

December, and that no copy of the analyst's certificate was served therewith.

At the hearing the defendant took the objection that the summons was made returnable too soon after service, and was not accompanied by the analyst's certificate, but the Court overruled the objections, and convicted the defendant.

The defendant obtained this order *nisi* to review that decision, on the following grounds (*inter alia*):—

1. That no copy of the analyst's certificate obtained on behalf of the prosecutor was served with the summons.

2. That the summons served on the said Thomas Brown Scott was made returnable in less than fourteen days from the day on which it was so served.

Fullagar for the defendant to move the order absolute.

Fazio, for the informant to show cause, referred to the "Pure Foods Act 1908" (N.S.W., 1908, No. 31), secs. 42, 43, 54; *Lloyd v. Roberts*, (1914) 31 W.N. (N.S.W.), 50; *Plumb v. Tritton*, (1915) 21 A.L.R. 431.

McARTHUR, J.—I think the order must be made absolute in this case. The charge was that the defendant sold to the complainant a package containing food, to wit flour, which package did not bear a label with the name and address of the manufacturer or packer of the contents of such package legibly and durably printed thereon, contrary to the "Health Act 1919."

It is not really disputed that the actual wording of that information is incorrect. There is no such offence as selling a package which does not bear the prescribed words upon it. The offence intended to be charged was the offence referred to in the "Health Act 1919" (No. 3041), sec. 231 (1) ["Health Act 1928" (No. 3697), sec. 240 (1)], which says that—"Any person who sells in a package any food or drug in contravention of this section shall be guilty of an offence against this Part." Then reading subsec. (2), paragraphs (a) and (b), we find what is a contravention of this section, and the contravention is selling food in a package which has not legibly and durably printed on it the name and address of the manufacturer or packer of the contents of the package. There can be no question that under that section the offence is that of selling food in a package. That being so, I am of opinion that this prosecution was a "prosecution or proceeding relating to any food" within the meaning of the "Health Act 1919," sec. 262 (d) ["Health Act 1928," sec. 271 (d)], and that really is the simple point in this case. I do not see how it can be said that a prosecution for selling food in a package not marked in accordance with the requirements of the Act is not a "prosecution or proceeding relating to any food." That being so, there is a special statutory requirement that the summons shall not be returnable in less than fourteen days from the date on which it is served.

In this case it was admitted that the summons was made returnable on a date less than fourteen days from the date on which it was served. Therefore it seems to me that the statutory requirement of sec. 262 was not complied with, and the prosecution must fail. No doubt the latter part of sec. 262 (d), which provides that "there shall be served with the summons a copy of any analyst's certificate (if any) obtained on behalf of the prosecutor," tends, and I think tends very strongly, to show that paragraph (d) was intended only to relate to prosecutions for selling food which did not come up to the required standard as food, as, for instance, adulterated food. But I do not think I can get away from the plain meaning of these words. "prosecution or proceeding relating to any food."

For these reasons I think the order *nisi* should be made absolute, with costs. Order of Court below set aside, and in lieu thereof summons struck out. That is the order which the Court below should have made.

Order absolute.

[Solicitors—For the informant, Fink, Best and Miller; for the defendant, D. H. Herald and Son.]

E. H. C.

High Court of Australia.

FULL COURT—(Isaacs, Gavan	Jan. 7, 8, 9, 10,
Duffy, Rich, Starke and	13, 14, 15, 16,
Dixon, JJ.)	22.
(Melbourne.)	

CALEDONIAN COLLIERIES LIMITED and Others

v.

AUSTRALASIAN COAL AND SHALE EMPLOYEES' FEDERATION and Others.

R. v. COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION and Others.

Constitutional law — Conciliation and arbitration—
"Industrial dispute extending beyond the limits of any one State," what is—"Threatened or impending or probable industrial dispute," what is—Constitution, sec. 51 (xxxv.)—"Commonwealth Conciliation and Arbitration Act 1904-1928," secs. 4, 21AA, 38 (b).

An industrial dispute does not extend "beyond the limits of any one State" unless in each of two or more States at one time the dispute exists between persons or groups who stand towards one another in some industrial relation.

An industrial dispute extending beyond the limits of any one State is not "threatened or impending or probable" unless it appears that it will probably exist simultaneously in more than one State. It is not sufficient that a dispute exists in one State, and that on its termination a further dispute, with regard to the same subject-matter, in another State, is threatened or impending or probable.

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Therefore (1) where colliery-owners and coal-miners in New South Wales were disputing as to wages, and miners in Victoria and Queensland, without making any demand on their own employers, and without complaining of their own conditions, assisted the miners in New South Wales by money contributions and by stopping work; and (2) where, if and when the miners in New South Wales agreed to work at reduced wages, but not before, the colliery-owners in Victoria and Queensland were likely to demand, and the miners to refuse, a similar reduction in wages,—

Held, per Gavan Duffy, Rich, Starke and Dixon, JJ. (Isaacs, J., dissenting as to the inferences to be drawn from the evidence), that there was not (1) an industrial dispute extending beyond the limits of any one State within the meaning of the Constitution; nor (2) a threatened or impending or probable industrial dispute within the meaning of the "Commonwealth Conciliation and Arbitration Act 1904-1928," section 4.

Held, further, that the Court of Conciliation and Arbitration has not judicial power to determine conclusively the matters upon which its jurisdiction depends.

PROHIBITION.

Coal is mined in Australia, *inter alia*, in New South Wales, Queensland, Victoria and Tasmania. The Australasian Coal and Shale Employees' Federation, one of the respondents to the summonses herein, was an organisation of employees engaged in winning coal in those States, registered as an organisation under the "Commonwealth Conciliation and Arbitration Act." The various collieries in New South Wales, Queensland and Tasmania were carried on by various private companies, firms and individuals, and Wonthaggi, the principal colliery in Victoria, was carried on by the Victorian Railways Commissioners, a statutory corporation. There was no evidence that any of the colliery proprietors carried on the business of winning coal in more than one State. The wages and conditions in the industry were regulated in fact by various awards and agreements under the Industrial Peace Acts 1920. Those awards and agreements were not the same for each State or for each colliery in a State, but, allowing for variations in local conditions, prescribed similar conditions for the whole of the area in question. Some classes of employees in certain pits were paid by piece-work rates; the rest of the employees were paid at rates fixed by reference to the time worked. Almost all these awards and agreements had expired, and had no force in law, unless sec. 17 of the "Industrial Peace Act 1920" made the provisions of sec. 28 of the "Commonwealth Conciliation and Arbitration Act 1904-28" applicable.

In 1928 the then Prime Minister of the Commonwealth and the Premier of New South Wales, in order to reduce the selling price of the best quality coal, viz., that produced in Maitland field in New South Wales, put forward a scheme for reducing the export price by 5s. per ton, the scheme being that the State of New South Wales should reduce its charges by 2s. per ton, the employees on piece-work rates should agree to a reduction of their wages by 1s. per ton, and employees paid by reference to the time worked should agree to a corresponding reduction, which was tentatively assumed to be 12½ per cent. of their wages, the

Commonwealth Government should grant a bounty of 1s. per ton on the export of coal, and the colliery proprietors should themselves bear the additional 1s. per ton necessary to reduce the export price of coal by 5s. per ton. The colliery proprietors agreed to this scheme, but the employees rejected it. Although this scheme applied only to the Maitland field in New South Wales, it was probable that a reduction in the price of Maitland coal would force a reduction in the selling price of coal from the rest of New South Wales, and from the other coal-producing States, and that in order to bring about such a reduction the employees engaged in winning such coal would also be compelled to submit to a reduction in their wages.

In 1929 the Caledonian Collieries Limited and other colliery proprietors, who formed an organisation known as the Northern Colliery Proprietors' Association, and who were the applicants in one of these summonses and one of these motions for prohibition, served notices of dismissal on their employees, which took effect as from the 2nd March, 1929. The purpose of these dismissals was to compel the employees to accept some such scheme as that already described, and as from the 2nd March, 1929, it was admitted that there was in New South Wales an industrial dispute as to wages. The question in this case was whether that or any other industrial dispute extended beyond the limits of New South Wales.

From the 2nd March, 1929, onwards, those members of the Federation whose employment had not been terminated contributed to the support of those who had been dismissed. In November, 1929, as the result of negotiations, a proposal was put forward which involved the reduction of the wages of the employees by the equivalent of 9d. per ton. This was accepted, subject to confirmation, by representatives of the employees whose engagements had been terminated. Immediately the members of the Federation in Queensland and Victoria protested against any reduction, and demanded that they should be consulted before any reduction was agreed to. However, the employees directly affected refused to confirm the suggested scheme, which was thus rejected by the employees.

Prior to 16th December the Government of New South Wales made preparations for opening Rothbury, one of the collieries at which men had been dismissed on 2nd March, manning it with non-union labour solely, paid a rate of wages lower than that at which the men dismissed had been employed, and selling the coal won at a reduced price. On 16th December there was a clash between the police guarding the Rothbury mine and a crowd composed to some extent of members of the Federation, which clash resulted in bloodshed. Immediately a telegram was sent by the general secretary of the Federation to the local secretary at Wonthaggi in the following terms:—"Member killed, others wounded by police at Rothbury. Stop Wonthaggi to-morrow without fail.

"Send me urgent wire in the morning that Wonthaggi has stopped." On the next day the men at Wonthaggi ceased work, and did not resume until after the making of the award in this case. In Queensland also the men at three collieries, Blackheath, Aberdare and Bonnie Dundee, ceased work till after the award, one mine stopping on the 17th, the other two on the 19th December.

On the 16th December the Deputy Industrial Registrar gave a certificate, under sec. 19 (a) of the "Commonwealth Conciliation and Arbitration Act 1904-1928," that the dispute in question was proper to be dealt with by the Court in the public interest. On the same day Chief Judge Dethridge, by telegram, summoned a compulsory conference before Judge Beeby in Sydney. The parties to the conference were the Federation and the colliery proprietors, members of the Northern Colliery Proprietors' Association. That conference was held on 17th and 18th December, and on the 18th December, the conference having failed, Judge Beeby referred the matter into Court, under sec. 19 (d) of the Act. The representatives of the Federation forthwith applied, under sec. 38 (b), for an interim award. That application was heard on the 19th December. The Commonwealth, by leave, intervened, and the State of New South Wales, being given notice, appeared, and, despite its protests, was joined as a party. Judge Beeby then awarded—"That by way of interim award only, and without prejudice to the parties on the full hearing of the dispute, the hewing rates, wages and conditions of employment of coalminers and other workmen now or hereafter employed in the production of coal, shall be those prevailing immediately prior to the 2nd March, 1929." The award was expressed to come into operation on 20th December, 1929, and to remain in force until 31st January, 1930, or further order.

The colliery proprietors and the Attorney-General for the State of New South Wales then took out summonses, under sec. 21AA of the "Commonwealth Conciliation and Arbitration Act," returnable before His Honour the Chief Justice on 23rd December. Subsequently the summonses were amended, and the two applicants also took out rules *nisi* for prohibition. The proceedings were commenced before Knox, C.J., and continued before Rich, J., who, after hearing all the evidence submitted, directed the case to be argued before the Full Court, pursuant to the "Judiciary Act 1903-1927," sec. 18. The summonses, as amended, asked for the determination of the questions, *inter alia*, whether the alleged industrial dispute referred into Court extended beyond the limits of one State, or then was threatened or impending or probable as an industrial dispute extending beyond the limits of any one State, whether the interim award could be validly made when the only employers parties to the proceedings were employers whose industrial operations were wholly within the State of New South

Wales, and whether the interim award could be validly made when it did not purport to affect or bind any employers other than those within the State of New South Wales. Other questions were included, raising various technical objections. As they were not dealt with by the Court the facts and arguments relevant to them are not reported. The rules *nisi* for prohibition raised substantially the same questions as the summonses.

Menzies, K.C., and *Ferguson* for the colliery proprietors.—There was no interstate dispute, either existing or probable, at the relevant time. The only existing dispute was confined to New South Wales, and the only probable dispute would not arise till the men in New South Wales returned to work at reduced wages. The various stoppages in Victoria and Queensland, even if caused by resentment with the position in New South Wales, were not industrial disputes, as the employees made no demand on their own employers and expressed no dissatisfaction with their own conditions.

Teece, K.C., and *Gee* for the Attorney-General for New South Wales.

Brown, K.C., and *McKell* for the Australasian Coal and Shale Employees' Federation.—In this case members of the organisation in several States were disputing with the employers in New South Wales. It is submitted that that is sufficient to constitute an interstate dispute. If the industry, and the disputants on one side, extend beyond one State, and the claim made will have an interstate effect, it does not matter that all the disputants on the other side are confined to one State. In addition, the miners in Victoria and Queensland were impliedly demanding that their present wages should be continued, and at all events a dispute in those two States was impending, threatened and probable.

Dr. Evatt, K.C., and *Miller* for the Commonwealth intervening.—The Arbitration Court had jurisdiction to decide for itself the existence of an interstate dispute, and the effect of recent legislation vesting in that Court part of the judicial power of the Commonwealth is to render its decision binding on the High Court. The conduct of the men in New South Wales, Victoria and Tasmania amounted to a demand that conditions throughout Australia should be uniform. Such a demand, being joint in substance, could not be accepted by the several assent of some only of the employees. Until all the employees assented the demand, in its full interstate significance, remained unaffected, and constituted a dispute extending beyond the limits of one State, even although the employers in Victoria and Queensland might be willing to accede to it.

Menzies, K.C., and *Teece, K.C.*, replied.

The following cases were cited:—*Federated Clothing Trades v. Archer*, (1919) 25 A.L.R. 253, 27 C.L.R. 207; *Australian Boot Trade Employees' Federation v. Whybrow*, (1910) 16 A.L.R. 513, 11 C.L.R. 311; *Merchant*

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Service Guild v. Newcastle and Hunter River S.S. Co. (No. 1), (1913) 19 A.L.R. 422, 16 C.L.R. 591; *Metropolitan Coal Company of Sydney Ltd. v. Australian, Coal and Shale Employees' Federation*, (1917) 24 A.L.R. 170, 24 C.L.R. 85; *Clyde Engineering Company v. Cowburn*, (1926) A.L.R. 214, 37 C.L.R. 466; *H. V. McKay Pty. Ltd. v. Hunt*, (1926) A.L.R. 393, 38 C.L.R. 308; *R. v. Commonwealth Arbitration Court, Ex parte Brisbane Tramway Company (No. 2)*, (1914) 20 A.L.R. 470, 19 C.L.R. 43; *R. v. Judges of Commonwealth Arbitration Court, Ex parte Engineers' Conciliation Committee*, (1927) A.L.R. 90, 38 C.L.R. 563; *R. v. Commonwealth Arbitration Court, Ex parte Jones*, (1914) 20 A.L.R. 411, 18 C.L.R. 224; *Federated Felt Hatting Employees' Union v. Denton Hat Mills Ltd.*, (1914) 20 A.L.R. 141, 18 C.L.R. 88; *R. v. Commonwealth Arbitration Court, Ex parte Taylor*, (1912) 19 A.L.R. 45, 15 C.L.R. 586; *Australian Workers' Union v. Pastoralists' Federal Council*, (1917) 23 A.L.R. 282, 23 C.L.R. 22; *R. v. Hibble*, (1921) 27 A.L.R. 84, 29 C.L.R. 290; *Federated Engine Drivers' Association v. Broken Hill Proprietary Co. Ltd.*, (1911) 17 A.L.R. 285, 12 C.L.R. 398; *Federated Engine Drivers' Association v. Broken Hill Proprietary Co. Ltd.*, (1913) 19 A.L.R. 177, 16 C.L.R. 245; *Municipal Council of Sydney v. Harris*, (1912) 18 A.L.R. 561, 14 C.L.R. 1; *Weinberger v. Inglis*, (1919) A.C. 606; *R. v. North*, (1927) 1 K.B. 491; *R. v. Huntingdon Confirming Authority*, (1929) 1 K.B. 698; *R. v. Commonwealth Arbitration Court, Ex parte Holyman and Sons Ltd.*, (1914) 20 A.L.R. 429, 18 C.L.R. 273; *Burwood Cinema Ltd. v. Australian Theatrical, &c., Employees' Association*, (1925) 31 A.L.R. 282, 35 C.L.R. 528; *Federated Engine Drivers', &c., Association v. Adelaide Chemical and Fertiliser Company*, (1920) 26 A.L.R. 169, 28 C.L.R. 1; *Australian Tramway Employees' Association v. Prahran and Malvern Tramways Trust*, (1913) 19 A.L.R. 573, 17 C.L.R. 680; *Federated Municipal, &c., Employees' Union v. Melbourne City Council*, (1919) 25 A.L.R. 309, 26 C.L.R. 508; *In re Federated Saw Mill, &c., Employees' Association*, (1909) 15 A.L.R. 374, 8 C.L.R. 465; *Jumbunna Coal Mine N.L. v. Victorian Coal Miners' Association*, (1908) 14 A.L.R. 701, 6 C.L.R. 309; *George Hudson Ltd. v. Australian Timber Workers' Union*, (1923) 30 A.L.R. 13, 32 C.L.R. 413; *Australian Commonwealth Shipping Board v. Federated Seamen's Union*, (1925) 31 A.L.R. 97, 35 C.L.R. 462; *Waterside Workers' Federation v. Commonwealth Steamship Owners' Association*, (1916) 22 A.L.R. 373, 21 C.L.R. 642; *Waterside Workers' Federation v. Commonwealth Steamship Owners' Association*, (1916) 10 C.A.R. at p. 431; *Ex parte Hopwood*, (1850) 15 Q.B. 121; *Waterside Workers' Federation v. Alexander*, (1918) 24 A.L.R. 341, 25 C.L.R. 434; *Amalgamated Engineering Union v. Alderdice Pty. Ltd.*, (1928) A.L.R. 401, 41 C.L.R. 402; *Monard v. H. M. Leggo and Co.*, (1923) 29 A.L.R. 474, 33 C.L.R. 155; *In re Judiciary and Navigation Acts*, (1921) 27 A.L.R. 193, 29 C.L.R. 257; *Ince*

Brothers v. Federated Clothing, &c., Union, (1924) 30 A.L.R. 310, 34 C.L.R. 457; *J. C. Williamson Ltd. v. Musicians' Union*, (1912) 19 A.L.R. 84, 15 C.L.R. 636.

Cur. adv. vult.

The following judgments were given:—

ISAACS, J.—On 16th December, 1929, the Government of New South Wales reopened Rothbury coalmine, in the northern district of that State. That was the culmination of a series of events that profoundly affected not merely the State of New South Wales, but practically all Australia. There had been months of inactivity on that minefield, months of struggle and endurance on both sides, severe privations on one side and great losses on the other, months of vain negotiations between the Northern proprietors and their former employees, in which the then Prime Minister and the Premier of New South Wales had taken part. Disorder arose and life was lost. There can be no question as to the fact that at that time an industrial dispute of a very bitter character existed between the proprietors of the northern collieries and the miners formerly employed by them, in which the respective disputants were maintaining at great sacrifice to themselves what they asserted to be their just rights. But it is also a painful truth that their strife was causing untold injury to the general community, and in every reasonable sense it was of an Australian character. On the day the Rothbury mine opened and the disturbance occurred the news of what had happened was rapidly known by radio in Victoria and Queensland. It became alarmingly evident that a great industrial conflagration was imminent.

No one can possibly doubt that on 16th, 17th and 18th December the emergency, be its legal designation what you will, had assumed proportions in area and general effect entirely beyond the power of any one State to control. At that juncture the machinery of the Federal Arbitration Court was set in motion. It is the only tribunal in Australia armed with the authority of the whole people to preserve or restore industrial peace where a conflict of national extent is imminent or in progress. By direction of Chief Judge Dethridge, a compulsory conference was summoned by Judge Beely, and held before him on 17th and 18th December. It was ineffectual to secure agreement. His Honour then, in accordance with the Act, informed his mind by taking judicial notice of events that every rational adult in Australia was aware of, and arrived at the conclusion that "an industrial dispute of which the Court can take cognizance exists or is threatened and impending," and he referred the dispute into Court for hearing and determination.

That finding has been criticised as vague and fatally indistinct, so as to render all subsequent proceedings void. The objection is to me incomprehensible. The law, when it prescribes a duty, does not demand impossibilities. At the stage reached by

Judge Beeby on 18th December, with the evidence then available to him, it would have been as easy to delimit the precise locality and incidents of an advancing thunder-storm as to mark out with the suggested definiteness the boundaries as to parties and the items of subject-matter included or to be included in the dispute. Obviously the interstate dispute he found to exist consisted of the uncontroverted dispute in New South Wales and the stoppages of coalminers in Victoria and Queensland. That is clear from his reference to the affidavits of Davies and Lowden in his order of 19th December. There was manifest urgency to restore working conditions as soon as possible without prejudicing any party. He then made an interim award for New South Wales, temporarily restoring the previously existing rates and wages, and so removing the local cause of disorder in that region of the dispute. He made the New South Wales Government a party to the award, so far only as it might employ union labour, and announced his intention of proceeding with the hearing of the whole dispute at an early date. He distinctly stated that the interim award was "without prejudice to the parties on the full hearing of the dispute."

The beneficent effect of the interim award was immediately apparent. The effect on the Wonthaggi miners is definitely shown by Mr. McVicar's evidence. He says as to meetings of the miners before the opening of Rothbury—"The general sentiment and expressions of opinion by members were that if a reduction did take place at any particular colliery in New South Wales, it would reflect itself on members in Victoria. Their reason for expressing that opinion was that the awards under which they are working at the present time are practically awards made by various tribunals, and what affected one State affected the whole of the States. They naturally thought that if New South Wales went to work under a reduction in wages, it would automatically apply to Victoria."

Acting on this belief, the Wonthaggi miners stopped work. But as soon as Judge Beeby made his interim award and announced his intention to examine the position further, they were at once instructed to return to work, and they were thoroughly satisfied to do so. At two mines in Queensland work was resumed where the danger of the reduction being operative had also been apprehended. Much stress was laid on instructions from the trusted officials of the miners, but that no more shows want of determination to protect their personal interests than acting by voters on instructions from party officials at elections shows absence of individual political opinions. Besides, Mr. McVicar swears positively that the stoppage was not exclusively due to the instructions. Obviously the miners' own apprehensions were a contributing factor.

No one can reasonably doubt that had Judge Beeby's temporary award not been challenged, but acted upon,

the subsequent deplorable disorder and disorganisation that have occurred would have been averted. But his intervention has on many grounds been attacked as unlawful. The present applications are in substance for a decision of this Court nullifying what he has done, forbidding him to proceed further with the work of pacification, and casting the controversy once again into the furnace of open industrial conflict. If that is the inexorable requirement of the law, then the Court must do it regardless of consequences, and leave the reproach with the law. For reproach it would be if the law so demanded.

Viewing the matter for myself, however, from the strictest legal standpoint, the only aspect from which I allow myself to regard it for this purpose, I hold most firmly, and I hope to make it clear why I so hold, that the Court's duty is to refuse to take the course suggested. In my opinion, the circumstances not only justified, but loudly demanded, the intervention of the Arbitration Court. That intervention was the interposition of the national law to save the community from the loss and suffering of a national calamity, and it has been rightfully and properly exercised.

Before briefly summarising the circumstances leading to the necessity of that interposition, I would as pointedly as possible state the decisive factor in this case.

Apart from some technical objections, which may be altogether disregarded as unsubstantial, the lawfulness or unlawfulness of Judge Beeby's interim award and his proposed later inquiry, depends, not on any disputed doctrine of law, nor on any contested independent concrete fact, but entirely on a mere inference from a number of correlated facts. It stands thus: Is it a right or a wrong inference from what transpired at Wonthaggi or in Queensland, from 18th December to 19th December, read by the light of all that preceded and followed, that the men, besides supporting their fellow-miners in New South Wales, were also indicating their determination not to permit any consequent reduction of their own wages, which was feared as a result of what was happening in New South Wales, and did not their respective employers naturally so understand and passively decline to acquiesce? If that question be answered in the affirmative, either as to Victoria or Queensland, then I do not understand it to be denied there was jurisdiction to intervene, because there was the same subject-matter, or at least sufficiently related subject-matters, in dispute in more than one State at the same time. Merely on the propriety of that inference, at best for the applicants a most disputable one, rests the central and momentous question whether Judge Beeby is in the present matter to be allowed in any way to bridge the dreadful chasm that has arisen between capital and labour in a fundamental industry.

I wish to make it quite plain at this point that, as a matter of recognised judicial practice, which is

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therefore in effect part of the Common Law, this Court is not justified in deciding that question free from the great weight to be given to the decision of Judge Beeby. I shall later refer to some familiar authorities which show that His Honour's decision—for it is regarded as a decision, though not a final one—that there was an interstate industrial dispute, and therefore impliedly that the inference referred to should be drawn in favour of the respondents here, ought not to be overridden unless he was clearly wrong. A doubtful balance of probabilities will not suffice.

Now the circumstances, so far as material, that had gathered into concentration, for the full understanding of the situation in the middle of December, and as they must have presented themselves to Judge Beeby, were shortly these. For many years the coal-mining industry in New South Wales, Victoria and Queensland had been working under Federal awards made by the coal tribunal under the "Industrial Peace Act 1920," in settlement of one or more interstate industrial disputes affecting them all. In a real sense, the rates and wages were uniform, when taken in connection with the commercial selling differences of the product. It was thought by everyone concerned that all these awards made years before, and under which *de facto* the working conditions were observed, were still in legal operation. Certainly the northern collieries proprietors thought so. Mr. Mereweather, one of them, and he is also a barrister, distinctly stated so in evidence. As this was not assented to during the argument, it being considered that he was speaking only for himself, I shall refer to his evidence.

Speaking of a period after the mines were closed, he said that there were meetings of the northern collieries proprietors as to reopening them. Then he stated—"We could not reopen the mines unless we wished to run the risk of breaking the law. The only way in which we could get over the difficulty would be subject to the award being amended, and subject to a reduction of wages. We were willing to give re-employment to the men on those conditions." So it is clear the mineowners all thought the awards were in force, and that the industrial dispute that led to them was so far in existence that the coal tribunal could, under its statutory powers, if applied to, vary the award. That opinion was obviously shared by the men. It follows necessarily that a compulsory reduction of wages at any point, unless by the Federal authority that had fixed them, would be regarded by those engaged in the industry as a disturbance of the Federal scheme.

The northern collieries owners, feeling unable to meet competition in overseas and interstate trade unless they could reduce their prices, sought some means of reducing their cost of production. As a result of long consideration and consultation, proposals were made by the Premier of New South Wales to meet the difficulty by the State foregoing 2s. of its charges per ton, the owners giving up 1s. per ton of

their profit, and the miners 1s. per ton of their wages. This latter was ultimately reduced to 9d. per ton. The miners objected, asserting it was not necessary. Whoever was right and whoever was wrong, it is not my province to determine. That, in my view, is the question that should be left for Judge Beeby to investigate. For present purposes the only thing material is that it formed the nucleus of a dispute that has spread and has desperately injured, and is still injuring, Australia, and my only function is to express my opinion whether the only tribunal capable of dealing with the matter should now have its hands tied.

The question remained technically a purely New South Wales industrial dispute so long as the contest was confined to the employees and employers there, notwithstanding the injury caused elsewhere. But, unlike any other dispute within my knowledge, there was one special feature of the northern collieries that affected both the commercial and the industrial position elsewhere, and which in my opinion dominates the issue here. The selling price of the other coal—like Wonthaggi coal—was regulated by its calorific value in comparison with that of Maitland (northern) coal. Maitland coal was the sterling. If its market price dropped, it compelled a corresponding drop in Wonthaggi and Queensland coal. Until the opening of Rothbury, at stipulated reduced selling price and reduced wages, that drop was only remote. Not only so, the absence of northern coal competition naturally secured an advanced price for Wonthaggi and Queensland coal. But once Rothbury actually opened with the promise of other northern mines opening, the position was radically altered, because Maitland coal was once more in sight in a business sense.

The contract made by the Government with the Rothbury mineowners included not only the winning, but also the merchandising, disposal and delivery of the Rothbury coal in terms that as to place and quantity were unlimited; and, reading the terms of the contract either alone or with the light of the evidence as to the causes operating to require a reduction of wages, the power of the Government on construction of the document extended to selling overseas and interstate. Further, inasmuch as it is admitted the Government's own needs for railways were already substantially supplied from the western and southern mines, there was the highest probability that the Maitland coal would be distributed to gas companies and others for gasmaking and other industrial purposes. The moment had therefore come when Wonthaggi and Queensland coal would presently have not merely to lose the advance in price it had gained by the absence of northern competition, but would also have to face a reduction of its former price by reason of the lower price to be charged henceforth for Maitland coal. This was patently imminent to all concerned. The Victorian and Queensland miners could not help seeing their own wages in real danger, because a drop in

selling price meant a drop in wages, at least in all human probability. It matters not if it were merely a possibility. The sworn evidence is that the men then presently feared it, and their opinion must be taken as an impelling factor in judging of the reason of their stoppage.

At this point comes the critical consideration. I refer to the central inference already stated. True, the owners did not say to the miners—"We intend to 'reduce your wages when we have to cut the price 'of coal.'" True also the miners did not say in so many words to their employers—"We see the fall in 'price coming soon, and the time has come to tell you 'in unison with our fellow-unionists in New South 'Wales that we object to a reduction in award wages.'" But sometimes actions speak louder than words, and their stoppage when it occurred could hardly be misunderstood. An industrial dispute does not always mean a collision. It may arise, and wisely so, to avoid a collision that is feared.

If I could think the Victorian and Queensland miners entirely ignored their own personal direct interests, then I would have to regard them either as angels or lunatics. If I can see, as I plainly do, that they at least included the defence of their own award rates, then I must give credit to their employers for seeing that fact as plainly as myself. And that is what Judge Beeby, well experienced in such matters, evidently did. The employers maintained a passive resistance to what, if thought were given at all, must have appeared a determined demand to retain existing award rates in Victoria and Queensland, even if selling prices were forced down, just as the New South Wales miners were contending. And the employers' passive resistance, as silently but as significantly expressed as was the demand, placed the two opposing parties in disagreement. Judge Beeby reviewed the whole situation, and taking into account its origin, its progress and its culmination, drew the inference that there was an interstate dispute. I entirely agree with him. There is nothing to the contrary more substantial than a mere surmise that his view is wrong. It is a surmise that treats the positive evidence of Mr. McVicars above quoted as unworthy of belief, for if that evidence is accepted as true, there is no reasonable escape from the conclusion that the men were protecting their own interests, that their employers' representatives knew what was taking place at meetings, knew the general situation, and fully understood the true significance of the stoppage in the sense now contended for by the respondents.

It was urged during the argument that the Wonthaggi and Queensland miners had not make a written demand for the retention of their award wages. I am unable to place the matter on this narrow ledge of formality and technicality, but rest the inference on the broad substantial business meaning of what was done. The reality was as unmistakable as was

the Russo-Japanese War, days before the formal declaration. All that is needed to see this matter in its true light is to view it, not with the usual circumscribed vision appropriate to individual controversies, but with the broader outlook necessary to take into account the wider field of operations on which industrial conflicts move. On the accuracy or inaccuracy of the inferential conclusion from the men's action at Wonthaggi and in Queensland in the middle of December, as I have said, rests, so far as these proceedings are concerned, the whole issue of peaceful determination of the present crisis in the Arbitration Court, or the ordeal by battle outside. True, other attempts may be made to invoke the Arbitration Court, but at what cost, and with what eventual result? Legal exhaustion is only one of the ways in which the "process of attrition"—to use a phrase occurring in the course of this case—may be applied to industrial conflicts.

Now, as to the proper inference as to whether the Victorian and Queensland miners were acting in defence of their own interests, both principle and precedent, as applied to the circumstances of this case, go to support an answer in the affirmative. One principle which I regard as indispensable in interpreting the legislation is that stated by Lord Shaw, in *Butler v. Fife Coal Company*, (1912) A.C. at pp. 178-9, in a passage I have cited in other cases, but which may advantageously be cited again. Lord Shaw said—"The commanding principle in the construction of a statute passed to remedy the evils and 'to protect against the dangers which confront or 'threaten persons or classes of His Majesty's subjects, 'is that, consistently with the actual language employed, the Act shall be interpreted in the sense 'favourable to making the remedy effective and the 'protection secure. This principle is sound and undeniably."

There follows from that as a corollary, that since the Legislature intends an award to be effective as a preventive of open war, or as a peaceful restoration of public services, it should not lightly be destroyed. Every reasonable doubt should be resolved in its favour. The arbitrator is not, it is true, by any express provision of the Act, empowered judicially to determine the existence or non-existence of the alleged industrial dispute, which is an indispensable condition of his effective arbitral action. When the Arbitration Court was a purely arbitral body, that was an inescapable result. But since the Court is now also a true judicial body, it is a matter worthy of consideration whether every reason of justice and effective operation of the Act, does not point to the desirability—I will go so far as to say the practical necessity—of expressly conferring on that Court in its judicial character, the authority and the duty of inquiring and determining finally and conclusively at the earliest possible moment, whether the alleged dispute exists or not. As in the present case, that is

THE COLLIERIES CASE

always a question of fact. Whether the facts as found by the tribunal amount constitutionally to an industrial dispute may, of course, well be reserved in some way for this Court. To what I have said on this subject in *Amalgamated Engineering Union v. Alderdice*, (1928) A.L.R. at pp. 409-10, 41 C.L.R. at pp. 427 and 428, I adhere.

But though that judicial power does not yet exist in the Court of Arbitration, there remains a very powerful reason why the conclusion of that Court as to the existence or non-existence of a dispute should be regarded as of very considerable weight in the scales of deliberation, and not be discarded without great caution and hesitation. That is a rule, not of strict law, but of prudence, always well understood, though seldom necessary to be applied. In this case, as it seems to me, its application ought to be decisive, if the Court thinks the issue doubtful. It is, of course, the law that a tribunal whose jurisdiction is expressly limited by a condition, cannot usurp jurisdiction by acting in the absence of that condition. It may be expressly or by implication authorised to determine that condition, and if it does so, the jurisdiction is satisfied. But even where not so authorised, a superior Court, possessing the necessary power of prohibition, observes a rule of practice which justice requires. The rule is thus expressed by Kennedy, L.J., in *Rex v. Shoredditch Assessment Committee*, (1910) 2 K.B. at p. 888—"Where the evidence upon which the inferior tribunal has decided in exercising or refusing to exercise jurisdiction is conflicting, that circumstance, though not conclusive upon the Court so as absolutely to deprive it of the discretionary power of granting the prohibition or the *mandamus*, will so far influence the Court that very strong ground will be required before it interferes with the decision. That is the language of Blackburn, J., in *Elston v. Rose*, (1868) L.R. 4 Q.B. 4 at p. 8."

In *R. v. Yaldwyn*, (1899) 9 Q.L.J. at p. 244, Griffith, C.J., said—"If the decision of justices on a question on which their jurisdiction depends is manifestly wrong, the Court will not pay any attention to their finding; if it manifestly proceeded upon a wrong notion of the law, the Court would not pay any attention to their finding; but if the facts upon which their jurisdiction depends were investigated by them, and their finding was not manifestly wrong, the Court will hesitate very much before it will interfere. That does not import that the Court abrogates its right to enquire into the jurisdiction of inferior Courts, but that it will decline to interfere when it is very doubtful whether the facts are different from what the inferior Courts have found." There are numerous cases to the same effect, some of which are collected in Curlew, Edwards and Sanderson on *Prohibition*, at pp. 163 and following pages. That is definitely settled beyond question, and is tacitly recognised by the Privy Council in *Colonial Bank v. Willan*, L.R. 5 P.C. at p. 445. The essence of that rule, which justice

requires the Court for itself, and merely as a matter of prudence, to take into account when weighing the circumstances of the case and before arriving at a final conclusion, is this. It is clear and unquestionable that when, as was the case here, objection is taken before a Judge of limited jurisdiction, "the Judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point, but this decision must be open to question." &c.—*Bunbury v. Fuller*, (1853) 9 Ex. 111 at p. 140. But since the law requires him to decide, and afterwards to proceed if he should be of an affirmative opinion regarding his jurisdiction, it is not so absurd as to nullify all he does in obedience to his duty, unless he makes a manifest error. The duty on an arbitrator and on a Judge as to the existence of jurisdiction is precisely the same. If he errs in law, that is manifest. As to fact, a doubt as to error is resolved in favour of jurisdiction. In a private matter, such is the caution prescribed by established precedent, how much more should it be observed in a case like the present, where the chief matter at stake is not the individual interests of the disputants, but the tranquility of the nation.

In addition to the public considerations that instantly suggest themselves, namely, the necessity of preventing or ending social strife and private suffering, there is the very practical reason that a Judge of the Arbitration Court has in a sense to decide authoritatively the very thing itself. He cannot properly make an award except on subjects in controversy and between parties in controversy, and therefore in substance the law requires of him directly to see what is in dispute and as between what parties. But more than all, the state of dispute or no dispute is frequently, as in this case, a question not determinable by reference to a single fact or a few single facts undisputed and of unmistakable significance, directly or by clear inference, proving or disproving the condition of dispute or participation in it. It depends frequently, as in this case, on many circumstances, equivocal in themselves and in isolation, but bringing about when concentrated and focussed at a particular point a state of affairs requiring a somewhat special knowledge of the subject to form the most reliable conclusion.

In this case many such circumstances concur, some of them immeasurable and only to be properly appreciated and appraised by those familiar with such occurrences and the incidents behind them. They include the current industrial relations of employer and employed, their methods of organisation and communication, their mutual understandings, the impulses that ordinarily motivate combined action in industry, the multitudinous and constantly changing incidents of trade and occupations, and the effect of

the existence or supposed existence of Federal awards on conduct.

In respect of all these and similar matters, the Arbitration Judge is in daily contact with the persons associated in industry and their affairs; he is far more familiar with the necessary subject-matter than myself as a member of this Court. I cannot deny that the Arbitration Judge occupies a position of advantage over me in this respect. To replace the opinion of Judge Beeby with my own as to the existence of an interstate dispute on 17th, 18th and 19th December, would be to substitute the opinion of a general practitioner for that of an expert on his special subject. It is true that in this Court there was sworn testimony and many exhibits mounting up to hundreds of pages of transcribed evidence. But after all it only amounted to a formal narration of facts and circumstances that the Act permits and requires the Arbitration Judge to ascertain less formally. It is impossible to eliminate any of the circumstances proved here from the circumstances of which the Judge took notice in addition to the sworn testimony before him. We are bound to assume he was cognisant of them all as they were in fact, as they stood in relation to each other.

In the melee of circumstances affecting his decision, it would indeed be a bold assertion to make that Judge Beeby could not reasonably have drawn the conclusion at which he arrived. Facts showing he was manifestly wrong are conspicuously absent, while on the other hand there is a heavy balance of probability that he was right. If even I saw less clearly than I do that Judge Beeby was absolutely right, if I were in any doubt about it, I should in accordance with the eminent authorities to which I have referred, be constrained to withhold my hand and not take a course which may leave open hostility unregulated.

There are, as stated, other objections to the arbitration proceedings inferior in importance to those I have dealt with. In the circumstances I content myself with stating my opinion that they are unsustainable, and that the applicants should fail.

So much for the present case. But as the future is always more important than the past or the present, I feel constrained to add a few words as to the procedure adopted by the applicants. Their main reliance for the scope of the attack on the interim order, and through that on the whole arbitration proceedings, was placed on sec. 21AA, which has lately played a distinguished part in the extinction of industrial awards. I have not long since expressed my views, with some elaboration, as to the true relation of that section to the general scheme of arbitration. I refer to the case known as *Alderdice's Case*, (1928) A.L.R. 401, 41 C.L.R. 402, and once more earnestly and respectfully press upon those responsible for the statutory provisions controlling that subject, the observations I there made. One thing appears to me to be transparently clear. It is possible to retain sec.

21AA. It is possible to have stability in industrial awards. It is not possible to have both.

In the present intricate state of legislation awards brought into this Court and under cover of that section, subjected to the attacks of destructive criticism of all kinds, and sometimes meticulous technicalities suggested by ingenious legal minds, who, as the law stands, are only doing their duty to those they represent, have very much the same chance of escape as had the victims in the arena of the ancient Roman Colosseum. How is a Statute of this nature, so uncertain, contradictory and deceptive, to achieve its declared object?

The Act is not occasionally, but inherently inconsistent. It creates an important tribunal, both arbitral and judicial, invests it with great powers, even to declare invalid a State Act inconsistent with a Federal award, and enacts that all orders and awards of the Court shall be unchallengeable in any other Court. But it omits to invest the Court with power to decide authoritatively and finally the fact of a dispute, the very foundation of its arbitral proceedings, and, as interpreted, throws all its orders and directions at any distance of time and at any cost into the crucible of this Court, even when evidence may be weakened or lost. It would be rash to assert that any Federal award to-day has any existence except on sufferance. And it must be remembered that for present purposes the power of this Court is destructive only, it can neither rebuild nor amend. Can such a system, giving with one hand and taking back with the other, conserve or promote peace? It invites thousands to a peaceful journey on a *Lusitania*, and then provides the torpedo that destroys the vessel. It is not for me, but for the Legislature, to consider how far such a system conduces to its declared high purpose by inspiring confidence in arbitration as a reliable substitute for the force of strike or lockout, both of which bring loss and suffering to the combatants themselves and tend to impoverish the community.

Before parting with this case I wish to express my appreciation of the admirable arguments of learned Counsel on both sides, and of their illuminating analyses of the vast mass of material they had to deal with.

GAVAN DUFFY, RICH, STARKE and DIXON, JJ.
—The question for the determination of this Court is whether an interim award of the Commonwealth Court of Conciliation and Arbitration, made by His Honour Judge Beeby on 19th December, 1929, is valid, or was made without jurisdiction. The award was expressed to operate from 20th December, 1929, until 31st January, 1930, or until further order, and to bind His Majesty the King in right of the State of New South Wales, eight proprietors of collieries in the northern coalfields of New South Wales, and an organisation of which they were members, called "the Northern Collieries Association," and to bind them

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as to the employment of members of four industrial organisations of employees. In relation to these persons it awarded, ordered and prescribed—"That by way of interim award only and without prejudice to the parties on the full hearing of the dispute, the hewing rates . . . and conditions of employment of coalminers and other workmen now or hereafter employed in the production of coal shall be those prevailing immediately prior to the 2nd March, 1929."

The collieries of the proprietors bound by the award had been closed since 2nd March, 1929, and no members of the organisations of employees entitled to the benefit of the award appear to have been employed by the Government of New South Wales, which had begun to work a colliery on 16th December, 1929. The award therefore seems to have had no direct practical application. But the Attorney-General of New South Wales and the colliery proprietors which it purported to bind at once impeached its validity by the institution of these proceedings, which have been heard by this Court as matters of urgency. Section 38 (b) of the "Commonwealth Conciliation and Arbitration Act 1904-28" empowers the Court of Conciliation and Arbitration as regards every industrial dispute of which it has cognisance to make any interim order or award relating to any or all the matters in dispute.

A serious industrial dispute existed in the State of New South Wales between the parties to the award, other than the King in right of the State of New South Wales, upon the matters to which the award relates. But the Court of Conciliation and Arbitration can have neither cognisance of that dispute nor jurisdiction over it, unless it extended beyond the limits of New South Wales or its extension beyond those limits was threatened, impending or probable. If on 19th December, 1929, when the award was made, the dispute did not extend beyond the limits of any one State, and its extension was not threatened, impending or probable, the award is not only beyond the jurisdiction which the Parliament has conferred upon the Court of Conciliation and Arbitration, but it is beyond any jurisdiction which under the Constitution the Parliament could possibly confer upon it.

The power which sec. 51 (xxxv.) of the Constitution confides to the Federal Legislature is to make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. "The words 'extending beyond the limits' 'of any one State' as applied to a dispute mean that the dispute is one 'existing in two or more States,' 'or in other words, 'covering Australian territory' 'comprised within two or more States.'" This is the fourth of the five propositions which in *Holyman's Case*, 20 A.L.R. 429 at p. 434, (1914) 18 C.L.R. 273 at p. 285, Isaacs, J., on behalf of himself, Gavan Duffy,

J., Powers, J., and Rich, J., stated as definitely settled. It is equally well established that to constitute an industrial dispute there must be disagreement between people or groups of people who stand in some industrial relation upon some matter which affects or arises out of the relationship. Such a disagreement may cause a strike, a lockout, and disturbance and dislocation of industry; but these are the consequences of the industrial dispute, and not the industrial dispute itself, which lies in the disagreement. It is only because this meaning of the words "industrial dispute" was adopted that the Court of Conciliation and Arbitration has been able to exercise the function of prescribing rates of wages and conditions of employment at the instance of organisations which have done little more than formulate and deliver logs of demands with which employers have not complied. But upon this conception of an industrial dispute, it cannot extend beyond the limits of any one State unless in each of two or more States, at one time, the disagreement exists between people or groups who stand in some industrial relation.

The disagreement in New South Wales was clear and definite. The colliery proprietors in the northern field of New South Wales insisted upon a reduction of wages, and the men refused to submit to it. The existing rates had been established by a special tribunal under the "Industrial Peace Act 1920" by awards which had for the most part expired. Similar awards had been made by the same tribunal in Queensland and for Wonthaggi in Victoria. A well-disciplined organisation included in its members the miners in New South Wales, Victoria and Queensland. The coal from the northern collieries in New South Wales was of such a quality that its selling price was necessarily a factor in determining the maximum price at which coal produced in Queensland or at Wonthaggi could be sold. A reduction of wages in the northern collieries would therefore almost certainly lead to a reduction, or attempted reduction, of wages in the neighbouring States. To this the combined unions of the coal industry were alive as early as September, 1928, when they informed the Premier of New South Wales that, while they believed the proposals were intended to apply only to the northern district of New South Wales, they were of the opinion that the effect of the proposed reduction of the workers' wages in that district would mean within a short time a reduction to the workers in every other coal-producing district of that State and the Commonwealth generally. Partly no doubt for this reason, and partly because of the union discipline, the members of the miners' organisation in the southern and western districts of New South Wales, and in Queensland and in Victoria, contributed 12½ per cent. of their pay to the sustenance of the men who belonged to the mines which had closed down. As the dispute in New South Wales proceeded, various proposals for its settlement were made, and in November, 1929, it was arranged,

subject to the ratification of the men, that there should be a resumption at a hewing rate reduced by 9d. per ton. Claims were put forward from Queensland and at Wonthaggi to vote upon this proposal, and protests were sent against its acceptance. It was, however, rejected early in December by combined meetings of the lodges of the northern field, to whom alone it was submitted.

After the New South Wales Government announced its intention of operating a colliery, resolutions in favour of a general stoppage in the coal industry were passed by a meeting of the combined unions in the coal industry, and by the Labour Council; and a conference of lodge delegates and officials from the Coal and Shale Employees' Federation resolved "to recommend all sections of the Union to extend and intensify the present dispute beyond the lengths of this State and to prepare and organise for an all out policy in the mining industry," a recommendation which was adopted by the Central Council on the 17th or 18th December, 1929.

The Government of New South Wales commenced coalmining on the 16th December, but not without the occurrence of scenes of violence. The general secretary of the Coal and Shale Employees' Federation sent a telegram on the same day to the secretary of the branch at Wonthaggi—"Member killed, others wounded by the police at Rothbury. Stop Wonthaggi to-morrow without fail. Send me urgent wire in the morning that Wonthaggi has stopped." The men at Wonthaggi ceased work on 17th December, and did not resume on the following day. They were ready to resume on the day after the award, 20th December, 1929. In Queensland the men at one mine stopped work on 17th December and at two others on 19th December.

From these facts let it be assumed that the miners in Queensland and Victoria were strongly opposed to any reduction of wages in New South Wales, not only upon principle, but because their own wages would be endangered by such a reduction, and that they were prepared to stop the production of coal in order to aid the general resistance to the attempt in New South Wales to lower wages.

But how does all this make the lowering of wages a matter of dispute between miners and mineowners in Queensland or Victoria? The closing of the mines in the northern district of New South Wales greatly increased the selling price of coal, and unless and until these mines resumed production at lower costs, no one contemplated a reduction in Victoria or Queensland. It is said that the action of the miners in these States and their leaders there and in New South Wales manifested or imported a demand on all mineowners jointly throughout the three States that existing wages and conditions should remain unaltered, and that nothing but uniform acceptance by each and all of these owners could prevent a disagreement with all of them which would amount to a dispute, and

therefore that the continuance of the mineowners' demands in New South Wales for a reduction resulted in a dispute. This artificial view of the matter was supported by the contention that if a demand was made upon a number of employers that each and all should give concessions, the refusal of these concessions by one of them created a disagreement or dispute with all, notwithstanding that the rest complied with the demand.

Another view relied upon was that the Victorian and Queensland miners impliedly required from their employers an assurance that, come what might in New South Wales, their wages would not be affected. This view imputes to the miners a demand for an immediate promise or contract that wages should in no event be reduced in future, although events in New South Wales might put the Victorian and Queensland proprietors in the dilemma of reducing wages or closing the mines. But the truth is that the conduct of the men and of their leaders imported no request or demand upon their employers in either of these two States. Their employers would not understand that anything was asked of them, nor would they be understood as either requiring anything of, or refusing anything to, the men.

Mr. Browne, for the Australian Coal and Shale Employees' Federation, in an endeavour to avoid the consequences of this view, boldly argued that an interstate dispute existed whenever men in two States combined for the common interest in resisting the demands made in one State. This contention cannot be sustained in view of *Holymans Case* (*supra*). The dispute in New South Wales did not extend to Victoria or Queensland. Was its extension threatened, impending or probable? No desire or attempt to reduce wages and no question about wages would arise between men and owners in Queensland or Victoria out of the present situation, unless and until the mines resumed in New South Wales at a reduced cost of production. But this would mean the settlement of the dispute in New South Wales. It would not extend to Queensland or Victoria, although its settlement might so affect the trade in coal in those States that new similar disputes might there arise.

A limit imposed alike by the Act and by the Constitution upon the jurisdiction of the Court of Conciliation and Arbitration is that it must be exercised by award so as to settle the dispute—see *per* Isaacs, J., and Rich, J., in *Federated Clothing Trades v. Archer*, (1919) 25 A.L.R. 253, 27 C.L.R. 207. On 19th December there was no dispute in relation to wages, whether existing, threatened, impending or probable, which could be so settled between the men and the proprietors in Victoria or Queensland.

For these reasons Judge Beeby had no jurisdiction to make his interim award of that date, which is accordingly invalid.

Dr. Evatt, for the Commonwealth, contended that, even if Judge Beeby had no jurisdiction in fact, yet

GEORGE v. GREATER ADELAIDE LAND DEVELOPMENT CO. his decision that he had jurisdiction was conclusive because he now exercised the judicial power of the Commonwealth. It is enough to say that, whether it could do so or not, the Legislature has not attempted to confer upon the Court of Conciliation and Arbitration judicial power conclusively to determine the matter upon which its jurisdiction depends. This view has been long entertained and repeatedly acted upon. See, *e.g.*, *Federated Engine Drivers' and Firemen's Association v. Broken Hill Proprietary*, (1911) 17 A.L.R. 285, 12 C.L.R. 398, *per* Griffith, C.J. (17 A.L.R. at p. 291, 12 C.L.R. at p. 415), Barton, J. (17 A.L.R. at p. 296, 12 C.L.R. at p. 428), O'Connor, J. (17 A.L.R. at p. 302, 12 C.L.R. at p. 444) and Isaacs, J. (17 A.L.R. at pp. 305-6, 12 C.L.R. at pp. 453-4); *Re v. Commonwealth Court of Conciliation and Arbitration, Ex parte Broken Hill Proprietary*, (1909) 15 A.L.R. 416, 8 C.L.R. 419, *per* Griffith, C.J. (15 A.L.R. at pp. 418-9, 8 C.L.R. at p. 428), O'Connor, J. (15 A.L.R. at p. 427, 8 C.L.R. at pp. 449-50), and Isaacs, J. (15 A.L.R. at pp. 428-9, 8 C.L.R. at p. 453); *Re v. Commonwealth Arbitration Court, Ex parte Whybrow*, (1910) 16 A.L.R. at p. 393, 11 C.L.R. at p. 56, *per* Isaacs, J.; and *Merchant Service Guild v. Newcastle and Hunter River Steamship Company and Others*, (1913) 19 A.L.R. at p. 422, 16 C.L.R. at p. 599. He further contended that sec. 31 of the Act operated to give validity to the award, although made without jurisdiction. This is opposed both to the decisions of this Court and to the Constitution as it has been interpreted.

Some minor points were raised by the applicants in these cases. They contended that the order of reference made by Judge Beeby was void, because it failed to disclose what dispute he had referred into Court, and that the award could not stand because he had declined to afford the applicants an opportunity of dealing with the allegation that an industrial dispute extending beyond the limits of New South Wales, or with the merits. Although these arguments do not lack a foundation of fact, we do not think they need be discussed, in view of our decision that the award was made without jurisdiction, because there was no dispute actual or threatened.

As to costs, we think that all parties should abide their own—mainly because the arbitration proceedings were initiated by the Court itself, and not by the parties, and the error is substantially that of the Court and not of the parties.

Order: On summonses under sec. 21AA, the Commonwealth Court of Conciliation and Arbitration had no jurisdiction to make the interim award of the 19th December, 1929, and the same is bad in law, and void. On rules nisi for prohibition: In view of the decision under the summonses under sec. 21AA, these rules are adjourned sine die, with liberty to any of the parties

to apply to make them absolute in case of need (see the memorandum relating to Ex parte Motions and Prohibitions, reported (1916) 22 A.L.R. 355, 21 C.L.R. 669).

[Solicitors—For the colliery proprietors, Blake and Riggall, agents for Sly and Russell, Sydney; for the Attorney-General for New South Wales, J. V. Tillett, Crown Solicitor for New South Wales; for the Australasian Coal and Shale Employees' Federation, Marsland and Co.; for the Commonwealth intervening, Sharwood, Commonwealth Crown Solicitor.]

E. H. C.

FULL COURT — (Knox, C.J., } Sept. 27, Oct. 1.
Isaacs and Starke, JJ.) } Dec. 9, 1929.
(Adelaide and Sydney.)

CHARLES EDGAR GEORGE, Defendant Appellant

v.

GREATER ADELAIDE LAND DEVELOPMENT
CO. LTD., Plaintiff Respondent.

Contract—Sale of land — Statutory provisions as to sale not complied with—Sale subject to compliance with statutory provisions — Effect of on contract—Money paid under illegal contract — Counterclaim for recovery of—Town Planning and Development Act 1920 " (S.A.), secs. 23, 35, 44.

The "Town Planning and Development Act 1920" of South Australia and the regulations thereunder prohibit the sale of any allotment or parcel of land unless the provisions of the Act and regulations are complied with, and a penalty is imposed on any person contravening that provision. The regulations require that any person desiring to offer for sale or sell any allotment or parcel of land shall submit a plan to the Government Town Planner, and obtain his certificate of approval before any sale is made.

A contract for the sale of certain land was expressed to be "subject to the provisions of the Town Planning and Development Act 1920 being complied with." In an action by the vendor, claiming the balance of purchase money, in which the purchaser counter-claimed for instalments of purchase money already paid.—

Held, that the contract contravened the provisions of the "Town Planning and Development Act 1920," and was therefore illegal and invalid, and that therefore, the parties being *in pari delicto*, the vendor could not recover the balance of purchase money, nor could the purchaser recover the instalments of purchase money he had paid.

Harse v. Pearl Life Assurance Company, (1904) 1 K.B. 558, followed.

Decision of Murray, C.J., reversed.

APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA (Murray, C.J.).

In an action in the Supreme Court of South Australia, the Greater Adelaide Land Development Co. Ltd. claimed from Charles Edgar George the sum of £914, being the balance of moneys alleged to be due under an agreement in writing made on 15th November, 1925, for the sale and purchase of certain allot-