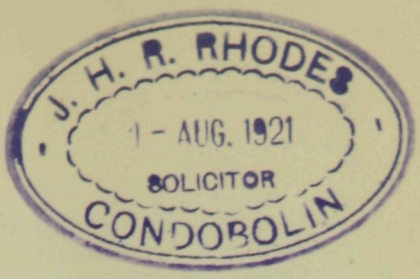

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1920-1921.

[HIGH COURT OF AUSTRALIA.]

FEDERATED ENGINE-DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA } CLAIMANT;

AND

ADELAIDE CHEMICAL AND FERTILIZER COMPANY LIMITED AND OTHERS . } RESPONDENTS.

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MELBOURNE, *March* 8, 9.

SYDNEY, *March* 25.

Industrial Arbitration—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Dispute extending beyond one State—Settlement of part of dispute—Award as to dispute in one State only—Award inconsistent with State law—Determination of Wages Board—Minimum wage—Retrospective award—Payment in respect of past work—No prior award—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (XXXV.)—*Commonwealth Conciliation and Arbitration Act* 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *secs.* 16A, 19, 23, 24, 28—*Wages Boards Act* 1910 (*Tas.*) (1 *Geo. V. No.* 62), *sec.* 20.

Knox C.J., Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ., (1) that, where the Commonwealth Court of Conciliation and Arbitration has acquired cognizance of an industrial dispute extending beyond the limits of one State between an organization of employees and employers in different States, the fact that, by reason of awards made by that Court or of agreements certified and filed pursuant to the *Commonwealth Conciliation and Arbitration Act*, there remain in one State only employers who have not made any such agreement and against whom no such award has been made does not prevent that Court from making an award in respect of those remaining

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employers; (2), following *Federated Sawmill &c. Employees' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.*, 8 C.L.R., 465, and *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.*, 10 C.L.R., 266, that the Commonwealth Court of Conciliation and Arbitration may by an award fix a minimum rate of wages lower than the minimum rate fixed by a Wages Board of a State pursuant to a statute of that State for the same class of work.

Held, also, by *Knox* C.J., *Higgins*, *Gavan Duffy*, *Rich* and *Starke* JJ. (*Powers* J. dissenting), that, where no prior award has been made by the Commonwealth Court of Conciliation and Arbitration on the particular subject matter, that Court may by an award make provisions in respect of matters which are past at the date of the award if those matters were in issue in the original dispute and, therefore, may order payment in respect of work done after the point of time when as a fact the industrial dispute began and before the award is made.

CASE STATED.

On the hearing before the Commonwealth Court of Conciliation and Arbitration of an industrial dispute between the Federated Engine-Drivers' and Firemen's Association of Australasia, an organization of employees, claimant, and the Adelaide Chemical and Fertilizer Co. Ltd. and a large number of other employers, respondents, which had been referred into the Court by *Powers* J., he stated, for the opinion of the High Court, a case which was, in substance, as follows :—

1. The reference into Court of the dispute between the claimant organization and the respondents in the States of Victoria, New South Wales, South Australia, Western Australia and Tasmania in this matter was made on 20th December 1918. The dispute was one about a claim for a log of wages and conditions of work demanded in October and November 1918, from respondents in Victoria, New South Wales, South Australia, Western Australia and Tasmania.

2. A copy of the reference is attached hereto, omitting the names of the respondents, numbering nine hundred and seven, set out in the first schedule to the case stated.

3. Prior to 25th July 1919, by consent of both parties, I agreed to delay the making of an award against Tasmanian respondents until the witnesses for both parties could give evidence before the Court at Melbourne as to the dispute and the merits. At that time

it was impossible to do so because of quarantine restrictions during the influenza epidemic.

4. Prior to 15th September 1919 I found that an industrial dispute extending beyond the limits of one State existed between the organization and certain respondents in Victoria, New South Wales and South Australia, but I did not, for reasons mentioned later on, at that time make any finding as to respondents in Western Australia or in Tasmania.

5 I made an award on 15th September 1919 as to the respondents in the States of South Australia, Victoria and New South Wales, who had not settled the dispute, settling the dispute so far as they were concerned. The respondents in Western Australia settled their dispute out of Court before any award was made.

6. Some of the respondents in Tasmania, after 25th July 1919, entered into agreements with the organization in settlement of part of the dispute, which agreements have been certified to and filed in accordance with sec. 24 of the *Commonwealth Conciliation and Arbitration Act*.

7. Some of the other Tasmanian respondents appeared at the adjourned hearing on 29th September and 31st October 1919 to oppose the claims made, but they have not contended that there is not an industrial dispute between them and the organization or that there was not, up to 15th September 1919, an industrial dispute extending beyond the limits of one State to which they were then parties.

8. Other Tasmanian respondents have not appeared or been represented at the hearing, although duly summoned to appear (see sec. 29 (*b*) of the *Commonwealth Conciliation and Arbitration Act*).

9. I found, on 31st October 1919, that on and prior to 13th September 1919 there was an industrial dispute extending beyond the limits of one State between the organization and respondents in the States of Victoria, New South Wales, South Australia and Tasmania in respect of the matters claimed under this reference, and that that dispute had not been settled on 31st October 1919 so far as many of the respondents in Tasmania were concerned, but

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that it had been settled as to the part with the respondents in Victoria, South Australia and New South Wales before that date by awards of this Court and agreements, that is, so far as the respondents in all the other States were concerned.

10. I am now asked to make an award settling the dispute or part of the dispute at present existing with Tasmanian respondents only.

11. The organization further asks the Court to make an award, as far as the wages to be awarded are concerned, retrospective as from 1st January 1919 as against the Tasmanian respondents represented at the hearing and those unrepresented although summoned to attend.

12. The original claim did not include any special claim for retrospective payment of wages or conditions of work or for payment from any specified date.

13. No prior award binding on some of the respondents in Tasmania continued in force on 1st January 1919 or since in respect of any of the claims set out in the log. As to other respondents, some were parties to awards No. 37 of 1914 and No. 74 of 1916, which continues in force so far as Tasmania is concerned as no new award has been made against them nor any order determining the award.

14. The Tasmanian respondents who appeared or were represented at the hearing object to any award being made retrospective as from 1st January 1919, or from any date prior to the date the award is made.

15. Before the award was made in September 1919 as to respondents in the other States, a Tasmanian Wages Board had made a determination fixing wages and conditions of work to be observed by all employers of engine-drivers, firemen, &c., in the State of Tasmania, including the respondents in this case.

16. I have been pressed to make an award in this case against the Tasmanian respondents, fixing rates and conditions similar to those fixed by the Wages Board determination, and I do not feel justified on the evidence before me in fixing similar rates or conditions of work to those granted by the said determination.

17. It was contended that this Court could not make an award

for lower rates than those fixed by a State Wages Board for the same class of work.

18. The Wages Board determination in question was made under the authority of the *Wages Board Act* 1910, and is now a State law in Tasmania which must be obeyed by the respondents.

The questions of law arising in this case and submitted to the High Court for its opinion are :—

(1) Can the Commonwealth Court of Conciliation and Arbitration make an award binding on the respondents in the State of Tasmania only, after the part of the common dispute with the respondents in all the five States, including Tasmania, has been settled by or for all the respondents in the other four States by an award or by agreements ?

(2) If so, can the Commonwealth Court of Conciliation and Arbitration make any such award or order against the Tasmanian respondents in this matter who were not parties to an award which continues in force for payment of wages for work done prior to the date the award is to be made in the matter ?

(3) If the Commonwealth Court of Conciliation and Arbitration can make such an award or order, can the payment of wages be made retrospective (*a*) as from the date of the refusal of the respondents to grant the demands, or (*b*) as from the date the Court had cognizance of the dispute, or (*c*) as from the date on which the Court decides that a dispute exists ?

(4) Can the Commonwealth Court of Conciliation and Arbitration legally make an award binding on Tasmanian respondents fixing lower minimum rates than those fixed by the State Wages Board determination in question for the same class of work ?

The reference mentioned in pars. 1 and 2 of the case recited that there existed an industrial dispute within the meaning of the *Commonwealth Conciliation and Arbitration Act* between the organization and a number of employers set out in the first schedule, that at the instance of the organization the Deputy President summoned persons representing the organization and persons representing the employers to a conference under sec. 16A of the Act, at which he presided on 20th December 1918, and that no agreement was reached at the conference for the settlement of the dispute. The

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reference then continued: "Now therefore in pursuance of sec. 19 (*d*) of the said Act and of all other powers I may have under the said Act I, as Deputy President of the said Court, do refer the said dispute to the said Court, that is to say, the dispute existing between the said organization and its members employees of the one part and the said employers of the second part as to the matters set forth in the second schedule hereto."

Robert Menzies, for the claimant. As to the first question: the Commonwealth Court of Conciliation and Arbitration, having once had cognizance under sec. 19 of the *Commonwealth Conciliation and Arbitration Act* of a dispute, is directed by sec. 24 to settle that dispute, and no award which does not settle the whole of that dispute can conclude the jurisdiction of the Court to complete the settlement. The Commonwealth Court of Conciliation and Arbitration has jurisdiction to make a retrospective award where there is no award of that Court on the same subject in existence. As to the fourth question: a determination by a Wages Board under the *Wages Boards Act* 1910 (Tas.) fixing a minimum rate of wages has the force of law. Assuming that the decision of this Court in *Federated Sawmill &c. Employees' Association of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1) and *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (2), that the Commonwealth Court of Conciliation and Arbitration cannot make an award inconsistent with such a determination of a State Wages Board, is correct, there is an inconsistency where the Commonwealth Court fixes a lower minimum rate than that fixed by the Wages Board. The proper test of inconsistency is not that stated by *Griffith* C.J. in the former case (3). The effect of the determination by the Wages Board is that by paying wages lower than the minimum wage fixed by it an employer breaks the law. An award which has the effect of saying that by paying those lower wages the law is not broken must be inconsistent with the determination of the Wages Board. That is borne out by the statement of *Griffith* C.J. that an award cannot fix a lower minimum rate than that fixed by a State Wages Board (3).

(1) 8 C.L.R., 465. (2) 10 C.L.R., 266.
(3) 8 C.L.R., at p. 500.

Sir Edward Mitchell K.C. and *Latham*, for the Mount Bischoff Tin Mining Co. Ltd., one of the respondents. Where all that remains of an industrial dispute is a dispute between an organization of employees and employers in one State, the dispute has ceased to have an inter-State character and the Commonwealth Court of Conciliation and Arbitration has no jurisdiction to deal with it either under the Act or under sec. 51 (xxxv.) of the Constitution (*Tramways Case* [*No.* 2] (1); *Metropolitan Coal Co. of Sydney Ltd.* v. *Australian Coal and Shale Employees' Federation* (2)). In the case of a Court of limited jurisdiction the proper time for determining whether in a particular case it has jurisdiction is when it gives judgment. The jurisdiction of the Court under sec. 24 is to settle inter-State disputes; and if in the process of settlement the Court reduces the dispute to a one-State dispute, its jurisdiction under the Act is fulfilled, and Parliament cannot legislate to give it any further jurisdiction. As to questions 2 and 3: the obvious and natural meaning of sec. 28 (1) is that the operation of an award is to extend from the date of the making of the award until some date in the future not more than five years thereafter. An attempt to make the operation of the award begin before the date of the award is an attempt to extend its term just as much as is an attempt to continue its operation after the expiration of the five years. This view is supported by *Australian Sugar Producers' Association Ltd.* v. *Australian Workers' Union* (3). As to the fourth question: on the authority of the *Woodworkers' Case* (4) and *Whybrow's Case* (5), an award by the Commonwealth Court of Conciliation and Arbitration of a lower minimum rate of wages than that determined by a State Wages Board is not inconsistent with the latter, and is permissible.

Owen Dixon (with him *Clyne*), for the Commonwealth, intervening. As to the first question: the power of the Court to determine the whole and every part of an industrial dispute extending beyond one State continues right up to the end. It is one indivisible dispute

(1) 19 C.L.R., 43, at p. 78.
(2) 24 C.L.R., 85.
(3) 23 C.L.R., 58, at pp. 64, 73.
(4) 8 C.L.R., 465.
(5) 10 C.L.R., 266.

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not consisting of parts which are naturally severable. The jurisdiction to settle that dispute is given by its inter-State character, and the fact that the process of settlement deprives it of that character in the last stage does not deprive the Court of jurisdiction. As to the second and third questions : the jurisdiction of the Court extends to the settlement of the dispute by awarding future payment in respect of services which at the date of the award are past. The question of what wages shall be paid involves the question from what date they are to be paid. The demand for payment of certain wages and the refusal to pay them fixes the time from which the wages are required to be paid. The Court may settle the dispute raised by that demand and refusal by awarding relief in the nature of a payment in respect of services rendered subsequent to that time and up to the date of the award. Sec. 28 would not be infringed, because the duty to make that payment is a future duty. As to the fourth question : the judgment of the majority of the Court in *Whybrow's Case* (1) went on this—that the Court might, by its award, order that which the parties might by voluntary agreement lawfully agree to do. There is no inconsistency within that case between the award of the Court and the determination of the Wages Board. The result is that there are two prohibitions, both of which prohibit the payment of wages below the lower minimum and one of which prohibits the payment of wages below the higher minimum, and neither of them is more than a prohibition.

Robert Menzies, in reply.

Cur. adv. vult.

March 25.

The following judgments were read :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. (read by KNOX C.J.). This was a case stated for the opinion of this Court by the Deputy President of the Commonwealth Court of Conciliation and Arbitration. On 20th December 1918 the Deputy President, after a compulsory conference under sec. 16A of the Arbitration Act, referred the dispute, then appearing to exist between certain parties, into Court pursuant to sec. 19 (*d*) of the Act. By this means the Arbitration Court

(1) 10 C.L.R., 266.

acquired cognizance of the dispute (see sec. 19). During the hearing of the dispute the Deputy President made awards as to the respondents in the States other than Western Australia and Tasmania. The respondents in Western Australia composed their differences out of Court, and some of the respondents in Tasmania arrived at agreements which were certified and filed pursuant to sec. 24 of the Arbitration Act. But there remained in Tasmania some respondents who made no agreements and against whom no award has yet been made. The first question is whether the Arbitration Court can now make an award against the last-mentioned class of respondents. It was contended that the dispute referred into the Arbitration Court ceased to exist as an inter-State dispute, and was in fact determined or put an end to, or, in the alternative, lost its inter-State character and so ceased to be within the jurisdiction of the Arbitration Court, so soon as awards or agreements certified and filed pursuant to sec. 24 were made leaving respondents in only one State to be dealt with. It was said that one or other of these consequences must follow as soon as the dispute ceased to project itself beyond the limits of some one State. The argument is untenable. The Court became seised of a dispute extending beyond the limits of one State, and it then became its duty to determine that dispute in so far as no agreement between the parties was arrived at (see sec. 24). The fact that the Court or the parties on the road to or in process of settlement of the dispute made some awards or some such agreements, which did not together cover the whole area of the dispute, did not dispose of or end the dispute or change its character. The jurisdiction of the Court having once vested is not divested, and the duty of the Court is not completely performed by the partial settlement of the matter. The contrary view is, indeed, opposed to sec. 24, which provides that the Court shall determine the dispute or so much of the dispute as is not settled by agreement. The dispute here referred is the dispute over which the Court originally acquired jurisdiction. There is nothing in the Arbitration Act compelling the Court to make one award; it may dispose of the dispute wholly or piecemeal as it thinks convenient.

The substance of the second and third questions in the case stated is whether an award against the Tasmanian respondents, in

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the circumstances already mentioned, can provide for work done prior to the date of the award, and, if so, from what date. The basis of the questions, it must be repeated, is that the Tasmanian respondents are not affected or bound by any existing award of the Arbitration Court. Consequently the case is clear of the decision of this Court in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (1). It is said, however, that the implication from the words of the Act, and especially of sec. 28 (1), is that no award can effectively provide for a period anterior to its date, and opinions expressed in the *Sugar Employees' Case* (2) are relied upon as supporting the proposition. So far as the *Sugar Employees' Case* is concerned, it is sufficient to say that the opinions there expressed were not given on this statute and were, in any case, extra-judicial. Putting aside the *Sugar Employees' Case* does not, however, weaken the argument, but compels an examination of the Arbitration Act itself. The Court has jurisdiction to prevent and settle, pursuant to the Act, all industrial disputes (sec. 18), and can acquire cognizance of them in the manner prescribed in sec. 19.. A very comprehensive definition of industrial dispute is given in sec. 4. This is the subject matter with which the Court is empowered to deal. It is obvious that some past conditions or rates of wages, &c., may be the subject of express claims, or that the exigency of the business of the Arbitration Court itself may render a settlement of an industrial dispute impossible for some days or months after the proceedings have begun. The Court must have power to deal with these conditions and rates as to a time past, if the " industrial dispute " is to be settled as the Act in these sections apparently contemplates.

But sec. 28 must be considered. In sub-sec. 1 it is provided that the award is to continue in force for a period to be specified in the award, not exceeding five years from the date of the award; and it is said that an award for a specified period must necessarily look only to future conditions and rates, or its prescribed term will be exceeded. The argument cannot be supported. The provisions of sec. 28 of the Act prescribe the period during which the award, when made, shall be operative, but do not restrict its operation to questions arising out of the relations of the parties during that period. The

(1) 27 C.L.R., 72.

(2) 23 C.L.R., 58.

fact that the award makes some provision in respect of matters arising before the date of the award does not extend its duration. The award operates during the period therein specified, and neither before nor afterwards, subject, of course, to the provisions of sec. 28 (2). If the award prescribes a payment in respect of wages for work done prior to the award, the duty of obedience arises in the specified period and neither before nor afterwards. It is a mistaken notion that persons on whom rests the duty of obedience to the award have committed an offence or breach of the award because the conditions or wages in respect of a period anterior to the award were not observed or paid during that period. The duty of obedience arises only upon the making of the award, and continues during the specified period. It follows from what has been said that, subject to any limitations expressed in the Act, the Arbitration Court can make provisions by its award in respect of matters which are in issue in the industrial dispute, and of such matters only. What matters are so in issue is, of course, a question of fact in each case.

Sometimes the claims of the contending parties will expressly fix the date from which it is said that a higher wage should be paid, and sometimes the date must be fixed from the claims made and refused and from the whole conduct of the parties. In the present case a log of wages was served by the union intimating that if the claims were not granted within fourteen days, or a satisfactory settlement arrived at, the union would "use every means to press same," and we should think that payment as from that date was in dispute here; but that is a question of fact which we think the Deputy President should decide for himself, and which we are not at liberty to determine on this special case.

The last question raised by the special case is whether the Arbitration Court can fix lower minimum rates of wages than those fixed by a State Wages Board. Under the *Wages Board Act* 1910 of Tasmania, provision is made for the appointment of Wages Boards which are empowered to determine the lowest prices or rates of payment to classes of employees or for specified work (sec. 20). The Engine-Drivers, Firemen, Cleaners, Greasers and Trimmers Board was appointed under this Act, and it made a determination, coming into force in August 1919, fixing certain minimum rates of

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wages. The argument was that the Arbitration Court could not make an award inconsistent with a State law, and that a Wages Board determination is a State law. The cases relied upon were the *Woodworkers' Case* (1) and *Whybrow's Case* (2), and all parties accepted these decisions, and rested their arguments upon the basis of the same. We therefore apply the rule of law enunciated in those cases; but it must not be said hereafter that we have either reconsidered the principle of those decisions or reaffirmed the same. We think the rule laid down in *Whybrow's Case* amounts to no more than this: that there is no inconsistency between an award of the Arbitration Court and the determination of a State Wages Board when it is possible to obey each without disobeying either.

In *Whybrow's Case* it was held by this Court that an award fixing a minimum rate of wages higher than that fixed by a State Wages Board was not inconsistent with the determination, because it was plain on the interpretation of the determination that employers were not forbidden to pay more than the minimum. The present case is the converse of *Whybrow's Case*, for the lower minimum is here fixed by the Arbitration Court. The terms of the award must be considered, but, assuming that the common form is adopted, namely, "The minimum rates of wages to be paid to employees members of the claimant union shall be," it is plain that the employers are not forbidden to pay more than the minimum so prescribed. To use the language of *Griffith* C.J. in *Whybrow's Case* (3), it follows that the proposed award of the Arbitration Court is not inconsistent with the determination in question, nor with the Statute which gave it the force of law.

The questions stated for the opinion of this Court should be answered as follows:—(1) Yes. (2) Yes. (3) (*a*) Yes, as from the commencement of the dispute—that is, the date which the Deputy President finds to be the date claimed and denied as the commencing point of the new industrial relations. (3) (*b*) and (*c*) In view of our answer to (*a*) it is unnecessary to express an opinion on these questions. (4) Yes.

(1) 8 C.L.R., 465.

(2) 10 C.L.R., 266.

(3) 10 C.L.R., at p. 287.

HIGGINS J. I concur in the opinion that the first question should be answered in the affirmative.

It is assumed for the purposes of this case that there was an industrial dispute extending beyond one State—a dispute affecting employers in five States, including Tasmania. Owing to circumstances which need not be discussed, the State of Western Australia is treated as exempted from the dispute ; and the Court of Conciliation heard the case as to respondents in South Australia, Victoria and New South Wales before it heard the case as to respondents in Tasmania. An award was made as to the former respondents on 15th September 1919. Some of the Tasmanian respondents have made agreements which have been certified and filed under sec. 24 ; others have not done so. The question is, has the Court power to award as to these others? It is urged that the jurisdiction of the Court has ended, that there is no longer a dispute extending beyond one State as to which the Court can award.

Under sec. 18 of the Act, the Court had jurisdiction of the composite dispute as it originally stood ; and the Court got cognizance thereof, for purposes of settlement, by an order referring the dispute into Court under sec. 19 (*d*). Under sec. 23, the Court has to investigate every " industrial dispute of which it has cognizance " ; and its first duty is to try to induce the settlement of the dispute (that is, the *whole* dispute of which it had cognizance) by amicable agreement. Under sec. 24, any agreement, if procured, has to be put in writing and certified by the President (or Deputy President), and it has to be deemed an award. This duty, to certify and have filed, applies to any agreement " between all *or any* of the parties as to the whole or any part of the dispute " (sec. 24 (1)) ; and if no agreement between the parties as to the whole of the dispute is arrived at, the Court *must* (" shall "), by an award, determine the dispute or so much of the dispute as is not settled by an agreement. So *the dispute*—the whole dispute of which the Court gets cognizance —is treated as if it were one concrete entity which the Court must deal with somehow in all its parts. It is like a cheese which has to be disposed of wholly—by the silver knife of conciliation and, if and so far as necessary, by the steel knife of arbitration ; by cutting vertically as between respondents, or horizontally as between different

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subjects. It is clear that the Act, in using the words "the dispute" so often, means the whole of the dispute of which the Court once gets cognizance (see secs. 24, 29, 35, 36, 38 (*a*), (*h*), (*i*), (*j*), (*p*), (*s*), 38A, 39, 40 (1) (*b*), 40 (2)). No doubt, the dispute which the Court must settle must have a certain character (that of extending beyond one State) before the Court begins its process of conciliation; but the changes made in the entity by the operations of the Court do not change that character. As well might it be contended that if a domestic be authorized to cut up any cheese with a red rind round it, the cutting authority ceases as soon as the first cut has been made, and the red rind has been broken. If the argument for the Mount Bischoff Co. in this case is right, then, if there were six respondents, one in each State, and five consent to make agreements in settlement of the dispute, the Court would have to stop after the fifth respondent, and refuse to accept a sixth agreement, as well as refuse to award as to the sixth respondent. For, if the Court has no power to make an award as to the sixth respondent, it has no power to accept an agreement made with him: agreement and award are equally processes of settling the dispute. The absurdity is, indeed, sufficiently patent in the present circumstances; for it was owing to delay caused through the influenza epidemic that the Tasmanian case had to be presented after the cases for the other States. I feel strongly that it is the duty of this Court, in construing such Acts as the Conciliation Act, to find out the main object which Parliament had in view, and not to attribute to Parliament—unless compelled by the clearest words—a meaning which involves futility or absurdity; or, in other words (if Latin can add any weight to a principle of common sense), that it is our duty to construe the Act *ut res magis valeat quam pereat.*

From the nature of the case, one cannot hope to find much British authority on the subject. But in the United States Constitution it is provided (Art. III., sec. 2) that the judicial power shall extend to controversies "between citizens of different States"; and there is a consistent series of decisions, discovered by my brother *Rich*, to the effect that if the litigating parties are citizens of different States when the action is launched, the jurisdiction of the Federal Courts does not cease if one of the parties become a citizen of his

opponent's State during the course of the action (*Morgan's Heirs* v. *Morgan* (1); *Mollan* v. *Torrance* (2); *Clarke* v. *Mathewson* (3); *Louisville &c. Railway Co.* v. *Louisville Trust Co.* (4)).

My view is that if the character of a two-State dispute exists at the time of the Court getting cognizance, that character remains until the dispute has been fully settled.

There have been certain dicta cited from the judgments of individual Justices which certainly favour the view which Sir *Edward Mitchell* urges; but, as he frankly admits, none of the dicta is binding on us as an authoritative statement of the law; and this seems to be the first case in which the issue has been fully raised for decision.

Question 2 arises in the event of question 1 being answered in the affirmative; and it applies only to such of the Tasmanian respondents as have made no agreements, and as have not been subject to any previous agreement or award. So the difficult questions argued in the *Gas Employees' Case* (5) and in the case of *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (6) do not affect our answer.

The log was served on employers in five States in October and November 1918. It claimed certain wages and conditions. It said that if the claims should not be granted within fourteen days from date, or if a satisfactory settlement should not be reached, the organization would use every means to press them, and, if necessary, have them referred to the Court of Conciliation. The learned Deputy President is satisfied that "on and prior to 15th September 1919" there was an industrial dispute extending, &c., as to the respondents in Tasmania as well as to the respondents in Victoria, South Australia and New South Wales. The question is: Can an award be made as to wages for work done prior to the date of the award—taking the award as dated on or after 31st October 1919?

My opinion is that the award can be made as to any period covered by the actual dispute; and, as the dispute existed on and prior to 15th September 1919, an obligation can be imposed as to the wages for work done during the time that the dispute existed and in respect of which the claims are made. It is urged by Sir *Edward*

(1) 4 Curt., 110.
(2) 6 Curt., 172.
(3) 12 Curt., 674.
(4) 174 U.S., 552.
(5) 27 C.L.R., 72.
(6) *Post.*

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Mitchell, that under sec. 28 (1) the award must be for the future —for the time subsequent to 31st October 1919, or other date of the award. Sec. 28 (1) says that the award is to "continue in force for a period to be specified in the award, not exceeding five years from the date of the award." But these words fix the *terminus ad quem*: they do not fix the *terminus a quo*. The demand as to wages and conditions speaks as from its date; and the refusal —express or implied—speaks as from its date. The jurisdiction depends on the actual dispute, what period it refers to; and if the demand and the refusal are complete, the dispute is complete, and the jurisdiction is complete.

It is unnecessary in this case to decide the question whether there may be a dispute entertained by the Court as to a time which has passed before the dispute existed. At present I can see nothing in the Act or in the Constitution to limit the disputes which the Court can entertain to future conditions only. It is hard to see how the Court of Conciliation could in fairness, in most cases, make an award as to conditions other than wages retrospective; but this is a practical difficulty, not a difficulty of jurisdiction. Under sec. 4 an industrial dispute includes "*any* dispute as to industrial matters"; and "industrial matters" include "*all* matters pertaining to the relations of employers and employees" (not merely the *future* relations). They include not only dismissals or non-employment of particular persons, but "any claim arising under an industrial agreement." Does this not mean that the claims may be made for past grievances? But I do not decide the point.

My answer to the present question is Yes.

As to question 3, my opinion is that the award in this case can make the wages payable as for the work done since the dispute began to exist; and if the dispute began to exist when the respondents refused the demands, the new wages can be made payable as from that time at all events.

As the decision of the learned Deputy President is not, according to decided cases, even *primâ facie* evidence of the existence of a dispute, I do not like to answer Yes to question 3 (*c*) as it stands. The critical moment is that at which the dispute truly exists, not

necessarily that at which the dispute exists according to the view of the President or Deputy President.

Question 4 is : Can the Court fix lower minimum rates than a Tasmanian Wages Board by an award binding Tasmanian respondents ? On this question I treat the decision of the majority of the Full High Court in *Whybrow's Case* (1) as binding on us. It has not been impugned in argument. The decision, so far as relevant to this case, is that it is not competent for the Court to make any award which is inconsistent with a determination of a State Wages Board ; but that an award of the Court fixing a higher rate than the State Wages Board has fixed is not inconsistent—as both the determination and the award can be obeyed. The precise figures, as to which my learned brother seeks our opinion, are not stated. But if the Tasmanian Board prescribe 12s. for a minimum rate, and if the Court prescribe 10s., the determination and the award are not inconsistent—they can both be obeyed. In my opinion, the same test of inconsistency must apply to the case of the Court prescribing a lower minimum, as to the case of the Wages Board prescribing a lower minimum.

It is true that at pp. 499-500 of the *Woodworkers' Case* (2) there are some words used by the late Chief Justice which, at first sight, favour the idea that the Court must not prescribe a lower minimum than the Wages Board. The words are :—" In my opinion the Wages Boards are subordinate legislative bodies duly constituted by the law of Victoria, and, for reasons already given, I think that the Court cannot supersede ordinances made by them. *That is to say, the Court cannot fix a lower minimum of pay or a higher maximum of hours of labour than those prescribed by the determination, or make any other order inconsistent with the particular ordinance* of the Board as to a matter within its jurisdiction. The test of inconsistency is, of course, whether a proposed act is consistent with obedience to both directions."

I rather think that the learned Chief Justice used the word " fix," in this context, as meaning " establish to the exclusion of any other minimum "—so that any other minimum is to be superseded. So also the words of *O'Connor* J. in *Whybrow's Case* (3) may have to

(1) 10 C.L.R., 266. (2) 8 C.L.R., 465. (3) 10 C.L.R., at p. 308.

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be read with a similar explanation. The doctrine that the two orders are not inconsistent had not, in the *Woodworkers' Case* (1), been yet fully developed. But whatever was the real intention of the expression, they are dicta, not necessary for the decision of either case, and are not binding on us. My opinion is that the Court is at liberty to prescribe its minimum for the purposes of the Conciliation Act, and the Wages Board is at liberty to prescribe its minimum for the purposes of the Tasmanian Act; and that, as both prescriptions can be obeyed, there is not—according to *Whybrow's Case*—any inconsistency, or (to use the word found in sec. 2 of the *Colonial Laws Validity Act*) "repugnancy."

POWERS J. I submitted the four questions in this special case for the opinion of the High Court because, although as Deputy President I followed the practice of the Arbitration Court, decisions of this Court, and weighty dicta in other cases in this Court, made it doubtful whether the Commonwealth Conciliation and Arbitration Court had power (1) to make an award, in a two-State dispute of which the Court had cognizance, as to respondents in one State only after the dispute, except as to the part in that State, had previously been settled; (2) to make awards retrospective; (3) to fix a minimum rate of wage in any State below the rates fixed by State Wages Boards in such State.

As to question 1, I agree that a two-State dispute, once the Arbitration Court has cognizance of it in pursuance of the *Commonwealth Conciliation and Arbitration Act*, must be treated as if it were one concrete entity, and that the settlement of parts of the dispute does not affect the character of the dispute. The part left to be settled is still part of the two-State dispute of which this Court had, and has, cognizance. The answer to question 1 should be Yes.

I regret that I do not see my way to agree with my learned brothers as to the answer to question 2. I recognize that industrial disputes extending beyond the limits of one State do arise, and cannot be settled by the Court from the date they arise, but only from the date of the award, unless the Court can make awards to take effect

(1) 8 C.L.R., 465.

prior to the date of the award. That, however, does not decide the answer to the question. In the majority of industrial disputes the dispute can only be settled as from the date of the award—for instance, disputes as to the hours to be worked, the starting and finishing time, the conditions under which work is to be performed, &c. From the words of the Act, and especially sec. 28 (1), I hold that the Act only enables the Court to fix the future, not the past, relations of employers and employees; and that intention was clearly and definitely expressed in sec. 28 (1) by limiting the power of the Court to make awards for five years from the date of the award—not five years from the time the dispute arose, or from the time the Court had cognizance of the dispute. Sec. 28 (1) cannot be properly read, so far as an order as to the wages to be paid for work done prior to the award is concerned, as if the words "from the date of the award" were omitted; and those words must, I think, be disregarded before it can be held that awards can be made as to the rate of wages to be paid, as from a date prior to the date of the award, even if the payment can only be enforced from the date of the award. The effect is the same. The Court cannot do indirectly what it cannot do directly.

The judgments of the late Chief Justice of this Court (1) and of the late Mr. Justice *Barton* (2) in the *Sugar Employees' Case* show that they held the view on a somewhat similar section in a Queensland Act that "the Industrial Court has no jurisdiction by an award to direct that the award shall take effect as from a date anterior to that of the making of the award" (3). It is admitted that the opinions expressed were extra-judicial, and therefore are not binding on this Court. After stating that the appellants in that case maintained that "the general rule which requires that legislative enactments shall be construed as dealing with the future only unless it clearly appears that they were intended to have a retrospective operation applies also to the interpretation of laws establishing subordinate legislative bodies, and to their ordinances, and that the words of the Statute do not purport, either directly or by necessary implication, to confer any such retroactive power upon

(1) 23 C.L.R., at pp. 64-65. (2) 23 C.L.R., at p. 73.
(3) 23 C.L.R., at p. 59.

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the Industrial Court," the late Chief Justice said (1): "In my opinion the language of the Act does not purport to confer upon the Industrial Court any retroactive jurisdiction."

The answer to the next question must, I think, if this question is answered in the affirmative, be: Yes, as from the date of the dispute. That would enable the Court to make awards enforcing payment of increased rates for work done even for two years prior to the award, and after the employer (contractor, manufacturer or merchant) had finished his contract or disposed of his goods.

In this case an answer in the affirmative would enable me, as Deputy President of the Arbitration Court, in March 1920 to make an award in respect of all work done since December 1918. In that way an award made for five years from the date of the award would really affect the wages to be paid by employers for six years and four months—including sixteen months before the date of the award. No employer could safely fix any contract price or price for goods manufactured if he is to be liable to an award at any time requiring him to pay additional sums for work done twelve months previously, and twelve months after he has paid his employees the then current union wage prior to any award. That cannot affect the question if the Act authorizes the Court to make such an order, but I do not think such an order was intended or authorized by the Act. I agree that Parliament can, by an amendment of the Act, authorize the Court to make awards retrospective, or to settle disputes by awards from the date of the dispute and not only from the date of the award; but I do not think it has done so expressly, or by necessary implication from the words of the Statute.

The answer to question 2 should be No.

As to the third question, the answer (as the second question is answered in the affirmative by a majority of the Court) should be: As from the date of the dispute. It is not necessary to answer question 3 (*b*) and (*c*), because the dispute must precede both dates referred to.

As to the fourth question: None of the parties questioned the decision of this Full Court in the *Woodworkers' Case* (2). The actual decision in that case was as to whether a Federal award could

(1) 23 C.L.R., at p. 65.

(2) 8 C.L.R., 465.

grant a higher minimum rate than the State law. The Commonwealth Arbitration Court has jurisdiction to settle industrial disputes extending beyond one State submitted to it in pursuance of the Act. The Court is bound by the Act to make such award as seems just to it. Such award must not be contrary to Federal law. As the question submitted is open to this Court—apart from any binding decision—I agree that the answer to question 4 should be Yes.

RICH J. In the circumstances of this case the Commonwealth Court of Conciliation and Arbitration having cognizance of the dispute proceeded to settle it pursuant to the Act. Some of the respondents settled the dispute, so far as they were concerned, out of Court. With regard to other respondents, the Deputy President made an award. Certain other respondents arrived at agreements which were certified and filed in accordance with sec. 24 (1) of the Act. In the result, there were left some respondents in the State of Tasmania only whose differences had not been settled in or out of Court. It is said that the Court has no jurisdiction to make an award against these respondents as the dispute, being now confined to one State, is no longer an inter-State dispute. Leaving out of consideration the settlements made out of Court, which still left an inter-State dispute, the process adopted by the Deputy President was the statutory process of settling one dispute, and that process assumed the existence of an inter-State dispute until it was settled. Nothing done under the Act has the effect of destroying the dispute in any part, but what is done under the Act has only the effect of settling it. Action taken under sub-sec. 1 of sec. 24 is not intended to, and does not, put an end to the dispute unless it covers the whole ground. The intention is that, if the whole dispute is not ended in that way, the Court under sub-sec. 2 "shall, by an award" (that is, the Court's award), determine the dispute or such part as is not settled by "the agreement." The Court need not settle the dispute *uno ictu*, but may, according to circumstances, proceed by steps as it finds it necessary or convenient until at last it arrives at a complete settlement so far as it finds it just to do so. My answer to the first question is "Yes." The jurisdiction of the

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Court is to settle "the dispute," whatever it is, subject to any limitation of authority. In the case of the Tasmanian respondents, there being no prior award affecting them, no such limitation exists. The result is that "the dispute," notwithstanding that the claims include a period antecedent to the making of the award, can be provided for.

The date of the refusal of the respondents is the date when the dispute is constituted, but it does not necessarily represent the earliest date to which the matters claimed refer. The claims may be pending (say) as from 1st January and the dispute is whether increased wages (for instance) are to be paid as from that date; the refusal may not occur until, perhaps, 1st March: the Court, however, must determine "the dispute," namely, whether increased wages are to be paid as from 1st January. Again, the date when the Court acquires cognizance of the dispute is not necessarily the earliest date in respect of which the award is to operate, and for the same reasons. Nor, again, can the date on which the Court decides that the dispute exists be the commencing date of the mutual rights and obligations, because *ex vi termini* the Court finds the dispute is already in existence. Therefore the only answer to questions 2 and 3 must be: 2. "Yes"; 3. "Yes, according to the terms of the dispute"—that is, according to its terms, express or implied, from which the Court finds the date claimed and denied as the commencing point of the new industrial relations.

Certain dicta in some previous cases with respect to the power of the Commonwealth Arbitration Court, and with respect to the effect of its awards, have not been made the subject of reconsideration. Without in any way conveying the opinion that these dicta are correct, I answer the fourth question in the affirmative.

Questions answered: (1) *Yes*; (2) *Yes*; (3) (*a*) *Yes, as from the commencement of the dispute—that is, the date which the Deputy President finds to be the date claimed and denied as the commencing point of the new industrial relations*; (4) *Yes.*

Solicitor for the claimant, *H. H. Hoare.*

Solicitors for the respondent the Mount Bischoff Tin Mining Co. Ltd., *Derham, Robertson & Derham.*

Solicitor for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

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[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE LICENSING COURT OF BRISBANE AND OTHERS.

Ex parte DANIELL.

ON REMOVAL FROM THE SUPREME COURT OF QUEENSLAND TO THE HIGH COURT.

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SYDNEY, *March* 22; *April* 22.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Constitutional Law—Legislative powers—Parliamentary election—Prohibition of vote under State law on day of Federal election—Ultra vires—Inconsistency between Federal and State laws—Validity of proceedings dependent on vote—Local option poll—Reduction of number of licences—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 9, 10, 51 (XXXVI.) *and* (XXXIX.), 109—*Commonwealth Electoral Act* 1902-1911 (*No.* 19 *of* 1902—*No.* 17 *of* 1911), *sec.* 182—*Commonwealth Electoral* (*War-time*) *Act* 1917 (*No.* 8 *of* 1917), *sec.* 14—*Election of Senators Act* 1903 (*Qd.*) (3 *Edw. VII. No.* 6), *sec.* 3—*Liquor Act* 1912 (*Qd.*) (3 *Geo. V. No.* 29), *secs.* 166, 167, 172—*Liquor Act Amendment Act* 1914 (*Qd.*) (5 *Geo. V. No.* 21), *sec.* 19 (3)—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *secs.* 38A, 40A.

Sec. 14 of the *Commonwealth Electoral* (*War-time*) *Act* 1917 provides that "On the day appointed as polling day for an election of the Senate or a general election of the House of Representatives, no referendum or vote of the electors of any State or part of a State shall be taken under the law of a State."

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ., that sec. 14 is a lawful exercise of the power conferred on the Parliament of the Commonwealth by secs. 10, 51 (XXXVI.) and (XXXIX.) of the Constitution.