THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND OTHERS;

EX PARTE BARRETT AND OTHERS.

BARRETT AND OTHERS . . . . . APPELLANTS;
RESPONDENTS,

AND

OPITZ AND OTHERS . . . . . RESPONDENTS.
APPLICANTS,

ON APPEAL FROM THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

BELCHER AND OTHERS . . . . . APPELLANTS;
RESPONDENTS,

AND

OPITZ AND OTHERS . . . . . RESPONDENTS.
APPLICANTS,

ON APPEAL FROM THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

H. C. OF A. 1945.

MELBOURNE, *May* 30, 31; *June* 1.

SYDNEY, *July* 30.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ

Federal Judiciary—Validity of grant of judicial power—Matter "arising under" any laws made by the Parliament of the Commonwealth—Commonwealth Court of Conciliation and Arbitration—Power to direct performance or observance of rules of organization—Validity of provision—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 76 (ii.), 77 (i.)—*Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *s.* 58E.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

Commonwealth Court of Conciliation and Arbitration—Power to direct performance or observance of rules of organization—Constitutional validity of provision—Scope of power—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 76 (ii.), 77 (i.)—*Commonwealth Conciliation and Arbitration Act* 1904-1934 (*No.* 13 *of* 1904—*No.* 54 *of* 1934), *s.* 58E.

Section 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 provides as follows:—"(1) The Court may, upon complaint by any member of an organization . . . make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules. (2) Any person who fails to comply with such directions shall be guilty of an offence."

Held that s. 58E is valid as a grant of jurisdiction, under s. 76 (ii.) of the Constitution, to the Commonwealth Court of Conciliation and Arbitration; it relates to a matter "arising under" a law made by the Parliament of the Commonwealth, viz. the *Commonwealth Conciliation and Arbitration Act*. *Per Latham* C.J.:—A matter is one "arising under" a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law. *Per Latham* C.J. and *Dixon* J.:—One and the same provision may create a Federal right in respect of which a "matter" may arise and invest a court with jurisdiction in such a matter.

Under s. 58E, the Court has power to give detailed directions for acts and forbearances which will constitute performance or observance of the rules. The "rules of an organization" within the meaning of that section include the rules of a branch.

ORDER NISI for prohibition, and APPEALS from the Commonwealth Court of Conciliation and Arbitration.

Upon the application of H. Opitz and certain other members of the Victorian branch of the Federated Clerks' Union of Australia, a summons was issued out of the Commonwealth Court of Conciliation and Arbitration directed to Walter J. Barrett, J. R. Hughes and Elizabeth Johnston, on behalf of themselves and all other members of the Federal executive of the Federated Clerks' Union of Australia, H. A. Thorne, the general secretary of the union, E. C. Belcher and others (who claimed to have been declared elected as councillors of the Victorian branch on 27th January 1945 under an election held by Thorne), and William Merritt (a former secretary and treasurer of the Victorian branch and a member of the Federal executive, whose services as secretary and treasurer of the Victorian branch were terminated as from 24th January 1945 under a resolution of the branch council), to show cause why an order should not be made, under s. 58E of the *Commonwealth Conciliation and Arbitration Act*

1904-1934, giving direction for the observance of the rules (including the Victorian branch rules) of the Federated Clerks' Union of Australia, and in particular for orders declaring that the purported resolution of the Federal executive appointing Thorne returning officer for the Victorian branch elections was contrary to the rules and of no effect and declaring that the persons claiming to be the council of the Victorian branch pursuant to the purported declaration of Thorne were not entitled to act as branch councillors and declaring that the council of the Victorian branch consisted of the persons who were members of the council prior to the purported elections conducted by Thorne.

The rules of the union provided that all ballots for the election of office bearers in the branches should be conducted by the returning officer or officers appointed by the branch, in accordance with the branch rules, unless certain conditions were fulfilled, in which case the Federal conference or Federal executive should be empowered to appoint a returning officer or officers for the branch. On the footing that the necessary conditions were complied with, the Federal executive appointed Thorne returning officer for the election of office bearers of the Victorian branch, and an election was held by him in January 1945.

In the Commonwealth Court of Conciliation and Arbitration, Chief Judge *Piper* held that the necessary conditions were not fulfilled giving power to Thorne to conduct the elections, and that the election purported to be held by him as returning officer was invalid. He held that the officers elected in February 1944 continued to hold office until the holding of a valid 1945 election. He held that Merritt had been validly dismissed. In order to give effect to his decision, Chief Judge *Piper* made orders:—(1) against the members of the Federal executive and Thorne, directing them to recognize the branch councillors of 1944 as the branch councillors duly in office, to refrain from recognizing any other persons as branch councillors, not to recognize Merritt as secretary or treasurer of the branch, and to refrain from recognizing Thorne as having been duly appointed returning officer; (2) against Merritt, directing him to refrain from performing the duties or exercising the powers of secretary or treasurer, to surrender the office of the branch and the custody of books, papers and records, and to refrain from collecting contributions, fines and levies; (3) against certain persons claiming under the void elections, directing them to refrain from acting as branch councillors, from excluding the old councillors, and from assuming to take part in the management or government of the branch.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

Barrett and others obtained an order nisi for a writ of prohibition calling upon his Honour Judge *Piper*, Chief Judge of the Commonwealth Court of Conciliation and Arbitration, Opitz and others to show cause why a writ of prohibition should not issue restraining them from further proceeding on or in respect of the orders of Chief Judge *Piper*, on the grounds, *inter alia* :—

(1) That s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 is invalid as beyond the power of the Commonwealth Parliament under the Constitution.

(2) That there was no jurisdiction under s. 58E of the Act to make the orders or give the directions because—

(*a*) Section 58E relates only to the rules of an organization and not to the rules of a branch.

(*b*) The orders made or directions given were not orders or directions within the meaning of the section.

(*c*) The orders or directions were directed against and affected persons who were under no obligation to perform or observe the branch rules.

(*d*) The orders made were not orders or directions for the enforcing of the registered rules of an organization.

Barrett and others, and Belcher and others, also instituted separate appeals to the High Court from the decision of Chief Judge *Piper*. The grounds of appeal, other than those which were the same as ground (2) above of the application for prohibition, are not material to this report.

Relevant statutory provisions are set out in the judgments hereunder.

The application for prohibition was heard first.

Leave was given to the Commonwealth to intervene on the question of the validity of s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934.

Fullagar K.C. and *P. D. Phillips* (with them *Rapke*), for the prosecutors.

Dean K.C. and *Stanley Lewis* (with them *Smith*), for the respondents other than Chief Judge *Piper*.

Eggleston (*Barry* K.C. with him), for the Commonwealth (intervening).

The point as to the validity of s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 was argued first.

P. D. Phillips, for the prosecutors. Section 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 is invalid. It confers judicial power on the Commonwealth Court of Conciliation and Arbitration (*Jacka* v. *Lewis* (1)). Original jurisdiction can only be conferred on a Federal court in accordance with Chapter III. (The Judicature) of the Constitution. In this case, the only relevant head of power to confer original jurisdiction is " any matter . . . arising under any laws made by the Parliament " (ss. 76 (ii.) and 77 of the Constitution). Here there is no matter arising under any law made by the Commonwealth Parliament because all that is involved is a dispute as to the rules of the Victorian branch of the Federated Clerks' Union. The rules of an organization which is registered under the *Commonwealth Conciliation and Arbitration Act* exist independently of and are unaffected by the fact of registration ; the rights and duties of the members *inter se* do not in any sense depend on registration. [He referred to ss. 56 and 57 of the Act and to the *Conciliation and Arbitration Regulations*, reg. 6 (which explains Schedule B to the Act).] There is nothing in the Act or Rules to show that any rights, privileges, protections or prohibitions are given to or imposed on members thereby (*In re Judiciary Act* 1903-1920, *and Navigation Act* 1912-1920 (2)). The essence of judicial power is the enunciation of previously existing rights (*Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (3)). In order to give effect to s. 58E, the Court must mould its order to ensure the observance of rights and duties previously existing. Section 15A of the *Acts Interpretation Act* 1901-1941 cannot affect the validity of s. 58E, because the nature of the power in s. 58E is not a matter of construction but of operative effect or character. [He also referred to *McGlew* v. *New South Wales Malting Co. Ltd.* (4).]

Dean K.C. and *Stanley Lewis* (with them *Smith*), for the respondents other than Chief Judge *Piper*.

Dean K.C. The rules of a registered organization have certain effects by virtue of the *Commonwealth Conciliation and Arbitration Act*, whatever may have been the position before registration. The character of the rules is altered by the change in character from an unincorporated to an incorporated association. The rules derive statutory effect from the fact that they are the rules of an organization. Section 58E of the Act should not be taken entirely by itself, but should be looked at with other sections of the scheme

(1) (1944) 68 C.L.R. 455.
(2) (1921) 29 C.L.R. 257, at pp. 264-267.
(3) (1944) 69 C.L.R. 185.
(4) (1918) 25 C.L.R. 416.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

of legislation, and is to be read as if it contained a provision that the rules are to be binding on the members. [He referred to ss. 58A-58D, 60 (1) (*c*), (1A), (6), 65-69 of the Act, Statutory Rules 1928 No. 81, reg. 6.] "Matter" in s. 77 of the Constitution means the subject matter of a legal proceeding. Section 77 of the Constitution is not the only source of power to confer jurisdiction; jurisdiction may be conferred as ancillary to the powers contained in s. 51.

Stanley Lewis. The arbitration power involves all sorts of incidental things in order to make the power effective: See, e.g., *Mallinson* v. *Scottish Australian Investment Co. Ltd.* (1). The matter which arises in this case is the obligation to comply with the registered rules of an organization. Section 58E of the *Commonwealth Conciliation and Arbitration Act* implies the obligation to comply with the rules.

Eggleston, for the Commonwealth (intervening). It was necessary to make some provision such as s. 58E in order to carry the scheme of the Act into effect. The section gives a penal sanction for the observance of the rules, which is to be enforced by the court, so that the rules are not enforceable only at the will of the parties. Provided that the Commonwealth Parliament has legislative power in relation to a subject matter, it is not necessary to use any particular form of words in order to get a matter arising under a law of the Commonwealth (*McGlew* v. *New South Wales Malting Co. Ltd.* (2)). The *Commonwealth Conciliation and Arbitration Act* creates a new obligation between the members and the organization. The organization only comes into existence as a juristic person by reason of the legislation. [He referred to ss. 68 and 69 of the Act.] The legislature did not intend that rules regulating the rights of members *inter se* should continue to depend on agreement, while other rules should have statutory force. The obligation to obey registered rules rests on the Act (*United Grocers, Tea & Dairy Produce Employees' Union of Victoria* v. *Linaker* (3)), and s. 58E provides the means of enforcing the obligation.

P. D. Phillips, in reply. The true meaning of the expression "matter . . . arising under any laws made by the Parliament" is that adopted by the Supreme Court of the United States of America on a similar provision in the American Constitution, Article III., s. 2 —the controversy must involve the consideration and application of Federal law and not the mere incidental intrusion of Federal law:

(1) (1920) 28 C.L.R. 66.
(2) (1918) 25 C.L.R. 416.
(3) (1916) 22 C.L.R. 176, at pp. 179, 181, 182.

See *Willoughby on the Constitution of the United States*, 2nd ed. (1929), vol. 2, pp. 1283-1285, par. 810, and cases there cited; *Shoshone Mining Co.* v. *Rutter* (1); *Gulley* (*Tax Collector for Mississippi*) v. *First National Bank in Meridian* (2). The true view of the provisions of the *Commonwealth Conciliation and Arbitration Act* dealing with organizations is that they create a fence within which the rights of the parties may be fixed. Section 58E does no more than give jurisdiction and does not create rights.

Dean K.C., by leave, referred to *Federal Intermediate Credit Bank of Columbia* v. *Mitchell* (3).

The Court then heard argument on the other grounds of the application for prohibition.

P. D. Phillips, for the prosecutors. Section 58E empowers the Arbitration Court only to order the doing of acts which the rules require to be performed or the abstention from acts which the rules prohibit, and does not empower the Court to make an order declaring the legality of past events and imposing a general course of conduct (*Evans* v. *Davies* (4); *Hyde* v. *Warden* (5)). Under s. 69 of the Act, disputes between an organization and its members are to be determined by the domestic forum. The order must be dealt with as a whole and set aside. There is no jurisdiction given by s. 58E in respect of the rules of a branch, which are complete and self-operative, and are not the rules of an organization within the meaning of the section (Act, ss. 72, 72A, and regulations). The only persons who are bound to observe the rules of the Victorian branch are the members of that branch; the order is invalid because certain of the persons to whom it is directed are not members of that branch. [He referred to *Prentice* v. *Amalgamated Mining Employees Association of Victoria and Tasmania* (6); *Waterside Workers' Federation of Australia* v. *Burgess Bros. Ltd.* (7); *Waterside Workers' Federation of Australia* v. *Burke* (8); *Davidson* v. *Australian Society of Progressive Carpenters & Joiners, Melbourne Branch* (9).]

Dean K.C., for the respondents other than Chief Judge *Piper*. Section 58E of the Act is directed not merely to performance, but also to observance. The power contained in the section must be construed liberally, having regard to the nature of the rules of

(1) (1900) 177 U.S. 505 [44 Law Ed. 864].
(2) (1936) 299 U.S. 109, at p. 112 [81 Law. Ed. 70, at p. 71].
(3) (1928) 277 U.S. 213 [72 Law. Ed. 854].
(4) (1878) 10 Ch. D. 747, at p. 757.
(5) (1877) 3 Ex. D. 72, at p. 82.
(6) (1912) 15 C.L.R. 235, at p. 239.
(7) (1916) 21 C.L.R. 129.
(8) (1916) 21 C.L.R. 140.
(9) (1917) 23 C.L.R. 143.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

registered organizations, and the way they are dealt with in the Act and Regulations. If any portion of the order is beyond jurisdiction, the whole order is not invalidated. "Recognize" in the order means "deal with as officers." The order is in a form usually adopted by the Arbitration Court for orders of this nature (See, e.g., *Amalgamated Society of Carpenters & Joiners of Australia (Newberry)* v. *Gale* (1); *O'Connell* v. *Greenhill* (2); *Alford* v. *Poole* (3)); the fact that it contains detailed directions, designed to secure something which the Court has power to order, does not invalidate it. Reference to the Act shows that the Federal body and the branches are integral parts of the organization and that "rules of an organization" in s. 58E includes rules of the branches as well as rules of the Federal body. All members of an organization are bound to perform and observe the rules of the organization, including the rules of the branches, in so far as they are applicable to them. The members of the Federal executive are bound to observe the rules of the branches, especially those relating to elections, and, if they take part in a breach of the rules of a branch, they are subject to the jurisdiction conferred by s. 58E. The objections that the branch rules were not rules of the organization and that the members of the Federal executive were not bound by the branch rules do not go to jurisdiction and should be dealt with on appeal, not on application for prohibition.

Fullagar K.C., in reply. There is a distinction between directing compliance in the future with certain requirements (which s. 58E gives authority to do) and ascertaining the effect of things done or not done in the past (which is what the Court did in this case).

Cur. adv. vult.

The appeals then came on for hearing.

P. D. Phillips (with him *Rapke*), for the appellants in both appeals, stated that he relied on all points raised on behalf of the prosecutors in the argument on the application for prohibition, and would not argue the other grounds set out in the notices of appeal, though he did not abandon them.

Dean K.C. (with him *Stanley Lewis* and *Smith*), for the respondents, stated that he relied on the reasons for judgment of his Honour Chief Judge *Piper*.

Cur. adv. vult.

(1) (1930) 29 C.A.R. 51. (2) (1937) 38 C.A.R. 605.
(3) (1938) 39 C.A.R. 1177.

The following written judgments were delivered :—

LATHAM C.J. The Victorian branch of the Federated Clerks' Union of Australia has been divided by controversy into two sections. One section is represented by the branch members who are respondents in these prohibition proceedings. They contend that they are duly elected officers of the branch by virtue of an election held in February 1944 and by virtue of rules which, it is argued, continue them in office until a subsequent valid election is held. The other section is represented by the prosecutors. These prosecutors are members of the Federal executive of the union, the general secretary of the Federated Union, and other members of the Victorian branch. They contend that the respondents were never duly elected to the positions which they claim to hold, and are not now in office, and that another set of persons, including certain of the prosecutors, were duly elected as officers of the branch. The prosecutors rely upon an election said to have been conducted by the authority of the Federal executive of the union in February 1945. His Honour Chief Judge *Piper* has held that the said respondents are rightfully in office, and has made an order directing that they be recognized as the officers of the union.

The proceedings before the Arbitration Court were taken by the respondents under s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934, which is in the following terms :—

"(1) The Court may, upon complaint by any member of an organization and after giving any person against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.

(2) Any person who fails to comply with such directions shall be guilty of an offence.

Penalty : Fifty pounds."

It is contended, for various reasons, that the Court had no jurisdiction to make the order directing the prosecutors to recognize the respondents as officers of the union. These contentions are the basis of the proceedings in prohibition. There is also an appeal to this Court from the order made by Chief Judge *Piper*. All the points taken for the prosecutors in the prohibition proceedings are relied upon by them as appellants in the appeal. Certain proceedings relating to the matters in dispute between the parties are also pending before the Supreme Court of Victoria.

In the first place, it is argued that s. 58E of the *Arbitration Act* is invalid as beyond the power of the Commonwealth Parliament under

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

Latham C.J.

the Constitution, so that the order made under the section is invalid. It has been held in *Jacka* v. *Lewis* (1) that the power vested in the Arbitration Court by s. 58E is judicial power. The Constitution, s. 77 (i.), provides that, with respect to any of the matters mentioned in ss. 75 and 76, the Parliament may make laws defining the jurisdiction of any Federal court other than the High Court. Section 76 provides that: "The Parliament may make laws conferring original jurisdiction on the High Court in any matter— . . . (ii.) Arising under any laws made by the Parliament." It is contended for the prosecutors that a controversy between members of an organization registered under the *Arbitration Act* with respect to the observance of the rules of the organization does not fall within the category of matters arising under a law made by the Parliament.

The argument has been based upon the words "arising under any law" rather than upon the word "matter." A controversy between persons as to whether rules of an organization to which they belong have or have not been observed is, when brought before a court, included within the meaning of the word "matter" as used in the Constitution, s. 76: See *In re Judiciary Act* 1903-1920, *and Navigation Act* 1912-1920 (2). It involves "a right or privilege or protection given by law" and "the prevention, redress or punishment of some act inhibited by law."

It is contended, however, that any right that a member of an organization may have to require the observance of the rules of the organization by other members of the organization does not depend upon and is not created by the *Arbitration Act*, but is derived from the agreement of the members of the organization to be bound by the rules of the organization. Therefore, it is argued, the controversy between the parties is not a matter arising under any law made by the Parliament, but is a matter arising at common law under the agreement of the members.

The objection of the prosecutors depends upon the proposition that the rules of the Clerks' Union depend for their operation upon an agreement of the members to be bound by the rules. It may be the fact that the Clerks' Union existed as a voluntary organization, with some rules, before it came into existence as a registered organization and a corporation under the Act, s. 58 (*Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (3)). But there is no evidence that this was the case. It is quite as probable that the rules—the terms of which show that they were made in contemplation of such registration—were intended to bind the members only if and when

(1) (1944) 68 C.L.R. 455.
(2) (1921) 29 C.L.R. 257, at p. 266.
(3) (1908) 6 C.L.R. 309, at p. 336.

the organization, with its rules, obtained registration. If this was the case, the rules became rules of the organization for the first time when the organization was registered, and only by virtue of the registration. The rules bound the original members, not merely because each of them had agreed to be bound by them, but because they were the rules of an organization which was registered under the Act.

The *Arbitration Act* contains several references to rules:— s. 55 (2), with Schedule B (originally) and now with Statutory Rules 1928 No. 81, requires an organization to have rules as prescribed; s. 58C provides that no alteration of a rule shall be valid until registered; s. 58D authorizes the Court to disallow rules; and, under s. 56, a Judge of the Court may authorize an association applying to be registered to adopt any rules to enable it to comply with the prescribed conditions, and it is provided that any rules adopted in pursuance of the section shall, notwithstanding anything in the constitution or rules of the association, be binding on its members. Branches must file their rules with the Registrar (Act, s. 72, Statutory Rules 1928 No. 81, reg. 21). These provisions attach, by means of Federal legislation, characteristics to the rules of a registered organization which they would not otherwise possess. The rules, as rules of the organization, derive their efficacy from their registration, and not only from the fact (if it happens to be a fact) that the members have agreed to them. No agreement of the members can alter or dispense with the rules: Cf. *United Grocers', Tea & Dairy Produce Employees' Union of Victoria* v. *Linaker* (1).

In the present case, it is not shown that the rules of the organization were binding upon members of a voluntary association by virtue of a contract before the organization became a registered organization under the Act. But, even if it were shown that the rules had previously, by virtue of a contract, become binding upon the members of the voluntary association, that fact alone would not, after registration, be the source of rights or duties, either in the case of original members, or in the case of members who joined the organization after the registration. The rules, as registered, are what are binding. It is not necessary or relevant in order to discover what the rules are to make any inquiry into any agreement by any of the members. In my opinion, the rules as rules of the organization derive their force from the Act, and, therefore, a controversy as to the observance or performance of the rules is a matter arising under the Act. A claim that the rules should be observed and performed is a claim to a right conferred by or under the statute. It therefore

(1) (1916) 22 C.L.R. 176.

H. C. OF A. 1945. THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT. BARRETT v. OPITZ. BELCHER v. OPITZ. Latham C.J.

arises under the statute. When a member applies for an order under s. 58E, he is seeking to enforce a right which would not exist, as it actually exists, apart from the Federal law contained in the *Arbitration Act*, and he is necessarily litigating a claim arising under that law.

But it has been argued that this view of the nature of a "matter arising" is inconsistent with the interpretation adopted by the Supreme Court of the United States of a similar provision in the American Constitution. In that Constitution, it is provided that the judicial power shall extend to "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties", &c. The decisions interpreting this provision are not completely consistent. Sometimes it has been held that a case arises under the Constitution or a Federal law only when the decision of the case depends upon the construction of the Constitution or of the law in question—i.e., when it is really a case *about* the Constitution or law. Upon this view, there must be a controversy as to a right, the decision of which controversy depends, at least in part, upon the operation or effect of the Constitution or of a Federal law (*Little York Gold Washing & Water Co.* v. *Keyes* (1)). It would not be enough, if the existence of the right was not disputed, that the right sought to be enforced was created by a Federal law, or that a Federal law provided for its enforcement (*Blackburn* v. *Portland Gold Mining Co.* (2)). Thus, in *Shulthis* v. *McDougal* (3), it was said :—"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

On the other hand, there is much authority for the proposition which is denied in the passage quoted. In *Henry* v. *A. B. Dick Co.* (4), it was said, with reference to Federal jurisdiction :—"The test of jurisdiction is this : Does the complainant 'set up some right, title, or interest under the patent laws of the United States, or make it appear that some right or privilege will be defeated by one construction, or sustained by another, of those laws ? ' " According to this view, a case arises under a Federal law *either* if the plaintiff sets up a right created by Federal law *or* if his right will be defeated or sustained according to the construction of a Federal law. In

(1) (1878) 96 U.S. 199 [24 Law. Ed. 656].
(2) (1900) 175 U.S. 571 [44 Law. Ed. 276].
(3) (1912) 225 U.S. 561, at p. 569 [56 Law. Ed. 1205, at p. 1211].
(4) (1912) 224 U.S. 1, at p. 16 [56 Law. Ed. 645, at p. 651].

People of Puerto Rico v. *Russell & Co.* (1), interpretation and enforcement of a Federal statute were placed upon the same footing, and it was held that a suit to enforce a right created by a law of the United States was a case arising under such a law: "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute" (2). So also in *Willoughby on the Constitution of the United States*, 2nd ed. (1929), vol. II., p. 1284, it is said: "The Federal judicial power attaches when it is shown that a Federal right is substantially involved, whether express or implied."

Sometimes the two suggested criteria are to be found approved together in the same case—e.g., in *Tennessee* v. *Davis* (3), where it is said that a case "arising" under the Constitution or a law or a treaty was "not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either." But this statement is immediately followed by the following: "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted." These statements are repeated in *New Orleans, Mobile and Texas Railroad Co.* v. *Mississipi* (4).

It has long been accepted as law that a corporation created under an Act of Congress may, merely because it derives its existence and its rights as a corporation from Federal laws, sue (or be sued) in the Federal courts upon any claim whatever (*Osborn* v. *Bank of U.S.* (5) and other cases cited in *Federal Intermediate Credit Bank of Columbia* v. *Mitchell* (6)).

There are thus two quite distinct interpretations of the words "cases arising under this Constitution and the laws of the United States." According to one view, a case falls within this class if a right sought to be enforced owes its existence to the Constitution or to a Federal law. According to the other view, a case does not "arise" under the Constitution or a Federal law unless the decision of the case depends upon the interpretation of the Constitution or of a Federal law. Thus the decisions of the United States Supreme Court are not of very great assistance.

(1) (1933) 288 U.S. 476 [77 Law. Ed. 903].
(2) (1933) 288 U.S., at p. 483 [77 Law Ed., at p. 909].
(3) (1880) 100 U.S. 257, at p. 264 [25 Law. Ed. 648, at p. 650].
(4) (1880) 102 U.S. 135, at p. 141 [26 Law. Ed. 96, at p. 98].
(5) (1824) 22 U.S. 737 [6 Law. Ed. 204].
(6) (1928) 277 U.S. 213, at p. 214 [72 Law. Ed. 854, at p. 855].

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

Latham C.J.

In my opinion, the words of the Commonwealth Constitution are sufficiently clear to avoid the difficulties of interpretation which are disclosed by an analysis of the American decisions. The Commonwealth Constitution, s. 76, contains the following provisions:—

"The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

(i.) Arising under this Constitution, or involving its interpretation:

(ii.) Arising under any laws made by the Parliament".

The terms of par. (i.) show that a matter may arise under the Constitution without involving its interpretation, and that a case may involve the interpretation of the Constitution without arising under the Constitution. Paragraph (ii.) is limited to matters arising under Federal statutes, and does not extend to matters involving the interpretation of such statutes if they do not arise thereunder. This variation in language supports the view that, in order to bring a matter within s. 76 (ii.)—which is the relevant provision in the present case—the inquiry to be made is not whether the determination of the matter involves the interpretation of a Federal law. The relevant inquiry is whether the matter arises under the law. Thus one is compelled to the conclusion that a matter may properly be said to arise under a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law. In either of these cases, the matter arises under the Federal law. If a right claimed is conferred by or under a Federal statute, the claim arises under the statute. This view is in accordance with *Federal Capital Commission* v. *Laristan Building & Investment Co. Pty. Ltd.* (1). The construction of a Federal law, and perhaps a question of the validity of such a law, may be involved in such a matter. But it is not necessary that this should be the case in order that the matter may arise under the law. It is not necessary or desirable to attempt to frame an exhaustive definition of "matters arising under a law." In my opinion, "matters arising" include matters of the character mentioned.

It has been further argued that, before the power conferred upon the Parliament by s. 76 (ii.) can be exercised so as to vest jurisdiction in a court, there must be a "matter" arising independently of any vesting legislation. It is urged that one and the same provision cannot create a Federal right in respect of which a "matter" may arise and invest a court with jurisdiction in such a matter.

(1) (1929) 42 C.L.R. 582: See pp. 585-586.

In *McGlew* v. *N.S.W. Malting Co. Ltd.* (1), it was held that it was incidental to provisions for the service of State process beyond the territorial limits of the State to provide that security for costs should be given in proper cases. The provision in question took the form of authorizing a court to determine judicially whether security should be given. It was held that such a provision was validly enacted under s. 76 (ii.) and s. 77 of the Constitution. So also in *The Commonwealth* v. *Cole* (2), a provision conferring jurisdiction upon courts to make orders for the attachment of salary, wages or pay of a Commonwealth public servant was held to be a law investing the courts with Federal jurisdiction. These cases adopt and apply the principle that it is within the power of the Commonwealth Parliament, when legislating upon a subject matter within its constitutional competence, to provide that a court may make orders which are incidental to carrying into effect the legislative scheme, and that a proceeding to obtain such an order is a matter arising under the Federal law. A right is created by the provision that a court may make an order, and such a provision also gives jurisdiction to the court to make the order. The fact that the court may not be bound to make an order, but may exercise a discretion, does not alter the effect of such a provision. See, for example, the statutory provisions with respect to testator's family maintenance. In Victoria, the *Administration and Probate Act* 1928, s. 139 as amended in 1937, merely provides that in certain cases " the Court may in its discretion " upon application by or for a widow, widower or children, order provision for maintenance out of the estate of a deceased person. Such a provision gives a new jurisdiction to the court and also, if the court exercises its discretion in favour of the applicant, a new right to the applicant, which right arises under the provision conferring jurisdiction upon the court. Section 58E of the *Arbitration Act* is, in my opinion, a provision of the same character.

Section 58E of the *Arbitration Act* relates to the enforcement of rules of an organization registered under the Act. The establishment of such organizations is an appropriate part of an industrial arbitration system set up by statute under the power conferred upon the Commonwealth Parliament by s. 51 (xxxv.) of the Constitution (*Jumbunna Case* (3)). Such organizations are required to be governed by rules—as a matter of obvious necessity and as expressly provided by the Act. The enforcement of such rules is plainly a matter incidental to the performance of the functions of the Court in the prevention and settlement of industrial disputes. Section

(1) (1918) 25 C.L.R. 416. (2) (1923) 32 C.L.R. 602.
(3) (1908) 6 C.L.R. 309.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

Latham C.J.

58E provides for the enforcement of such rules by adopting the method of empowering the Court to enforce them. The jurisdiction so vested in the Court is therefore a jurisdiction in matters arising under the *Arbitration Act*.

For these reasons, in my opinion, s. 58E is a valid exercise of the power conferred on the Commonwealth Parliament by the Constitution, s. 77 (i.) and s. 76 (ii.).

It is next argued that the order of Chief Judge *Piper* is invalid because it exceeds the powers conferred upon him by s. 58E, even if that section be valid. That section enables a judge to "make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules." In the first place, it may be observed that s. 58E marks a departure from trade union law as contained in Trade Union Acts in England and Australia: See the English *Trade Union Act* 1871, s. 4; the Victorian *Trade Unions Act* 1928, s. 5. These and similar provisions in other State legislation prevent any court directly enforcing certain rules of a trade union, including rules requiring the payment of subscriptions and the provision of benefits for members. "There is some uncertainty as to how far the courts will interfere indirectly to enforce, *inter se*, the rights of trade union members" (*Encyclopaedia of Laws of England*, 2nd ed. (1909), vol. 14, p. 192)—See *Wolfe* v. *Matthews* (1) and the cases mentioned in *Halsbury's Laws of England*, 2nd ed., vol. 32, pp. 476, 477. A consideration of these cases will show that the legal position with respect to the enforcement of the rules of a trade union was uncertain, complicated and unsatisfactory. Section 58E removes these difficulties by giving to the Arbitration Court a power of enforcing the rules of a union registered under the Act.

It is objected to the order of his Honour Chief Judge *Piper* that the order does not merely direct the observance of a specific rule, but that it gives detailed directions for the doing of certain acts as, for example, the recognizing of certain named persons as officers of the union. It is contended that the only power given by the section is a power to direct the performance or observance of a particular rule without specifying the manner in which it is to be performed. In my opinion, this objection cannot be sustained. There might be more to be said for it if the section provided merely that the Court might "make an order for the performance or observance" of the rules. But the words of the section are "make an order giving directions for the performance or observance" of the rules. In my

(1) (1882) 21 Ch. D. 194.

opinion, these words contemplate the giving of detailed directions for the doing of acts or observance of forbearances which will constitute performance or observance of the rules.

It is next objected that the rules ordered to be observed are rules of a branch of the organization, and not of the organization itself, and that s. 58E relates only to the rules of the organization. The organization is registered under the Act, and the organization consists of branches; persons become members by joining branches: See Federal rule 5. The Federal rules provide that branches shall have power to make rules from time to time for their own internal management as they may deem advisable, subject to any rule adopted by a Federal conference or Federal executive (Federal rule 24 (b)). Statutory Rules 1928 No. 81, reg. 6V. (*b*), requires the rules of every branch of an organization to be registered.

In my opinion, Chief Judge *Piper* rightly held that the rules of the branches of the Clerks' Union were rules of the organization within the meaning of s. 58E. The fact that the rules of the Victorian branch apply only to the Victorian branch does not prevent them from being rules of the organization. The Federal rules contain certain rules which apply only to the Federal president, the Federal secretary and the Federal conference, but these rules, though their application is limited, are plainly rules of the organization. In the same way, in my opinion, branch rules, though they apply only to a particular branch, are rules of the organization.

A further objection to the order of Chief Judge *Piper* is that it is made against some persons who are members of the Federal executive and not members of the Victorian branch, and that therefore they are not persons bound to observe the rules of the organization within the meaning of s. 58E. In my opinion, this objection fails for the reason that the branch rules are, as I have already said, rules of the organization, and all members of the organization are bound to act in accordance with the branch rules, and are therefore bound to recognize officers of the branch as entitled to discharge the functions incidental to their respective offices.

It is argued that the direction that certain persons be recognized as officers is too vague to be enforced. I do not agree with this contention. Rule 28 (d) of the branch rules, relating to the election of officers, provides that after a declaration of ballot the returning officer shall give a certificate of the result of the election, and proceeds as follows: "the Secretary shall on receipt of such certificate recognise the officers whose names appear on the certificate issued to him by the Returning Officer and shall notify them accordingly." There is no difficulty in understanding the meaning of this rule.

H. C. OF A. 1945. THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT. BARRETT v. OPITZ. BELCHER v. OPITZ. Latham C.J.

There is no greater difficulty in understanding the directions given in the order that other persons than the secretary shall recognize officers who are duly elected. This is, I think, plainly a direction to observe and perform the rules of the organization.

In my opinion, all the objections to jurisdiction fail and the order nisi should be discharged.

In the appeal from the order of Chief Judge *Piper*, the appellants relied upon the same arguments as those advanced for the prosecutors in the prohibition proceedings. The grounds of appeal also particularly challenge the construction placed by the learned judge upon a Federal rule entitling the Federal executive, upon receipt of a petition signed by not less than ten per cent of the financial members of a branch, to take charge of the elections for branch officers. This matter was not argued, but I have considered it, and I agree with the construction placed upon this rule and other relevant rules by the learned judge.

In my opinion, the appeal should be dismissed.

RICH J. The controversy the subject of these proceedings was fully argued and has been dealt with in other judgments in such a fashion that I feel I am not justified in re-stating similar observations. I agree that the rule nisi should be discharged and the appeals dismissed with costs in all the matters.

STARKE J. Rule nisi directed to the Chief Judge of the Arbitration Court and others to show cause why a writ of prohibition should not issue directed to the Chief Judge and others to restrain them and each of them from further proceeding on or in respect of orders and directions made and given on 30th April 1945 by the Chief Judge in pursuance of the provisions of s. 58E of the *Commonwealth Conciliation and Arbitration Act* 1904-1934 and also two appeals, one brought by Barrett and others, the other by Belcher and others, against the same orders and directions. The rule nisi for prohibition is founded upon the provisions of the Constitution, s. 75 (v.), and the appeals are competent by reason of the provisions of the Constitution, s. 73 (ii.) (*Jacka* v. *Lewis* (1)).

Section 58E is as follows :—

" (1) The Court " (Commonwealth Court of Conciliation and Arbitration) " may, upon complaint by any member of an organization . . . make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.

(1) (1944) 68 C.L.R. 455.

(2) Any person who fails to comply with such directions shall be guilty of an offence."

During the argument, it was suggested that s. 58E is an arbitral provision that confers no judicial power upon the Commonwealth Court of Conciliation and Arbitration. If so, appeals to this Court would be precluded. But this suggestion cuts across the decision in *Jacka* v. *Lewis* (1) and the parties to these proceedings did not challenge the decision, nor do I think they could successfully have challenged it. The frame of the section is quite opposed to the suggestion. Its purpose is to enforce the performance and observance of the existing rules of an organization and not to prescribe further or new rules or regulations for the conduct of members of an organization. Such an authority is, I think, a plain exercise of judicial power and not in any sense an exercise of the arbitral authority of the Court.

The prosecutors in the prohibition proceedings and the appellants in the appeals challenge, however, the validity of s. 58E.

The Constitution, s. 77, provides that with respect to the matters mentioned in ss. 75 and 76 the Parliament may make laws defining the jurisdiction of any Federal court other than the High Court. And coupled with s. 76 Parliament is authorized to make laws conferring jurisdiction on any Federal court in any matter arising under any laws made by the Parliament. It was not disputed that a summons calling upon parties to show cause why an order should not be made giving directions for the performance and observance by them of the rules of an organization registered under the *Commonwealth Conciliation and Arbitration Act* was a complaint for the purposes of s. 58E. Nor was it seriously disputed that there was a controversy in this case between parties which constituted a matter within the meaning of ss. 76 and 77 of the Constitution.

In *In re Judiciary and Navigation Acts* (2) it was said that a matter under the Constitution involved some right or privilege or protection given by law or the prevention, redress or punishment of some act inhibited by law. But it was argued that the matter did not arise under any law made by the Parliament.

The *Commonwealth Conciliation and Arbitration Act* provides for the registration of organizations of employers and employees, that such organizations shall be regulated by rules specifying the purposes for which they are formed and providing, among other things, the times when and terms on which persons shall become or cease to be members. And no alteration of a rule is valid unless registered. The rules, in truth, establish the constitution of the organization.

(1) (1944) 68 C.L.R. 455.

(2) (1921) 29 C.L.R. 257, at p. 266.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

Starke J.

And all this, it has been held, is within the constitutional power of the Parliament 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 (*Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (1)). Then s. 58E provides for the enforcement of the performance and observance of these rules and finally provides that any person failing to comply with orders or directions of the Arbitration Court for the performance or observance of those rules shall be guilty of an offence.

In my opinion, it is implicit in these provisions that the rules of the organization shall be performed and observed by its members; the rules impose a duty upon the members of the organization to observe and obey them. And the enforcing of that duty is remitted to the Arbitration Court upon which is constitutionally conferred part of the judicial power of the Commonwealth for that purpose: See *McGlew* v. *New South Wales Malting Co. Ltd.* (2). Thus the controversy or the matter in issue between the parties in this case depends upon and arises out of the provisions of the *Arbitration Act* itself, which is, of course, a law made by the Parliament.

Accordingly s. 58E is a valid provision.

Another argument, which I take substantially from the grounds of appeal, is that the only order that the Court could make was an order directing the performance or observance of a particular rule and not general declarations and injunctions as were made and issued by the Court. But s. 58E should not be construed too strictly, especially in view of such a provision as s. 25. The power is wide enough to authorize orders and directions relevant to the performance and observance of the rules. If orders and directions be wider than are proper in a particular case, that does not involve any want of jurisdiction but an improper exercise of jurisdiction, which is a matter of appeal, a subject to which I shall refer later.

Another argument was that the Court could only make orders and directions for the performance and observance of the rules of the organization and not of the rules of a branch of the organization. But the rules of the organization provide for branches, which are given power to make rules for their own internal management. The rules of the organization therefore comprise both the rules of the organization and its branches.

A number of other grounds are mentioned in the rule nisi and in the notices of appeal, some of which were not argued. Of those that were argued, it is enough to say that I have considered the contentions and think them untenable. Of those that were not

(1) (1908) 6 C.L.R. 309. (2) (1918) 25 C.L.R. 416.

argued, it is not, I think, the function of the Court to investigate such matters for itself: the correctness of the decision of the Court below should be assumed unless challenged and shown to be erroneous.

But I desire to draw attention to the form of the orders and directions in this case. Any person who fails to comply with the orders and directions given pursuant to s. 58E is guilty of an offence. Therefore the directions should be clear and precise. Substantially orders and directions restraining certain persons from acting or attempting to act as members of the branch council and from exercising power and authority as members of the branch council and for delivery up of property, books, records and so forth, and restraining them from interfering with the members of the branch council in office were all that were necessary in the present case. Instead, the orders and directions are prolix and, as I think, embarrassing. There are a dozen and more orders and directions directing certain persons, for instance, to refrain from recognizing other than members (unnamed) of the branch council on 31st December 1944 as members of the branch council. The word "recognize" is not unknown in the law: thus we speak of recognizing foreign judgments, but it is a word of rather indefinite meaning and as applied to persons by description and not by name is somewhat vague and therefore embarrassing. These orders and directions wholly depart from the summons which originated the proceedings under s. 58E and, so far as I follow the transcript, were presented by the prosecuting parties without any objection being taken to the form in which they were presented to the Court. But for this fact the Court on appeal, but not on prohibition, would have authority, in my opinion, to modify or mould the orders and directions or to remit them to the Arbitration Court for reconsideration. The course of the proceedings before the Arbitration Court is, however, a sufficient reason for not disturbing the orders and directions in this Court, though, as I think, both are open to objection.

The rule nisi for prohibition should be discharged and both appeals dismissed.

DIXON J. The purpose of these proceedings is to attack an order made by his Honour the Chief Judge of the Court of Conciliation and Arbitration under s. 58E of the *Arbitration Act*.

The order gives specific directions calculated to establish or re-establish in office the president, vice-presidents and councillors and other officers of the branch council of the Victorian branch of the Federated Clerks' Union of Australia who were elected for the year 1944. Notwithstanding the expiration of the period for which

H. C. OF A. 1945. THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT. BARRETT v. OPITZ. BELCHER v. OPITZ. Dixon J.

they were elected, his Honour considered that they remained *de jure* the council of the branch because there had been no valid election of office-bearers to replace them in 1945, and, as his Honour interpreted the rules, they continue in office until their successors are duly chosen. There was a purported election of officers of the branch for the year 1945, but it was not conducted by a returning officer appointed by the branch as the rules of the branch require unless exceptional conditions arise, which are specified. On the footing that these conditions had arisen, the purported election was conducted by a returning officer appointed by the Federal executive, who took the matter out of the hands of the branch. The Chief Judge decided that the necessary conditions were not fulfilled and the power of the Federal executive to conduct the branch elections never became lawfully exercisable, with the consequence that the pretended election was null and void. Upon the facts, and upon the construction of the rules, I think that the Chief Judge was entirely right in this conclusion.

In order to give effect to it, his Honour made the order under s. 58E which is complained of in the present proceedings before this Court. The order contains lengthy directions. Compendiously stated, they are to the following effect :—(1) they direct the Federal executive to recognize the branch councillors of 1944 as still duly in office and not to recognize the persons claiming under the void election, whether as councillors or as treasurer or secretary, and not to recognize the appointment of the supposed returning officer; (2) they direct the branch secretary, who had been dismissed by the council of 1944, to surrender the office and no longer to act therein; (3) they direct certain persons claiming under the void election to refrain from acting as branch councillors, from excluding the old councillors, and from assuming to take part in the management or government of the branch.

The order is impugned on the ground that s. 58E, upon which it is founded, does not avail to authorize it. The first reason given in support of this contention is that s. 58E is unconstitutional and void as amounting to an attempt to confer the judicial power of the Commonwealth upon the Court in a matter of original jurisdiction not comprised within s. 75 or s. 76 of the Constitution.

Before dealing with the argument, it is, I think, desirable to examine the text of s. 58E itself and to consider its meaning. It is divided into two sub-sections. The first is expressed to authorize the Arbitration Court to give directions for the performance or observance of the rules of an organization. The second makes it an offence to fail to comply with directions so given and prescribes a penalty,

which, under s. 89B, might be imposed by the Arbitration Court on a person charged before that court with the offence.

The section thus provides for two separate and distinct proceedings. The first results in the imposition of a duty, breach of which is punishable. The second deals with the penal consequences. The first proceeding is " upon complaint by any member of an organization." The person against whom the order is sought is to be given an opportunity of being heard. Subject to these conditions, the Court may (not must) make an order giving directions. The directions are " for," that is, " for the purpose of securing," the performance, which is active, or the observance, which is passive, of the rules of the organization. The performance or observance is to be by someone under an obligation to perform or observe them. I see no reason to treat the word " may " as anything but permissive or facultative. It connotes a discretion ; it does not create a power which the Arbitration Court is bound to exercise, when invoked, upon its appearing that the stated conditions are fulfilled. The late Chief Judge (Sir George *Beeby*) said, in reference to the section, " It has been held by the " (Arbitration) " Court that this unusual power, vested in the Court as an ancillary power to the hearing and determination of industrial disputes, should not be exercised merely to enable parties to determine their domestic disputes, but that there must be some element of public interest in the matters in issue to justify the Court in exercising this discretionary power " (*Chapman* v. *Sear* (1)). It is a discretionary power with which the Court is armed, not for the purpose of enforcing the civil rights of individuals, but to enable the Court, when industrial considerations appear to make it necessary or desirable to do so, to insist upon observance of the rules, which, under s. 55 (2), must comply with the conditions prescribed by reg. 6 of Statutory Rules 1928 No. 81.

It will be noticed that any member of the organization may complain. He need not represent other members nor, indeed, need he himself be under any loss or prejudice because of a breach of the rules. In fact, the section does not say that the existence of an actual or threatened infringement of the rules is a condition of the Court's power. The directions which the Court may give must have for their object the securing of performance or observance of the rules. But I do not think that the power is restricted to specifically commanding compliance with the exact obligation expressed by the rule or rules in question in a given case.

The foregoing is a brief statement in the abstract of the interpretation I place upon the provision.

(1) (1931) 30 C.A.R. 165.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

Dixon J.

The attack upon the section depends upon the view that it undertakes to confer upon the Arbitration Court jurisdiction to enforce the rights of members under the rules of an organization considered as a contract *inter socios*, a contract *inter socios* deriving its obligatory force either from the common law governing voluntary associations, as modified by such legislation as the English *Trade Union Act* 1871 (Cf. *Trade Unions Act* 1928 of Victoria), or from registration under State legislation of that kind. They are rights, it is said, which do not rest upon Federal law, but upon the law over which the States have authority. But Federal judicial power can be conferred upon a court only under the provisions of Chapter III. of the Constitution, and original jurisdiction cannot be conferred, except pursuant to s. 71 and s. 77. Under s. 77 (i.) the jurisdiction of a Federal court must be confined to the nine classes of matters contained in s. 75 and s. 76, and, it is said, the only class that is relevant is that described in s. 76 (ii.), viz., "any matter . . . arising under any laws made by the Parliament."

Apart from authority, I should have been disposed to say that the function or power confided to the Arbitration Court by s. 58E did not include any part of the judicial power of the Commonwealth, but consisted in a discretionary authority to impose upon persons already under an obligation to perform or observe the rules of an organization an expanded or transmuted duty or set of duties enforceable by new and penal sanctions, a discretionary authority ancillary and auxiliary to the settlement of industrial disputes by arbitration or conciliation. But in *Jacka* v. *Lewis* (1) it was decided that the order there in question made by the Arbitration Court under s. 58E, was judicial in character, so that an appeal lay from it under s. 73 (ii.) of the Constitution, the legislative exception formerly made by s. 31 of the Act having been removed by Act No. 43 of 1930. It follows that, within s. 58E, some attempted grant of judicial power of the Commonwealth must be contained. But, even so, it does not follow that s. 58E should be considered invalid on the ground that the "matter" over which it attempts to give jurisdiction arises under State, and not Federal, law.

The enforceable rights which, under State law, result to members of trades unions from the adoption of rules or by-laws are by no means co-extensive with what may be covered or obtained by a "complaint" under s. 58E. Under the general law, the rules of a voluntary association do not always confer enforceable rights upon members. An examination of the subject will be found in *Cameron* v. *Hogan* (2), and I shall not repeat what is there said. A passage is quoted

(1) (1944) 68 C.L.R. 455.

(2) (1934) 51 C.L.R. 358, at pp. 370-373.

from the judgment of *Isaacs* J. in *Edgar* v. *Meade* (1). A fuller quotation of the same passage will not only illustrate the restricted extent of the rights given under the general law with reference to voluntary associations, but it will also show how the operation of the *Conciliation and Arbitration Act* may be considered to enlarge the rights of members of organizations registered under Part V. of that statute. *Isaacs* J. said :—" In the case of a purely voluntary association, a court of equity bases its jurisdiction on property, there being nothing else for it to act on. A court of common law before the *Judicature Act* regarded the invalid expulsion as void, and gave no damages. So between the two jurisdictions the plaintiff could rely only on property as the basis of jurisdiction. But here the situation, in my opinion, calls for another view. This organization is the creature of the Federal Parliament for a special reason, and as incidental to a specific power in the Constitution. The incorporation of employees in such an organization is a matter of public policy, and to effectuate the object of the Act. For this purpose rules are required to be registered, and in my opinion a member or a group of members forming a branch recognized by the rules have a *locus standi* to assert in a competent court their legal rights to remain members of the organization, notwithstanding an invalid resolution to expel him or them, and so exclude him or them from the status and benefits which the Act intended them to have " (2).

Section 58E enables a member to " complain," and so to originate a proceeding that may result in directions for the performance of the rules, even (i) although he has no proprietary interest at stake, (ii) although the particular rule or rules he invokes confer no benefit or advantage upon him ; and, indeed, notwithstanding that he may share the obligations under the rules of the person complained against, (iii) although his complaint affects matters of internal management under the control of the majority, or capable of being dealt with under the rules : Cf. *Taylor* v. *Smith* (3) ; *Bowen* v. *Hinchcliffe* (4) ; *Atkinson* v. *Lamont* (5).

It appears to me, that, on the footing that s. 58E includes judicial power, it must be taken to perform a double function, namely to deal with substantive liabilities or substantive legal relations and to give jurisdiction with reference to them. It is not unusual to find that statutes impose liabilities, create obligations or otherwise affect substantive rights, although they are expressed only to give

(1) (1916) 23 C.L.R. 29, at p. 43.
(2) (1916) 23 C.L.R., at p. 43.
(3) (1922) 23 S.R. (N.S.W.) 174 ; 39 W.N. 270.
(4) (1924) 24 S.R. (N.S.W.) 262 ; 41 W.N. 32.
(5) (1938) Q.S.R. 33.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

DIXON J.

jurisdiction or authority, whether of a judicial or administrative nature. Indeed, in his *Legislative Methods and Forms* (p. 249), Sir *Courtenay Ilbert* appears expressly to advert to this trick of drafting, for the purpose of condemning it, when he says: "The enactment should be so expressed as to give the right, not the remedy, to say that a person may do a particular thing, not that he may bring a particular action or obtain from the court a particular order."

The form of legislation which is expressed to hinge upon the act of a court or other authority is less scientific than realistic and is perhaps now outmoded. But it was once common. To take an example from a very different legal field, 9 Geo. I., c. 19, enacted that if any person by colour of any authority of any foreign Government sold a ticket in any foreign lottery and *should be convicted by two or more justices* he should forfeit, and so on: See *Attorney-General of Victoria* v. *Moses* (1), where successive enactments *in pari materia* but in different forms are set out. Nowadays, the same legislative sentiment is clothed differently and raises different, if more serious, questions: Compare the legislation dealt with in *R.* v. *Martin*; *Ex parte Wawn* (2), where the liability of the offender is imposed quite independently of the jurisdiction wherein, or the procedure whereby, it is to be enforced. But, under either form of legislation, it is quite clear that a liability is imposed and that the liability accordingly supplies an appropriate subject or "matter" upon which "judicial power" or "jurisdiction" may operate, whether the jurisdiction is given in the same breath or quite independently.

Now, s. 77 (i.) and (iii.) of the Constitution speak of defining and vesting jurisdiction with respect to the matters to which the section refers as if the existence of the matters must always be independently brought about, or must arise independently. The attack on s. 58E assumes that it is devoted to the grant of judicial power over a subject or "matter" independently existing. As the only discoverable "matter" existing apart from s. 58E itself is the "obligation to perform or observe" (the) "rules" of the organization, it is contended that s. 58E is an attempt to give jurisdiction over that matter and no more, that is to say to give jurisdiction to hear and determine an application to enforce that obligation. Since the pre-existing obligation arises, as it is said, only from the efficacy given by State law to the contract *inter socios*, the "matter" is not one arising under the law of the Commonwealth. To pursue the example given, let it be supposed that the power of the Commonwealth Parliament with respect to commerce with other countries covers foreign lottery tickets. Then under legislation in the modern form

(1) (1907) V.L.R. 130, at pp. 139, 140. (2) (1939) 62 C.L.R. 457.

dealt with in *Wawn's Case* (1), if the Commonwealth Parliament were to pass such an enactment, a clear subject or "matter" suitable for the exercise of Federal jurisdiction would be brought into being and you would look elsewhere for the grant of judicial power to deal with it. Under the older form in which 9 Geo. I., c. 19, was cast, you would find the liability and the jurisdiction created at the same time and in the same place, but nevertheless it would not be difficult to separate them and you could properly treat the two conceptions as independent and accordingly fit them into the pattern of Chapter III. of the Constitution. In the case imagined, an absolute liability would be imposed and a jurisdiction would be given, the exercise of which would be imperative. The two things are therefore independent in idea, if not in expression.

But suppose the purpose of the legislature is not to create an absolute liability, and not to give a jurisdiction imperatively exercisable. Suppose, on the contrary, that what the legislature desires is to bestow upon a judicial body a discretionary power. How then can it proceed under s. 77 ? Must it separate out the rights and liabilities of the parties to be affected from the jurisdiction to affect them by the exercise of the power ?

Examples are not wanting in existing Federal legislation of provisions in which this course has not been attempted. For instance, in s. 87 of the *Patents Act* 1903-1935 an immediate grant is made to the Supreme Courts of the States (as well as to this Court) of a facultative power to order a patentee to grant compulsory licences. In s. 87A, the same Courts are invested with an imperative jurisdiction to declare in effect that a patent has not been sufficiently exercised, and thereafter with a discretion to extend or revoke the operation of the order. The legal consequences which flow from the order are described by the section. In s. 72 of the *Trade Marks Act* 1905-1936, a discretionary power is given to the courts to order the removal of a trade mark from the register after three years' non-user. In s. 385 of the *Navigation Act* 1912-1942, power is given to the court to remove a master of a ship, "if it thinks it necessary to do so" and also to appoint a new master. Section 11 of the *Lands Acquisition Act* 1906-1936 empowers the Supreme Courts, as well as this Court, to deal with the application and investment of compensation moneys: See, too, s. 46. Section 38 of the *Estate Duty Assessment Act* 1914-1942 gives the same Courts power, on the application of an administrator, to order a sale to pay estate duty. Section 109 of the *Excise Act* 1901-1942 gives the Supreme Courts and this Court a discretionary power to dispense with notice

(1) (1939) 62 C.L.R. 457.

H. C. OF A 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

DIXON J.

of action against excise officers, irrespective of the court in which the action is instituted.

These supply very varying examples of attempts to provide for matters of substance by arming courts with power to deal with them, instead of legislating directly and laying down inflexible rules prescribing independently the liabilities of the parties or what they may or must do.

Legislation in the form under discussion must, of course, fall within one of the subjects of the legislative power of the Federal Parliament in s. 51 or s. 52. But, assuming the law is one with respect to one or other of the enumerated powers and that it also defines the jurisdiction of a Federal court with respect to a justiciable subject matter, why should not an application to obtain the benefit of the provision be a matter arising under that very law? *Ex hypothesi*, the justiciable subject matter is not only specified or indicated by the law defining the jurisdiction, but falls within one of the enumerated legislative powers. That is to say that, apart from the special requirements of Chapter III., it would be an exercise of legislative power upon an assigned subject. Why should not the legislation thus conferring power upon the court perform the two functions of giving rise to the " matter " and conferring jurisdiction over it?

To go back to the examples taken from existing legislation, the power over patents extends to providing for compulsory licences. If the question is remitted to a court, it seems logical to describe the matter dealt with by the court as arising under the law which states the conditions and empowers the court to determine whether a licence should be ordered. In the same way, conditions justifying the removal of a trade mark from the register being specified by the law giving jurisdiction to the court, surely the matter comes before the court as one arising under that law. So with the removal of the master of a ship, always assuming, of course, that s. 98 of the Constitution enables the Parliament to give a discretionary power to remove masters. The sale of property to pay estate duty, the application and investment of compensation moneys, and the removal of a protection to Commonwealth officers against suit, it may be assumed, are all incidental to the subjects of legislation they touch. If so, no misuse of language or of reasoning appears to be involved in treating a law directly authorizing courts to exercise authority over and give directions upon those subjects both as dealing with them so as to give rise to a subject matter of jurisdiction and as defining or vesting the jurisdiction. As I understand it, this

is the view which, in *McGlew* v. *N.S.W. Malting Co. Ltd.* (1), the the Court took of s. 10 of the *Service and Execution of Process Act*, although no exposition of the reasoning was given.

In the case of s. 58E of the *Arbitration Act*, it is no doubt true that one condition of the power is that the party proceeded against must be under an obligation to perform or observe the rule or rules. It is perhaps because it was taken for granted that the Arbitration Court was intended to determine conclusively whether or not the party lay under such an obligation that, in *Jacka* v. *Lewis* (2), this Court treated the order then under appeal as judicial. But, even so, the obligatory character under State law of the rule or rules to be performed is no more than a condition of the exercise of the power. In considering the effect of s. 58E, it must be borne in mind that Part V. of the Act treats the existence and the content of the rules of an organization as a matter of special concern. As appears from the passage already quoted from his judgment in *Edgar* v. *Meade* (3), *Isaacs* J. found, in the provisions of Part V. and the schedule, enough to support an injunction, where the general law would not have given that remedy.

Section 58E then undertakes a further step in the regulation and control of the internal affairs of registered industrial organizations. It does so not for the purpose of protecting the civil rights of individuals and of enforcing social contracts. The purpose is to further the ends of the *Arbitration Act* as an industrial measure and supervise the administration of the rules, the adoption of which it is part of the plan of that Act to require. It is, we may assume, within the legislative power granted by s. 51 (xxxv.) and (xxxix.) to deal with the rules of organizations and, when it appears conducive to the ends of the arbitration power to do so, to see that the rules are observed. From this it follows that the legislature might have laid down the circumstances in which the enforcement of rules should be undertaken, the circumstances so far as relevant to the power over industrial arbitration and conciliation. It preferred to arm the Court with a discretionary power to intervene on the complaint of a member. In this it was amplifying the policy of which *Isaacs* J. discovered a sufficient indication in Part V. and the schedule. The grant of that discretionary power appears to me to involve an exercise of the legislative power under s. 51, and, on the assumption that it is a judicial matter, either in whole or in part, an exercise of that power *uno ictu* with a use of the legislative power under s. 77 (i.).

(1) (1918) 25 C.L.R. 416.
(2) (1944) 68 C.L.R. 455.
(3) (1916) 23 C.L.R. 29, at p. 43.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

DIXON J.

I am therefore of opinion that s. 58E is valid.

The second reason given in support of the contention that the order made by the Chief Judge is not authorized by s. 58E is that the section relates only to the rules of an organization, and that the rules with which the order deals are those of the Victorian branch and not of the organization. In my opinion, this objection was rightly answered that, within the meaning of s. 58E, the rules of the organization called the "Federated Clerks' Union of Australia" comprise both Federal and branch rules.

Rule 24 of the Federal rules provides that the union shall consist of members throughout Australia, and may have a branch in each State, the formation of which is to be decided by the Federal conference or executive. It confers upon the branches power to make rules for their own internal management, and authorizes them to conduct their own election of delegates to the Federal conference. Rules 25 and 26 deal with the revenues and meetings of the branches, and rule 5 (a) and (f) and rule 6 show that membership and entrance fee are branch matters. Rule 10 enumerates the branches. It follows that the union is organized in branches, and that the rules of the branches are made in the exercise of a power delegated or conferred by the Federal rules. Under such a constitution, the expression "rules of an organization" comprises the whole rules, both Federal and branch rules.

It was next said that the directions given by the order went beyond the authority given by s. 58E, because they followed no specific rule and imposed obligations which, besides being either no more than consequential on, and calculated to remedy past failures to observe, the rules or ancillary to renewed observance of them, were too vaguely expressed to form a foundation for the further penal proceeding contemplated by sub-s. (2) of s. 58E.

In my opinion, s. 58E intends that the court shall go beyond the precise form of the rules and shall give directions calculated to ensure that they are carried out. In the circumstances of this case, the directions are well framed to bring about a compliance with the rules. The objection that they are vague is based upon the use in the order of such expressions as "recognize." But this word is, I think, well understood in reference to claims to authority made by a person on the footing that he is an occupant of an office. It means that the person to be recognized is not to be excluded from the exercise of the office, and that his authority is not to be denied, but that, on the contrary, dealings are to be carried on with him as the person occupying the office.

Then it was contended that so much of the order as related to members of the Federal executive who were not members of the Victorian branch undertook to give directions for the observance of the Victorian branch rules by persons under no obligation to observe them. When the directions in question are examined, it appears that they are pointed at the " recognition " by the Federal executive of the true office-bearers of the Victorian branch. That is a matter which results from the necessary implications of the Federal rules operating in relation to the branch. It is an objection which I think must fail.

There are other grounds of appeal which I think go only to the Chief Judge's discretion. In the appeal of Barrett and others, they are numbered 7, 8, 9 and 10. Ground 11 really goes also to discretion. There is no reason to think that his Honour's view was erroneous. I do not think that ground 12 can be supported. Ground 13 is met by the terms of the section itself. Grounds 14, 15, 16 and 18 are, in my opinion, ill founded. Grounds 17, 19 and 20 I do not follow, and they were not discussed. I have dealt with the matters covered by grounds 1 to 6 of the notice of appeal. The appeal of Belcher and others depends upon the same matters.

In my opinion, the order nisi for the prerogative writ of prohibition should be discharged with costs and the appeals dismissed with costs.

McTIERNAN J. In these proceedings, a writ of prohibition is applied for under s. 75 of the Constitution to restrain further proceedings upon an order made by the Commonwealth Court of Conciliation and Arbitration under s. 58E of the *Commonwealth Conciliation and Arbitration Act*. The grounds of the application are that s. 58E is beyond the legislative power of the Parliament and in any event that the order in respect of which the writ is sought is in excess of the power which, under the section, it was the intention of the Parliament to vest in the Court.

In my opinion, s. 58E is valid for the reason that it is a law defining the jurisdiction of the Commonwealth Court of Conciliation and Arbitration with respect to a matter arising under the *Commonwealth Conciliation and Arbitration Act* 1904-1934 (s. 76 (ii.) and s. 77 (i.) of the Constitution). The object of the section is to vest in the Court authority to secure the performance and observance of the rules of a registered organization by any person who is under an obligation to perform or observe the rules. It was decided in the *Jumbunna Case* (1) that the provisions of the *Commonwealth Conciliа-*

(1) (1908) 6 C.L.R. 309.

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

McTiernan J.

tion and Arbitration Act 1904 in respect of the registration of associations as organizations are valid as being incidental to the powers conferred upon the Parliament by s. 51 (xxxv.) of the Constitution. The decision applies particularly to the provisions of that Act relating to the incorporation of organizations when registered and to the registration of an association of employers or employees in an industry in one State only. Referring to the above-mentioned power, *O'Connor* J. said :—" The power is restricted to prevention and settlement by conciliation and arbitration. Any attempt to effectively prevent and settle industrial disputes by either of these means would be idle if individual workmen and employees only could be dealt with. The application of the ' principle of collective bargaining,' not long in use at the time of the passing of the Constitution, is essential to bind the body of workers in a trade and to ensure anything like permanence in the settlement. Some system was therefore essential by which the powers of the Act could be made to operate on representatives of workmen, and on bodies of workmen, instead of on individuals only. But if such representatives were merely chosen for the occasion without any permanent status before the Court, it is difficult to see how the permanency of any settlement of a dispute could be assured. Even when the dispute is at the stage when it may be prevented or settled by conciliation, the representative body must have the right to bind and the power to persuade not only the individuals with whom the dispute has arisen, but the ever changing body of workmen that constitute the trade.

It has been contended that it was unnecessary for this purpose that the Court should do more than give to the trade unions and other associations constituted under the State laws a *locus standi* before the Commonwealth. But such a course would very much limit the effective exercise of the power. All employers likely to seek the aid of the Court are not in State unions or associations. Besides, it may be fairly said that it is essential to the proper control of the organization by the Court that their rules and constitutions should be under the control of the Court, and that the constitution of all organizations having a status in the Court should, in certain respects at least, be uniform " (1).

The meaning of the word " matter " in s. 76 is explained in the case *In re Judiciary and Navigation Acts* (2) and in *Jacka* v. *Lewis* (3) it was held that an order made under s. 58E is a judicial order made in the exercise of judicial power. I think that a controversy

(1) (1908) 6 C.L.R., at pp. 358, 359. (2) (1921) 29 C.L.R., at pp. 265, 266.
(3) (1944) 68 C.L.R. 455.

which may be determined by complaint under s. 58E involves a "matter" within the interpretation of the word in the former case.

It is a condition precedent to the Court's jurisdiction under the section that the complainant is a member of a registered organization and it is also a condition that the rules in respect of which the complaint is made are the rules of a registered organization.

The question whether the respondent is under an obligation to perform or observe the rules of the organization is a substantial part of the subject matter of the controversy. The rules of the organization are not, however, a law made by the Parliament of the Commonwealth, and, without deciding the point, it may be conceded that the obligation sought to be established in a proceeding under s. 58E would not always be a matter arising under such a law.

But another substantial question involved in a controversy under s. 58E is what are the matters which the Court should take into consideration in exercising its powers under s. 58E. These powers are vested in the Court to aid it in the exercise of its powers of conciliation and arbitration for the prevention and settlement of industrial disputes. That is the constitutional basis of the section. In determining what directions should be given for the performance or observance of the rules of a registered organization by a respondent found to be under an obligation to perform or observe them, I think that it is implicit in s. 58E that the Court should take into consideration the question how its order would affect the object for which the Act vests it with the above-mentioned powers. The determination of this substantial part of the subject matter of a controversy under s. 58E is governed by the objects expressed in s. 2 of the Act. The words "arising under" extend to the connection between this part of the subject matter of the controversy and Federal law even if they should be held not to be appropriate to describe the connection between the obligation of a person under the rules of a registered organization and the Federal Act. It is sufficient to render s. 58E constitutional that the jurisdiction conferred by it extends to a part of the subject matter involved in a controversy under the section. In *Osborn* v. *Bank of U.S.* (1), *Marshall* C.J. said: "We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

(1) (1824) 22 U.S. 737, at p. 822 [6 Law. Ed. 204, at p. 224].

H. C. OF A. 1945.

THE KING v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION; EX PARTE BARRETT.

BARRETT v. OPITZ.

BELCHER v. OPITZ.

McTiernan J.

In my opinion, the order and directions which the Commonwealth Court of Conciliation and Arbitration gave are not in excess of the jurisdiction vested in the Court by s. 58E.

I think that it would narrow the ordinary grammatical meaning of the language of the section to construe it as conferring jurisdiction limited to ordering a person to do a specific act directed by any rule or to refrain from doing a specific act forbidden by any rule. The jurisdiction of the Court extends to giving directions for the purpose of having the rules of the organization carried out: and it is not necessary that these directions should literally pursue the terms of any of the rules.

The order was made in respect of a set of rules which have been called the rules of the Victorian branch of the organization. Upon a consideration of these rules and their relation to the rules which have been called the rules of the registered organization, I think that the learned Chief Judge was also right in holding that the former rules are rules of the organization. It follows that the applicants who were members of the Federal executive were under an obligation to perform or observe the rules in respect of which his Honour made the order.

I think that the word "recognize" in the learned Chief Judge's order means "recognize the authority of" and it follows from what I have said as to the scope of his jurisdiction that he had power to give that direction.

For these reasons, I think that the order nisi should be discharged.

There are also appeals from the judge's order. The appellants advanced the arguments in support of the appeals which they urged in the prohibition proceedings. No other ground of appeal was argued. In these circumstances, I think that none of the grounds of appeal should be upheld and that the appeals should therefore be dismissed.

R. v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett.*—*Order nisi discharged with costs.*

Barrett v. *Opitz.*—*Appeal dismissed with costs.*

Belcher v. *Opitz.*—*Appeal dismissed with costs.*

Solicitors for the prosecutors in the prohibition proceedings and the appellants in the appeals, *Oswald Burt & Co.*; *Jack M. Lazarus.*

Solicitors for the respondents, *Maurice Blackburn & Co.*

Solicitor for the Commonwealth (intervening), *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. M.