[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE AUSTRALIAN RAILWAYS UNION;

Ex parte THE VICTORIAN RAILWAYS COMMISSIONERS.

THE VICTORIAN RAILWAYS COMMISSIONERS Applicants;

AND

THE AUSTRALIAN RAILWAYS UNION . . Respondent.

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Melbourne, *Feb.* 18, 19; *April* 30.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Industrial Arbitration—Industrial dispute—Award—Order varying—Order setting aside—Application to restore original award—Order restoring award "as varied"—Effect of order—Expiration of award—Jurisdiction to make orders varying award after expiration—New award as if on unsettled dispute—Validity—Commonwealth Conciliation and Arbitration Act 1904-1930 (*No.* 13 *of* 1904—*No.* 43 *of* 1930), *secs.* 28, 38.

An industrial dispute arose in 1924 in which the Commonwealth Court of Conciliation and Arbitration made various interim awards. These were replaced by a consolidated award dated 25th March 1930 prescribing a basic wage for railway employees and prescribing wages, salaries, hours of duty and other conditions, the award to continue in force until 31st December 1931, leave being reserved to prosecute further claims relating to conditions of employment. On 4th October 1930, the Court set aside the award except as to the basic wage and standard hours of work. On 22nd January 1931, the Court varied the award by reducing the basic wage by ten per cent. On 17th April

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1934, the Court rescinded the order reducing the wages, and at the same time prescribed a new basic wage. The organization of employees subsequently applied to the Court for an award in respect of the pay of certain classes of employees and for rescission of the order of 4th October 1930, or, alternatively, for restoration of the consolidated award of 25th March 1930. Upon that application an interim award was made declaring that all the provisions of the consolidated award, as varied to date, should be deemed incorporated in the interim award, and that the rates and wages and the conditions prescribed by the consolidated award should be paid and observed by the employer concerned, and that the interim award should continue in force for six months from 29th November 1934.

Held, by *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. (*Rich*, *Starke* and *Dixon* JJ. dissenting), that sec. 28 (3) of the *Commonwealth Conciliation and Arbitration Act* was sufficient authority for the making of the interim award, as the "setting aside" order of 4th October 1930 was a "variation" of the terms of the consolidated award by the omission of certain of its provisions, leaving the basic wage and standard hours provisions remaining, and the reinsertion of the omitted provisions was a further variation of the terms of the award as previously varied.

ORDER NISI for prohibition and SUMMONS under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*.

On 29th May 1924 a log of claims covering wages, salaries and working conditions of the members of the Australian Railways Union in the employ of the Victorian Railways Commissioners and others was served by the Union upon the Railways Commissioners. The claims made by the log were not complied with and there came into existence an industrial dispute extending beyond the limits of one State. A plaint was filed in the Commonwealth Court of Conciliation and Arbitration on 29th July 1924. The plaint came on for hearing on 13th November 1924 and between that date and March 1930 twelve interim awards were made against the Victorian Railways Commissioners and other interim awards were made against other respondents. On 25th March 1930 these were replaced by a consolidated award against the Victorian Railways Commissioners and by consolidated awards against all the other respondent Railways Commissioners. Clause 5 of the consolidated award reserved leave to the Union to prosecute its claims in the dispute applicable to conditions of employment. On 18th August 1930 an amendment to the *Commonwealth Conciliation and Arbitration Act* became law. On 8th September 1930 it was notified by proclamation

that pursuant to sec. 34 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 a conciliation committee had been appointed to deal (*inter alia*) with any application for the variation of the consolidated award of 25th March 1930. On 17th September 1930 the present applicant, together with other Railways Commissioners, applied to the Commonwealth Court of Conciliation and Arbitration for an order to " set aside " the award. On 4th October 1930 the Arbitration Court made an order which " set aside " the consolidated award, except so far as it prescribed the basic wage and standard hours of work, and, in particular, marginal allowances were struck out. The Union then took out a summons in the High Court for the purpose of having it declared that the order of the Arbitration Court was void as having been made contrary to sec. 33 of the *Commonwealth Conciliation and Arbitration Act*. The Union contended that, although the application had assumed the form of an attempt to " set aside " the award, what was done amounted to a " variation " which the Arbitration Court had no power to make under secs. 33 and 34 of the Act. The majority of the High Court held that the order of the Arbitration Court of 4th October was valid on the ground that secs. 33 and 34 were invalid as amounting to an attempt to authorize the settlement of an industrial dispute without arbitration (*Australian Railways Union* v. *Victorian Railways Commissioners* (1)). On 22nd January 1931 the Arbitration Court further varied the award by reducing the basic wage by ten per cent. On 31st December 1931 the operation of the award expired by virtue of clause 3 thereof, and thereafter it was continued in force by virtue of sec. 28 (2) of the *Conciliation and Arbitration Act*. In April 1931 and August 1933 unsuccessful applications were made to the Court by the Union for the restoration of the ten per cent reduction to the base rate. On 17th April 1934 a further variation of the award was made in relation to this ten per cent reduction and an entirely new method of determining the base rate was adopted. On 2nd October 1934 the Union took out a summons calling upon the Victorian Railways Commissioners to show cause why, subject to exceptions specified, the order of 4th October 1930 should not be revoked and those portions of the award of 25th

(1) (1930) 44 C.L.R. 319.

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March 1930 which were set aside by the order of 4th October restored, or, alternatively, why an award should not be made in the terms of the award of 25th March 1930 as at 4th October 1930, as since varied. On the hearing of this summons the Full Court of the Commonwealth Court of Conciliation and Arbitration announced that they proposed, not to restore the award as a whole, but to assign the application to Judge *Drake-Brockman*. On 9th November 1934 the Union took out a further summons requiring the Victorian Railways Commissioners to show cause why an interim award should not be made against them in the same terms as the award dated 25th March 1930 as varied by the order dated 17th April 1934, subject to certain specified exceptions. This summons came on for hearing before Judge *Drake-Brockman* on 15th November 1934 and objection was taken on behalf of the Victorian Railways Commissioners that Judge *Drake-Brockman* had no jurisdiction to make an award. The judgment of Judge *Drake-Brockman* concluded as follows:—"I propose to make an interim award covering both New South Wales and Victoria in the terms of the existing wages and conditions that obtain to-day. I do not propose to put that interim award into operation until to-day fortnight, which would meet the requirements of the Victorian Railways Commissioners and give them, I think, ample time to initiate their proceedings in the High Court, which, of course, will bring everything to a stand-still." The contention of the Victorian Railways Commissioners was that, whatever disputes were now outstanding between the Union and the Commissioners, they were not in any relevant sense the same disputes as, and had no economic relationship to, the dispute raised by the log served over ten years previously.

The Commissioners accordingly obtained an order nisi for prohibition, returnable before the Full Court of the High Court, and also took out a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, which was referred to the Full Court. The grounds of the summons were:—(*a*) That the dispute created in 1924, and determined by the consolidated award of 25th March 1930, is not now existing in whole or in part between the Union and the Commissioners. (*b*) That if any part of the dispute does exist to which the Commissioners are a party, it does not extend

beyond the limits of any one State. (*c*) That the Commonwealth Court of Conciliation and Arbitration has no jurisdiction to make the interim award proposed to be made by Judge *Drake-Brockman*. (*d*) That Judge *Drake-Brockman* had no jurisdiction to abrogate or vary directly or indirectly the order of the Full Arbitration Court of 4th October 1930, setting aside the consolidated award. (*e*) That the Full Arbitration Court, having set aside the consolidated award, had thereafter no jurisdiction to remit or assign to Judge *Drake-Brockman* the matters so set aside with a view to his dealing with them in any manner inconsistent with the order setting them aside. The grounds of the order nisi comprised the first four of the foregoing grounds.

Lewis (with him *Ellis*), for the applicant Commissioners. The two matters are the application to make absolute the rule nisi for prohibition and the application under sec. 21AA. The basis of the jurisdiction of the Arbitration Court is the existence of a dispute. After the consolidated award was made the dispute was settled and no longer existed. Its only relevance was in providing boundaries for the dispute. The dispute passed out of existence and merged in the curial act. When the Arbitration Court sets aside an award, wholly or in part, the part set aside is completely abrogated, and the award goes so far as it is set aside. If the Act purports to give the Court power to reopen a dispute after it has been finally determined by award or after it has been set aside, then it is *ultra vires*, because it would be a law with reference to the preservation of a dispute rather than for the settlement of disputes. No matter what view be taken of the legal position, the dispute of 1924 now no longer exists in fact. Judge *Drake-Brockman* proposes to make an interim award as to all wages and to reopen the whole matter and to traverse the whole field of inquiry previously covered. There is no variation about this matter. It is a re-opening of the whole dispute. The proposed interim award is an attempt to give the Court jurisdiction to do this. The power to "vary set aside or reopen" an award does not give the Court power to make an entirely different and new award. The dispute must be

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genuine and not merely on paper (*Caledonian Collieries Ltd.* v. *Australasian Coal and Shale Employees' Federation* [*No.* 2] (1)). Here there was never any genuine existing dispute after the award was made. If a part of the award is set aside, that part is wholly gone. Even if the interim award is only a variation, it must be made by three Judges and cannot be made by a single Judge. This award considered both basic wage and margins. These two matters are dealt with separately and it is with respect to the latter that the Judge has purported to deal. The purpose of making the interim award is to enable the Judge to take hold of the entire matter and make an entirely fresh investigation. The award ends the dispute, which merges in the award (*Commonwealth Conciliation and Arbitration Act*, secs. 19, 24 (1), (2), 38 (*a*), (*b*)). The power that the Court has to terminate the award does not involve a power to make another award. The procedure by prohibition is more appropriate than the summons under sec. 21AA (*Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (2)). [Counsel also referred to *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (3) and *Australian Railways Union* v. *Victorian Railways Commissioners* (4).]

Blackburn, for the respondent Union. The dispute still exists even after an award is made. The word "determine" used in connection with the word "dispute" in this Act means settle in accordance with the Act, but a settled dispute is not dead. It continues to exist and the Court still has cognizance of it, and the powers which sec. 38 gives to the Court are powers which the Court exercises in respect of the dispute of which it has cognizance. So the dispute exists as something of which the Court has cognizance for the purpose of prevention and settlement (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (5)). Having cognizance of it, the Court can exercise the powers given by sec. 38, and making the award does not extinguish the dispute. It is immaterial whether the settlement is a provisional settlement

(1) (1930) 42 C.L.R. 558.
(2) (1924) 34 C.L.R. 457.
(3) (1920) 28 C.L.R. 209.
(4) (1930) 44 C.L.R. 319.
(5) (1924) 34 C.L.R. 482, at p. 556.

(*R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.* (1)), or is a final settlement but subject to variation within the limits of the dispute. In either case the Court has cognizance of the dispute. The power to set aside is part of the powers given to the Court for the purpose of settling disputes, and does not determine the dispute, any more than the original making of the award does (*Australian Railways Union* v. *Victorian Railways Commissioners* (2)). In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte North Melbourne Electric Tramways and Lighting Co.* (3) the application to vary was made after the expiration of the term fixed by the award, but the point was not taken that the award had expired. In *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (4) it is said that the award continues and not the rates fixed by the Court. This shows that the award continues subject to sec. 38, and no limitation is placed on sec. 28 (3). The proposed interim award is a variation merely, and is within the Judge's powers. He cannot alter the basic wage or standard hours, and anything else is a mere variation of the award (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (5)). That case shows that the making of an interim award was contemplated. So long as he keeps within the ambit of the award, the Judge has power to reopen the whole matter and may make any variation, including a rehearing and reopening of the whole dispute.

Lewis, in reply. The Judge has shown that he intends to cover the whole field by the interim order which he has made. It is clear that the Judge is attempting to exercise jurisdiction as to the whole of the matters in dispute. That is not a variation, and prohibition will, therefore, lie. The dispute passes into the award (*Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (6); *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (7)).

Cur. adv. vult.

(1) (1910) 11 C.L.R. 1, at p. 27.
(2) (1930) 44 C.L.R., at pp. 379, 380.
(3) (1920) 29 C.L.R. 106.
(4) (1920) 28 C.L.R., at p. 234.
(5) (1920) 28 C.L.R. 1.
(6) (1924) 34 C.L.R. 457.
(7) (1920) 28 C.L.R. 209.

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April 30.

The following written judgments were delivered :—

GAVAN DUFFY C.J., EVATT AND MCTIERNAN JJ. This is an application on behalf of the Victorian Railways Commissioners to make absolute an order nisi for a writ of prohibition to prohibit the Commonwealth Court of Conciliation and Arbitration and his Honor Judge *Drake-Brockman* from making or promulgating " an interim award covering both New South Wales and Victoria in the terms of the existing wages and conditions that obtain to-day," Judge *Drake-Brockman* having announced his intention to make such an order or award on 15th November last. Counsel for the present applicant then stated certain grounds of objection to his Honor's jurisdiction and these have since been somewhat elaborated and now fall for consideration.

The facts of the case are not in dispute. The respondent Union's log of demands was filed on 29th May 1924 and it is admitted that, on non-compliance with such demands, there came into existence an industrial dispute extending beyond the limits of one State, the parties to which included the present applicants and the respondent Union. On 29th July 1924 the Commonwealth Court of Conciliation and Arbitration assumed cognizance of the dispute in pursuance of sec. 19 (*b*) of the Act, a plaint being duly filed. Between July 1924 and March 1930, no less than twelve interim awards were made by the Deputy President, Sir *John Quick*, who, on 25th March 1930, promulgated a consolidated award. Clause 5 of the consolidated award reserved leave to the Union to prosecute its claims in the dispute applicable to conditions of employment.

On 18th August 1930, an amendment to the *Commonwealth Conciliation and Arbitration Act* became law. By sec. 27 of that Act a new section (sec. 34) was inserted in the principal Act, and purported to give the Governor-General power to appoint Conciliation Committees for the purpose of dealing with industrial disputes then subject to the jurisdiction of the *Commonwealth Conciliation and Arbitration Act*. By sec. 26 of the amending Act another section (sec. 33) was inserted, which provides that the Commonwealth Arbitration Court could deal with " an industrial dispute or an application to vary an award " in relation to disputes or applications committed to a Conciliation Committee in pursuance of sec. 34. On 8th September 1930, it was

notified by proclamation that, pursuant to sec. 34 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, a Conciliation Committee had been appointed to deal with (*inter alia*) any application for the variation of the consolidated award of 25th March 1930 (*Australian Railways Union* v. *Victorian Railways Commissioners* (1)).

On 17th September 1930, the present applicant, together with other Railway Commissioners, applied to the Commonwealth Arbitration Court for an order to "set aside" the consolidated award. Clearly the application was so framed in order to avoid any appearance of a "variation" application contrary to sec. 33. On 4th October 1930, the Arbitration Court made an order which "set aside" the consolidated award except so far as it prescribed the basic wage and standard hours of work. In particular, marginal allowances were struck out. The Union thereupon took out a summons in this Court for the purpose of having it declared that the order of the Arbitration Court was void as having been made contrary to sec. 33 of the *Commonwealth Conciliation and Arbitration Act* (*Australian Railways Union* v. *Victorian Railways Commissioners* (2)). The Union contended that, although the application had assumed the form of an attempt to "set aside" the award, what was done amounted to a "variation."

The majority of this Court held that the order of the Arbitration Court of 4th October was valid, but for a reason not suggested either by the Railways Commissioners or the Arbitration Court, or by counsel in this Court, until attention was directed to the matter from the Bench (3). The reason for the decision was that both sec. 33 and sec. 34 were invalid as amounting to an attempt to authorize the settlement of an industrial dispute without arbitration (4).

Now, only two Justices expressed an opinion as to whether what had been done by the Arbitration Court on 4th October 1930 was a "variation" of the consolidated award of 25th March. *Isaacs* C.J. closely analyzed the order (5) and concluded :—

> "The substance of the matter is that no variation of the award of 25th March 1930 could be made by the Court. We have then to see whether that

(1) (1930) 44 C.L.R., at pp. 320-321.
(2) (1930) 44 C.L.R., at p. 321.
(3) (1930) 44 C.L.R., at p. 326.
(4) (1930) 44 C.L.R., at p. 328.
(5) (1930) 44 C.L.R., at pp. 379-381.

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order was in fact and in law a variation of the award. Inspection of the award as it stood before the order of the Court, and as it purports to stand now, at once reveals that the order has left an award still existing and operating, but very considerably and vitally varied. When the formal order, as signed by the learned Judges who made it, is applied to the award, and the latter verbally corrected accordingly, the true nature of the order as a variation of a pronounced character is clearly seen " (1).

With this opinion *Gavan Duffy* J. agreed (2).

We are of opinion that the view of *Isaacs* C.J. and *Gavan Duffy* J. was correct, and that the setting aside of certain of the provisions in the consolidated award constituted a " variation " of the latter award. It may be noted that, even after the variation order of 4th October 1930, the provision of clause 5 reserving leave to the Union to prosecute its claims in relation to conditions of employment, still remained.

It is only necessary to trace the subsequent alterations of the award in broad outline. On 22nd January 1931 the Arbitration Court further varied the award by reducing the basic wage by ten per cent. On 31st December 1931 the operation of the award expired by virtue of clause 3 thereof, and thereafter it was continued in force by virtue of sec. 28 (2) of the *Conciliation and Arbitration Act*. In April, 1931, and August, 1933, unsuccessful applications were made to the Court by the Union for the restoration of the ten per cent reduction to the base rate. On 17th April 1934, a further variation of the award was made in relation to this ten per cent reduction, and an entirely new method of determining the base rate was adopted. On 17th October 1934, and 12th November 1934, the Union made the two applications in relation to which an " interim award " was about to be pronounced. The application of 17th October was " (1) for an interim award in respect of the rates of wages and salaries for females employed by the Victorian Railways Commissioners, and (2) for rescission of the order of the Court dated 4th October 1930 or alternatively for an award in terms of the said consolidated awards subject to certain exceptions." In reference to this application the Full Court of the Commonwealth Court of Conciliation and Arbitration announced that they did not propose to restore the award as a whole, but to assign the application

(1) (1930) 44 C.L.R., at pp. 379, 380. (2) (1930) 44 C.L.R., at p. 381.

to Judge *Drake-Brockman*. The latter application of 12th November was for an interim order or award.

By sec. 28 (3) of the *Commonwealth Conciliation and Arbitration Act*, the Court, if satisfied that circumstances had arisen which affect the justice of any terms of the award, is empowered to "set aside or vary any terms so affected." This sub-section defines the powers of the Court after the period specified in an original award has expired, and the latter continues in force merely by virtue of sec. 28 (2). In our opinion, sec. 28 (3) is an ample warrant for the granting of such application as the Union made on 17th October 1934 and 12th November 1934. If, as we have held, the "setting aside" order of 4th October 1930 really "varied" the terms of the consolidated award by the omission of certain provisions therein, leaving the basic wage and standard hours provisions remaining, it necessarily follows that an application to reinsert the omitted provisions is a further variation of the terms of the award as previously varied. In reference to the marginal allowances the position is even more clear. After the alteration produced by the setting aside order, the employees were entitled to be paid as a minimum no more than the base rate. The present application to restore marginal allowances is no more than an application to have the minimum rate of wage increased by the amount of the margin. So far as general conditions of employment are concerned, the terms of the existing award expressly reserve liberty to the Union to apply for an appropriate order so that the addition to the award of such provisions would be a variation of the terms thereof.

Objection was taken to the proposal of Judge *Drake-Brockman* to make an "interim award." Whatever objection may be raised to such phrase as a description, it is clear that what was proposed to be done was no more than a provisional order in the nature of a variation pending the fuller inquiry which was to be made in accordance with the terms of sec. 28 (3). We reject the argument that the length of the inquiry upon which he is to embark is of any relevance, that being a matter in the Judge's discretion under sec. 28 (3).

The applicant has attempted to use Judge *Drake-Brockman's* reference to an "interim award" as foreshadowing the making of

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an entirely new award, regardless of the terms of the award still subsisting. In our opinion it is competent to the Arbitration Court to modify and alter the terms of the existing award so long as it does not travel beyond the area or ambit fixed by the terms of the original dispute. (Compare *Australian Insurance Staffs' Federation* v. *Atlas Insurance Co.* (1).) No doubt, in exercising the powers under sec. 28 (3), the Court does not start with a clean slate, but investigates the question whether justice requires that alterations should be made in the terms of the existing award. Such an investigation may often include numerous matters and cover a very wide area. There is no evidence whatever that the learned Judge intends to do more than act in accordance with sec. 28 (3).

Since the Court reserved judgment, Judge *Drake-Brockman* has settled the terms of his interim order of variation. The parties are agreed that the order does no more than carry out the expressed intention of the Court, and we see no sufficient reason to disagree with them. In our opinion, the clue to the meaning of the award is to be found in clause 3, which provides for the incorporation of the consolidated award "as varied to date." The Court has deliberately used the term "varied" so as to exclude the "setting aside" order of 4th October 1930. This was in accordance with its view as to the nature of the application there made, and as to the extent of its power, although, for reasons we have given, we think that the order of setting aside did effect a "variation" of the consolidated award. In our view, clause 4 of the order operates to restore the margins as they are embodied in the consolidated award. Clause 6 of the order provides that "this award shall be an interim award and shall come into operation on the 29th day of November 1934 and shall continue in force for a period of six months." The fixing of this period of six months is not beyond the Court's powers. It rather emphasizes the fact that the Court thinks that for the present justice requires that the terms of the existing settlement should be varied, but for a limited period only. The validity of clause 5 of the award is not attacked. In the circumstances, we think that the order of variation does no more than accede to part of the applications of the Union dated 17th October 1934, and 12th

(1) (1931) 45 C.L.R. 409.

November 1934. Such was obviously the intention of Judge *Drake-Brockman*, and both parties accept the position that the intention has been carried into effect, though clearer and simpler language could have been used.

We therefore hold that the application for a prohibition fails and should be dismissed. It is unnecessary to deal with the summons taken out under sec. 21AA, as we hold that the interim order is valid and that it is competent for Judge *Drake-Brockman* to proceed upon an inquiry under sec. 28 (3) with a view to varying any or all the terms of the award as justice may require.

RICH J. Order nisi for prohibition directed to the Court of Conciliation and Arbitration and summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, heard together. The proceedings sought to be prohibited and declared incompetent are pending before Judge *Drake-Brockman*. They arise out of applications made by the Australian Railways Union for an order or orders varying an award made by Sir *John Quick* on 25th March 1930 the terms of which have, since that date, been the subject of much variation and alteration. The variations and alterations made in the award up to the proceedings now in question originated in the rapid change of conditions from the date when the award was pronounced which took place as the result of the financial depression. The award of Sir *John Quick* was a consolidation of many awards which he had made in relation to the Victorian Railways in the course of settling a dispute between the organization and the Railways Commissioners of the State of Victoria and three other States. Up to the making of the award half the period of the siege of Troy had been occupied in settling the dispute. The remainder of that period has since elapsed but we are told that the dispute is still alive and not yet completely settled. The award was expressed to have a currency ending on 31st December 1931. But on 4th October 1930 it was set aside except in so far as it prescribed a basic wage and standard hours of work. The difficulties of jurisdiction created by that order were dealt with at the time in this Court (*Australian Railways Union* v. *Victorian Railways Commissioners* (1)). In the following January the wages prescribed were reduced by

(1) (1930) 44 C.L.R. 319.

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ten per cent by an order of the Court of Conciliation and Arbitration, an order which was rescinded on 17th April 1934 when a new basic wage was prescribed. All these orders, including, in my opinion, the so-called setting aside order, amounted to orders of variation. Last October the organization applied to the Court of Conciliation and Arbitration for the reinstatement of the terms of the consolidated award. This is not the first of such applications. The Full Court of the Court of Conciliation and Arbitration expressed the view which it had also before expressed that the great change in economic and industrial conditions precluded such a course. It recommended that fresh proceedings, founded, as I understand, on some new dispute, should be taken in order that a new regulation of wages and conditions might be obtained. The organization nevertheless took the course of resorting to the old dispute which arose ten years before, and without raising any fresh dispute applied to Judge *Drake-Brockman* for orders of variation of Sir *John Quick's* award. That award was kept alive from 31st December 1931, the date of its expiration, only by the force of sec. 28 (2) of the Act. Power to vary it is given by sub-sec. 3. Upon the history of the legislation there is much to be said for the view that it is the only power to vary an award the specified period of which has ended (see the discussion by *Evatt* J. in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (1)). The Victorian Railways Commissioners objected that under this power Judge *Drake-Brockman* could not engage in a reconsideration or consideration of the terms and conditions appropriate to the present time for the regulation of the railway industry in Victoria. His Honor treated the ten year old dispute as still subsisting and as retaining enough vitality to give him jurisdiction.

I have before remarked upon the attempts to press to an impossible extension the already very wide interpretation which sec. 51 (xxxv.) of the Constitution has received in this Court (see *Federated State School Teachers' Association of Australia* v. *Victoria* (2) ; *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (3)). To repeat what I said in the latter case, " Liberal, however,

(1) (1931) 45 C.L.R., at pp. 439 et seq.

(2) (1929) 41 C.L.R. 569, at pp. 590, 591.

(3) (1931) 45 C.L.R., at pp. 420, 421.

as has been the application of the limitations imposed by the Constitution upon the Federal power, those limitations cannot be escaped. But the very width of application which has been given to them has increased the difficulties of ascertaining the boundaries of the power. The enlargement by judicial decision has been progressive, and has been accomplished by the double process of the Court of Conciliation and Arbitration making, whether by experiment or otherwise, awards the validity of which was uncertain or disputable, and this Court resolving the doubt in favour of that Court's decision. As a result, perhaps less certainty of definition has been achieved than might be desired, but only an optimist could hope at once for a widening jurisdiction and fixity of definition. But at no time had there been any doubt that the existence and the ambit of a dispute determine the power of the Court of Conciliation and Arbitration to embody its will in an award. To go outside matters in a dispute and to regulate wages or conditions otherwise than by a decree which is fairly incident to composing the difference between the parties is neither to arbitrate nor to settle an industrial dispute " (1). Every constitutional power has limits, and however liberally it may be construed the limits are at length reached and an attempt is then made to go beyond them. It may be true that when an award is made settling an existing dispute the then existence of the dispute is enough to support afterwards the industrial regulation contained in the award; but it is an extreme deduction from that principle that a dispute which existed ten years ago can be settled all over again and form the foundation of a new and up-to-date regulation of industrial terms and conditions. In my opinion the award of Sir *John Quick* as varied remains in force only by virtue of sec. 28 (2). The power of the Court further to vary rests exclusively upon the theory that an award continued in force may be varied in order to prevent its continuance in force operating unjustly. (See *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2).) It is continued in force to bridge a gap, namely the gap between the termination of its specified period and a new award in a new dispute. But the bridge over the gap may be reconditioned by the power of variation lest in changing

(1) (1931) 45 C.L.R., at p. 421.

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

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conditions it grows altogether unsuitable for the purpose. A new bridge cannot be constructed. The reconditioning cannot extend beyond those repairs and adjustments necessary to preserve a useful structure. If the bridge is removed, another industrial regulation cannot be put in its place unless there is a living dispute which really requires settlement to compose the then existing controversy. I gather from Judge *Drake-Brockman's* observations that he did not take this limited view of his functions. Much of what he said is open to the interpretation that he regarded himself under a burden comparable to that which engrossed the labours of Sir *John Quick* until he made his award in 1930. As a first step his Honor pronounced what he described as an interim award. His doing so provoked the present applications to this Court. When they came on to be argued the interim award as drawn up was not available and we experienced some difficulty in obtaining from the materials before us and the discrepant contentions of the parties a clear apprehension of what his Honor had done. After the argument, however, we were furnished with a copy of the instrument. The text was not in accordance with what I had been led to expect. The parties, however, by a joint memorandum adopted a construction or interpretation of the interim award in which they concurred. Each furnished in support of the interpretation separate memoranda in which their tendency to agree was by no means so marked. It is satisfactory, however, to find them concurring in the substantial effect which they think should be given to the award, from whatever motive their concurrence may spring. It is no less satisfactory because I myself without their aid would probably not have hit upon the meaning which thus has been ascribed to the award. They agree that by the interim award it is intended to award, for six months from 29th November 1934 unless in the meantime it is otherwise ordered and subject to certain qualifications, that the terms of the consolidated award of 25th March 1930 should be in force, including the marginal payments and all other parts of the award which had been set aside in 1930. The qualifications mentioned, put briefly, are that deductions may be made not greater than those authorized by State law, and that all other variations made in the meantime shall apply. Clause 6 of the interim award provided as follows:

"This award shall be an interim award and shall come into operation on 29th November 1934 and shall continue in force for the period of six months." Clause 3 provides that "all the provisions of the consolidated award as varied to date are to be deemed to be incorporated herein." Now, whatever else may be said of the interim award, there can be no doubt that by these clauses, particularly as they have been interpreted by the parties, it establishes referentially rates and conditions to govern the industry for a specified period of six months. This appears to me to be quite outside the power given by sec. 28 (3) to the Court of varying an expired award continued in force by sec. 28 (2). It is an attempt to make an interim award as if a dispute were still unsettled and as if the Court were making an award to which sec. 28 (1) applied. No doubt it could be terminated before the expiration of six months, but so could any award made under sec. 28 (1) be brought to an end before the expiration of its period.

The rule nisi should, in my opinion, be made absolute to prohibit proceedings upon this so-called interim award. The Commissioners do not appear to have a *locus standi* under sec. 21AA and prohibition is therefore the appropriate remedy. The summons should be dismissed.

STARKE J. Order nisi for a writ of prohibition, and summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930. Both proceedings raise the same questions, namely, whether the Federal Arbitration Court has jurisdiction to reopen and reconsider generally the various industrial disputes respecting railways which had been the subject of awards made by the Court, and whether an interim order of the Court made on 15th November 1934 is valid.

As far back as 1924, the Australian Railways had submitted an industrial dispute to the Court by plaint, in which the Victorian Railways Commissioners, the Railways Commissioners for New South Wales, the South Australian Railways Commissioner, the Commissioner for Railways, Hobart, and others, were named as parties. The hearing lasted several years, and various awards were made in the matter, but final or consolidated awards were apparently

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contemplated on the completion of the hearing of the case. Awards were made in March of 1930 in respect of the operations carried on by the railway authorities in the various States. One of these is known as the Consolidated Award Victorian Daily Paid and Salaried Grades. It determined the basic wage, margins above the basic wage, hours of duty, and other matters. Leave, however, was reserved to the parties to prosecute various undetermined claims, such, for instance, as those applicable to conditions of employment. In October of 1930, the Arbitration Court in Full Court set aside these awards, except so far as the awards prescribed the basic wage and standard hours of work. In January of 1931, the Full Court also reduced the wage rates by ten per cent. Applications were made to restore the awards, and in 1933 the Full Court declined to restore or re-enact them, but intimated that the way was open for the parties to bring any application before the Court "for the purpose of getting an award such as the Court thinks is appropriate to present conditions." In April of 1934 the Full Court determined that the ten per cent reduction should no longer operate, and it varied the method of determining the basic wage. Later in 1934, another application was made to restore the consolidated award, or for an award in terms of that award as at 4th October 1930 as since varied. Again the Full Court denied the application, but stated that it proposed to assign all the outstanding railway matters, the application to restore, and other matters on the list, to a single Judge. All outstanding railway matters were accordingly listed before Judge *Drake-Brockman*, including a summons dated 2nd October 1934, seeking the restoration of the consolidated award known as the Victorian Daily Paid and Salaried Grades Award, subject to certain exceptions or qualifications, or for an award "in terms of the said award as at the 4th October 1930 as since varied, but subject to the said exceptions and qualifications." Another summons, dated 9th November 1934, was also issued. It called upon the Victorian Railways Commissioners to show cause why interim awards should not be made against them in terms of the award of the Court dated 25th March 1930, known as the Consolidated Award Victorian Daily Paid and Salaried Grades, as varied by orders dated 17th April 1934 (the order varying the method of determining the basic

wage) subject to certain specified exceptions. The consolidated award specified that it should continue in operation until 31st December 1931. "After the expiration of the period so specified, the award shall, unless the Court . . . otherwise orders, continue in force until a new award has been made" (*Commonwealth Conciliation and Arbitration Act*, sec. 28 (2); *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1)). The duration of the award is extended by force of the Act. But the Court has not lost cognizance of the industrial dispute in which the award was made. It has the powers conferred by sec. 28 (3) in respect of the award, but that power does not oust other powers and authorities which the Court has in respect of its awards and orders. Indeed, the proviso to sec. 28 (3) puts the matter, to my mind, beyond any real doubt. The provision contained in sec. 28 (2) may duplicate the powers of the Court, but I see no reason why the powers contained in sec. 38 in respect of awards which have been continued in force under sec. 28 (2) should not be exercised in the same manner and to the same extent as in the case of awards during their specified periods. The award is not the less an award because its duration is extended.

But, in my opinion, Judge *Drake-Brockman* has misunderstood the powers and authorities of the Court. He appears to think that so long as the Court has cognizance of an industrial dispute, though it has by award or order settled it wholly or in part, yet it can, under the authority to vary its awards or reopen any question, proceed to hear, determine and settle *de novo* the whole dispute. Such an assumption of power is wholly unwarranted. Varying the terms of an award or reopening some question in the dispute is one thing, but rehearing or re-determining the whole dispute is another. The learned Judge has made an interim award or order dated 15th November 1934 against or affecting the Victorian Railways Commissioners—the prosecutors in the prohibition and the applicants in the summons under sec. 21AA. Its character and effect must be gathered from its terms and the proceedings in which it was made, and to it I therefore turn.

(1) (1920) 28 C.L.R., at p. 219.

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It should be remembered that the award or order was made on an application seeking the restoration of the consolidated award or an award in terms of that award as at 4th October 1930 as since varied. It is short, but is not without ambiguity. It prescribes that all the provisions of the consolidated award, as varied to date, are to be deemed to be incorporated therein, and then goes on to provide that "the minimum rates of wages payable thereunder and the conditions prescribed therein shall be paid and observed by the Victorian Railways Commissioners until otherwise determined by this Court." Do the words "as varied to date" incorporate "the set aside order" made by the Full Court in October of 1930? If they do, the interim order achieves little or nothing, and is harmless. Technically it may be true that "the set aside order" was but a variation of the consolidated award. But taken in the proceedings in which the interim order was made I cannot construe the words "as varied to date" as incorporating it. The summonses of 2nd October 1934 and 9th November 1934 make it clear enough that the applicant was seeking a restoration of the consolidated award as it existed before "the set aside order" was made, and as that order was varied on 17th April 1934. The order of Judge *Drake-Brockman* should be construed in relation to these proceedings and in the light of the surrounding circumstances, and having regard to the meaning attributed to the phrase in those proceedings. I agree, as the parties agree, that the interim order did not intend to and does not incorporate "the set aside order" as part of its provisions. But the difficulties then begin. The interim order is not, nor does it pretend to be, a variation of any existing order. It purports to settle and determine *ad interim* a dispute then before the learned Judge. The following is the order:—"Upon application made unto this Court this day on behalf of the above-mentioned claimant Union for an interim award in the above-mentioned dispute and upon reading the summons issued at the instance of the said Union on the 9th day of November 1934 and the affidavit of William Thomas Robeson sworn the 8th day of November 1934 and filed on behalf of the said Union and upon hearing Mr. *W. T. Robeson* for the said Union Mr. *Stanley Lewis* of counsel on questions of jurisdiction and Mr. *W. Swaney* for the Victorian Railways Commissioners and Mr.

V. G. Hall for the Commissioner for Railways New South Wales and the Commissioner for Road Transport and Tramways New South Wales, and the Court having informed its mind on the matter in such manner as it thought just, and in particular upon reading the plaint filed herein on behalf of the said Union on the 29th day of July 1924 this Court doth hereby award order and prescribe as follows:—1. This award is to be read in conjunction with the consolidated award—Victorian Daily Paid and Salaried Grades, made on 25th March 1930 as varied since that date. 2. All classes of employees and all classes of work specified in the said consolidated award as varied to date shall be deemed to be covered by this award. 3. All the provisions of the said consolidated award as varied to date are to be deemed to be incorporated herein. 4. The minimum rates of wages payable thereunder and the conditions prescribed therein shall be paid and observed by the Victorian Railways Commissioners until otherwise determined by this Court. 5. Notwithstanding anything contained in this award the Victorian Railways Commissioners may, in or from the rates of pay herein prescribed in conjunction with the aforesaid consolidated award, make reductions or deductions not greater than a statute of the State of Victoria now or at any time required to be made generally in or from substantially similar rates of pay of employees of the State or of the State instrumentalities. 6. This award shall be an interim award and shall come into operation on the 29th day of November 1934 and shall continue in force for a period of six months." This order is made upon an application for an interim award: the summons of 9th November 1934 was for an interim award. It is made upon the reading of the plaint of 1924, and after the Court had informed its mind in such manner as it thought just. It does not vary any existing award, but incorporates and makes an existing award a new and substantive act of the Court. It purports to and does re-determine but *ad interim* the dispute submitted to the Court in 1924. It does not, and could not under sec. 28 (2), order that the consolidated award should continue in force for a period of six months from 29th November 1934. But it makes a new award operating as such and for a period specified therein, namely six months from 29th November 1934. Everything points to what is the

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fact, namely, that Judge *Drake-Brockman* conceived and acted upon the view that the dispute submitted to the Court in 1924, and of which it had cognizance under the Act, was something he could reopen, rehear and re-determine as if it had never before been the subject of determination. The interim order is such a re-determination, though *ad interim*. It is not a variation within the power to vary contained in the Act and is consequently invalid.

Some reference was made during argument to the leave reserved by the consolidated award for the parties to prosecute their claims applicable to conditions of employment. The interim order does not touch these conditions, and if it did some inquiry would be necessary for the purpose of ascertaining whether the claims so reserved are subsisting or are now so stale and out of date that they should be regarded as having lapsed or been abandoned.

Finally, it is plain, I hope, from what I have said, that if Judge *Drake-Brockman* intends to reopen and re-determine *de novo* the whole of the controversy raised by the plaint of 1924, and to make a new award in relation thereto, then, in my opinion, he will transcend any power conferred upon him by the *Commonwealth Conciliation and Arbitration Act* and the proceedings will be as invalid as, in my opinion, is the interim order. Common sense, and not legal definition, is possibly the best guide to a legitimate use of the power to vary an award. It is not possible to define with any great precision what is and what is not a variation. But it is quite easy, in most cases, to say that a given provision is or is not a variation of an existing award. And in my opinion there is no difficulty in the present case in denying to the interim order the character of a variation.

The order nisi for prohibition as to the interim order should be made absolute, but it is not necessary to go further at the present time.

Dixon J. The Victorian Railways Commissioners on 14th February 1935 issued a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 for the purpose of establishing that the Court of Conciliation and Arbitration has no jurisdiction to make an interim award and proceed further in some

railway matters now pending before his Honor Judge *Drake-Brockman*. Before this summons was issued the Commissioners had obtained an order nisi for a writ of prohibition for the same purpose. To understand the nature of the proceedings before Judge *Drake-Brockman*, it is necessary to give a short account of the awards affecting the parties. As long ago as 29th May 1924, the organization, by a log of claims served upon the Commissioners and upon the railway authorities of three other States, took the first step in raising the industrial dispute which is said to be a sufficient foundation to support the challenged proceedings. Two months afterwards the organization filed a plaint based upon the dispute, the existence of which at that time does not appear to have been denied. The plaint sought terms and conditions against the Commissioners of four States, including Victoria. The hearing of the plaint was commenced on 16th March 1925 by a Deputy President (Sir *John Quick*) who proceeded to settle the dispute by a series of interim awards.

After a hearing extending over five years, the interim awards were collected into final consolidated awards for each State. The consolidated award was made on 25th March 1930. It prescribed a basic wage, and, by additions to the basic wage, prescribed wages for a long catalogue of railway employees of all classes. It dealt with hours of duty and some other conditions and also prescribed salaries for salaried officers. Clause 3 of the award provided that it should come into operation on 23rd March 1930, and, except as to certain clauses, should continue in operation until 31st December 1931, or such earlier date as should be ordered by the Court.

On 4th October 1930, upon an application by the Railways Commissioners for the four States, the Full Court of the Court of Conciliation and Arbitration made an order setting aside the consolidated awards except so far as the awards prescribed the basic wage and standard hours of work. The order contained a schedule setting out in detail the parts of the text of the awards set aside. Before this order was made a Conciliation Committee had been appointed under sec. 34 of the Act in relation to railway disputes and applications for variations. The organization objected that the order purporting to set aside portions of the award was in

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truth an order to vary, which, under sec. 33, the Court was forbidden to make after the appointment of a Conciliation Committee.

The majority of this Court held that secs. 33 and 34 were invalid (*Australian Railways Union* v. *Victorian Railways Commissioners* (1)). *Isaacs* C.J. and *Gavan Duffy* J. dissented. They held that sec. 33 was valid and that the order was one of variation and consequently was beyond the power of the Court of Conciliation and Arbitration. *Isaacs* C.J. stated fully his reasons for so regarding the order (2). Although the majority of the Court found it unnecessary to say whether the order was one of variation or setting aside, the very fact that they felt called upon to pronounce upon the constitutionality of secs. 33 and 34 indicates at least that they were not prepared to hold that it was a setting aside. For sec. 33 did not prohibit the Court of Conciliation and Arbitration from setting aside an award.

After these proceedings, namely, on 22nd January 1931, the Court of Conciliation and Arbitration varied the awards by reducing the wages therein prescribed by ten per cent. Later in the same year and again in 1933 the organization applied for an order rescinding the order of 4th October 1930. These applications were refused. But, on 17th April 1934, the Court of Conciliation and Arbitration did rescind the order reducing the wages by ten per cent. At the same time it prescribed a new basic wage and it authorized deductions from wages prescribed by the truncated award as varied, if the deductions were made under State law and were also allowable from the wages of substantially comparable employees in other services of the State. On 17th October 1934, the organization brought on a fresh application for restoration of the consolidated award. The application came on before the Full Court of the Court of Conciliation and Arbitration which, however directed that all outstanding railway matters should be heard by a single Judge. The members of the Bench had in 1933 and upon the subsequent applications expressed opinions substantially to the effect that the great change in the circumstances of the country and of industry necessitated a reconsideration of the wages and conditions which should be prescribed and made restoration of the

(1) (1930) 44 C.L.R. 319. (2) (1930) 44 C.L.R., at pp. 379-381.

terms of the old award a course which could be put out of consideration. It is clear that it was believed that a new dispute would be created in order to found proceedings for such a reconsideration of the industrial conditions to be prescribed. Nevertheless the organization applied to his Honor Judge *Drake-Brockman* on the footing of the old dispute and the old awards. The applications sought an interim award and subsequent relief amounting in form to a variation, whatever it amounted to in substance. Upon these applications Judge *Drake-Brockman* pronounced an interim award.

The argument before us took place before the award was drawn up, or, at any rate, was available. The parties were not then entirely in agreement as to what the interim award purported to do. Since the argument the award, as drawn up, has been placed before us and the parties have furnished to us a memorandum in which they agree what the instrument was intended to do. In effect, they concur in the view that it was intended to award for six months from 29th November 1934, or until otherwise earlier ordered, that the terms of the consolidated award of 24th March 1930, including the parts set aside by the order of 4th October 1930, should be in force subject to a qualification enabling reductions under State law. Unfortunately I am quite unable to find this intention expressed in the interim award. Omitting clause 5, which relates to the qualification, the clauses of the operative part of the award are as follows :—" 1. This award is to be read in conjunction with the consolidated award—Victorian Daily Paid and Salaried Grades, made on 25th March 1930 as varied since that date. 2. All classes of employees and all classes of work specified in the said consolidated award as varied to date shall be deemed to be covered by this award. 3. All the provisions of the said consolidated award as varied to date are to be deemed to be incorporated herein. 4. The minimum rates of wages payable thereunder and the conditions prescribed therein shall be paid and observed by the Victorian Railways Commissioners until otherwise determined by this Court. 6. This award shall be an interim award and shall come into operation on the 29th day of November 1934 and shall continue in force for a period of six months." The language of clause 4, which speaks of wages payable thereunder and conditions prescribed therein, appears to me clearly to

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refer to the words in clauses 2 and 3, " consolidated award as varied to date." I am quite unable to treat the words " as varied to date " as excluding the so-called order of setting aside of 4th October 1930. Independently of the history of the matter, they would naturally be read as including all the alterations in the operation of the award which had been made. But the history of the matter shows that the organization had succeeded in obtaining in this Court a definite expression of judicial opinion that the order was a variation. Moreover, if it had been intended to re-establish the provisions set aside, it is almost incredible that the interim award should contain no express provision doing so. The interim award appears to me to adopt the existing wages and conditions prescribed by the combined effect of the awards and orders in force, to qualify them by clause 5 which is to the effect of the qualification contained in the order of the Full Court of 17th April 1934, and to establish those wages and conditions for six months unless in the meantime the Court otherwise orders. Upon this interpretation of the award, which appears to me unavoidable, it accomplishes little. It is, therefore, easy to understand why the parties united in preferring to give it some other effect. On the one side, the Commissioners' counsel evidently considered the effect which both parties were prepared to attach to the interim award tended to support his attack on its validity, as indeed it does. On the other hand, the organization is no doubt desirous of giving to the instrument a meaning which will confer substantial advantages upon its members. Before the interim award was drawn up, however, neither party ascribed to the Judge an intention to do precisely what they now say the instrument would effect if valid. What his intention actually was it is fruitless to inquire. If it was wider than that which the instrument expresses, he was at liberty to revise it in drawing up the interim award. In a matter in which the validity of a proceeding of the Court of Conciliation and Arbitration is at issue, we are not at liberty to substitute for the text of the order of the Court the gloss which the parties put upon it. We are concerned with what the Court has done, not with what they would have liked it to do. If the order was ambiguous, it would perhaps be another matter. But I cannot find in its terms any ambiguity. The doubt as to its meaning exists, I think, only

because of its departure from an intention which the Judge was thought to entertain. To no one, who read the interim award without any prior knowledge or belief as to what Judge *Drake-Brockman* was supposed to have intended, would it occur, I think, to interpret the interim award in the manner in which the parties desire.

But even upon the interpretation of the instrument which I think it must receive, two difficulties remain in reference to its validity. In the first place, it assumes the title and form of an interim award. Now the power to make an interim award is given by sec. 38 (*b*) of the Act which is as follows:—"The Court shall, as regards every industrial dispute of which it has cognizance, have power . . . (*b*) to make any order or award (including any provisional or interim order or award relating to any or all of the matters in dispute) or give any direction in pursuance of the hearing or determination." This power of making interim or provisional awards appears to me to be directed at awards or orders which precede a final settlement of the dispute. But in the present case a final award has been made. It is, so far as concerns the Victorian Railways Commissioners, the consolidated award of 4th October 1930. The proceeding before Judge *Drake-Brockman* was, in form, an application to vary the provisions resulting from that award and the existing variations of it. The power to make an interim order or award given by sec. 38 (*b*) is not appropriate to such a proceeding. Of course the name or title of the order is not decisive of its character. If its substantial effect was to do what is within the authority of the Court of Conciliation and Arbitration, it would not lose its efficacy because it was entitled "Interim Award." Moreover, it is not difficult to understand an order of variation being made for some temporary purpose. No doubt it is competent for the Court to make a variation which it intends or expects afterwards to supersede or revoke. But at this point the so-called "Interim Award" encounters the second of the two difficulties. The power to deal with the existing award at all is to be found in sec. 28 of the Act. The fixed period of the consolidated award expired on 31st December 1931. It remains in force only by reason of sub-sec. 2 of sec. 28, not by reason of the decision or determination of the Deputy President who made it.

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In his opinion the settlement of the dispute required an award which operated until that date. But the Legislature has provided that, when the fixed period of an award expires, it shall remain in force until some new award is made, a condition which supposes a new dispute, or unless the Court makes some order to the contrary. This provision was upheld as valid by this Court upon the ground substantially that for the Legislature to keep an industrial regulation, brought into existence by an award, alive until a new regulation was made was incidental to the power of arbitration, at any rate so long as the Court of Conciliation and Arbitration was left at liberty to give any contrary direction it saw fit (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1)). Sub-sec. 2 of sec. 28 gives the Court power " otherwise to order." Sub-sec. 3 empowers the Court if it is satisfied that circumstances have arisen which affect the justice of any terms of an award in the same or another proceeding to set aside or vary any term so affected. This power was given after the decision of this Court in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1), in which *Isaacs* J., as he then was, and *Rich* J. held that the general power to vary, that given by sec. 38 (*o*), was not exercisable after the fixed period of an award had expired. I think that it is sec. 28 (2) and (3) and not sec. 38 (*o*) which empowers the Court of Conciliation and Arbitration to deal with an award after the effluxion of the specified period. This opinion is, I think in effect, expressed by *Evatt* J. in *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co.* (2). It means that, having regard to the amendment of the Act, the view of *Isaacs* and *Rich* JJ. of the meaning of the Act prior to the amendment should be accepted. Accordingly the sole power exercisable by his Honor Judge *Drake-Brockman* is to be found in sec. 28 (2) and (3). But that power does not contemplate giving a new fixed period to the provisions of the old award. Indeed the whole basis of sub-sec. 2 and of the reasoning by which its validity was supported is inconsistent with giving to the expired award a new specified period of duration. Yet this is precisely what the interim award does by its sixth clause. No doubt clause 6 is expressed as a fixation of the period of the interim

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

(2) (1931) 45 C.L.R., at pp. 439-442.

award. It is not necessary to decide whether an order of variation may be given a fixed period of duration. Even if it may, this order has a greater effect. It incorporates by clause 1 the existing award as varied. Having thus, so to speak, picked it up, it then provides in relation to the resultant industrial regulation that it shall have a six months duration subject to any order to the contrary. This, in my opinion, it could not do. Having regard to the nature of the award as I have interpreted it, its validity is probably a matter of much less practical importance than the parties were inclined to suppose. However that may be, in my opinion it is invalid.

But the root of the trouble by which the parties are unfortunately surrounded, is not really affected by this conclusion. The source of the difficulty is, I think, in a misconception of the power of the Court of Conciliation and Arbitration over the existing state of affairs. In the absence of a new dispute, its power is confined to sec. 28, which means sec. 28 (3) so far as concerns the declaration of new industrial terms. This power enables it only so to alter and modify the existing award as to make its application just and fair pending the making of an entirely new award in a new dispute. It does not enable it to proceed to make *de novo* a fresh regulation of industrial relations. The award is kept alive under sec. 28 (2), not by force of an arbitral decision, but by direct legislative enactment which operates notwithstanding that by arbitral decision a period of duration has been fixed for the award and that that period has expired. The authority to do this has been considered to belong to the Legislature because to hold an existing industrial regulation in force during the interval between arbitral decisions made in the settlement of disputes appeared to be fairly incidental to the subject matter of sec. 51 (xxxv.). To empower the Court of Conciliation and Arbitration to make alterations in the terms of the award so kept alive seems a further incident of the power, because, if it is right to retain in force by direct enactment an expired award, it is a reasonable consequence that, in case of unfairness or hardship, the Court should be allowed to exclude or modify the operation of the terms or conditions found inappropriate. But it must be remembered that all this is a result of the expiration of the industrial settlement effected by arbitration. It is the consequence of the

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fulfilment of the arbitral regulation which the Court making the award must be taken to have intended. Under colour of removing from the award thereafter continued in force by legislative enactment unfairness or unjustness of operation, the Court cannot resume the function of determining all over again what industrial relations should subsist between the parties just as if it were settling a living dispute between them. Cases can be conceived where, notwithstanding that an award has been made and has expired, the dispute which it was intended to settle remains an actual industrial conflict between the parties. In such a case the Court's attempt to settle the dispute has simply failed. Perhaps the Court may in such a case, consistently with the provisions of the Act, enter upon a fresh attempt to settle the dispute. But the present case does not present an example. It is inconceivable that the paper dispute brought into existence in 1924 should, after all the grave and unexpected economic events which have since occurred, remain a real and living controversy.

Unimportant as the practical operation of the interim award may be, its significance cannot be small. For the Court in pronouncing it appeared to exhibit an intention of undertaking a very wide survey of the terms and conditions which at the present day should be imposed upon the parties.

I think that the interim award was invalid for the reasons I have given and that this Court should so decide.

A difficulty exists in dealing with the matter under sec. 21AA because the original dispute was submitted by plaint and the Victorian Railways Commissioners are not an organization or association registered under the Act, which authorizes only such organizations or associations to apply under sec. 21AA when a dispute is so submitted.

In the circumstances I think the order nisi should be made absolute for a writ of prohibition against proceeding upon the interim award of 15th November 1934.

Order nisi discharged. No order on summons.

Solicitor for the applicants, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent Union, *M. Blackburn & Tredinnick.*

H. D. W.