HIGH COURT OF AUSTRALIA

Jumbunna Coal Mine

Vs.

Victorian Coal Miners Assn.

(Higgins J.)

20 February 1908

Higgins J

. read the following judgment:—

This is a proceeding called in the existing rules, though not in the Act, an appeal from the Industrial Registrar. The Registrar has decided to register the association as an organization under the *Commonwealth Conciliation and Arbitration Act 1904*, and I am asked to review the decision and to annul the registration. The application is made by two mining companies—The Jumbunna Coal Mine, No Liability, and the Outtrim, Howitt and British Consolidated Coal Co., No Liability. The companies have abandoned the ground on which the main contest took place before the Registrar, and do not now contend that the association does not contain 100 members. But the other objection to registration is pressed—that the miners' association could not be concerned in an industrial dispute extending beyond the limits of any one State.

There has also been added by my permission a new ground taken after the decision of the Registrar—by notice dated the 8th November—that the provisions of Part V. of the Act are *ultra vires* the provisions of the Constitution and void.

I have allowed the companies to supplement their case as put before the Registrar by statutory declarations to the effect that the companies carry on business in Victoria only, have no agreement with any employers in any other State, and are now almost the only employers of coal miners in Victoria.

The question of registration is one for this Court and this Court alone—the Commonwealth Court of Conciliation and Arbitration; and as I have been made solely responsible for the efficient working of this Court, I think it is my duty as far as possible to exercise the sole control which the Act gives me over the office and over the Registrar. If the main contention of the companies is right, the Registrar will have, in every case before registering an association, to decide whether the association can or cannot possibly be concerned at the present time, or at any future time, in an industrial dispute extending beyond the limits of any one State. This is a task of a nature not usually assigned to Registrars, and the Registrar himself would be the first to admit that it is not a matter which he should be called on to decide. Yet, though I should not ordinarily feel justified in seeking to cast on others the burden of problems relating to this Act and to this Court, I should not hesitate to exercise my discretionary power to state a case for the High Court if I felt that my decision would finally bind the rights of any of His Majesty's subjects in some important respect, and if I felt substantial doubt as to the legal position. I should also be much more disposed to state a case before declaring

an Act of Parliament *ultra vires* and void, than before refusing to so declare. In this case, however, if my decision be in favour of the association, it will not prevent the validity of the registration from being tested when the association attempts to use its new status as an organization, say, by applying to enforce an award, or by suing its members for penalties. I asked Mr. *Mitchell* to point out how his clients were prejudiced by registration, and the strongest point in his answer was that under sec. 9 an employer loses by the fact of registration his right to dismiss an employé for the mere fact that he is a member of an organization. But even in such a remote case the employer can, notwithstanding sec. 57, raise the defence that the association is not an "organization" and could not be an "organization," as it is not legally registrable. Moreover, if the question of registration should at any time become crucial, any party interested, or the Registrar, may apply for cancellation (sec. 60). I might add that, but for the course taken by the Full Court in the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employés Association*[1] , I should have doubted the propriety of allowing an Act of Parliament to be impeached as unconstitutional and void on a mere application to register an association, or at the instance of persons who are not hurt or affected by the mere fact of registration. The practice in the United States is not to decide against an Act except "in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals" : *Chicago and Grand Trunk Railway Co. v. Wellman*[2] . However, I bow to the opinion of the Full Court on the point; and I shall also treat as binding me for the purposes of this case all the principles laid down in the *Railway Traffic Employés Case*[3] , notwithstanding the subsequent judgment of the Privy Council in *Webb v. Outtrim*[4] . My decision in this case is to be regarded as merely a decision as to the duties of the Industrial Registrar on an application to register.

One of the arguments used against registration is that this association is incapable of being concerned in an industrial dispute "extending beyond the limits of any one State." These are the words of sub-sec. xxxv. of sec. 51 of the *Constitution*, which may, for the purposes of this argument, be taken as defining the limits of the legislative power of the Federal Parliament on this subject. The argument assumes that, if an association cannot be concerned in an industrial dispute of the character mentioned in the Constitution—which I may call for shortness "a two-State dispute" —the Federal Parliament has no power to allow the association to be registered. Counsel have argued on this assumption, and I shall first deal with their arguments. I shall say something as to the assumption afterwards. Let it be assumed, then, that there is no power for the Federal Parliament to allow an association to be registered if it cannot possibly be concerned in a two-State dispute. Yet I am certainly not prepared to say that this association cannot be concerned in such a dispute—now or at any future time. It is true that there is at present no evidence of any combination or understanding between the colliery owners of Newcastle, or of the Collie coalfield with the owners of these Victorian mines; and that there is no evidence of any combination between the employés at these places. But it is not difficult to conceive circumstances in which there might be such a combination on both sides; and, in my opinion, this is just the kind of case that the constitutional provision in sec. 51 sub-sec. xxxv. was designed to meet:—"Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." I may grant that in an industrial quarrel each of the employés is disputing with his employer. In this sense each man's dispute is separate from every other man's dispute. But the phraseology of sub-sec. xxxv. treats an industrial dispute as if it were an epidemic disease or a fire. Of course each of the victims has a separate disease; and each blade of grass has its separate blaze. But there is such a connection between the various sufferers, or the various blades of grass, that it is not unusual or incorrect to speak of the disease, or of the fire as "extending" or as "spreading." So with an industrial dispute. At the time that the Constitution was enacted by the British Parliament, nothing was more marked than

the tendency of strikes to "spread" ; and to "restrict the area of a strike" was a common endeavour. Union is strength; and nothing is more common in modern industrial disputes than for the employers to seek a common course of action, and for the employés to mass themselves in one opposing array. Mr. *Mitchell* has sought to confine the disputes referred to in sub-sec. xxxv. to disputes where there is one employer—one person or partnership or company—carrying on business in at least two States. But sub-sec. xxxv. does not provide that the employment must extend beyond the limits of one State—it provides that the disputes must so extend. Mr. *Mitchell* said that this Court would have no power to intervene even if the Sydney wharf labourers, having a dispute with a line of steamers, refused to handle goods for that line, and sought to induce, or even actually induced, the wharf labourers of Melbourne to follow their example. He suggested, however, that there might possibly be an alternative case—the case, for instance, of all the pastoralists of New South Wales and Victoria having a binding agreement to insist on one common set of conditions of labour, and the shearers having a counter agreement among themselves. This suggested case becomes very nearly an admission of the impossibility of accepting the view at first pressed. But there is no need to confine the power conferred on the Parliament within such narrow limits. The power was evidently meant to enable the Federal Parliament to deal with disputes which could not be so effectually dealt with by a Parliament having power only within the limits of one State. The New South Wales Parliament can deal with a dispute which is confined to New South Wales—when the Newcastle mine owners act in combination, and the Newcastle miners act in combination. But it cannot deal so effectively with a dispute when the Newcastle mine owners act in a combination with the Victorian mine owners, and the Newcastle miners act in combination with the Victorian miners; and, in my opinion, sub-sec. xxxv. was meant to enable the Australian Parliament to make provision for such latter combinations. The only difficulty seems to arise from the fact that a "dispute" is something intangible and abstract, and yet the section requires us to measure it by things concrete and tangible—by States, areas of territory. But the meaning of the language is plain enough.

The next argument is that, even if this association can possibly be a party to a two-State dispute, sec. 55 is too wide in that it allows associations to be registered which cannot by any possibility be parties to such a dispute, and that therefore the whole of sec. 55 is unconstitutional and void. The instances suggested by Mr. *Mitchell* of associations that cannot by any possibility be parties to such a dispute—Melbourne railway employés, Melbourne corporation employés, employés in a Queensland industry—are not, indeed, very convincing as illustrations. But let it be assumed that there are associations which can never be parties to such a dispute; what follows? In the first place, as the words of sec. 55 are general, it would be the duty of the Court to presume that the legislature meant to keep within the bounds of the Constitution, and to allow registration to such associations only as could be interested in such disputes: *D'Emden v. Pedder*[5] ; *United States v. Coombs*[6] ; *Parsons v. Bedford*[7] ; *Grenada County Supervisors v. Brogden*[8] ; *Presser v. Illinois*[9] . But even if this rule of construction were not applicable, even if sec. 55 means that all industrial associations of 100 members are free to register whether they can be interested in a two-State dispute or not, even if sec. 55 is too wide as to the kind of associations that may register, is sec. 55 therefore to be treated as void altogether? Is it to be held that no association can register because the section purports to allow some associations to register which are not within the constitutional power? Mr. *Mitchell* admits that, if his argument is right, no association can be registered; and so there can be no "organization" under the Act; and there can be no industrial dispute entertained by this Court, and no award can be given; and, in short, the whole Act becomes nugatory. This seems to be a conclusion revolting to common sense; but it must be accepted if in accordance with law. It is urged that where we find an enactment in general terms in one section, terms that may include some things that Parliament has not power to legislate about, the whole enactment is void. In my opinion, there

is no such rigid rule of law. Whenever Parliament transcends its powers in legislation, the Court has to determine, as in the case of any other agent exceeding its powers, whether the part *intra vires* is so bound up with the part *ultra vires* that it cannot be disentangled. If a man wrongfully mix up another's property with his own so that it cannot be ascertained which is his and which is not his, he loses the whole; and so with legislatures of limited powers. If the legislature has power to deal with matters called A, and not with matters called B, and it pass a clause dealing with A and B as one united indivisible whole, or in some other fashion indicating that its dealing with A is dependent on its dealing with B, then the whole clause is void. If the Commonwealth Parliament had power under the Constitution to make laws for the government of the tropical part of South Australia, and passed an Act providing for the government of all tropical Australia as one whole, the Act would be invalid. But if it passed an Act providing for the government of the tropical part of South Australia, and also enacted—in the same Act, or in a subsequent Act—that the same provisions should apply to the tropical part of Queensland, and to the tropical part of Western Australia, severally, the Act would be valid as to South Australia and invalid as to Queensland and Western Australia. The same result would follow if South Australia, Queensland and Western Australia were all referred to in the same section and the same sentence. The doctrine of unconstitutionality in legislation is really a branch of the law as to powers—a part of the law that has been developed with more logical completeness than most parts. If there be an appointment to several persons, some of whom are and some of whom are not objects of the power, and the appointment to the objects is severable from the appointment to the strangers, it will be valid, and the appointment to the stranger will fail. *Contra*, if it is impossible to say how much of the appointment falls within the power and how much not: *Farwell on Powers*, 2nd ed., pp. 298, 312; *Adams v. Adams*[10] ; *Hamilton v. Royse*[11] ; *In re Brown's Trusts*[12] ; *In re Kerr's Trusts*[13] ; *In re Farncombe's Trusts*[14] . The test is, if Parliament had rightly understood the extent of its power, would it not have executed it in this manner as to the associations subject to its power. This test fits the *Railway Traffic Employés Case*[15] , and the American cases therein cited. In that case the Court was considering the validity of the definition of in sec. 4 of this Act. The question was (so far as now material), could the Federal Parliament deal with railway servants by virtue of the inter-state trade and commerce power (sec. 51, sub-sec. 1) taken in conjunction with sec. 98? The Court assumed, for the sake of argument, that it could, but "only so far as regards inter-state traffic and only as far as regards men engaged in that traffic" [16]

. But, inasmuch as the Act dealt with New South Wales railway servants in connection with any kind of traffic, whether interstate or confined to New South Wales, and had no intention of dealing with, say, a shunter at Albury, in his inter-state functions—as distinguished from his State functions—acting in one set of functions for three minutes, and another set for the following thirty, the Court held that the power of legislating for railway servants as regards inter-state functions had simply not been exercised. Similarly in the *Trade Mark Cases*[17] cited by the Court the American Judges find that "the main purpose" of the Federal Act was to "establish a regulation applicable to all trades, to commerce at all points," and that "it was designed to govern the commerce wholly between citizens of the same State." In other words, the Act would not have been passed except as an entirety. Similarly in the electoral machinery case: *United States v. Reese*[18] , the Court found that the Federal Congress, having power to legislate so as to prevent the States from denying the rights of citizens on account of race, colour &c., had actually prescribed for the State its electoral machinery for voting irrespective of race and colour, and as the parts could not be separated in administration, the whole provision had to be treated as void. The principle does not depend on the form of words used, whether they are found in one section or in several; whether in one general phrase or in successive specific expressions. As it has been expressed by Mr. Justice *Cooley*

(*Constitutional Limitations*, 7th ed., 250), "a legislative Act may be entirely valid as to some classes of cases and entirely void as to others. A general law for the punishment of offences, which should endeavour to reach by its retroactive operation acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control." This passage was read with approval, and adopted by the Supreme Court in *Jaehne v. New York*[19] . In the Massachusetts case of *Commonwealth v. Hitchings*[20] , the Court said as follows.—"The constitutional and the unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance." Again in *Warren v. Charlestown*[21] , the same Court said:—"if they (the parts) are so mutually connected with, dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

To prevent an unconstitutional law from operating as far as it can, it must be "evident" (again to quote *Cooley*, p. 250) "from a contemplation of the Statute and of the purpose to be accomplished by it, that it would not have been passed at all except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others." See also *Tiernan v. Rinker*[22] ; *Penniman's Case*[23] ; *Field v. Clark*[24] ; *People v. Rochester*[25] ; *Re Middletown*[26] ; *R. v. Lundrie*[27] ; *Presser v. Illinois*[28] ; *Commonwealth v. Clapp*[29] ; *American and English Encyd.*, vol 18, p. 225.

Then it is contended that because sec. 4 of the Act, under the definition of "industrial disputes," purports to include disputes in relation to employment upon State railways, and the Full Court has declared that the Act is *ultra vires* and void in so far as it attempts to include such disputes, sec. 55 must be void also. It is true that sec. 55 does not refer to the State railway servants, or even to industrial disputes. But it is urged that sec. 55 allows any industrial association of 100 members to register; that the legislature must have meant to allow a railways servants' association to register; and that therefore the whole provision for registration—even in the case of wharf labourers or of shearers—is wholly void. I presume that even if a separate Act was passed, purporting to include disputes relating to employment upon State railways under the term "industrial disputes," the same argument would be applied—that this whole Principal Act and all its provisions for registration, for conciliation, for arbitration, are *ultra vires*, inasmuch as the two Acts must be read together as one scheme, and all is void if part is void. At all events, if I am right in thinking that sec. 55 is not void as to all associations if it be void as to some associations, it is plain, *a fortiori*, that it is not void because sec. 4 covers forbidden ground. I am unable to think that the provisions of sec. 4 as to "industrial disputes" and the provisions of sec. 55 as to registration, are "so connected together in subject-matter, meaning, or purpose, that it cannot be presumed the legislature would have passed one without the other" : *Re Middletown*[30] .

Now I come to the assumption that the Federal Parliament has no power to permit an association to be registered, even on its own application, if the association cannot, in the opinion of the Court, be concerned in a two-State industrial dispute. I must say that, to my mind, this assumption is by no means obviously right. No doubt the Federal Parliament must not trench on State functions. But if, with a view to dealing effectively with all disputes of a two-State character, it permit any association

of a certain number of members, and having certain industrial objects, to register, and thereby secure particulars with regard to such associations, to be used if and so far as required, if and when a two-State dispute occurs, I am not prepared to say that the direction would be invalid. The Federal Parliament has to deal with defence. If, with a view to organizing a citizen army, it allowed any adult male to register his name, would not that law be good, even though it allowed the maimed and blind to register? The powers of the Federal Parliament, even as the powers of trustees and other donees of powers, must be exercised *bonâ fide* to the ends and within the limits prescribed; but the means, the machinery, the method of carrying out the powers, are all in the discretion of the Parliament. Even if the words of sub-sec. xxxv. of sec. 51 of the *Constitution* are not sufficient of themselves to enable Parliament to permit (we are not now talking of compelling) an industrial association of 100 members to register itself with a view to possibilities, yet sub-sec. xxxix. enables the Parliament to make laws as to "matters incidental to the execution of any power vested by this Constitution in the Parliament." This power is certainly at least as comprehensive as that in the *Constitution of the United States*—"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Yet, in the United States, the Courts never set aside any legislation of Congress as unconstitutional unless it is clearly apparent that it can by no means be needful or appropriate to the execution of the specified powers. This principle was carried to an extreme length by *Marshall* C.J. in the great case of *M'Culloch v. Maryland*[31] , for there it was held that Congress could incorporate a bank, as incidental to its powers of levying and collecting taxes, borrowing money, conducting war, &c. It was held that Congress could adopt any means "which are appropriate, which are plainly adapted to that end." Our Constitution, like the *United States Constitution*, is "meant to endure for ages, and therefore to be adapted to the various crises of human affairs" ; and no one can foretell the future developments in industrial combinations. In the present case the registration of any industrial association of 100 members that desires to register (under sec. 55), or is proclaimed an organization against its will (under sec. 62) may well be helpful to the President when he proceeds to prevent a two-State dispute before it occur, or to settle it after it has occurred. It seems to be often overlooked that the Constitution allows provision for conciliation as well as for arbitration, and for prevention as well as for settlement. "Prevention" involves interference before the evil—the evil of a two-State dispute—has occurred; while the dispute is perhaps only threatened, or is confined as yet to only one State. As disease may be dealt with by way of prevention as well as by way of cure, so a dispute may be dealt with by the way of prevention as well as by the way of settlement. I assume that the evil to be cured—or prevented—is a dispute which extends in fact into more than one State. But just as disease may be stamped out, or a bush fire extinguished, before it pass a State boundary, so may a two-State dispute be "prevented" from existing as a two-State dispute. Under sec. 16 of the Act, therefore, the President is required to endeavour to reconcile and prevent two-State disputes; and registration is an obviously convenient method of finding out to whom he should address himself (sec. 16), whom he should summon, who should be heard as applicants or as parties interested or possibly interested, and on whom awards and orders should be made binding. No doubt, if Parliament or the President, under colour of dealing with disputes of the two-State character, attempted to take out of the control of the State authorities a dispute which could not extend beyond the State, the Courts would declare the steps taken by Parliament or by the President to be void. It may be difficult in some cases to draw the line between cases in which federal power may, and cases in which it may not interfere. But that is a difficulty inherent in the subject matter dealt with in sub-sec. xxxv. of the *Constitution*. As was well said in *Gibbons v. Ogden*[32] :—"Wherever the powers of the respective Governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct." "The sovereignty of Congress, though limited to specified objects, is plenary as to those objects" [33] . The Constitution allows of

"all appropriate means which are conducive or adapted to the end to be accomplished, and which, in the judgment of Congress will most advantageously effect it" : *Legal Tender Cases*; *(Juillard v. Greenman)*[34] . "It would be incorrect," said *Marshall* C.J., "and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power" : *United States v. Fisher*[35] . For the purpose of gaining information with a view to the exercise of its admitted powers, the United States Congress enforces a census periodically, and obtains thereby information as to sex, age, production, &c., throughout both States and territories, yet the Constitution provides only for an enumeration of the people of the States. For the present purpose, all I need say is that, in my opinion, a provision is not unconstitutional which enables any industrial association of 100 members to write its name as it were in the books of the Court, so that the Court may find it and deal with it if there should be occasion. I have not now to consider the consequences of registration. It may possibly be that some of the sections of the Act prescribing consequences (secs. 57, 58, 67, 68, 69, &c.) may not be upheld, but the registration itself would not thereby be invalidated.

The position is, of course, quite different when an association of State railway servants, or of other State employés, comes to register. If the doctrine of the *Railway Traffic Employés' Case*[36] be accepted, the Constitution, by implication, prohibits the federal power from touching the State servants, as such, in any way—even for the promotion of peace, order, and good government, and even by entering a railway servants' association on the register kept under this Act. The State Government service is, in short, taboo to the federal power. There is no such taboo or prohibition as to any other industrial employés.

For the reasons which I have given, I must dismiss the appeal—refuse the application of the companies. As a result, the Registrar will not, when an association applies for registration, have to make up his mind whether the association can or cannot be interested in a two-State dispute. He will not, so far as I am concerned, be under the burden of deciding, on the balance of probabilities, as if by prophetic vision of future industrial developments, whether the association can ever, in future years or ages, be concerned in such a dispute.

Appeal dismissed.

Solicitors for appellants, Derham & Derham.

Solicitor for the Industrial Registrar, Powers, Commonwealth Crown Solicitor.

H C of A

On appeal from the President of the Commonwealth Court of Conciliation and Arbitration

6 October 1908

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Mitchell K.C. (with him W. H. Williams), for the appellants.

Duffy K.C. (with him McArthur), for the Industrial Registrar,

1908, Feb. 20

Higgins J

. read the following judgment:—

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There has also been added by my permission a new ground taken after the decision of the Registrar—by notice dated the 8th November—that the provisions of Part V. of the Act are *ultra vires* the provisions of the Constitution and void.

I have allowed the companies to supplement their case as put before the Registrar by statutory declarations to the effect that the companies carry on business in Victoria only, have no agreement with any employers in any other State, and are now almost the only employers of coal miners in Victoria.

The question of registration is one for this Court and this Court alone—the Commonwealth Court of Conciliation and Arbitration; and as I have been made solely responsible for the efficient working of this Court, I think it is my duty as far as possible to exercise the sole control which the Act gives me over the office and over the Registrar. If the main contention of the companies is right, the Registrar will have, in every case before registering an association, to decide whether the association can or cannot possibly be concerned at the present time, or at any future time, in an industrial dispute extending beyond the limits of any one State. This is a task of a nature not usually assigned to Registrars, and the Registrar himself would be the first to admit that it is not a matter which he should be called on to decide. Yet, though I should not ordinarily feel justified in seeking to cast on others the burden of problems relating to this Act and to this Court, I should not hesitate to exercise my discretionary power to state a case for the High Court if I felt that my decision would finally bind the rights of any of His Majesty's subjects in some important respect, and if I felt substantial doubt as to the legal position. I should also be much more disposed to state a case before declaring an Act of Parliament *ultra vires* and void, than before refusing to so declare. In this case, however, if my decision be in favour of the association, it will not prevent the validity of the registration from being tested when the association attempts to use its new status as an organization, say, by applying to enforce an award, or by suing its members for penalties. I asked Mr. *Mitchell* to point out how his clients were prejudiced by registration, and the strongest point in his answer was that under sec. 9 an employer loses by the fact of registration his right to dismiss an employé for the mere fact that he is a member of an organization. But even in such a remote case the employer can, notwithstanding sec. 57, raise the defence that the association is not an "organization" and could not be an "organization," as it is not legally registrable. Moreover, if the question of registration should at any time become crucial, any party interested, or the Registrar, may apply for cancellation (sec. 60). I might add that, but for the course taken by the Full Court in the *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employés Association*[37] , I should have doubted the propriety of allowing an Act of Parliament to be impeached as

unconstitutional and void on a mere application to register an association, or at the instance of persons who are not hurt or affected by the mere fact of registration. The practice in the United States is not to decide against an Act except "in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals" : *Chicago and Grand Trunk Railway Co. v. Wellman*[38] . However, I bow to the opinion of the Full Court on the point; and I shall also treat as binding me for the purposes of this case all the principles laid down in the *Railway Traffic Employés Case*[39] , notwithstanding the subsequent judgment of the Privy Council in *Webb v. Outtrim*[40] . My decision in this case is to be regarded as merely a decision as to the duties of the Industrial Registrar on an application to register.

One of the arguments used against registration is that this association is incapable of being concerned in an industrial dispute "extending beyond the limits of any one State." These are the words of sub-sec. xxxv. of sec. 51 of the *Constitution*, which may, for the purposes of this argument, be taken as defining the limits of the legislative power of the Federal Parliament on this subject. The argument assumes that, if an association cannot be concerned in an industrial dispute of the character mentioned in the Constitution—which I may call for shortness "a two-State dispute" —the Federal Parliament has no power to allow the association to be registered. Counsel have argued on this assumption, and I shall first deal with their arguments. I shall say something as to the assumption afterwards. Let it be assumed, then, that there is no power for the Federal Parliament to allow an association to be registered if it cannot possibly be concerned in a two-State dispute. Yet I am certainly not prepared to say that this association cannot be concerned in such a dispute—now or at any future time. It is true that there is at present no evidence of any combination or understanding between the colliery owners of Newcastle, or of the Collie coalfield with the owners of these Victorian mines; and that there is no evidence of any combination between the employés at these places. But it is not difficult to conceive circumstances in which there might be such a combination on both sides; and, in my opinion, this is just the kind of case that the constitutional provision in sec. 51 sub-sec. xxxv. was designed to meet:—"Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." I may grant that in an industrial quarrel each of the employés is disputing with his employer. In this sense each man's dispute is separate from every other man's dispute. But the phraseology of sub-sec. xxxv. treats an industrial dispute as if it were an epidemic disease or a fire. Of course each of the victims has a separate disease; and each blade of grass has its separate blaze. But there is such a connection between the various sufferers, or the various blades of grass, that it is not unusual or incorrect to speak of the disease, or of the fire as "extending" or as "spreading." So with an industrial dispute. At the time that the Constitution was enacted by the British Parliament, nothing was more marked than the tendency of strikes to "spread" ; and to "restrict the area of a strike" was a common endeavour. Union is strength; and nothing is more common in modern industrial disputes than for the employers to seek a common course of action, and for the employés to mass themselves in one opposing array. Mr. *Mitchell* has sought to confine the disputes referred to in sub-sec. xxxv. to disputes where there is one employer—one person or partnership or company—carrying on business in at least two States. But sub-sec. xxxv. does not provide that the employment must extend beyond the limits of one State—it provides that the disputes must so extend. Mr. *Mitchell* said that this Court would have no power to intervene even if the Sydney wharf labourers, having a dispute with a line of steamers, refused to handle goods for that line, and sought to induce, or even actually induced, the wharf labourers of Melbourne to follow their example. He suggested, however, that there might possibly be an alternative case—the case, for instance, of all the pastoralists of New South Wales and Victoria having a binding agreement to insist on one common set of conditions of labour, and the shearers having a counter agreement among themselves. This suggested case

becomes very nearly an admission of the impossibility of accepting the view at first pressed. But there is no need to confine the power conferred on the Parliament within such narrow limits. The power was evidently meant to enable the Federal Parliament to deal with disputes which could not be so effectually dealt with by a Parliament having power only within the limits of one State. The New South Wales Parliament can deal with a dispute which is confined to New South Wales—when the Newcastle mine owners act in combination, and the Newcastle miners act in combination. But it cannot deal so effectively with a dispute when the Newcastle mine owners act in a combination with the Victorian mine owners, and the Newcastle miners act in combination with the Victorian miners; and, in my opinion, sub-sec. xxxv. was meant to enable the Australian Parliament to make provision for such latter combinations. The only difficulty seems to arise from the fact that a "dispute" is something intangible and abstract, and yet the section requires us to measure it by things concrete and tangible—by States, areas of territory. But the meaning of the language is plain enough.

The next argument is that, even if this association can possibly be a party to a two-State dispute, sec. 55 is too wide in that it allows associations to be registered which cannot by any possibility be parties to such a dispute, and that therefore the whole of sec. 55 is unconstitutional and void. The instances suggested by Mr. *Mitchell* of associations that cannot by any possibility be parties to such a dispute—Melbourne railway employés, Melbourne corporation employés, employés in a Queensland industry—are not, indeed, very convincing as illustrations. But let it be assumed that there are associations which can never be parties to such a dispute; what follows? In the first place, as the words of sec. 55 are general, it would be the duty of the Court to presume that the legislature meant to keep within the bounds of the Constitution, and to allow registration to such associations only as could be interested in such disputes: *D'Emden v. Pedder*[41] ; *United States v. Coombs*[42] ; *Parsons v. Bedford*[43] ; *Grenada County Supervisors v. Brogden*[44] ; *Presser v. Illinois*[45] . But even if this rule of construction were not applicable, even if sec. 55 means that all industrial associations of 100 members are free to register whether they can be interested in a two-State dispute or not, even if sec. 55 is too wide as to the kind of associations that may register, is sec. 55 therefore to be treated as void altogether? Is it to be held that no association can register because the section purports to allow some associations to register which are not within the constitutional power? Mr. *Mitchell* admits that, if his argument is right, no association can be registered; and so there can be no "organization" under the Act; and there can be no industrial dispute entertained by this Court, and no award can be given; and, in short, the whole Act becomes nugatory. This seems to be a conclusion revolting to common sense; but it must be accepted if in accordance with law. It is urged that where we find an enactment in general terms in one section, terms that may include some things that Parliament has not power to legislate about, the whole enactment is void. In my opinion, there is no such rigid rule of law. Whenever Parliament transcends its powers in legislation, the Court has to determine, as in the case of any other agent exceeding its powers, whether the part *intra vires* is so bound up with the part *ultra vires* that it cannot be disentangled. If a man wrongfully mix up another's property with his own so that it cannot be ascertained which is his and which is not his, he loses the whole; and so with legislatures of limited powers. If the legislature has power to deal with matters called A, and not with matters called B, and it pass a clause dealing with A and B as one united indivisible whole, or in some other fashion indicating that its dealing with A is dependent on its dealing with B, then the whole clause is void. If the Commonwealth Parliament had power under the Constitution to make laws for the government of the tropical part of South Australia, and passed an Act providing for the government of all tropical Australia as one whole, the Act would be invalid. But if it passed an Act providing for the government of the tropical part of South Australia, and also enacted—in the same Act, or in a subsequent Act—that the same provisions should apply to the tropical part of Queensland, and to the tropical part of Western

Australia, severally, the Act would be valid as to South Australia and invalid as to Queensland and Western Australia. The same result would follow if South Australia, Queensland and Western Australia were all referred to in the same section and the same sentence. The doctrine of unconstitutionality in legislation is really a branch of the law as to powers—a part of the law that has been developed with more logical completeness than most parts. If there be an appointment to several persons, some of whom are and some of whom are not objects of the power, and the appointment to the objects is severable from the appointment to the strangers, it will be valid, and the appointment to the stranger will fail. *Contra*, if it is impossible to say how much of the appointment falls within the power and how much not: *Farwell on Powers*, 2nd ed., pp. 298, 312; *Adams v. Adams*[46] ; *Hamilton v. Royse*[47] ; *In re Brown's Trusts*[48] ; *In re Kerr's Trusts*[49] ; *In re Farncombe's Trusts*[50] . The test is, if Parliament had rightly understood the extent of its power, would it not have executed it in this manner as to the associations subject to its power. This test fits the *Railway Traffic Employés Case*[51] , and the American cases therein cited. In that case the Court was considering the validity of the definition of in sec. 4 of this Act. The question was (so far as now material), could the Federal Parliament deal with railway servants by virtue of the inter-state trade and commerce power (sec. 51, sub-sec. 1) taken in conjunction with sec. 98? The Court assumed, for the sake of argument, that it could, but "only so far as regards inter-state traffic and only as far as regards men engaged in that traffic" [52]

. But, inasmuch as the Act dealt with New South Wales railway servants in connection with any kind of traffic, whether interstate or confined to New South Wales, and had no intention of dealing with, say, a shunter at Albury, in his inter-state functions—as distinguished from his State functions—acting in one set of functions for three minutes, and another set for the following thirty, the Court held that the power of legislating for railway servants as regards inter-state functions had simply not been exercised. Similarly in the *Trade Mark Cases*[53] cited by the Court the American Judges find that "the main purpose" of the Federal Act was to "establish a regulation applicable to all trades, to commerce at all points," and that "it was designed to govern the commerce wholly between citizens of the same State." In other words, the Act would not have been passed except as an entirety. Similarly in the electoral machinery case: *United States v. Reese*[54] , the Court found that the Federal Congress, having power to legislate so as to prevent the States from denying the rights of citizens on account of race, colour &c., had actually prescribed for the State its electoral machinery for voting irrespective of race and colour, and as the parts could not be separated in administration, the whole provision had to be treated as void. The principle does not depend on the form of words used, whether they are found in one section or in several; whether in one general phrase or in successive specific expressions. As it has been expressed by Mr. Justice *Cooley* (*Constitutional Limitations*, 7th ed., 250), "a legislative Act may be entirely valid as to some classes of cases and entirely void as to others. A general law for the punishment of offences, which should endeavour to reach by its retroactive operation acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control." This passage was read with approval, and adopted by the Supreme Court in *Jaehne v. New York*[55] . In the Massachusetts case of *Commonwealth v. Hitchings*[56] , the Court said as follows.—"The constitutional and the unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance." Again in *Warren v. Charlestown*[57] , the same Court said:—"if they (the parts) are so mutually connected with, dependent on each other, as conditions, considerations, or compensations

for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

To prevent an unconstitutional law from operating as far as it can, it must be "evident" (again to quote *Cooley*, p. 250) "from a contemplation of the Statute and of the purpose to be accomplished by it, that it would not have been passed at all except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others." See also *Tiernan v. Rinker*[58] ; *Penniman's Case*[59] ; *Field v. Clark*[60] ; *People v. Rochester*[61] ; *Re Middletown*[62] ; *R. v. Lundrie*[63] ; *Presser v. Illinois*[64] ; *Commonwealth v. Clapp*[65] ; *American and English Encyd.*, vol 18, p. 225.

Then it is contended that because sec. 4 of the Act, under the definition of "industrial disputes," purports to include disputes in relation to employment upon State railways, and the Full Court has declared that the Act is *ultra vires* and void in so far as it attempts to include such disputes, sec. 55 must be void also. It is true that sec. 55 does not refer to the State railway servants, or even to industrial disputes. But it is urged that sec. 55 allows any industrial association of 100 members to register; that the legislature must have meant to allow a railways servants' association to register; and that therefore the whole provision for registration—even in the case of wharf labourers or of shearers—is wholly void. I presume that even if a separate Act was passed, purporting to include disputes relating to employment upon State railways under the term "industrial disputes," the same argument would be applied—that this whole Principal Act and all its provisions for registration, for conciliation, for arbitration, are *ultra vires*, inasmuch as the two Acts must be read together as one scheme, and all is void if part is void. At all events, if I am right in thinking that sec. 55 is not void as to all associations if it be void as to some associations, it is plain, *a fortiori*, that it is not void because sec. 4 covers forbidden ground. I am unable to think that the provisions of sec. 4 as to "industrial disputes" and the provisions of sec. 55 as to registration, are "so connected together in subject-matter, meaning, or purpose, that it cannot be presumed the legislature would have passed one without the other" : *Re Middletown*[66] .

Now I come to the assumption that the Federal Parliament has no power to permit an association to be registered, even on its own application, if the association cannot, in the opinion of the Court, be concerned in a two-State industrial dispute. I must say that, to my mind, this assumption is by no means obviously right. No doubt the Federal Parliament must not trench on State functions. But if, with a view to dealing effectively with all disputes of a two-State character, it permit any association of a certain number of members, and having certain industrial objects, to register, and thereby secure particulars with regard to such associations, to be used if and so far as required, if and when a two-State dispute occurs, I am not prepared to say that the direction would be invalid. The Federal Parliament has to deal with defence. If, with a view to organizing a citizen army, it allowed any adult male to register his name, would not that law be good, even though it allowed the maimed and blind to register? The powers of the Federal Parliament, even as the powers of trustees and other donees of powers, must be exercised *bonâ fide* to the ends and within the limits prescribed; but the means, the machinery, the method of carrying out the powers, are all in the discretion of the Parliament. Even if the words of sub-sec. xxxv. of sec. 51 of the *Constitution* are not sufficient of themselves to enable Parliament to permit (we are not now talking of compelling) an industrial association of 100 members to register itself with a view to possibilities, yet sub-sec. xxxix. enables the Parliament to make laws as to "matters incidental to the execution of any power vested by this Constitution in the Parliament." This power is certainly at least as comprehensive as that in the

Constitution of the United States—"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Yet, in the United States, the Courts never set aside any legislation of Congress as unconstitutional unless it is clearly apparent that it can by no means be needful or appropriate to the execution of the specified powers. This principle was carried to an extreme length by *Marshall* C.J. in the great case of *M'Culloch v. Maryland*[67] , for there it was held that Congress could incorporate a bank, as incidental to its powers of levying and collecting taxes, borrowing money, conducting war, &c. It was held that Congress could adopt any means "which are appropriate, which are plainly adapted to that end." Our Constitution, like the *United States Constitution*, is "meant to endure for ages, and therefore to be adapted to the various crises of human affairs" ; and no one can foretell the future developments in industrial combinations. In the present case the registration of any industrial association of 100 members that desires to register (under sec. 55), or is proclaimed an organization against its will (under sec. 62) may well be helpful to the President when he proceeds to prevent a two-State dispute before it occur, or to settle it after it has occurred. It seems to be often overlooked that the Constitution allows provision for conciliation as well as for arbitration, and for prevention as well as for settlement. "Prevention" involves interference before the evil—the evil of a two-State dispute—has occurred; while the dispute is perhaps only threatened, or is confined as yet to only one State. As disease may be dealt with by way of prevention as well as by way of cure, so a dispute may be dealt with by the way of prevention as well as by the way of settlement. I assume that the evil to be cured—or prevented—is a dispute which extends in fact into more than one State. But just as disease may be stamped out, or a bush fire extinguished, before it pass a State boundary, so may a two-State dispute be "prevented" from existing as a two-State dispute. Under sec. 16 of the Act, therefore, the President is required to endeavour to reconcile and prevent two-State disputes; and registration is an obviously convenient method of finding out to whom he should address himself (sec. 16), whom he should summon, who should be heard as applicants or as parties interested or possibly interested, and on whom awards and orders should be made binding. No doubt, if Parliament or the President, under colour of dealing with disputes of the two-State character, attempted to take out of the control of the State authorities a dispute which could not extend beyond the State, the Courts would declare the steps taken by Parliament or by the President to be void. It may be difficult in some cases to draw the line between cases in which federal power may, and cases in which it may not interfere. But that is a difficulty inherent in the subject matter dealt with in sub-sec. xxxv. of the *Constitution*. As was well said in *Gibbons v. Ogden*[68] :—"Wherever the powers of the respective Governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct." "The sovereignty of Congress, though limited to specified objects, is plenary as to those objects" [69] . The Constitution allows of "all appropriate means which are conducive or adapted to the end to be accomplished, and which, in the judgment of Congress will most advantageously effect it" : *Legal Tender Cases*; *(Juillard v. Greenman)*[70] . "It would be incorrect," said *Marshall* C.J., "and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power" : *United States v. Fisher*[71] . For the purpose of gaining information with a view to the exercise of its admitted powers, the United States Congress enforces a census periodically, and obtains thereby information as to sex, age, production, &c., throughout both States and territories, yet the Constitution provides only for an enumeration of the people of the States. For the present purpose, all I need say is that, in my opinion, a provision is not unconstitutional which enables any industrial association of 100 members to write its name as it were in the books of the Court, so that the Court may find it and deal with it if there should be occasion. I have not now to consider the consequences of registration. It may possibly be that some of the sections of the Act prescribing consequences (secs. 57, 58, 67, 68, 69, &c.) may not be

upheld, but the registration itself would not thereby be invalidated.

The position is, of course, quite different when an association of State railway servants, or of other State employés, comes to register. If the doctrine of the *Railway Traffic Employés' Case*[72] be accepted, the Constitution, by implication, prohibits the federal power from touching the State servants, as such, in any way—even for the promotion of peace, order, and good government, and even by entering a railway servants' association on the register kept under this Act. The State Government service is, in short, taboo to the federal power. There is no such taboo or prohibition as to any other industrial employés.

For the reasons which I have given, I must dismiss the appeal—refuse the application of the companies. As a result, the Registrar will not, when an association applies for registration, have to make up his mind whether the association can or cannot be interested in a two-State dispute. He will not, so far as I am concerned, be under the burden of deciding, on the balance of probabilities, as if by prophetic vision of future industrial developments, whether the association can ever, in future years or ages, be concerned in such a dispute.

Appeal dismissed.

Solicitors for appellants, Derham & Derham.

Solicitor for the Industrial Registrar, Powers, Commonwealth Crown Solicitor.

1. [1906] HCA 94; 4 C.L.R., 488.

2. [1892] USSC 52; 143 U.S., 339, at p. 345.

3. [1906] HCA 94; 4 C.L.R., 488.

4. (1907) A.C., 81.

5. [1904] HCA 1; 1 C.L.R., 91, at p. 119.

6. [1838] USSC 39; 12 Pet., 72, at p. 75.

7. [1830] USSC 57; 3 Pet., 433.

8. [1884] USSC 236; 112 U.S., 261.

9. [1886] USSC 13; 116 U.S., 252, at p. 269.

10. Cowp. 651.

11. 2 Sch. & Lef., 315, at p. 332.

12. L.R., 1 Eq., 74.

13. 4 Ch. D., 600.

14. 9 Ch. D., 652.

15. [1906] HCA 94; 4 C.L.R., 488, at pp. 545-7.

16. [1906] HCA 94; 4 C.L.R., 488, at p. 545.

17. [1879] USSC 171; 100 U.S., 82, at pp. 96, 98-9.

18. [1875] USSC 177; 92 U.S., 214, at p. 221.

19. 128 U.S., 189, at p. 194.

20. 5 Gray (Mass.), 482, at p. 486.

21. 2 Gray (Mass.), 84, at p. 99.

22. [1880] USSC 178; 102 U.S., 123.

23. [1880] USSC 192; 103 U.S., 714.

24. [1892] USSC 54; 143 U.S., 649.

25. 50 N.Y., 525.

26. 82 N.Y., 196.

27. L.J., May 1907, p. 157.

28. [1886] USSC 13; 116 U.S., 252.

29. 5 Gray (Mass.), 97, at p. 100.

30. 82 N.Y., 196, at p. 202.

31. 4 Wheat., 316, at p. 421.

32. [1824] USSC 18; 9 Wheat., 1, at p. 239.

33. [1824] USSC 18; 9 Wheat., 1, at p. 197.

34. [1884] USSC 87; 110 U.S., 421, at p. 440.

35. [1805] USSC 18; 2 Cranch., 358, at p. 396.

36. [1906] HCA 94; 4 C.L.R., 488.

37. [1906] HCA 94; 4 C.L.R., 488.

38. [1892] USSC 52; 143 U.S., 339, at p. 345.

39. [1906] HCA 94; 4 C.L.R., 488.

40. (1907) A.C., 81.

41. [1904] HCA 1; 1 C.L.R., 91, at p. 119.

42. [1838] USSC 39; 12 Pet., 72, at p. 75.

43. [1830] USSC 57; 3 Pet., 433.

44. [1884] USSC 236; 112 U.S., 261.

45. [1886] USSC 13; 116 U.S., 252, at p. 269.

46. Cowp. 651.

47. 2 Sch. & Lef., 315, at p. 332.

48. L.R., 1 Eq., 74.

49. 4 Ch. D., 600.

50. 9 Ch. D., 652.

51. [1906] HCA 94; 4 C.L.R., 488, at pp. 545-7.

52. [1906] HCA 94; 4 C.L.R., 488, at p. 545.

53. [1879] USSC 171; 100 U.S., 82, at pp. 96, 98-9.

54. [1875] USSC 177; 92 U.S., 214, at p. 221.

55. 128 U.S., 189, at p. 194.

56. 5 Gray (Mass.), 482, at p. 486.

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58. [1880] USSC 178; 102 U.S., 123.

59. [1880] USSC 192; 103 U.S., 714.

60. [1892] USSC 54; 143 U.S., 649.

61. 50 N.Y., 525.

62. 82 N.Y., 196.

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66. 82 N.Y., 196, at p. 202.

67. 4 Wheat., 316, at p. 421.

68. [1824] USSC 18; 9 Wheat., 1, at p. 239.

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70. [1884] USSC 87; 110 U.S., 421, at p. 440.

71. [1805] USSC 18; 2 Cranch., 358, at p. 396.

72. [1906] HCA 94; 4 C.L.R., 488.

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