superstructure can be built on a nullity. It has long been regarded as definitely settled that an industrial dispute means a real dispute *in fact*, and is not limited by any artificial criteria. (See *Holyman's Case* (2).) It is the disputes in fact which may and often do interrupt and disorganize

(1) (1875) L.R. 7 H.L. 653.

(2) (1914) 18 C.L.R. 273, at p. 285.

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essential services to the community, and when, by extension beyond the limits of any one State, they attain a Commonwealth character, they fall within the Commonwealth Conciliation and Arbitration power. Failure on the part of an Australian employer to accede to the industrial demands of his employers may arise through unwillingness, notwithstanding ability, or from inability, however arising, whether in fact or in law. He may be, as was said during the argument, a trustee with strictly limited powers, or he may be the Australian representative of a foreign company, forbidden by his instructions to go beyond certain limits, or he may be a State construction authority with statutory restrictions as to wages and hours and other industrial conditions. If the argument were admitted to be correct, a State Parliament might entirely exclude Commonwealth authority by enacting that it should not be lawful to demand or to pay wages or observe hours or other industrial conditions except in accordance with the provisions of State Wages Boards or other State industrial authorities. In my opinion this argument should be overruled.

(c) *Parliamentary Appropriations.*—The contention as to this practically stands on the same footing as that I have just dealt with. It was, to a certain extent, made a separate argument. The view pressed was that there was no jurisdiction in the Federal Legislature to authorize anyone other than the State Parliament to permit an invasion of the State Consolidated Revenue Fund. This also has the merit of novelty as an objection in such cases as the present, but, in my opinion, it has been so far properly disregarded. It never has been contended, and I do not suggest it ever could be properly contended, that anyone but the State Parliament could appropriate the King's State revenue. But there have been many cases in this Court where the question of appropriation must have been present to the mind of the Court as well as the counsel who argued those cases. In *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1) the State Act made appropriation a necessary condition of payment of the employees; so in the case of the Colonial Treasurer of New South Wales, the Minister of Public Works of New South Wales and the Chief Secretary of New South

(1) (1920) 28 C.L.R., at p. 155.

Wales (*Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 2] (1)). Those are precedents which cannot have been rightly decided if the argument now under consideration is sound. But it is unsound in principle. It is true that every contract with any responsible Government of His Majesty, whether it be one of a mercantile character or one of service, is subject to the condition that before payment is made out of the Public Consolidated Fund Parliament must appropriate the necessary sum. But subject to that condition, unless some competent statute properly construed makes the appropriation a condition precedent, a contract by the Government otherwise within its authority is binding. The Federal awards in the *Engineers' Case* (2) and New South Wales cases above referred to, superseded the State law as to the extent of the industrial relations between employers and employed, but left to the State Parliament, and to it alone, the jurisdiction to provide the means of honouring the State's obligations to its employees as in all other cases. By sec. 106 of the Constitution, a State Constitution is subject to the Federal Constitution. But there is nothing in the Federal Constitution which interferes with the State constitutional provisions as to State parliamentary appropriation of State Consolidated Revenue Funds before payment out of those funds. But that in no way prevents the full operation of an industrial award. An industrial award is not a judicial decision that A owes B a sum of money. It is of a legislative nature when operated on by the Federal Act, governing future industrial rights and duties as between individuals who may happen to enter into stated industrial relations. With such legislative declarations, the appropriation of money has no direct connection. Should strictly judicial proceedings thereafter be necessary in respect of those rights and duties, the position may be somewhat as stated by Sir *George Farwell* for the Judicial Committee in *Eastern Trust Co.* v. *McKenzie, Mann & Co.* (3). There is one decision in this Court which bears directly on the question. It is the case of *Williamson* v. *Commonwealth* (4). In that case *Higgins* J. (5) held that, notwithstanding sec. 78 of the *Public Service Act*, which provided

(1) (1920) 28 C.L.R. 436, at pp. 449, 450.
(2) (1920) 28 C.L.R. 129.
(3) (1915) A.C. 750, at p. 759.
(4) (1907) 5 C.L.R. 174.
(5) (1907) 5 C.L.R., at p. 183.

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that "nothing in this Act shall authorize the expenditure of any greater sum out of the Consolidated Revenue Fund by way of payment of any salary than is from time to time appropriated by the Parliament for the purpose," the Court still had power to declare rights and pronounce judgments, leaving it to Parliament to find money for payment of the judgments against the Crown. This is in accordance with the observations of the Judicial Committee in *R.* v. *Fisher* (1), a case referred to by *Higgins* J. This objection also cannot, in my opinion, prevail.

In the result, all the objections suggested for the exclusion of State railways from the provisions of sec. 51 (xxxv.) of the Constitution fail, and the decision of this case must depend upon the view taken by the Court as to the relevant provisions of the Conciliation and Arbitration Act itself, which require the preliminary consideration of the true constitutional meaning of the word "arbitration" in sec. 51 (xxxv.).

(B) *Arbitration.*—In the case of *The Lion* (2) Lord *Romilly*, for the Judicial Committee, said: "The meaning of particular words in an Act of Parliament, to use the words of *Abbott* C.J. in *R.* v. *Hall* (3), 'is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used.'" The word "arbitration," therefore, for present purposes is to be interpreted according to the way it is understood and was in 1900 understood in relation to industrial disputes. Before coming to any conclusion as to the validity of sec. 34, and therefore of sec. 33, it is indispensable, in my opinion, to grasp the true signification of "arbitration" in this relation. Sir *Edward Mitchell*, in the course of his argument, referred to Sir *John Romilly's* definition of the term "arbitration" in the case of *Collins* v. *Collins* (4). The definition was: "An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties." *The concept includes an implication that the arbitration shall be conducted impartially and in a quasi-judicial manner.* But

(1) (1903) A.C., at p. 167.
(2) (1869) L.R. 2 P.C. 525, at p. 530.
(3) (1822) 1 B. & C. 123, at p. 136; 107 E.R. 47, at p. 51.
(4) (1858) 26 Beav., at p. 312; 53 E.R., at p. 918.

it does not necessarily carry with it an implication to perform the function in any specific manner, provided substantial justice is satisfied. For instance, in the case of *Board of Education* v. *Rice* (1) Lord *Loreburn* said :—" Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind ; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either *they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything.* But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, *always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.*"

In relation to industrial disputes, arbitration signifies a means of settling a question in dispute by reference to a third party or parties when the contendants themselves have failed to agree. But it is all-important to observe that *in industrial history that does not mean that the third party or parties must be unconnected with the disputants themselves.* For instance, Mr. Jeans, in his work on *Conciliation and Arbitration in Labour Disputes*, published in 1894, says, at p. 26 :—" Arbitration, as commonly understood and practised, is of course a much more formal and stately process " (that is, than conciliation). " The essential principle of this system is, that the matter in dispute shall be referred, and that the decision of the referee shall be accepted. But thereby hang not a few difficulties and complications. The parties to the dispute are left entirely at liberty to make their own arrangements. They agree upon *the constitution of the Court*, upon the number of arbitrators, upon the

(1) (1911) A.C. 179, at p. 182

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form of procedure, upon the lines within which evidence or pleadings shall be admitted, and finally upon the umpire or referee. As, however, the system is usually followed, *the employers appoint two or more of their own number as arbitrators, and the men do the same,* so that those who nominally hold the position of arbitrators are really more like advocates, and in ninety-nine out of every hundred cases referred, the *ultimate decision rests with the umpire.*" The passage just quoted indicates that in the settlement of industrial disputes the term " arbitration " was in 1894 understood to include the settlement of the dispute by a tribunal which included disputing employers and disputing employees as well as an independent umpire. It is obvious that, once that fact is conceded, there was nothing to prevent the parties from agreeing that a majority of the nominees of the disputants from among their own number should have power to determine the question and so settle the dispute. The history of conciliation and arbitration in the sense of to-day only begins in 1860. It is excellently traced in an address by Mr. Carroll D. Wright, United States Commissioner of Labour, delivered at the Conference of the National Civic Federation in New York in December 1901. He points out that it was in 1860 when, mainly through the efforts of Mr. Mundella, the first permanent or continuous Board of Arbitration and Conciliation in England was established. It was in the hosiery and glove trade of Nottingham. Mr. Wright says that the distinguishing feature of the Board organized by Mr. Mundella's efforts, and at the same time the peculiar characteristic of arbitration since 1860, lies in the fact that it is systematic conciliation and arbitration organized on a purely voluntary basis, without an appeal to legal processes, even to enforce its decisions. He points out also the essential difference between conciliation and arbitration, and this important passage appears in his address:— " It is the preventive feature which gives a value beyond estimation. It involves the moral attitude of the two parties, or rather, the ability of each morally to consider the attitude of the other. Probably the very essence of its strength lies in the fact that arbitration is at the back of it, or at least that arbitration may be resorted to, provided conciliation fails to effect its purpose; because ultimately where parties cannot reason together, *there must be the power to determine,*

and where that power is voluntarily given to the representatives of each party involved, it becomes arbitration, and arbitration can accomplish at certain points in the dispute what conciliation is powerless to bring about." I may interpose this observation, that *if that is arbitration, though voluntary, the Commonwealth Parliament may make the same process compulsory.* Then Mr. Wright says: "Reasoning along these lines, the Nottingham system of arbitration and conciliation, the first great systematic effort, becomes historic." He traces Mr. Mundella's effort, and relates the conference which led to organization of what was termed "the Board of Arbitration and Conciliation in the glove and hosiery trade." He shows that in 1863 and 1864, and later, the example was followed in the building trades of Wolverhampton, with some differences, the iron trade and the coal trade. Then he relates instances of miners' strikes and engineers' strikes. Then, with regard to the miners' dispute in 1893, a Board of Conciliation was constituted to last for one year at least, consisting of an equal number of coal owners' and miners' representatives, fourteen each. Mr. Wright observes:—"It was provided that at their first meeting they should endeavour to elect a chairman from outside, and if they failed, they were to ask the Speaker of the House of Commons to nominate one, *the chairman to have a casting vote*, the Board when constituted was to have *power to determine* from time to time the rate of wages on and from 1st February 1894. It is plain from this statement that the whole Board, including the representatives, was a board of arbitration as well as conciliation, and it is equally plain that if the chairman was to have only a casting vote, he was to have no vote where a majority existed." In various industries, as, for instance, in the boot and shoe industry of Northampton, after the strike of 1895, it was agreed, says Mr. Wright, that there should be a joint committee of "representatives of the employers and workmen, four of each, *to determine* the principles and methods of arrangement and classification on which piece-work statements for machine workers shall be based; that there may be various local boards of arbitration and conciliation, consisting of equal numbers of representatives of employers and workmen in the Northampton district." And he says: "Only once since 1895 has an umpire been called upon to make a decision of award for

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breach of compact." In many other industries have what are called boards of conciliation and arbitration been constituted as in 1899, and although it is self-evident that where the respective representatives of the two contestants voted solidly in opposition to each other, no agreement or determination could be arrived at without the assistance of an umpire or referee. The term "arbitration" was used, at least in many cases, with reference to a determination arrived at not by the umpire or referee solely, but by means of his vote giving a majority to one side or the other. The recent work, published in 1929, entitled *Industrial Arbitration in Great Britain*, by Lord Amulree, G.B.E., one of His Majesty's counsel, and formerly President of the Industrial Court and chairman of the National Wages Board for Railways (now the successor as Air Minister of the late Lord Thomson), throws great light upon this subject. It will be sufficient to say of that work that it gives a succinct account of the subject matter of its title. At p. 85 is a reference to a memorandum appended to the Commission of 1867-1869, referring to spontaneous boards of arbitration of the character already mentioned. It would be tedious to do more than select a few leading passages. At pp. 99-100 the author, speaking of "the voluntary boards of arbitration, whether set up by the trades themselves or by outside authorities," says they were faced with a difficulty, namely, "when the parties went outside the trade for an arbitrator or umpire, it was not always easy to find a suitable man." It was obvious from that, that they did not always go outside the trade. Actual proof of that will be presently given. In 1894 a Royal Commission, the report of which has been frequently quoted in this Court, endeavoured to define more clearly the terms in common use. "Arbitration" was defined as "the settlement by one or more presumably impartial persons of an issue on which the parties have failed to agree." The accepted meaning of this will presently be seen. "Conciliation" was defined as "the coming together of the parties for the discussion of questions with a view to amicable settlement." In 1896 was passed the *Conciliation Act* 1896, entitled "An Act to make better provision for the Prevention and Settlement of Trade Disputes." In sec. 2 there is a provision that where a difference exists or is apprehended between an employer or any class

of employers and workmen, the Board of Trade may, if it thinks fit, exercise certain powers, including "(*c*) on the application of employers or workmen interested, and after taking into consideration the existence and adequacy of means available for conciliation in the district or trade and the circumstances of the case," power to "appoint a person or persons, to act as a conciliator or as a board of conciliation;" and then "(*d*) on the application of both parties to the difference, appoint *an arbitrator*." It is scarcely necessary to say that under the *Acts Interpretation Act* the word "arbitrator" may be read as "arbitrators." Now, Lord Amulree, in relating the course taken in appointing arbitrators, shows how the word "arbitration" is legally interpreted in this connection. At p. 112 he says that "in the early years under the *Conciliation Act* 1896, the Government and parties were fortunate in obtaining the services as arbitrators of men of sound sense and good judgment, and there was less disposition to rely upon exalted rank and high-sounding titles. Sir William Markby, Sir Edward Fry, Sir David Dale, Sir Henry James (afterwards Lord James of Hereford), Sir Horatio Lloyd and Mr. J. V. Austin (County Court Judges), and Dr. Spence Watson, were of the type of men that were called in." I pause there for a moment to say that Sir David Dale was himself one of the largest employers in the North of England in the iron trade, and although it is said that he was an entirely exceptional man, being trusted by both sides, his selection under the Act as arbitrator to settle industrial conditions in which he himself was directly interested, itself shows that as the term "arbitration" was understood in relation to such disputes, the decision of the dispute by a person personally interested and, indeed, one of the disputants, is not outside the ambit of arbitration in this connection. But Lord Amulree continues in a passage that is of the very highest importance in this case. He says:—"The awards of such men were loyally accepted. It was felt, however, that the practice of throwing full and undivided responsibility upon one person had its drawbacks. The single arbitrator relied entirely upon the arguments and statements put forward by the *parties* appearing before him. If the case was highly technical he might have the help of assessors; but these were only for consultation on the facts and in no way shared

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responsibility for the award. It was felt that a safer method was to be found in *a reversion to the old system under which the matter in dispute was determined by a tribunal of three persons; one representing the point of view of the employers; another representing the point of view of the workpeople; and a third having no connection with either employers or workers.* The advantage of this form of tribunal is that while *it is incumbent upon each member of the tribunal to take, as far as he is able to do so, an impartial view of the matter in issue*, it is helpful to the chairman to be able to talk over the matter in private with *two persons* who are able to assess at their right importance the various considerations urged by the parties; and who know something of the industrial and psychological background of the arguments brought forward." At p. 113 Lord Amulree says:—"In 1908 when Mr. Winston Churchill was at the Board of Trade, the panel of arbitrators was reconstructed in accordance with this view, and it henceforth consisted of a panel of chairmen, and panels of persons capable of representing the points of view of the employers and employees respectively. Henceforward arbitration might be by a single arbitrator, as before, or by a Court consisting of three or five members, together, if necessary, with assessors appointed to give the Court information on technical matters. The first Court appointed under this arrangement dealt with 'quantities' statements of 'clickers' in the boot and shoe trade of Northampton, and consisted of Sir A. E. Bateman, K.C.M.G., chairman, Sir Albert Spicer, Bart., M.P., *representing the employers*, and Mr. (afterwards Sir) D. J. Shackleton, M.P., representing the workpeople." At pp. 114-118 reference is made to a new industrial council established in 1911. It consisted of thirteen representatives of employers, thirteen representatives of workers, with Sir George (now Lord) Askwith as chairman. At p. 117 it is said that "the council included arbitration amongst its functions, but its principal purpose appears to have been to ventilate the rights and wrongs of any dispute of major importance. *The representative members were all actively engaged as officials of employers' and workmen's associations.* It was, in any case, too large to act as a judicial tribunal; and although it was agreed at its first meeting that members should treat matters 'as though they were acting

in a judicial capacity and not as advocates,' it was rather a large demand to make on their powers of detachment, engaged as they otherwise were as protagonists on the side of employers or employees, and selected as they were because of that fact." The learned author proceeds to state that it was not a success, their appointments being for one year, and renewed only once, so that the council ceased. But it is perfectly plain that, whatever difference existed in the constitution of arbitrators or boards of conciliation and arbitration, then "the general principles of conciliation and arbitration were thus taking root," as Lord Amulree says at p. 119. (See also p. 106 as to National Wages Board.) It is also unquestionably evident that as used and understood in relation to industrial disputes from 1860 continuously to the present day, the ambit of the term "arbitration" is large enough to include decisions by persons selected either voluntarily or compulsorily as arbitrators who represent the viewpoints of the disputants, and even if they are directly interested in the dispute itself as members or employees of the disputing parties. *It is expected of them that they will act impartially. It is presumed that they will do so to the best of their ability*, and the course of industrial history on this point shows that it is often safer in the interests of industrial peace to trust to the members of the tribunal recognizing not only the duty of conscientiously considering opposing views, but also the advantage to the parties with whose interests they are industrially connected or identified, not to persist in refusing what is reasonable. This, according to the authorities I refer to, has obviously been considered a more satisfactory method of arbitration than confining the term to the decision of persons whose personal ignorance of the conditions of the industry is a *sine qua non* of their eligibility as arbitrators. Instances of the last-mentioned class of arbitrator are given by Lord Amulree at pp. 100, 101. He says:—"One distinguished counsel, who afterwards became a Judge, so completely failed, that a witness at a subsequent inquiry (voicing the views of many people) declared with reference to the case decided by this arbitrator that 'that one settlement did more harm to the arbitration question than any other thing that I know of.' Another so failed to apprehend the technical expressions and technical points at issue that the

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parties quietly ignored his award and effected a settlement in another way." One cannot fail to notice that if individuals selected as *personæ designatæ* to be arbitrators in an industrial dispute were to be legally considered impossible because they were interested in the result, as officials or members of an organization or as employees or as one of several contending employers, voluntary industrial arbitration and perhaps even compulsory industrial arbitration would be almost impossible. For instance, if voluntary arbitration be resorted to in a coal dispute, would a wholesale boot manufacturer or a director of a gas company, be excluded because he was deeply and directly interested pecuniarily in settling the dispute and, indeed, in settling it on the basis of a low wage rate ? Almost any member of the public, and even Judges on the Bench, might be held to be personally interested in securing a low price for coal, or a resumption of coal production at all costs, for home purposes or travel. The very nature of the subject differentiates it in this respect from an ordinary arbitration. A mercantile dispute, or, indeed, any individual dispute, concerns the parties only, and the public are without interest in the result. But as to an industrial dispute, there are always three parties more or less directly interested, the immediate disputants and the public, the latter variously affected, but always in fact affected by the interruption of services. The quotations above made are only recognitions of this important consideration.

(c) *The Validity of the Act.*—Having ascertained the relevant meaning of conciliation and arbitration, it will be perceived that the validity and force of sec. 33 of the Principal Act, as enacted by the amending Act, depend entirely upon the validity of sub-secs. 1, 2, 3, 4, 5 and 18 of sec. 34, as since the amending statute that section now stands. If those sub-sections are valid, the applicants must, in my opinion, succeed. In order to make it clear that sec. 33 depends on sec. 34, I shall quote these provisions of sec. 33 and of the sub-sections mentioned. Sec. 33 provides: "Notwithstanding anything contained in this Act" (that is, in the Principal Act as amended by the recent Act), "an industrial dispute or an application to vary an award shall not be dealt

with by the Court or a Judge thereof, in pursuance of any power conferred upon the Court or Judge by this Act, in any case in which a Conciliation Committee has been appointed in pursuance of an application made under sub-section 2 of the next succeeding section." The new sec. 34 is the next succeeding section. Sub-sec. 1 of that section says: "In order to prevent or settle industrial disputes the Governor-General may appoint, for such period as he thinks proper, Conciliation Committees consisting of such number of persons as he thinks proper, and of a chairman appointed by him in accordance with sub-section 4 of this section." Sub-sec. 2: "An application for the appointment of a Conciliation Committee by the Governor-General may be made in the prescribed manner to the Industrial Registrar by any party to an industrial dispute." Sub-sec. 3: "A Conciliation Committee may be appointed in relation to industrial disputes in an industry, or in a branch or section of an industry defined by reference to locality or otherwise." Sub-sec. 4: "The Governor-General may appoint a Conciliation Commissioner as chairman of any Conciliation Committee appointed under this section." Sub-sec. 5: "Of the members, other than the chairman, one-half shall be representative of employers and one-half shall be representative of organizations of employees." Sub-sec. 18: "The foregoing provisions of this section shall apply in relation to applications to vary awards in like manner as they apply in relation to industrial disputes, as if the determination of such application were the settlement of industrial disputes." From the facts that I have narrated it will be seen that a Conciliation Committee was appointed *de facto* in pursuance of a *de facto* application made under sub-sec. 2 of sec. 34. If that application and that appointment are valid in law, it follows from the provisions of sec. 33 that the Arbitration Court had no jurisdiction to make its order of 4th October, provided that order on examination is found to be a variation of the award of 25th March. It was not disputed at the Bar that, assuming the validity of the legislation, the Committee was properly appointed. Nor do I think any doubt can exist that it was properly appointed. It was, however, contended on behalf of respondents that sec. 38 (*oa*), introduced by the amending Act, conferred upon the Court an unconditional power to set aside

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an award in whole or in part, even assuming the validity of secs. 33 and 34. The plain answer to that contention is that sec. 33 is introduced by the words "Notwithstanding anything contained in this Act," and therefore the prohibition in the circumstances of this case to vary the award of 25th March would, if valid, override the power in sec. 38 (*oa*). That the order of the Court of 4th October is a clear and distinct variation of the award of 25th March is hardly disputable. I defer the examination of the order and award for this purpose until I have completed my observations on the major question of the validity of secs. 33 and 34.

As it appears to me, the difference of opinion that unfortunately exists in this Court as to the validity of sec. 34, and consequently of sec. 33, depends upon two considerations, namely, the true connotation of the word "arbitration" in sec. 51 (xxxv.), and the construction of sec. 34. As to the first, namely, the meaning of "arbitration," I have already dealt with it, and I will only add this observation with regard to that matter: It appears to me that reading sec. 34 so as to follow its terminology and its scheme, the framers of the section adhered very closely to the historic meaning of the expressions used in the relevant connection. I am, of course, referring only to the interpretation of the words used, and not in any way to the policy or method adopted, which must remain entirely outside the consideration of this Court.

Construction of Sec. 34.—Before proceeding to construe the actual terms of sec. 34 as actually passed, it is necessary to have regard to some other sections in order to understand with sufficient clearness the nature and functions of a Conciliation Committee as constituted by the Act. It is not a meeting of the disputants, nor do its members meet as delegates of the disputants. *It is a new statutory tribunal*, having an independent entity and clothed with certain powers, and having jurisdiction to act and to arrive at conclusions and to perform its functions, sometimes in unanimity and sometimes by a majority. For instance, in sec. 31 a Conciliation Committee or a majority may if it thinks fit, *in any proceeding before it*, at any stage and upon such terms as it thinks fit, state a case in writing for the opinion of the Court upon any question of law arising in the proceeding, &c. Again, "Subject to this Act the Court shall

hear and determine any question stated under the last preceding sub-section and remit the case with its opinion *to the . . . Conciliation Committee.*" And finally, by sub-sec. 6 of sec. 31, " The Conciliation Committee or a majority thereof (as the case may be) may thereupon *make an award* not inconsistent with the opinion of the Court, and any award so made shall have the effect of an award of the Court." In sec. 31A an appeal is given to the Arbitration Court against any provision in any *award or order* of a Conciliation Committee affecting (a) wages, (b) hours, (c) any condition of employment, which in the opinion of the Court is likely to affect the public interest. Sub-sec. 4 of the same section says that an award or order of a Conciliation Committee " shall not, *except by consent of all the parties*, have effect until after the expiration of twenty-one days from the making thereof." It is plain from the sub-section last quoted that even a unanimous Conciliation Committee is *not the agreement of the parties.* It is equally plain that when the Act speaks of *a proceeding before the Conciliation Committee*, Parliament never intended the Conciliation Committee to be the parties themselves, or to be their representatives in the sense of agents in the conduct of the case in the proceeding upon which the tribunal was adjudicating, *or to decide the issues without hearing the parties.* Consequently, when we reach sec. 33 it is obvious that Parliament has determined that if either party has asked for a Conciliation Committee *as the tribunal*, and if the Executive has acceded to that request by appointing one, the Court is not to be the tribunal for dealing with the dispute or varying an award. That function is assigned to the Conciliation Committee, or in certain events to the Conciliation Commissioner with an appeal as to designated matters to the Arbitration Court. On sec. 34 the whole structure of Conciliation Committees rests. If that section is invalid, it seems to me not merely are conciliations annihilated, but the office of Conciliation Commissioner is practically a sinecure, at best a costly and almost useless occupation in the scheme of Arbitration, and even the Court is shorn of some of its intended jurisdiction. The first disputable provision of sec. 34 is sub-sec. 5, already quoted. Now, when it says that one-half of the members of a Conciliation Committee, other than the chairman, shall be " representative of employers,"

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and one-half shall be " representative of organizations of employees " that does not mean, consistently with the terminology employed in industrial disputes, that any member of the tribunal represents any disputant in the sense of agent, or as fighting his battle of claim or refusal, regardless of the rights of other disputants. The word " representative " in that collocation means, in accordance with the well understood terminology of the arena of industrial disputes, sufficiently illustrated above, *representative of the views of employers or employees*, as the case may be, bringing to the discharge of their functions first-hand knowledge of the essential facts and requirements of the two respective industrial groups, but not as adjudicators identified with actual disputants, and presumably prepared to act impartially in their determinations. It is significant that the members are to be *representative* of the employers and employees respectively, which is quite different from saying they shall be *representatives* of the disputants respectively. This is not only fully supported by the reference made to the actual history of industrial arbitration, but is indicated beyond any possibility of doubt by Commonwealth legislation *in pari materia*, as in the *Industrial Peace Act* 1920, secs. 5, 9, 14 and 22, where the identical expressions are found. Sub-sec. 6 of sec. 34 enacts: " Before appointing the members representative of employers or of organizations of employees, the Governor-General may take into consideration any recommendations made by or on behalf of employers or organizations of employees in relation to such appointments." Here again " employers " and " organizations of employees " are in the plural, and are general. The personnel of the Committee may be the subject of recommendation of any employer and any organization interested. They may be entirely unconnected with the industrial dispute in respect of which the application was made. Sub-sec. 7 says: " The first meeting of a Conciliation Committee in relation to a particular dispute shall be summoned by the chairman, and thereafter meetings shall be held at times agreed upon between the parties, or, in default of agreement, fixed by the chairman." Now, the personnel of the Committee being validly selected as possible arbitrators, there remains to be considered the procedure necessary for that purpose.

There are three reasons which convince me that at the first meeting of a Conciliation Committee in relation to any particular dispute, *an opportunity must, even for conciliation, and certainly for arbitration, be given to the parties themselves to be present personally or by their representatives, and to have a full and fair opportunity to support their respective views.* The first is, by sub-sec. 3 of sec. 34, the appointment of the Committee is not in relation to any specific material dispute. It is appointed like the various tribunals under the *Industrial Peace Act*, as *a standing tribunal* in relation to all industrial disputes that have occurred or may occur and require to be settled during the period for which it is appointed (sub-sec. 1) in the industry or branch or section of the industry for which it is appointed. If sec. 34 is invalid, so may be the *Industrial Peace Act*. It is evident that the personal identification of its members with any given dispute is by no means a certainty. The second reason is that its function is first of all to conciliate the parties, and, as appears from sec. 31 of the Principal Act as amended, sub-secs. 4, 5 and 6, and from sec. 31A of the Principal Act already quoted, the Committee has judicial functions to perform—not judicial in the strict sense, but in the same sense as administrative bodies frequently perform their function. This fact brings into play the principle of the common law stated by Lord *Loreburn* L.C. in *Board of Education* v. *Rice* (1), and already quoted. It is true that the members have been selected because of their personal acquaintance with the industry for which the Committee has been appointed. Still, that may leave a multitude of considerations to be put forward and urged by the respective parties and supported if the parties choose both by agreement and evidence. And Lord *Loreburn*, in the passage I have mentioned, has referred very clearly to the legal duty of administrative bodies who may have to arrive at a conclusion of fact or law. There are many other cases laying down the same inherent principle. They include *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (2) and *Green* v. *Howell* (3), and it would be pedantic further to quote authorities for the elementary proposition

(1) (1911) A.C., at p. 182.
(2) (1906) A.C. 535.
(3) (1910) 1 Ch. 495, at pp. 504, 508, 510.

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involved. Being tacitly included in the statutory function of quasi-judicial determination, there is no need to express it. The Court will always intervene if it has been violated. *Sub-sec.* 11 *therefore connotes that the parties have an opportunity by themselves or their representatives, in the sense of agents, to be present and to place their respective cases before the Committee.* In fact, to my mind it is absurd that the parties should not be notified to be present, since they are the disputants to be reconciled. What I have said as to the history of arbitration in industrial disputes really puts this beyond question. The third reason is that subsequent meetings are to be held at times agreed upon between "the parties," or, in default of agreement, fixed by the chairman. The sub-section itself draws a clear distinction between the Committee and the parties, and there is very good reason for this. One or other of the parties disputing may require more time for consideration than the other party is willing to allow, and it is very desirable that the Conciliation Committee at such a stage should not side with one party or the other. In any case the Court has no warrant for altering the words of the Legislature. Sub-sec. 8 is as follows: "The chairman shall not be present at or take part in any deliberations of a Conciliation Committee until or unless he is of opinion, or is informed by a representative of one or each of the parties, that the representatives appear unlikely in his absence to come to an agreement upon all the matters in dispute." Again, "representative" is used as a noun, and in relation to the parties. The provision that the chairman is not to be present at or take part in any of the deliberations of a Conciliation Committee until it is or seems to him unlikely that the parties will come to a complete agreement, is one of the provisions of this section which indicate, as I have already said, that the framers of the section had an intimate knowledge of the history of industrial conciliation and arbitration. Lord Amulree, at p. 82, points out that Mr. Mundella sometimes found trouble arising out of his exercising his casting vote. But when the chairman is of opinion that agreement is unlikely, sub-sec. 9 provides: "Thereafter the chairman shall preside at all meetings of the Conciliation Committee." From this point the section contemplates the probable failure of complete conciliation, or of

complete agreement leading to an award without the chairman's assistance, and the possible necessity of an award by the Commissioner himself, and therefore requires him to be present so as to hear all the parties have to urge. It contemplates the two possibilities of a total agreement between the parties and the failure of the parties to agree completely. Sub-secs. 10 and 11 afford one alternative method of settling a dispute in whole or in part; sub-secs. 12 to 17 inclusive afford a second alternative. As to the first alternative, sub-sec. 10 says: "If an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at, the provisions of" sub-sec. 1 of sec. 24 "of this Act shall apply to that agreement." That agreement is obviously the "proposed award." Then sub-sec. 11 says: "If the majority of the members comprising a Conciliation Committee agree upon the terms of a proposed award for the prevention or settlement of a dispute or part thereof, the provisions of" sub-sec. 1 of sec. 24 "of this Act shall, subject to this section, apply to the agreement embodying those terms." Now, in order to understand the mutual operation of those two sub-sections, it is necessary to read and carefully consider sub-sec. 1 of sec. 24 referred to. That sub-section says: "*If an agreement between all or any of the parties as* to the whole or any part of the dispute is arrived at, a memorandum of its terms shall be made in writing and *certified by a Judge or a Conciliation Commissioner*, and *the memorandum when so certified* shall be filed in the office of the Registrar, and unless otherwise ordered and subject as may be directed by the Court or a Conciliation Commissioner shall . . . have the same effect as, and *be deemed to be, an award* for all purposes including the purposes" of sec. 38. "Provided that a Judge or a Conciliation Commissioner may refuse to certify any such memorandum if he is of opinion that the agreement is not in settlement of an industrial dispute or contains clauses which the Court or a Conciliation Commissioner has no power to insert in awards, or that it is not in the public interest that it should be certified." Since the relevant legislative power to make an award binding rests on arbitration as a means, it is obvious that in order that sec. 24 should be valid at all, it is not the mere agreement of the parties that can "have the same effect as, and be deemed to be,

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an award for all purposes including the purposes of" sec. 38. The agreement itself is so far only a *proposed award*, as a bill passed by one House is only a proposed law until agreed to by the other House. As sec. 24 originally stood, the Judge was constituted the arbitrator, and his certificate converted the proposed award into the award. Under the amended Act, by the joint operation of sec. 18C and the amendment of sec. 24, the Conciliation Commissioner, who similarly certifies, is constituted the arbitrator, and his certificate converts the agreement into an award in all cases in which he acts simply as Conciliation Commissioner. But up to and including sub-sec. 11 of the new sec. 34, the Conciliation Commissioner acts not independently, but as chairman of a Conciliation Committee, and therefore, as to the agreement between the parties mentioned in sub-sec. 10, it is the Conciliation Committee that takes the place of the Judge or the Conciliation Commissioner in other cases. The agreement mentioned in sub-sec. 10 constitutes the terms of "a proposed award." *It is for that purpose the parties agree*; but inasmuch as sec. 33 cuts out the Judge, and inasmuch as there is no provision permitting the Conciliation Commissioner to take the matter at that stage out of the hands of the Conciliation Committee, it follows that some other provision had to be made, and the words of sub-sec. 11 distinctly provide for the approval of the *parties' proposed award by the Committee*. That is *the award* referred to in sec. 31A as the award of a Conciliation Committee. That is the first alternative which I have referred to. The distinction made between the "parties" and "the majority of the members comprising a Conciliation Committee" is distinct. Sub-sec. 10 contemplates the possibility of all or any of the parties agreeing, as in other cases pertinent to sec. 24, for the purpose of a proposed award within sec. 24 of the Act. But sub-sec. 11 requires approval of the majority of the members of the Committee, whether all the parties or only a minority of the parties as far as they are concerned, arrive at the agreement. It also shows that the expression in sub-sec. 11, "the agreement embodying those terms," applies to *the agreement of the parties in sub-sec. 10 upon which the majority of the Committee have also agreed*. The second alternative to sub-secs. 10 and 11 is contained in a series of provisions commencing with

sub-sec. 12. That sub-section says:—"If the parties are unable to agree upon the terms of a proposed award for the prevention or settlement of a dispute or part thereof" (which is the converse of sub-sec. 10), then says the sub-section: "and the views of the chairman do not coincide with the views of either party" (and how can he know unless the parties are present and have been heard by him?), "the chairman may issue a summons directed to such persons or organizations as he thinks proper, calling upon them to show cause to him why an award should not be made in accordance with the terms which in his view should be inserted in an award, which terms shall be set forth in, or attached to, the summons." The succeeding provisions from sub-sec. 13 to sub-sec. 17 inclusive need not be quoted verbatim, because no one could for a moment dispute that they merely regulate the procedure of an undoubted arbitrator. It should here be added as to sub-sec. 12, that if the parties are unable to agree upon the terms of a proposed award, but the views of the chairman *do* coincide with the views of one of the parties, the Act provides, by sec. 18C, that he may proceed under the general powers of sec. 38 to make an award accordingly. For every conceivable case the Act makes provision for arbitration if necessary, and partly by the express words of the statute and partly by force of the common law principles of natural justice, the law requires that *the parties* be sufficiently heard before an award is made by any tribunal. Two considerations it is imperative to bear in mind at this point. The first is the presumption of legality of a statute unless the Court is compelled by coercive language to the contrary. I repeat what I said on this subject in *Federal Commissioner of Taxation* v. *Munro* (1):—"Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim *Ut res magis valeat quam pereat.* Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must

(1) (1926) 38 C.L.R. 153, at p. 180.

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be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the Legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in *Macleod* v. *Attorney-General for New South Wales* (1). It is the principle which the Supreme Court of the United States has applied, in an unbroken line of decisions from *Marshall* C.J. to the present day (see *Adkins* v. *Children's Hospital* (2)). It is the rule of this Court (see, for instance, per *Griffith* C.J. in *Osborne* v. *Commonwealth* (3))." The second is that no Court can presume in advance that a tribunal constituted by Parliament to perform quasi-judicial functions will fail to observe the elementary requirements of justice. If a failure occurs, that can always be corrected, but the failure affects, not the validity of the enactment, but the particular decision complained of. With regard to an award by the Court or a Conciliation Commissioner sec. 25 gives express directions. With regard to the award of a Conciliation Committee under sec. 34, no such express directions are given. But why ? Simply because the law presumes natural justice will be adhered to, and, indeed, must be adhered to if conciliation is bona fide attempted, and because the only award which the Committee is empowered to make is one in accordance with the agreement which the parties themselves or their representatives for that purpose ultimately make. The opinion of this Court under sub-secs. 4, 5 and 6 of sec. 31 is one to which the agreement of the parties submitted to the Committee must conform before the Committee can transform it into an award under sec. 24. And if that course is not adopted, or in any other proper case, the provisions of sec. 31A apply as to wages (apparently so as not to transgress the law as to basic wage), or hours (apparently to preserve standard hours), or any condition affecting the public

(1) (1891) A.C. 455.
(2) (1923) 261 U.S. 525, at p. 544.
(3) (1911) 12 C.L.R. 321, at p 337.

interest—that is to say, three subjects which not even the agreement of the parties is permitted with impunity to affect prejudicially the public policy declared by the Legislature. The position, therefore, so far as the construction of the Act is concerned, is that awards may be made in various circumstances by a Judge as distinguished from the Court, or the Court, or a Conciliation Commissioner, or a Conciliation Committee. And the question is whether the constitutional provision contained in sec. 51 (xxxv.) of the Constitution is large enough to enable that to be done, and if not, whether the *Acts Interpretation Act* as it now stands saves sufficient of sec. 34 to give force and effect to sec. 33.

I have already indicated my opinion as to the connotation of the words "arbitration" and "industrial dispute" in that sub-section of the Constitution. So far as the word "arbitration" is concerned, even if the opinion of the majority of the Court is correct and therefore the word is to be so restricted as to exclude what the industrial world and great and responsible administrators, official and non-official, of industrial disputes in England, as well as the Federal Parliament, have thought it to include, or if for any other reason it be considered the requirements of arbitration by the Conciliation Committee have not been met, still, in my opinion, there is, in view of recent legislation, sufficient in sec. 34 of unimpeachable validity to enable sec. 33 to deprive the Arbitration Court of jurisdiction to make the order of 4th October 1930.

The Acts Interpretation Act 1901-1930, *sec.* 15A.—By Act No. 23 of 1930, called the *Acts Interpretation Act* 1930, a new section, numbered 15A, was introduced into the Principal Act. Its terms are: "Every Act, whether passed before or after the commencement of this section, shall be *read and construed* subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, *to the intent* that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power." That section has been proclaimed. That section, since the proclamation, is a declaratory enactment, applying to every Commonwealth statute whenever passed. It is a direction binding all strictly judicial tribunals—for they alone

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have the constitutional duty or power of determining the validity or meaning of a statute—that every Commonwealth Act "shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth." That portion of the section is a direction to every Court—to this Court in the present case—to disregard any portion of the statute that is invalid as exceeding the legislative powers of the Commonwealth. The second part proceeds to a further process of construction, namely, "To the intent that where any enactment . . . would, but for this section, have been construed as being in excess of that power"—as, for instance, sec. 33 or sec. 34—"it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power." That is to say, if, after discarding all excess exercise of legislative power, there remains any legislation that is within that power, the valid portion stands and must be given effect to. Now, although the section did not "commence" until it was proclaimed, yet once it has commenced so as to be a binding direction to this Court, its *operation* goes back to the commencement of every Act that is affected by it. It needs no subtle reasoning to convince one that a Court cannot say an Act was invalid yesterday and is valid to-day. Without that statutory rule of construction the Court might, as in the case of *Owners of s.s. Kalibia* v. *Wilson* (1) be compelled to say an enactment is invalid *in toto*. But with that rule of construction in existence, there cannot at the same moment be a reading and construction that makes the Act valid and one that makes it invalid. There can at a given moment be only one "construction" of a statute. The leading relevant principle is that stated by *Parke* B. in *Attorney-General* v. *Hertford* (2): "The Act, though not expressly mentioned to be so, yet, by way of construction, is declaratory of an antecedent Act, which is placed within the operation of the present Act; so that we must treat as part of it *all cases* falling within the antecedent Act." And *Platt* B. said (3): "The Court must give judgment in accordance with the direction contained in" the later Act, "which requires it so to expound the law, that certain gifts, though they might not before have been, shall now be *deemed* legacies subject

(1) (1910) 11 C.L.R. 689.

(2) (1849) 3 Exch. 670, at p. 685; 154 E.R. 1014, at p. 1021.

(3) (1849) 3 Exch., at pp. 688-689; 154 E.R., at p. 1022.

to duty." *A fortiori* must the principle be applied where there is an express legislative direction how the law is to be construed. Following that case is the case of *Attorney-General* v. *Theobald* (1). In 1889 an Act was passed saying that a certain description of property "shall be construed" &c. *Pollock* B. said (2) that *Attorney-General* v. *Hertford* (3) "is a strong authority that, if an Act is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable." *Hawkins* J. said (4): "The words are of a declaratory character, directing that, in all cases where the construction of sub-sec. 3 of sec. 38 comes in question after the passing of the Act of 1889, the former Act shall be construed as prescribed by the later Act." In *Harding* v. *Commissioners of Stamps for Queensland* (5) it is stated that the mere use of the words "it is declared" may be to introduce new rules of law. But, said Lord *Hobhouse* for the Judicial Committee (6), "the nature of the Act must be determined from its provisions." And then his Lordship, as his first reason for not considering an Act of 1895 as retrospective, says: "Now the Act does not contain any words to show that it purports to *construe* the Act of 1892." In *In re Lovell and Collard's Contract* (7) *Swinfen Eady* J., after referring to the last two cases already mentioned, said of sec. 6 of the *Finance Act* 1898 that it was "declaratory of the *construction* of sec. 54 of the *Stamp Act* 1891," and was retrospective.

Now, this is the first time that any strictly judicial construction of secs. 33 and 34 has been possible. The order of the Arbitration Court which is impeached in this case was made by that tribunal as an arbitral tribunal, and not under the judicial power of the Commonwealth. In that capacity it had no power to determine the validity of any enactment. It had, of course, to make up its mind as to the construction of the Act, but only for the purpose of the day, and no appeal to this Court in its appellate jurisdiction from the order made on 4th October would lie. (See *Story* on the

(1) (1890) 24 Q.B D. 557.
(2) (1890) 24 Q.B.D., at p. 559.
(3) (1849) 3 Exch. 670; 154 E.R. 1014.
(4) (1890) 24 Q.B D., at p. 561.
(5) (1898) A.C. 769.
(6) (1898) A.C., at p. 775.
(7) (1907) 1 Ch. 249, at p. 255.

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Constitution of the United States, par. 1761; and sec. 73 of the Australian Constitution.)

But, in addition to that, no question was ever raised before the Arbitration Court as to the validity of secs. 33 and 34, though there was a contention that sec. 38 (*oa*) gave to that Court a power independent of sec. 33. The Court considered the matter as in duty bound, and thought that that argument was correct. But it was not a strictly judicial decision, but only a conclusion which satisfied the arbitration tribunal that it was not exceeding its jurisdiction. The present occasion is an application in the original jurisdiction of this Court to decide whether the arbitral tribunal acted lawfully, and it is incidental to this case that secs. 33 and 34 have to be judicially construed. We have, therefore, to construe them in accordance with the legislative direction as to construction contained in sec. 15A of the recent *Acts Interpretation Act*. In obedience to the legislation, whatever we find invalid in either of these sections, we have judicially to eliminate and to retain so much of those sections as we find to be valid. And further, we have judicially to regard those sections as standing in that corrected condition as from their enactment, and consequently as being so corrected from 18th August 1930 onwards. On this basis the application of the Union for a Conciliation Committee, the appointments by the Governor-General in Council, the hearing by the Arbitration Court of the application to set aside the award, the making of its order, the issue of the summons under sec. 21AA of the Act, the argument in this Court, and our judgment on that summons, must be deemed to have occurred under the amended Act construed as we are directed to construe it. *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (1) must have been differently decided had sec. 15A of the *Acts Interpretation Act* been then in force.

Now, it has not been contested, and could not be sanely contested, that sub-secs. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 18 are valid to the extent at least of attempted conciliation. If, therefore, supposing the rest to be invalid, then in obedience to sec. 15A of the *Acts Interpretation Act* above quoted, the sub-sections I have just mentioned are to be taken as intended by Parliament to operate, even though

(1) (1925) 35 C.L.R. 422.

all the rest be struck out. And retaining those sub-sections, the conditions of sec. 33 are fully satisfied, because this is a "case in which a Conciliation Committee has been appointed in pursuance of an application made under" sub-sec. 2 "of the next succeeding section"—that is, sec. 34. There are two decided cases of great importance with reference to sec. 15A of the *Acts Interpretation Act*, and which support the views I have expressed. I take them in order of date. In the case of *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1) the very words of that section were construed by this Court. The provision appeared in sec. 2 (2) of the *Navigation Act* 1912-1920. *Inter alia*, the validity of the whole Act with its Schedules was challenged, in so far as it applied to the plaintiff's ships. This claim was made in reliance on the *Kalibia Case* (2). In the judgment in the *Newcastle and Hunter River Case* (3) it is said by the whole Court (consisting of *Knox* C.J. and *Higgins*, *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ.): "We think this provision is a *legislative declaration of the intention of Parliament* that, if valid and invalid provisions are found in the Act of Parliament, *however interwoven together, no provision within the power of Parliament shall fail by reason of such conjunction*, but the enactment shall operate on so much of its subject matter as Parliament might lawfully have dealt with." (The italics are mine.) I think it would be difficult to frame a proposition more definitely supporting the position that sec. 15A is a *declaratory* Act as to construction, and therefore retrospective as well, as to the validity of the necessary sub-sections of this case. Though not a member of the Court in that case, I entirely agree with the proposition quoted. The judgment proceeds:—"The intention and effect of the section may be illustrated by reference to sec. 135 of the Act. In terms the provisions of that section apply to the owner of every steamship registered in Australia or engaged in the coasting trade. This class of ships includes: (1) every ship registered in Australia engaged in inter-State or foreign trade; (2) every ship so registered engaged solely in intra-State trade; (3) every ship not so registered engaged in inter-State trade; (4)

(1) (1921) 29 C.L.R. 357. (2) (1910) 11 C.L.R. 689.
(3) (1921) 29 C.L.R., at p. 369.

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every ship not so registered engaged solely in intra-State trade. With respect to the ships comprised in classes 1 and 3, the Parliament has power to enact the provisions of sec. 135; with respect to those comprised in classes 2 and 4, it has no such power. The decision in the *Kalibia Case* (1) proceeded on the footing that the inclusion in one collective expression in an Act of Parliament of objects as to some of which the enactment was invalid, operated to invalidate the whole enactment because it did not appear that Parliament would have imposed the rule as to some only of the class if the whole class could not be affected. The whole enactment was declared invalid in that case only because it was impossible to ascertain an intention that some only of the class designated by the collective expression should be affected if the others were not. But in the present case sec. 2 (2), though its verbal expression may be open to criticism, sufficiently disclosed the intention of Parliament that if all four classes of ships could not be brought under the provisions of sec. 135 those provisions should operate in respect of all ships to which they might lawfully be applied. There is, in our opinion, nothing to prevent Parliament from legislating in this way in order to make its intention clear." Again I entirely agree. That case, indeed, goes much further than is at all necessary in the present case. That section in terms included " the owner of every steamship registered in Australia, or engaged in the coasting trade." So far as the words of the section itself are concerned, it was *one complete conception embracing in general terms the whole of the classes mentioned* in the judgment referred to, and it was therefore impossible, but for the saving sec. 2 (2), to disintegrate the general statement and apply the enactment to such portions as were within the jurisdiction of the Federal Parliament. Sec. 34 of the *Conciliation and Arbitration Act*, on the other hand, is itself segregated, and, in my opinion, whatever might be said of its severability in the absence of the recent *Acts Interpretation Act*, sec. 15A, I cannot conceive how, in the presence of that section and the decision referred to, any doubt can be left as to the validity of all the conciliation provisions of sec. 34. And, as I have already stated, if so much is saved, there is sufficient to answer the conditions required by sec. 33. The same

(1) (1910) 11 C.L.R. 689.

view is taken in the next year, 1923, by the Supreme Court of the United States in the case of *Chicago Board of Trade* v. *Olsen* (1). *Taft* C.J., speaking on behalf of seven Justices of the Court—there being two dissentients, namely, *McReynolds* J. and *Sutherland* J.—said (2) :—" We do not find it necessary to our decree in this case to consider the constitutional objections made in the bill to that part of the fourth section which forbids the use of the mails and inter-State facilities of communication to offer or accept sales for future deliveries or to send quotations of prices thereof except through members of a Board of Trade, because the plaintiffs are not affected thereby. Sec. 10 of the Act reads as follows : ' If any provision of this Act or the application thereof to any personal circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.' " The Chief Justice proceeds to say : " The unconstitutionality of these provisions, if they be unconstitutional, would, therefore, not invalidate the rest of the Act."

Consequently, unless standing by themselves, sub-secs. 1 to 9 inclusive of sec. 34 are invalid, there is no ground whatever, in my opinion, for declining to give full effect to sec. 33, which ousted the jurisdiction of the Arbitration Court from making the order of 4th October, if that order constitutes, as I hold it does, a variation of the award of 25th March.

Arbitration Court Order.—It was said for the applicants and the Commonwealth that the form of the application to set aside the award should be disregarded if in fact it was acted on as an application to vary the award. I entirely agree. Sec. 33 would be violated by a variation of the award, whatever form the application took. The substance of the matter is that no variation of the award of 25th March 1930 could be made by the Court. We have then to see whether that order was in fact and in law a variation of the award. Inspection of the award as it stood before the order of the Court, and as it purports to stand now, at once reveals that the order has left an award still existing and operating, but very considerably and vitally varied. When the formal order, as signed by the learned

(1) (1923) 262 U.S. 1. (2) (1923) 262 U.S., at p. 42.

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Judges who made it, is applied to the award, and the latter verbally corrected accordingly, the true nature of the order as a variation of a pronounced character is clearly seen. Schedule C, the Victorian Daily Paid and Salary Grades award, may be taken as an example. There is first retained in Part I. all the clauses 1 to 7 inclusive. Those clauses are left to operate so as to be applicable to members of the Australian Railways Union and for the Federation of Salaried Officers of Railways Commissioners who are employed by the Victorian Railways Commissioners in grades or callings for which rates of pay are prescribed by the award. They also leave the award binding on the Union, its branches, officers, and members, and, except as to Part 3 (the Daily Paid Employees), on the Salaried Officers, and also on the Commissioners. They leave the duration of the award to continue until 31st December 1931 or such earlier date as may be ordered. Leave is still preserved, as prescribed by clauses 4 to 7 inclusive, to the Union to prosecute its claims under Dispute No. 1 of 1924, applicable to conditions of employment, and similarly to the Federation under Dispute No. 74 of 1926, applicable to conditions of employment, and to the Commissioners to prosecute their claims in Dispute No. 89 of 1929 and Dispute No. 90 of 1929, applicable to conditions of employment. The order retains clause 9 repealing certain interim awards made in disputes No. 142 of 1924 and No. 74 of 1926. In Part 2, as to which there had been claims for lump sums for daily wage, and in which the claims had been dealt by fixing a wage consisting of a basic wage with a certain additional margin according to stated divisions, the order reduced the daily wage to the basic wage only. As to casual male employees to whom a fixed hourly wage had been awarded, subject to the cost of living adjustment on which the basic wage was based, the hourly wage was reduced to the basic wage alone. As to junior male employees, the whole provision was eliminated. Female employees were reduced from a fixed rate of daily pay, subject to cost of living adjustment, to 54 per cent of the basic wage for males. Guards, tram conductors, and others have lost their guaranteed fortnightly payment, and minimum standard hours are left. Rights of advancement are set aside. In this and other schedules much is left and much is abrogated. To deny that the

order did not seriously vary the award seems to deny the obvious. And the residue of the award remains as an award, by which the Court, so far from vacating control of State railways, retains its hold, binds all parties, enables further awards to be made in respect of the main dispute, and permits further awards to be made in respect of other existing disputes, and yet alters rights and duties formerly referable to the award.

I therefore hold that the applicants upon this summons should succeed, and the questions submitted should be answered in their favour.

Owing to temporary indisposition my brother *Gavan Duffy* has been unable to prepare a reasoned judgment in this case, but he wishes me to state that he feels constrained by the majority opinion in the *Engineers' Case* (1) to hold that the Commissioners of Railways are subject to the power conferred by sec. 51, sub-sec. xxxv., of the Constitution. He is also of opinion that though sec. 27 of Act No. 43 of 1930 attempts to confer on Conciliation Committees powers which it is not within the authority of the Parliament to confer, sec. 3 of Act No. 23 of 1930 compels him to hold that sec. 26 of Act No. 43 of 1930 is valid, and deprives the Arbitration Court of power to make the order which it purported to make.

RICH, STARKE AND DIXON JJ. We have already stated our conclusion that sec. 33 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 is void, and we now proceed to give reasons for that conclusion. Sec. 33 and sec. 34 were inserted in that statute by Act No. 43 of 1930, secs. 26 and 27. Sec. 34 provides for the appointment of Conciliation Committees by the Governor-General in Council. An appointment is to be made upon the application of a party to an industrial dispute or a party to an application to vary an award. Of the members other than the chairman, one-half are to be representative of employers and one-half representative of organizations of employees. This means no more than that they shall be typical of the class they represent. They are not chosen as the authorized agents of the disputants, but as persons whom the

(1) (1920) 28 C.L.R. 129.

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Governor-General in Council considers likely to appreciate their interests. This is made clear by the provision contained in sub-sec. 6 which requires the Governor-General in Council merely to "take into consideration" any recommendations made by or on behalf of employers or organizations of employees in relation to such appointments. The chairman of the Committee is to be a Conciliation Commissioner. He is to summon the first meeting of the Committee in relation to a particular dispute, but he is not to be present at, or take part in, its deliberations, until or unless he is of opinion or is informed by a representative of one or each of the parties that the representatives appear unlikely to come to an agreement on all of the matters in dispute. Thereafter he is to preside at the meetings of the Committee. Sub-secs. 10, 11 and 12 are as follows:—"(10) If an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at, the provisions of sub-section 1 of section twenty-four of this Act shall apply to that agreement. (11) If the majority of the members comprising a Conciliation Committee agree upon the terms of a proposed award for the prevention or settlement of a dispute or part thereof, the provisions of sub-section 1 of section twenty-four of this Act shall, subject to this section, apply to the agreement embodying those terms. (12) If the parties are unable to agree upon the terms of a proposed award for the prevention or settlement of a dispute or part thereof, and the views of the chairman do not coincide with the views of either party, the chairman may issue a summons directed to such persons or organizations as he thinks proper, calling upon them to show cause to him why an award should not be made in accordance with the terms which in his view should be inserted in an award, which terms shall be set forth in, or attached to, the summons." It appears to us to be quite clear that sub-sec. 11 purports to empower the majority of the members of a Committee to agree upon the terms of an award, and purports to apply the provisions of sub-sec. 1 of sec. 24 of the Act to that agreement of the Committee. Sec. 24 (1) provides that "if an agreement between all or any of the parties as to the whole or any part of the dispute is arrived at, a memorandum of its terms shall be made in writing and certified by a Judge or a Conciliation Commissioner, and the memorandum when so certified

shall be filed in the office of the Registrar, and unless otherwise ordered and subject as may be directed by the Court or a Conciliation Commissioner shall, as between the parties to the agreement . . . have the same effect as, and be deemed to be, an award for all purposes. . . ." We are quite unable to adopt the construction of sub-sec. 11 of sec. 34 by which it is made to mean that when the terms of a proposed award are agreed upon by the majority of the members of the Committee then they may be embodied in an agreement of the disputants themselves if they choose to make one. Such a construction appears to us to set the words of the provision at defiance and to make nonsense of its substance. It is evident upon a reading of the provision that the words "the agreement embodying those terms" refer to the agreement of the majority of the members of the Committee. To suppose that two agreements were contemplated, each voluntary and both to the same effect, is to render the first entirely superfluous. The parties are well able to arrive at an agreement whether a majority of the Committee do or do not agree, and it is not credible that the Legislature intended to fetter the parties' power to settle a dispute by agreement, by requiring as a preliminary condition that a majority of the Conciliation Committee should come to an identical agreement among themselves. We think that sub-sec. 1 of sec. 24 was meant to operate upon the agreement of the majority of members as it would operate upon an agreement between the parties to a dispute so that when filed pursuant to the certificate of the Commissioner it would bind the disputants as if it were an award. Sub-sec. 12 proceeds to provide for the case of the majority of the Committee being unable to agree upon the terms of a proposed award. When it says that "if the parties are unable to agree upon the terms of a proposed award . . . and the views of the chairman do not coincide with the views of either party" the chairman may call upon such persons or organizations as he thinks proper to show cause against an award which he proposes, it is clear that the "parties" referred to are the representatives. The chairman is not required to summon persons outside the Committee to show cause unless he cannot agree with one or other of the parties in the Committee. It is ridiculous to suppose that the provision means that if he is able to agree

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in toto with the demand of one set of the actual disputants no more is to be done, whereas if he disagrees with both of them he may proceed to an award. Yet, unless sub-sec. 11, in giving force to the agreement of a majority of the representatives, provides for the contingency of the chairman's view coinciding with that of a "party," there is nothing which according to sec. 34 remains to be done. It is equally ridiculous to suppose that in the event of his views coinciding with one set of actual disputants, the Commissioner is to act under sec. 18C (8), because this would mean that he makes an award in such a case without a summons to show cause, whereas if his opinion is not identical with the demands of one set of disputants he must issue a show cause summons before proceeding to award. The explanation of the use of the term "parties" to describe the representatives is, we think, that the Legislature identified the representatives with the class they were intended to represent, and therefore spoke of them as if they were parties to the controversy. This, we think, explains the language in which sub-sec. 10 is expressed. When sub-sec. 8 provides that the chairman is not to be present until he has reason to think "that the representatives appear unlikely in his absence to come to an agreement upon all of the matters in dispute," it alludes to an agreement which manifestly is conceived as the end of the Committee's deliberations; but unless that agreement is the agreement to which sub-sec. 10 refers, it would have no force whatever and have no other character than an empty agreement between committeemen followed by no legal consequence. Sub-sec. 19, which provides against an alteration of the standard hours or basic wage by an "agreement" other than an agreement under sub-sec. 10, accords with this view and shows why sub-sec. 11 contains the words "subject to this section." For these reasons we are of opinion that the function assigned to the Committee was that of agreeing either unanimously or by a majority upon terms which, when certified and filed, were to regulate the relations of the disputants as an award would do and bind them accordingly whether any or all of them liked them or not. When and only when the Committee failed to agree is the chairman, as Conciliation Commissioner, to proceed to arbitration between the disputants. A law which enables a body of persons to settle a dispute by issuing a

decree arrived at by discussion amongst themselves without any hearing or determination between the disputants is, in our opinion, not a law with respect to Conciliation and Arbitration for the prevention and settlement of industrial disputes and is not authorized by sec. 51 (xxxv.) of the Constitution. We are therefore of opinion that the provisions of sub-secs. 8, 9, 10, 11 and 12 are void. Sub-secs. 13, 14, 15, 16, 17 and 19 are merely ancillary to these provisions, and have no present materiality. Sub-sec. 2 of sec. 34 enables any party to an industrial dispute, or to an application to vary, to apply for the appointment of a Conciliation Committee. In any case in which a Conciliation Committee has been appointed in pursuance of an application made under sub-sec. 2 of sec. 34, sec. 33 provides that an industrial dispute, or an application to vary an award, shall not be dealt with by the Court of Conciliation and Arbitration or a Judge thereof. The result, therefore, of a successful application for a Committee would be to accomplish a transfer of the industrial dispute or application to vary from the authority of the Court to the supposed authority of the Committee. As we have held, however, that the Committee has no authority in law, it follows that such a transfer is impossible. The provisions, which purport to empower it, form a single legislative enactment which, on ordinary principles, must be wholly valid or wholly void. During the argument, however, counsel were asked from the Bench whether sec. 15A of the *Acts Interpretation Act* 1901-1930 (inserted therein by Act No. 23 of 1930) had been proclaimed to commence, and, if so, whether it had any relevance. It appeared that it had not been proclaimed, but on the same day a proclamation was made by a Deputy of the person administering the Government of the Commonwealth fixing 27th October 1930 as the date on which the section should commence. We assume that the section was thus brought into operation so as retrospectively to alter the law. The section provides " Every Act whether passed before or after the commencement of this section, shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess

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of that power." In our opinion it does not affect the matter. We think it cannot mean that when the Court has reached the conclusion, as we have done in this case, that a single and indivisible enactment of the Legislature is invalid, the Court is to turn aside from its judicial duties and, assuming the role of legislator, proceed to manufacture out of the material intended to compose the old enactment an entirely new enactment with a fresh policy and operation. In this case it is suggested that we should recognize that a transfer of the subject matter from one authority to another involves divesting one and investing the other, and that sec. 15A might therefore be used to validate the divesting in spite of the invalidity of the investing. The suggestion, it is said, is supported by the fact that the transfer is accomplished by two provisions, one giving and the other taking away. Unfortunately for this attempt to sever the substance by a neat division of its expression, sec. 33, which takes away, is in terms expressed to depend upon sub-sec. 2 of sec. 34. The consequence of such an application of sec. 15A would be that an attempt on the part of the Legislature to provide for the settlement of an industrial dispute by transferring authority over it from the Court to the Committee would result in the disappearance of all authority whatsoever over the dispute. The truth is that sec. 15A cannot apply to divert legislation from one purpose to another. In *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1) this Court considered a similar provision in the *Navigation Act* 1912-1920. It may be that a general provision applying to all legislation cannot be given the same operation as a special provision introduced into legislation the precise character of which was before the Legislature. Apart from any other considerations a later enactment would prevail if it disclosed a clear intention inconsistent with the application to it of sec. 15A, as perhaps it may be said Act No. 43 of 1930 does in this very case. But, adopting the metaphor which was employed to describe the effect of the provision in the *Navigation Act*, it enables the Court to uphold provisions, however interwoven, but it cannot separate the woof from the warp and manufacture a new web. It was suggested that perhaps the Committee had duties of conciliation

(1) (1921) 29 C.L.R. 357.

for which it might be well erected and that sec. 33 might be upheld because of the existence of those duties. Unfortunately for this view, the section contains no reference to duties of conciliation unless, indeed, the mutual conciliation of the representatives is impliedly referred to in the provisions relating to agreement among them. But, in any case, if conciliation of the disputants be one object and settlement by decree another, a more reasonable application of sec. 15A of the *Acts Interpretation Act* would be to separate the transfer of duties of conciliation from the attempted transfer of coercive authority and not to divide the process of transfer into steps of deprivation and investiture of power. For these reasons we think all material provisions of sec. 34 are invalid, and that sec. 33 is inseparable from them. We are, therefore, of opinion that sec. 33 is invalid and the purported appointment of the Conciliation Committee or Committees does not operate to impair the authority of the Court of Conciliation and Arbitration to deal with the awards of 25th March 1930, and, in particular, to make the order in the summons mentioned.

RICH J. I concur in the reasons to be published by my brother *Dixon* for holding the awards to have been validly made.

STARKE J. This principle is established in this Court—that States, and persons natural or artificial representing States, when parties to industrial disputes in fact, are subject to Commonwealth legislation under pl. XXXV. of sec. 51 of the Constitution, if such legislation, on its true construction, applies to them (*Engineers' Case* (1); *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 2] (2)). It was not contended in the present case that the States, or the corporations or bodies set up by the States to control their railways, did not fall within the terms of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, and that was inevitable, I think, in the face of sec. 19 and the provision of sec. 4 that "industrial dispute" means "an industrial dispute extending beyond the limits of any one State and includes . . . any dispute in relation to employment in an industry carried

(1) (1920) 28 C.L.R. 129. (2) (1920) 28 C.L.R. 436.

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on by or under the control of the Commonwealth or a State or any public authority constituted under the Commonwealth or a State." But it was contended that the railways owned or controlled by the States are not within the constitutional power already mentioned (sec. 51, pl. xxxv.). One argument was that certain express powers were given over State railways and therefore necessarily excluded the grant of any further or other powers in relation thereto. In support of this contention, we were referred to the Constitution, sec. 51, pll. xxxii., xxxiii., xxxiv., and secs. 98 and 102. But none of the powers conferred by these provisions operate as a negation of the arbitral power; and one—that dealt with in sec. 98—simply makes clear the content of sec. 51, pl. i. Another submission made to us may be thus stated: the various State Acts under which the State railways are managed and controlled, delimit and define the capacities, powers and authorities of managing corporations or bodies such as Railway Commissioners; these corporations could not, therefore, lawfully do or perform any act or pay any moneys, in excess of the powers conferred by those Acts, or in any way contravene them. Reference was made by way of illustration to the *Railway Management Acts* 1891 and 1910 of Tasmania (55 Vict. No. 40; 1 Geo. V. No. 69) and to the *Railways Act* 1928 of Victoria (No. 3759). Thus the Tasmanian *Railway Management Act* of 1910, sec. 27, provides:—"All appointments to the Railway Service shall be made by, and tenable during the pleasure of, the Commissioner. The Commissioner may appoint such and as many officers and employees as he thinks fit, and from time to time dismiss them, and may increase or diminish the number of officers. The Commissioner shall pay such salaries, wages, and allowances to the officers and employees as he may by regulation prescribe, and as Parliament may appropriate for the purpose." A similar provision may be found in the Victorian Act (sec. 137). Consequently, the argument proceeded, the managing corporations or bodies could not become involved in any industrial dispute in which better terms or conditions were claimed than those allowed by their Acts, or pay any salaries or wages beyond those prescribed by their Acts and appropriated by Parliament. The problem involved in this argument is not a new one, and it might be enough to say that it was decided against

the States in the *Engineers' Case* (1) and in the *Merchant Service Case* (2). The answer, however, to the argument is that the Constitution is the supreme law of the land, and, as it is interpreted by this Court, States and persons natural or artificial representing States are subject to it, if parties to industrial disputes extending beyond the limits of any one State, and are bound by the provisions of any law made within its powers. (See Constitution, sec. 5.) But then it is said that this doctrine impinges upon the Constitutions of the States, which prohibit moneys being taken out of the Consolidated Fund of the States (into which the revenues of the States are paid), except under a distinct authorization from the Parliaments of the States. (See as to Tasmania, 13 & 14 Vict. c. 59, sec. 14; 18 Vict. No. 17, sec. 1; and as to Victoria, *Constitution Act*, secs. 44, 55, 58, Schedule to 18 & 19 Vict. c. 55; *Churchward* v. *The Queen* (3); *Commercial Cable Co.* v. *Government of Newfoundland* (4); *Mackay* v. *Attorney-General for British Columbia* (5); *Auckland Harbour Board* v. *The King* (6); *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (7); *Commonwealth and the Central Wool Committee* v. *Colonial Combing, Spinning and Weaving Co.* (8).) It would require, I agree, the clearest words in the Constitution to interfere with or impair this constitutional principle, embedded in the Constitution of the States, and I can find nothing in sec. 51, pl. XXXV. or pl. XXXIX., which warrants any such conclusion. And, in the absence of any such provision in the Constitution, sec. 106 is conclusive. But, even if awards made by tribunals constituted by the Commonwealth under the power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, imposed obligations upon the States or on corporations or bodies managing or controlling their activities (see *Mallinson* v. *Scottish Australian Investment Co.* (9)), still, as Lord *Haldane* pointed out in *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (10), the responsibility of producing the fund out of which

(1) (1920) 28 C.L.R. 129.
(2) (1920) 28 C.L.R. 436.
(3) (1865) L.R. 1 Q.B. 173.
(4) (1916) 2 A.C. 610.
(5) (1922) 1 A.C. 457.
(6) (1924) A.C. 318.
(7) (1925) A.C. 754.
(8) (1922) 31 C.L.R. 421.
(9) (1920) 28 C.L.R. 66.
(10) (1925) A.C., at pp. 773-774.

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the obligation can be met, depends upon provision being made by the Parliaments of the States, if they choose—and only if they choose —so to provide. The provisions of the *Judiciary Act* (secs. 65 and 66) recognize this principle, and it was applied to the *Crown Remedies and Liability Act* 1865 of Victoria. (*Alcock* v. *Fergie* (1); and see *Fisher* v. *The Queen* (2).) If a right be established against a State or a body managing its activities under the Commonwealth Arbitration laws, then the Courts must assume that "provision necessary to satisfy that obligation will be readily and promptly made" (*R.* v. *Fisher* (3); *Attorney-General* v. *Great Southern and Western Railway Co. of Ireland* (4)). In the last resort, however, if an obligation under an arbitration award made pursuant to the *Commonwealth Conciliation and Arbitration Acts* involves the provision of funds by the Parliaments of the States, then that obligation cannot be discharged, nor its penal sanctions broken, unless the necessary provision be made.

On the other aspects of this case, my brother *Rich* delivers his opinion and that of my brother *Dixon* and myself.

DIXON J. The question is whether awards of the Commonwealth Court of Conciliation and Arbitration prescribing minimum wages and conditions of employment in the railway services of the States were validly made. I think this Court should hold that they were validly made. We ought not to examine the correctness of the rule adopted by the majority of the Court in the *Engineers' Case* (5), for the interpretation of the legislative powers of the Parliament. This rule I understand to be that, unless, and save in so far as, the contrary appears from some other provision of the Constitution or from the nature or the subject matter of the power or from the terms in which it is conferred, every grant of legislative power to the Commonwealth should be interpreted as authorizing the Parliament to make laws affecting the operations of the States and their agencies, at any rate if the State is not acting in the exercise of the Crown's prerogative and if the Parliament confines itself to laws which do not discriminate against the States or their agencies.

(1) (1867) 4 W. W. & aB. (L.) 285.
(2) (1901) 26 V.L.R., at p. 794; 22 A.L.T., at p. 221; (1903) A.C., at p. 167.
(3) (1903) A.C., at p 167.
(4) (1925) A.C., at pp. 766-767.
(5) (1920) 28 C.L.R. 129.

We should also accept the conclusion that when sec. 51 (xxxv.) is interpreted in this manner, it empowers the Parliament to make laws which apply to the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. But when sec. 51 (xxxv.) receives this meaning an intention to exclude State Railways from its operation, although otherwise the States and their agencies are included within it, can scarcely be inferred from the provisions of the Constitution which deals specifically with railways (sec. 51 (xxxii.), (xxxiii.), (xxxiv.), sec. 98, sec. 102 and sec. 104). These provisions might have been used in support of the doctrine which formerly prevailed, namely, that prima facie a legislative power of the Parliament did not extend to the States or their agencies. But after the overthrow of that doctrine, it does not appear reasonable to find in these provisions an intention specially to exclude State Railways from the consequences of the doctrine by which it has been replaced. The Commissioners of Railways are, in my opinion, no less within the operation of sec. 51 (xxxv.) than the Governments of the States. From this it follows that the Parliament has power to make a law for the settlement by arbitration of industrial disputes including disputes upon State railways. But it does not necessarily follow that the Parliament may in such a law deal with a State, and the agencies of a State, as if it were legislating for the subject. During the argument of this case it appeared that the judgment of the majority of the Court in the *Engineers' Case* (1) ought not to be understood as laying it down that over a State the power of the Parliament is as full and ample as over the subject and allows the same choice of remedies, measures and expedients to secure fulfilment of the legislative will. Whether any and what sanctions may be applied to a State by a law of the Parliament with respect to industrial arbitration, or whether such a law can do no more than impose upon a State duties of imperfect obligation, are matters which did not then arise for consideration. Perhaps private rights may be conferred which are enforceable according to a law made under sec. 78 and sec. 76 (ii.) of the Constitution. It may be that sec. 106 provides the restraint upon

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the legislative power over States which differentiates it from the power over the subject and that no law of the Commonwealth can impair or affect the Constitution of a State. No doubt, sec. 106 is conditioned by the words "subject to this Constitution" but so too is sec. 51. In any case no claim on the part of the Commonwealth has been made for so full and complete a legislative authority over States as that which was ascribed to Congress in *Virginia* v. *West Virginia* (1). But the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 under which the awards were made are framed primarily for the purpose of dealing with subjects, and the case of Governments is not specially provided for. The States and their agencies as well as the Commonwealth are brought under the operation of the Act by means only of the definition of "industrial dispute." By force of this definition the term includes any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State or any public authority constituted under the Commonwealth or a State. It was not disputed that the Railway Commissioners of the various States fell within this description. The original definition in the Act of 1904 included the words "disputes in relation to employment upon State railways" and, when the definition was recast after the decision in the *Railway Servants' Case* (2), these words were dropped, but none of the counsel for the Commissioners relied upon this circumstance to qualify the effect of the general words of the definition. The provisions of the Act under which the States and their Authorities are thus thrown by the definition of "industrial dispute" are not well adapted for dealing with such bodies politic and some of the provisions seem inappropriate, particularly some which relate to the enforcement of orders and awards. The awards in this case are not so expressed as to take account of the dependence of the Commissioners upon parliamentary appropriation but appear to intend that the Commissioners should be exposed to the sanctions which apply to private employers. I have, nevertheless, come to the conclusion that we are not called upon to consider whether the awards can and do so operate or what would be their effect if there were not a sufficient

(1) (1918) 246 U.S. 565. (2) (1906) 4 C.L.R. 488.

parliamentary appropriation. The validity of the awards does not appear to me to depend upon that question. It is enough that they may, and do, have some obligatory force. It was, however, contended that they could not but lack the necessary basis of an industrial dispute, because the Commissioners were all incapable in point of law of becoming disputants in respect of matters determined by the awards. It was said that they were corporations of limited powers and it would be *ultra vires* for them to agree to the demands made upon them. Reliance was, of course, placed upon what *Griffith* C.J., *Barton* and *O'Connor* JJ. said in *Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (1), as to the limitations of power arising from the connotation ascribed to the word "arbitration." It is unnecessary to discuss the authority which those statements now have, because, in my opinion, they do not cover a case of mere incapacity. I think that an industrial dispute may arise *de facto* out of the failure to concede demands which it would be *ultra vires* to grant, and that when it arises the dispute may be settled by an award which results in the imposition by Federal law of a duty to do what otherwise might have been beyond the capacity of the party.

For these reasons and for the reasons published for our opinion upon the validity of sec. 33, I concur in the answers given to the questions in the summons.

Questions answered accordingly.

Solicitors for the Australian Railways Union, *Maurice Blackburn & Tredinnick.*

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

Solicitors for the Railway Commissioners, *Moule, Hamilton & Derham.*

Solicitor for the State of Victoria and the State of South Australia, *F. G. Menzies*, Crown Solicitor for Victoria.

J. B.

(1) (1910) 10 C.L.R., at pp. 280-283, 293-296, 303-306.