[HIGH COURT OF AUSTRALIA.]

THE JUMBUNNA COAL MINE, NO LIABILITY AND ANOTHER . . } APPELLANTS;

AND

THE VICTORIAN COAL MINERS' ASSOCIATION . . . . . } RESPONDENTS.

ON APPEAL FROM THE PRESIDENT OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION

H. C. OF A. 1908.

MELBOURNE 1907. *Nov.* 20, 21, 22, 25, 26; *Dec.* 14. 1908. *Feb.* 20

Higgins J.

1908. *June* 12, 15, 16, 17, 18, 19. *October* 6.

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

Commonwealth Conciliation and Arbitration Act 1904 (*No.* 13 *of* 1904), *secs.* 4, 55, 58, 60, 65, 73—*Registration of association—Validity of legislation—Association of employés in one State—Incorporation of organization—"Industry," "Industrial Dispute" and "Extending beyond the limits of any one State," meaning of—The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.), (xxxix.)—*Appeal to High Court from President of Commonwealth Court of Conciliation and Arbitration.*

The provisions of the *Commonwealth Conciliation and Arbitration Act* 1904 in respect of the registration of associations as organizations, particularly in so far as they permit the registration of an association of employers or employés in an industry in one State only, and provide for the incorporation of organizations when registered, are valid as being incidental to the power conferred on the Commonwealth Parliament by sec. 51 (xxxv.) of the Constitution.

Judgment of the President (*Higgins* J.) affirmed.

Observations of the President as to his power to state a case for the opinion of the High Court.

An appeal lies to the High Court from a decision of the President of the Commonwealth Court of Conciliation and Arbitration dismissing an appeal to him from a decision of the Industrial Registrar disallowing objections to the registration of an association under the *Commonwealth Conciliation and Arbitration Act* 1904.

Observations as to the meaning of the expressions "Industry," "Industrial Dispute" and "Extending beyond the limits of any one State."

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

APPEAL from the President of the Commonwealth Court of Conciliation and Arbitration.

An application was made to the Industrial Registrar to register an association called the Victorian Coal Miners' Association as an organization of employés under the *Commonwealth Conciliation and Arbitration Act* 1904. The registration was objected to by the Jumbunna Coal Mine, No Liability, and the Outtrim, Howitt and British Consolidated Coal Co., No Liability, on the following ground:—

"That the said association is not an association capable of being registered under the Act in that—

"(*a*) It could not be concerned in an industrial dispute extending beyond the limits of any one State.

"(*b*) It is not an association of not less than one hundred employés in or in connection with the coal mining industry."

On 17th October 1907 the Industrial Registrar disallowed the objections and registered the association.

From this decision the two companies appealed to the President of the Commonwealth Court of Conciliation and Arbitration, the grounds of the appeal being:—

1. That the Industrial Registrar was wrong in disallowing the objections lodged against the application.

2. That the Victorian Coal Miners' Association is not an association capable of registration under the *Commonwealth Conciliation and Arbitration Act* 1904.

3. That the provisions of Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904 relating to registration of associations as organizations are *ultra vires* the provisions of the Constitution and void.

Other facts are set out in the judgment of *Higgins* J. There was no appearance for the Victorian Coal Miners' Association on the hearing of the appeal.

1907, Nov. 20, 12, 22, 25, 26; Dec. 14.

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

Duffy K.C. (with him *McArthur*), for the Industrial Registrar, who had obtained leave to appear.

Cur. adv. vult.

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

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

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* (1), notwithstanding

(1) 4 C.L.R., 488.

(2) 143 U.S., 339, at p. 345.

the subsequent judgment of the Privy Council in *Webb* v. *Outtrim* (1). 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

(1) (1907) A.C., 81.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Higgins J.

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* (1); *United States* v. *Coombs* (2); *Parsons* v. *Bedford* (3); *Grenada County Supervisors* v. *Brogden* (4); *Presser* v. *Illinois* (5). 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

(1) 1 C.L.R., 91, at p. 119.
(2) 12 Pet., 72, at p. 75.
(3) 3 Pet., 433.
(4) 112 U.S., 261.
(5) 116 U.S., 252, at p. 269.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Higgins J.

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* (1); *Hamilton* v. *Royse* (2); *In re Brown's Trusts* (3); *In re Kerr's Trusts* (4); *In re Farncombe's Trusts* (5). 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* (6), and the American cases therein cited. In that case the Court was considering the validity of the definition of "industrial dispute" 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" (7). But, inasmuch as the Act dealt with New South Wales railway servants in connection with any kind of traffic, whether inter-state 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* (8) 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* (9), the Court found that the Federal Congress, having power to legislate so as to prevent the States from

(1) Cowp. 651.
(2) 2 Sch. & Lef., 315, at p. 332.
(3) L.R., 1 Eq., 74.
(4) 4 Ch. D., 600.
(5) 9 Ch. D., 652.
(6) 4 C.L.R., 488, at pp. 545-7.
(7) 4 C.L.R., 488, at p. 545.
(8) 100 U.S., 82, at pp. 96, 98-9.
(9) 92 U.S., 214, at p. 221.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Higgins J.

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* (1). In the Massachusetts case of *Commonwealth* v. *Hitchings* (2), 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* (3), 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

(1) 128 U.S., 189, at p. 194.
(2) 5 Gray (Mass.), 482, at p. 486.
(3) 2 Gray (Mass.), 84, at p. 99.

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* (1); *Penniman's Case* (2); *Field* v. *Clark* (3); *People* v. *Rochester* (4); *Re Middletown* (5); *R.* v. *Lundrie* (6); *Presser* v. *Illinois* (7); *Commonwealth* v. *Clapp* (8); *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* (9).

(1) 102 U.S., 123.
(2) 103 U.S., 714.
(3) 143 U.S., 649.
(4) 50 N.Y., 525.
(5) 82 N.Y., 196.
(6) L.J., May 1907, p. 157.
(7) 116 U.S., 252.
(8) 5 Gray (Mass.), 97, at p. 100.
(9) 82 N.Y., 196, at p. 202.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Higgins J.

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* (1), for there it was held that Congress could incor-

(1) 4 Wheat., 316, at p. 421.

porate 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

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Higgins J.

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* (1):— "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" (2). 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*) (3). "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* (4). 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* (5) be accepted, the Constitution, by implication, prohibits the federal

(1) 9 Wheat., 1, at p. 239.
(2) 9 Wheat., 1, at p. 197.
(3) 110 U.S., 421, at p. 440.
(4) 2 Cranch., 358, at p. 396.
(5) 4 C.L.R., 488.

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.

From this decision the two companies now appealed to the High Court. June 12, 15-19.

Mitchell K.C., and *Glynn*, for the appellants.

Duffy K.C. and *Macfarlan*, for the Industrial Registrar. There is a preliminary objection. No appeal will lie. The Commonwealth Court of Conciliation and Arbitration is not a Federal Court within the meaning of sec. 73 of the Constitution, nor is the President of that Court on the hearing of an appeal such as that in the present case. Neither that Court nor its President exercises any functions *inter partes*. In sec. 55 of the *Commonwealth Conciliation and Arbitration Act* 1904 there is no provision for any person objecting. The only means of getting rid of the decision now under appeal is under sec. 60 of the *Commonwealth Conciliation and Arbitration Act* 1904. The Arbitration Court exercises no judicial power. The determination of the President is not a judgment, decree, order, or sentence within the meaning of sec. 73 of the Constitution. The present appellants are not competent appellants. They had no *locus standi* in the matter. The provisions of sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904 form an exception

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

within the meaning of sec. 73 of the Constitution, and show that it was intended there should be no appeal.

GRIFFITH C.J. We all think there is nothing in the objection. Sec. 73 of the Constitution gives an appeal to this Court from orders of any other federal Court, and the Court appealed from is such a Court. Sec. 31 of the Act has no application to the order now in question.

ISAACS J. I should like to say for myself that I start with the decision of this Court as to the position of the President in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1). I do not consider it for myself, as I do not think it is *res integra*.

Mitchell K.C. and *Glynn*. Upon the proper construction of sec. 51 sub-sec. xxxv. of the Constitution this association is incapable of being engaged in an industrial dispute extending beyond the limits of one State, and therefore cannot be registered under the *Commonwealth Conciliation and Arbitration Act* 1904. Assuming that this association is within sec. 55 of that Act, then that section and the other relevant sections of the Act as to registration are *ultra vires*. That section was intended to include associations which were incapable of being engaged in a dispute extending beyond the limits of one State, and therefore the doctrine of *D'Emden* v. *Pedder* (2) cannot be applied so as to cut down its meaning. A section in general terms is either wholly good or wholly bad. The registration provided for by sec. 55 is, not for the purpose of finding the association when it is wanted, but its results are to alter the status of the association and to invest it with a number of powers and privileges which it would not otherwise have. See secs. 49, 58, 68, Schedule B.; *In re Amos*; *Carrier* v. *Price* (3); *Rigby* v. *Connol* (4); *Duke* v. *Littleboy* (5); *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (6).

(1) 4 C.L.R., 488.
(2) 1 C.L.R., 91, at p. 119.
(3) (1891) 3 Ch., 159.
(4) 14 Ch. D., 482, at p. 489.
(5) 49 L.J. Ch., 802, at p. 804.
(6) (1892) A.C., 25, at p. 39.

[ISAACS J. referred to *Steele* v. *South Wales Miners' Federation* (1).]

The determining words of sec. 51, sub-sec. xxxv. of the Constitution are "extending beyond the limits of any one State." The reason for that clause is to enable the Commonwealth Parliament to deal effectively with certain disputes with which the State Parliaments could not so effectually deal, viz., disputes where the employment of individuals extends beyond one State, for example, in the case of seamen, land carriers and shearers. The other alternative is that the power extends to all industrial disputes.

The word "prevent" shows that the disputes must be such that, if they arise, they will extend beyond the limits of one State. If that is not the only class of disputes to which the clause applies, at any rate it does not extend beyond disputes between a body of employers or employés in the same industry acting in common, the body being in fact composed of individuals in more than one State, and a similar association of employés or employers respectively. The clause would not cover the case of a body composed of employés in more than one State, disputing with a body composed of employers in one State. Even if registration were for the purpose of recording the names and addresses of organizations, and if it applied to organizations which were incapable of being engaged in disputes extending beyond the limits of one State, the legislation would be invalid, for it would not be ancillary to any power of the Commonwealth Parliament. If a Victorian association combined with a New South Wales association, and formed one body, which was a party to a dispute extending beyond the limits of one State, the former association could not, as such, be a party to that dispute, and therefore could not be registered. To constitute an industrial dispute within sec. 51, sub-sec. xxxv. of the Constitution there must be a combination of demand, the organizations which are parties to that dispute must extend beyond one State, and the only organizations which can be registered are those which can be engaged in a dispute extending beyond the limits of one State. See *Federated Amalgamated Government Railway and*

(1) (1907) 1 K.B., 361.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Tramway Service Association v. *New South Wales Railway Traffic Employés Association* (1).

[GRIFFITH C.J.—What power has the Commonwealth Parliament to create these organizations corporations, as it has done in sec. 58?

O'CONNOR J.—It can only be for the purpose of carrying out the power of conciliation and arbitration.

GRIFFITH C.J.—Is it reasonably incidental to carrying out that power?

ISAACS J.—The creation of a Court is a much stronger step than creating a corporation. In *M'Culloch* v. *Maryland* (2) it was held that Congress might create corporations.]

Even if there is power, for the purpose of enforcing awards of the Court, to create corporations, that power must be strictly confined to that object. Parliament cannot confer rights upon bodies of employers or employés because some day they may be engaged in disputes extending beyond the limits of one State. If a body like that in this case can be registered, there is no limit to the power of the Parliament to interfere with the domestic commerce of the States. The power as to conciliation and arbitration must be exercised so as to directly affect that subject matter: *Tucker's Constitution of the United States*, p. 368; *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (3). The question of separability never arises in the case of a section in general terms, nor can the principle of limitation laid down in *D'Emden* v. *Pedder* (4) be applied to it: *United States* v. *Reese* (5); *Trade Mark Cases* (6); *United States* v. *Harris* (7); *Poindexter* v. *Greenhow* (8); *Baldwin* v. *Franks* (9); *United States* v. *Ju Toy* (10).

[ISAACS J. referred to *Illinois Central Railroad Co.* v. *McKendree* (11).]

The definition of "industry" in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904 is such as to show that

(1) 4 C.L.R., 488, at p. 544.
(2) 4 Wheat., 316.
(3) 4 C.L.R., 488, at p. 545.
(4) 1 C.L.R., 91.
(5) 92 U.S., 214, at p. 221.
(6) 100 U.S., 82, at p. 98.
(7) 106 U.S., 629, at p. 641.
(8) 114 U.S., 270, at p. 305.
(9) 120 U.S., 678, at pp. 685, 689.
(10) 198 U.S., 253, at p. 261.
(11) 203 U.S., 514.

the Parliament intended to extend the meaning of "industrial disputes" in sec. 51, sub-sec. XXXV. of the Constitution. "Industry," as ordinarily used, does not include every "calling, service, or employment, on land or water, in which persons are employed for pay, hire, advantage, or reward," and the exception—"excepting only persons engaged in domestic service"—shows how wide the meaning is intended to be. As a result of that definition sec. 55 includes associations which could not possibly be engaged in an industrial dispute extending beyond the limits of one State.

[ISAACS J.—The word "industry" is used with a very wide meaning in the South Australian *Conciliation Act* 1894, sec. 3. See also *Master and Servant Act* 1867 (30 & 31 Vict. c. 141); *Master and Servant Act* 1872 (35 & 36 Vict. c. 46.) The meaning of the word "industry" is limited to trade and commerce and transport. See *Industrial Commissioners Report* 1891; *Douglas Knoop on Industrial Conciliation and Arbitration*, p. 99; *Royal Commission on Labour*, 5th Report 1894, pp. 3, 49, 171.]

If the reason for registration is that organizations may appear before the Court, then it should be of bodies which can come before the Court in connection with, and as parties to, an industrial dispute extending beyond the limits of one State. The power to deal with registration is at most only ancillary to the power given by sec. 51, sub-sec. XXXV. of the Constitution, and, if the mere possibility of an association becoming involved in a dispute extending beyond the limits of one State were to give the right to be registered, the ancillary power would exceed the principal power. The power given by sec. 51, sub-sec. XXXV. of the Constitution is a new power which did not exist in the States before federation, and it is given in a very limited way so as not to interfere with the reserved power of the States to deal with such matters as those with which they could deal at the establishment of the Commonwealth. Any doubt as to the scope of the power should be resolved in such a way as not to hamper the powers of the States. It is for this Court to say whether a particular power is incidental to a power granted to the Commonwealth Parliament within the meaning of sec. 51, sub-sec. XXXIX. of the Constitution. The incidental power must be necessary for carrying out the principal power, or must be plainly adapted to

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

that end: *Quick & Garran's Constitution of the Commonwealth*, p. 652; *Tucker's Constitution of the United States*, pp. 368, 373; *Hepburn* v. *Griswold* (1); *M'Culloch* v. *Maryland* (2); *Cooley's Principles of Constitutional Law*, pp. 106, 111; *Legal Tender Case* (3); *Dred Scott* v. *Sandford* (4); *Story's Constitution of the United States*, p. 57; *Legal Tender Cases* (5); *Barton* v. *Taylor* (6); *Wandsworth Board of Works* v. *United Telephone Co.* (7).

[BARTON J. referred to *London and North Western Railway Co.* v. *Evans* (8).]

Duffy K.C. and *Macfarlan*. The power given to the Commonwealth Parliament by sec. 51, sub-sec. xxxv. of the Constitution was to enable it to do more efficiently what might have been done by the combined action of the State Parliaments in a less efficient manner. The words "industrial disputes" have one of two meanings, the wider being disputes in any employment or occupation in which a number of persons are engaged, and where there is the relation of master and servant, and the narrower being disputes in any employment or occupation connected with production or distribution. The nature of the particular work done by an individual in the employment does not matter. The words "extending beyond the limits of any one State" are satisfied if any of the essentials of the dispute exist in different States. Thus, as examples, one party to the dispute may be in one State and one in another, or the parties to the dispute may be in one State and the subject matter of the dispute in another. There must be, however, a community of action on one side of the dispute. The Commonwealth Parliament has taken certain classes of disputes and enacted their desire that they are to be dealt with in three ways; first, the President is to conciliate between the parties before or at the time when the dispute arises, in which case the result of the conciliation may be embodied in an award; secondly, if the President cannot conciliate between the parties, he is to determine between them; and,

(1) 8 Wall., 603.
(2) 4 Wheat., 316, at p. 421.
(3) 110 U.S., 421.
(4) 19 How., 393.
(5) 12 Wall., 457, at pp. 570, 573.
(6) 11 App. Cas., 197, at p. 203.
(7) 13 Q.B.D., 904, at p. 919.
(8) (1893) 1 Ch., 16, at p. 28.

thirdly, parties are encouraged to agree amongst themselves without the intervention of the President. Assuming that sec. 55 of the *Commonwealth Conciliation and Arbitration Act* 1904 only enables associations which can be engaged in disputes extending beyond the limits of one State to be registered, it is valid as being incidental to the power given by sec. 51, sub-sec. xxxv. of the Constitution within the meaning of sec. 51, sub-sec. xxxix. It merely gives power to establish representative bodies which may come into contact with the President, although they may not bring disputes before him unless they are parties to such a dispute. The section should be read as only applying to such bodies as can be engaged in industrial disputes extending beyond the limits of one State: *Irving* v. *Nishimura* (1); *Macleod* v. *Attorney-General for New South Wales* (2). The doctrine of separability may be applied to the definition of "industry" in sec. 4. If any individual case there included ought not to be included, it may be struck out. If that is done, that definition can have no effect in the way of invalidating sec. 55. Further, even if the words "industrial disputes" have the narrower meaning above stated, then the definition of "industry" in sec. 4 restricts and does not enlarge the meaning, but only shows the mode in which the industry may be carried on. As to the meaning of "industry" see *Mill's Political Economy*, vol. I., p. 53; *Marshall's Economics of Industry*, p. 52; *Marshall's Principles of Economics*, pp. 117, 299, 316. It is not to be assumed that the Commonwealth Parliament would not have provided for registration without giving to the organizations the protection afforded by sec. 9, and the benefit of being corporations (sec. 58). Those advantages may go without destroying the registration of the associations. See *Story's Constitution of the United States*, par. 1263; *Tucker's Constitution of the United States*, 3rd ed., vol. I., p. 371; *Black's Constitutional Law*, 2nd ed., p. 238.

[ISAACS J.—The power of Congress to create corporations is incidental to its other powers. See *Slaughter House Cases* (3); *Luxton* v. *North River Bridge Co.* (4).]

The word "incidental" in sec. 51, sub-sec. xxxix. of the

(1) 5 C.L.R., 233, at p. 236.
(2) (1891) A.C., 455.
(3) 16 Wall., 36, at p. 64.
(4) 153 U.S., 525, at p. 529.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Constitution is equivalent to the words "necessary and proper" in the section of the United States Constitution dealing with the powers of Congress. The mere fact that the means attempted to be used for carrying out a Commonwealth power may be the exercise of a power which the States also have does not invalidate the use of those means by the Commonwealth.

[GRIFFITH C.J.—Express powers appear to be given in sec. 51 sub-secs. xiii. and xx. of the Constitution in reference to corporations. Does that raise the implication of a prohibition against creating corporations in other cases?]

No. If the creation of corporations is really incidental to the power as to conciliation and arbitration, the Commonwealth Parliament may create them. "Incidental" means "used for the purpose of," or "conducive to" the carrying out of a power: *Tucker's Constitution of the United States*, 3rd ed., vol. I., p. 367. The power to create corporations is obviously as conducive to the power as conciliation and arbitration: *Legal Tender Case* (1). Part VI. of the *Commonwealth Conciliation and Arbitration Act* 1904 is separable from the rest of the Act. Though a general power is given in such terms that it may be inferred to be limited, yet that power may be used in its unlimited form as an incidental power: *Quick and Garran's Constitution of the Australian Commonwealth*, p. 652, citing *Bryce, Amer. Comm.* 1, pp. 370-1. There is in the creation of a corporation no clashing of the powers of the Commonwealth and the States. It is a use of a power of the Commonwealth over a matter as to which the States also have power: *Gibbons* v. *Ogden* (2); *Peterswald* v. *Bartley* (3).

Mitchell K.C. in reply. An association limited to one State, which may become a unit of a larger association, which larger association may hereafter be engaged in a dispute extending beyond the limits of one State, cannot itself be said to be an association which may be engaged in a dispute extending beyond the limits of one State.

A dispute extending beyond the limits of one State must be one of a class of disputes which from their nature must so

(1) 110 U.S., 421. (2) 9 Wheat., 1. (3) 1 C.L.R., 497, at p. 510.

extend, the parties disputing must each embrace units in more than one State, and the dispute must be such that it cannot be settled in one State without the consent of one of such parties. Unless both parties were required to extend beyond the limits of one State, one party to a dispute in a State might, by combining with an association in another State, create a dispute extending beyond the limits of one State. A corporation, once having been created, is a corporation for all purposes. The rights of a corporation are too remote and uncertain with reference to conciliation and arbitration to bring the creation of a corporation in this case within the incidental power. The definition of "industry" in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904 is not a limitation of the meaning of a word whose meaning is perfectly well-known. If the language of that definition is taken in its plain natural meaning, the intention is clearly to use words which will cover every kind of employment with the specific exceptions. The word "include" is used to enlarge the meaning of the word defined: *Dilworth* v. *Commissioners of Stamps* (1).

[Counsel also referred to *Pollock* v. *Farmers' Loan and Trust Co.* (2); *United States* v. *Dewitt* (3); *Cooley's General Principles of Constitutional Law*, p. 202; *Legal Tender Case* (4); *James* v. *Bowman* (5).

Cur. adv. vult.

The following judgments were read:—

October 6.

GRIFFITH C.J. The main question for determination in this case is whether, as incidental to the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," the Commonwealth Parliament can constitute new corporate bodies within the States, and confer on them such powers as Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904 purports to confer. The answer to the question requires a careful consideration of the language of the Constitution and of the Act itself.

(1) (1899) A.C., 99, at p. 105.
(2) 158 U.S., 601, at p. 635.
(3) 9 Wall., 41, at p. 44.
(4) 110 U.S., 421, at p. 450.
(5) 190 U.S., 127.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Griffith C.J.

The grant of the power in question is strictly limited by its express terms. The dispute must be one "extending beyond the limits of any one State." It does not, therefore, extend to purely domestic or municipal disputes.

Again, the power, so far as regards the prevention of disputes, is limited to conciliation for that purpose. It does not, therefore, extend to making laws for what is called "collective bargaining," except so far as collective bargaining may be incidental to such conciliation or to arbitration for the settlement of existing disputes.

An industrial dispute exists where a considerable number of employés engaged in some branch of industry make common cause in demanding from or refusing to their employers (whether one or more) some change in the conditions of employment which is denied to them or asked of them. The form of combination is immaterial, though it most commonly arises where there are organized associations of employés or employers. The degree of permanency of the combination is also immaterial, but there must be some continuity of action.

It is contended for the appellants that the term "industrial disputes extending beyond the limits of any one State" imports, of itself, that there must be on both sides of the dispute parties whose operations are carried on in more than one State. This, of course, includes the case of a single employer having employés in more than one State who combine together in a dispute with him.

It is conceded for the Registrar that this condition must exist on one side of the dispute, but he contends that it need not exist on both sides, and that if a combination of workmen or of employers operating in more than one State makes a common demand against separate employers or bodies of workmen in different States, those in one State being willing to accede to the demands and those in the other unwilling, there is nevertheless a dispute extending beyond the limits of one State. This is a difficult question which may some day arise for decision, but it is not necessary to decide it in this case.

A question which arises at the outset is, what is an "industrial dispute" within the meaning of the Constitution? It must,

of course, be a dispute relating to an "industry," and, in my judgment, the term "industry" should be construed as including all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life.

The term "extending beyond the limits of any one State" must connote the same idea in connection with both prevention and settlement. In the case of settlement of a dispute the dispute must be one extending already beyond the limits. In the case of prevention there can only be danger of such an extension. It follows that the dispute must be in its nature such that it is likely to extend, or at least capable of extending. This, however, does not throw much light on the question, since a dispute might arise in any industry whatever which in fact was carried on upon the border between two States, and would for that very reason be likely to extend from one to the other.

The word "settlement" connotes that the dispute to be settled is already existing. The power to legislate with respect to arbitration for the settlement of a dispute necessarily involves, in my opinion, power to make provisions for constituting an arbitral tribunal, for bringing before it the parties to the dispute, and for enforcing the award of the tribunal. In the exercise of this power, and to attain these ends, the Parliament is unfettered in its choice of means, provided that they are really incidental to the attainment of these ends, and not manifestly unconnected with them. There must be some nexus between the means and the end. I will return to the question of what might *primâ facie* be such means, but will first say a few words on the power to legislate with respect to conciliation for the prevention and settlement of disputes. In this case, *ex vi termini*, any notion of compulsion is excluded, so that it cannot be incidental to conciliation to make any change in the existing rights or capacities of any person or bodies of persons, except by creating agencies through which the function of conciliation may be the better exercised. These considerations apply whether the conciliation is for preventing a dispute from coming into existence or for bringing it to an end. Arbitration, on the other hand, can only relate to an existing dispute. It was suggested, but not pressed, that the

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Griffith C.J.

settlement by arbitration of an intra-state dispute might be a means of preventing the extension of the dispute beyond the limits of the State. This contention would involve the consequence that any domestic industrial dispute whatever would fall within the power, since it might possibly under some circumstances extend beyond the State—a consequence inconsistent with the retention by the States of the exclusive power to deal with the regulation of their own internal trade, and which would give no effectual meaning to the words "extending beyond the limits of any one State."

What means, then, may be regarded as incidental to bringing together for the purpose of conciliation parties between whom an industrial dispute is likely to arise or has already arisen, or incidental to bringing parties before the tribunal of arbitration for the purpose of settlement of an existing dispute and enforcement of the decision of the tribunal?

It is plain that communication with all the individual disputants or probable disputants would be impracticable for either purpose. It would, therefore, be expedient, and indeed necessary, to make provision for representation. And I can see no reason why the Parliament should not provide that existing State organizations, representative of bodies of employers or employés, should be recognized as representative for the purpose of the law which they pass to deal with the matter. Nor can I see any reason why they should not authorize the constitution of new organizations for the specific purposes of the Act. And they might confer upon such organizations of either kind such powers as are incidental to the discharge of these functions. They might, if they thought fit, prescribe that any such organization should be disentitled to act as a representative body unless it gave security in money or in the form of property for obeying the decisions of the tribunal. But beyond such limits it seems to me that they could not go in this respect. The Parliament has no independent power to create corporations, except in the cases specified in sec. 51 pl. xiii. (banks) and, possibly, in sec. 51 pl. xx. And, since the powers and functions of every corporation are limited by its constitution, it follows that the Parliament cannot confer upon a corporation created by it powers or functions for

the exercise of which alone it could not create a corporation. It could, however, I think, create a corporation as a means to the execution of an express power, and confer on it such powers and functions as are incidental to the execution of that power. This is the accepted doctrine under the Constitution of the United States.

I pass now to the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904 on which the appellants' objection is based. That objection takes two forms: (1) That the Act authorizes the creation of corporations which cannot from the nature of their powers and functions be parties, or representatives of parties, to an industrial dispute within the meaning of the Constitution; (2) that it purports to confer upon all corporations of which it authorizes the creation powers and functions which have nothing to do with conciliation or arbitration for the prevention and settlement of industrial disputes within that meaning, and that these provisions are so inseparably connected with the rest that they cannot be severed, with the consequence that the whole of the provisions must be held to be *ultra vires*. Whether this objection can be sustained depends in part upon the construction of the words of the Act itself, and in part on the question whether the powers and functions conferred can be regarded as incidental to conciliation or arbitration for the prevention or settlement of industrial disputes.

Part V. of the Act deals with "Organizations." Sec. 55 provides that any of the following associations may be registered as an organization:—

"(*a*) Any association of employers in or in connection with any industry, who have in the aggregate, throughout the six months next preceding the application for registration, employed on an average taken per month not less than one hundred employés in that industry, and

"(*b*) Any association of not less than one hundred employés in or in connection with any industry."

The term "association" is defined by sec. 4 as meaning "any trade or other union, or branch of any union, or any association or body composed of or representative of employers or employés, or for furthering or protecting the interests of employers or

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Griffith C.J.

employés." Sec. 55, therefore, authorizes the recognition, in addition to trade unions and other unions, of a new legal entity, described as "any association or body composed of or representative of employers or employés, or for furthering or protecting the interests of employers or employés." Sec. 58 provides that "every organization registered under this Act shall for the purposes of this Act have perpetual succession and a common seal." This is the accepted formula for creating a corporation. A question was raised as to the meaning of the words "for the purposes of this Act." But, remembering that the functions and powers of every corporation are limited, I think that these words may be read as meaning only that corporations so constituted shall have the powers and functions conferred by the Act. The section goes on to authorize these new corporations to hold real and personal property.

Read literally, sec. 58 incorporates every trade union upon its registration as an organization. The Act also, to some extent, regulates the internal management of such corporations, *quâ* corporations. Whether a trade union can at one and the same time both be a corporation under the Act and also not be a corporation, *quâ* trade union, is an interesting and novel question. Possibly it is analogous to the case of a corporation sole.

If the federal law is valid, it must prevail over State law, with the result that a body of persons associated under a State law and not incorporated under that law, can, on the pretext that it may some day become a party to a proceeding under this Act, be registered as an association, and so become a corporation which the State must recognize as such, with apparently no power to dissolve it or regulate it. Whether the corporation would die on the dissolution of the State-created body I do not know.

It was strenuously contended for the appellants that the competence of the Parliament to create representative organizations or corporations, as incidental to the execution of the power in question, was limited to organizations or corporations representing the employers or employés of more than one State, and I was for some time disposed to attach weight to this argument. But in the case of an industrial dispute in actual existence and extending beyond the limits of a State it is not unlikely that the parties to

the dispute on one side would be organizations of different States in temporary alliance for the common purpose, and in such a case it would be convenient that the Court should be able to call them before it. The recognition, or even the creation, and the registration, of such bodies may, therefore, be fairly considered as incidental to the power to make laws with respect to arbitration.

It was contended also that conferring upon such corporations the capacity to hold land is not a matter incidental to that power. It was answered that it is desirable that such corporations should hold property to answer orders and awards made against them. I am not at all impressed by this argument, but I think that the right to hold property is *primâ facie* incidental to all corporations lawfully created. I do not think, however, that a corporation created by the Parliament can hold land or any other property except for the limited purposes for which it is incorporated. If sec. 58 purports to confer a general authority to hold property to any extent for any purpose, I think that it is *pro tanto* ineffectual. But I think that this excess is severable, and does not vitiate the main provisions to which it is incident.

I pass to the other objection, which is, to my mind, much more serious.

Sec. 55 (2) enacts that the conditions to be complied with by associations applying to be registered as organizations shall be those set forth in Schedule B, which provides that the affairs of the association must be regulated by rules providing for a variety of matters, some of which are foreign to the primary objects of trade unions, one being the manner in which industrial agreements may be made by or on behalf of the association.

Part VI. of the Act relates to such industrial agreements.

This part of the Act is—I think unfortunately—based on the model of Statutes which were in force in some of the States and in New Zealand, and which were passed by legislatures of plenary authority, free to deal with other matters than those to which the competency of the Commonwealth Parliament is limited.

Sec. 73 provides that "any organization may make an industrial agreement with any other organization . . . for the prevention and settlement of industrial disputes by conciliation and arbitration."

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Griffith C.J.

The following sections, 74 to 81, contain detailed provisions as to such agreements and their effect. I have already expressed my view of the meaning to be attached to the word "industry." The terms "industrial agreements" and "industrial disputes" must have a corresponding meaning.

The Act, however, defines the term "industrial dispute" as meaning "a dispute in relation to industrial matters . . . . extending beyond the limits of any one State, including disputes in relation to employment upon State railways, or to employment in industries carried on by or under the control of the Commonwealth or a State or any public authority constituted under the Commonwealth or a State; but it does not include a dispute relating to employment in any agricultural, viticultural, horticultural, or dairying pursuit." And it defines the term "industry" as meaning "business, trade, manufacture, undertaking, calling, service, or employment, on land or water, in which persons are employed for pay, hire, advantage, or reward, excepting only persons engaged in domestic service, and persons engaged in agricultural, viticultural, horticultural, or dairying pursuits."

The appellants contend that this definition of "industry" includes callings and employments which are of such a nature that an "industrial dispute," as the term is used in the Constitution, cannot arise in respect to them, and that secs. 55 and 73 must be construed accordingly as extending to employments in which an "industrial dispute" is impossible, either from their nature or from their strictly localized operation. They further contend that the term "industrial dispute" as defined, having regard to the definition of that term itself and to the definition of "industrial," includes disputes which are not industrial disputes within the meaning of the Constitution, *i.e.*, extending beyond the limits of one State. As was pointed out in *The King* v. *Barger* (1), and the *Trade Mark Cases* (2), the Parliament cannot, either by means of a definition or otherwise, extend its powers beyond those conferred by the Constitution. If, therefore, these terms as used in the Act include matters not within the power, any provisions relating to such matters are to that

(1) 6 C.L.R., 41. (2) 100 U.S., 82.

extent invalid. Whether that invalidity affects the whole enactment is another question.

The definition of "industrial dispute" is on its face intended in one particular to include disputes which are outside the ambit of power of the Parliament as was decided in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1). If the definition of "industry" includes forms of employment which are not within the competence of the Parliament the provisions of the Act are, no doubt, *pro tanto* invalid, as was decided in that case. But, after some doubt, I have come to the conclusion that this does not affect their validity as to matters within their competence. So far, therefore, I think that this objection fails.

I think also that section 73, read according to the plain meaning of the words used, means that any registered organization may make an industrial agreement, using that term in the widest sense, with any other registered organization for any of the purposes mentioned in Part VI., and this whether the subject-matter of the agreement does or does not extend to operations beyond the limits of one State.

I have already pointed out that the power of the Commonwealth Parliament does not extend to general legislation for the prevention of industrial disputes but only to conciliation and arbitration for that end. Sec. 73, however, authorizes agreements for such prevention. It may be that industrial agreements, such as sec. 73 purports to authorize, would be conducive to preventing industrial disputes from arising, and would in that indirect way conduce to preventing them from extending beyond the limits of any one State. If this be so, and if the power to authorize such agreements had been conferred on the Parliament, it might be argued that industrial agreements between purely intra-state organizations would be justifiable as having a preventive tendency. Whether this would be a proper inference or not, I think that section 73 is based on that view, and that its plain language purports to authorize such agreements, whether they

(1) 4 C.L.R., 488.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Griffith C.J.

do or do not relate to an existing or prospective industrial dispute extending beyond the limits of any one State.

I am, therefore, of opinion that these provisions, on their face, and construed according to the intention of the legislature, extend to a great number of cases not within the competence of Parliament, and in so far ineffectual.

The question remains to be considered whether this excess invalidates the provisions of the Act relating to registration. In order that an association may be registered, its rules must provide for, amongst other things, (Schedule B. (*d*)), the mode in which industrial agreements may be made by it or on its behalf. Any provision in the rules for making an agreement which is not an agreement relating to a matter within the ambit of the powers of the Parliament cannot derive any authority from the Act, nor can any such agreement derive any validity from it. What, if any, validity it may have, it must derive from other sources. But I think that the Parliament may limit the privilege of registration to associations whose internal constitution is such that they have by agreement of the members authority to deal with other matters of a like kind, although not within the ambit of the powers of the Parliament. In this view the provisions of the Schedule are not enabling, but restrictive, provisions. And in this view I think that they are not open to objection. Upon the whole, therefore, I think that these provisions do not vitiate the provisions for registration.

Although, therefore, in my opinion, the Act contains provisions which are beyond the competence of the Parliament, I think that the provisions for registration of associations are severable from the invalid provisions, and are not themselves invalid.

I should add that the association registered in this case is one of employés in an industry, namely, coal-mining, which is clearly within the Constitution, and they might become parties to an industrial dispute extending beyond Victoria.

BARTON J. On appeal from the Industrial Registrar, the learned President of the Commonwealth Court of Conciliation and Arbitration confirmed the admission to registration of the respondent association. The formal grounds of the present

appeal are, first, that the respondents are not an association capable of being registered under the Act, not being an association capable of being concerned in an industrial dispute extending beyond the limits of any one State; secondly, that the provisions of sec. 55 (1) (*b*) and all other relevant provisions of Part V. of the Act, are invalid, being beyond the legislative powers of the Commonwealth as defined in the Constitution.

The questions involved turn on the extent and the manner of the exercise of two powers to make laws for the peace, order, and good government of the Commonwealth. Sec. 51 of the Constitution gives such powers in sub-sec. xxxv. with respect to: "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;" and in sub-sec. xxxix. with respect to: "Matters incidental to the execution of any power vested by this Constitution in The Parliament." Conciliation may possibly prevent a dispute—as to that I say nothing—and we know it may settle one; but I do not see how there can be an arbitration unless a dispute calling for settlement already exists. An industrial dispute in the everyday meaning of the term does not take place unless a number of employés in an industry unite on their part to enter into controversy with the person or persons employing them so as to secure what they consider an improvement, or to prevent or remove what they view as a wrong or a hardship, in relation to the terms of their employment. An industrial dispute, so as to extend beyond the limits of one State, seems still more insistently to involve the idea of numbers interested in the making or resisting of a claim in respect of industrial conditions. The existence or imminence of such a controversy, and the difficulty of preventing or composing it by any agency or tribunal confined in its influence or power to the territorial limits of one State, might well arouse apprehensions of danger to "peace, order, and good government," which to the framers of the Constitution would seem to justify the grant of legislative power co-extensive with the possible evil.

In this view of the mischief to be guarded against or remedied I am, after much consideration, unable to agree with the contention that the terms of sub-sec. xxxv. demand that every disputant, to become one of the parties to what the learned Presi-

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Barton J.

dent has called a two-State dispute, must have a sphere of operations extending beyond a single State. That does not follow from the fact that the subject matter of the dispute permeates or may permeate the whole extent of such operations, of which the disputant occupies only a partial area. Surely disputants in different States may make common cause to defend a common interest when it is attacked or threatened, provided that mere sympathy is not confounded with material interest. I think the power granted is wide enough to enable the legislature to make a body like the respondent association registrable as, under circumstances which may arise, though not perhaps in all events, a competent participator in a dispute extending beyond State limits where its industrial interests are wholly or in part at stake. Whether by reason of its registration or otherwise it will be a competent party in any future dispute, in which it may claim participation, will depend on the nature of that dispute, and the question how far its interest in the subject matter is inherent. I think too that the Statute contains an exercise of the power of which, if it survives attack on other grounds, the respondent association is at liberty to take advantage to the extent of registration. In my judgment it is not essential, in order to arrive at a just settlement of disputes affecting, say, the whole of the coal miners or the colliery owners of the Commonwealth or of more States than one, that the whole of the interests on the one side or the other should be gathered together in one huge organization. What they may respectively consider expedient is one thing; the indispensable requirement of the law is another. I am of opinion that organizations in the States concerned in a dispute within sub-sec. xxxv., each of them consisting wholly of members belonging to one or the other of those States, may join together as claimants or be joined as respondents in respect at least of an existing dispute in which their interests coincide.

But the appellants impeach for invalidity sec. 55 (1) (*b*) "and all other relevant provisions of Part V. of the Act," alleging these provisions to be beyond the constitutional powers of the Federal Parliament.

I take it as beyond doubt that the power in sub-sec. xxxv.

even without that in sub-sec. xxxix., is abundant to authorize legislation to constitute a Court of Arbitration and to provide for the proper representation of parties and the enforcement of its decisions. It is well to say here that I do not encumber this judgment with any avoidable references to the conciliation power and its exercise, because it is enough for the purposes of this appeal if a provision attacked is justified as an exercise of the arbitration power. It is here that resort may be had to sub-sec. xxxix. in aid, if it be necessary, of sub-sec. xxxv., though I must not be taken to assert that the former power would not have been exercisable without express grant. Still it has been explicitly given, perhaps largely because a similar express grant of power was thought convenient by the framers of the American Constitution. In this connection we here may well apply as nearly as may be the words of the Supreme Court of the United States in *Juilliard* v. *Greenman* (one of the *Legal Tender Cases*) (1). "A constitution . . . is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of these powers, or to specify all the means by which they may be carried into execution." In that Constitution the section which grants to Congress its principal powers of legislation concludes by giving that body authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department thereof." The judgment already quoted says that (2) "By the settled construction and the only reasonable interpretation of this clause, the words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will

(1) 110 U.S., 421, at p. 439. (2) 110 U.S., 421, at p. 440.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Barton J.

most advantageously effect it." In the case of *United States* v. *Fisher* (1), *Marshall* C.J. said in delivering judgment (2):—"In construing this clause it would be incorrect, 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. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." In *M'Culloch* v. *Maryland* (3), the Court says through the same great Judge:—"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The rule of interpretation thus laid down has been adhered to and acted on by the Supreme Court of the United States to this day. Now of the authority given in the American Constitution, to make "all laws which shall be necessary and proper" for carrying the expressly granted powers into effect, and the authority given in the Australian Charter, to "make laws . . . with respect to . . . matters incidental to the execution of any power vested by this Constitution in the Parliament," which is the wider? I cannot but think that the word "incidental" gives at least as ample a scope as the expression "necessary and proper"—probably an ampler one. At any rate, the Australian power is not complicated with any difficulty arising from the condition of necessity.

(1) 2 Cranch., 358. (2) 2 Cranch., 358, at p. 396.
(3) 4 Wheat., 316, at p. 421.

And believing as I do that the reasoning of the American jurists as to the extent of the authority conferred on Congress is conclusive, I must attribute a value at least as large to the authority conferred by sub-sec. xxxix. on the Australian Parliament. Clearly the questions whether the end is legitimate and within the scope of the Constitution, whether the means are appropriate and plainly adapted to the end, and consistent with the letter and spirit of the Constitution, are questions for the Court. But, the end being once found to be legitimate—that is, authorized by the Constitution—then, whether it is "wise and expedient" to resort to the means proposed is "a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the Courts" (1).

"Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground:" *M'Culloch* v. *Maryland* (2).

The question, then, is whether the provisions challenged by the appellants are within the provisions of sub-secs. xxxv. and xxxix., bearing in mind that the later sub-section authorizes a choice of any means incidental, or, to use the better word, ancillary to the attainment of the ends warranted by the conciliation and arbitration power.

The proper representation of the parties before the tribunal and the enforcement of its decisions being within the power, it was constitutional to provide by sec. 55 for such representation to be by means of the registration of such associations as there described, and their conversion thereby into "organizations" capable of being parties if they complied with the other valid conditions prescribed in Part V. But as a condition precedent to registration, sec. 55 (2) requires compliance, so long as they remain unaltered, with the requirements of Schedule B. That Schedule insists that the affairs of the applicant association shall be regulated by rules specifying the purposes of its formation and providing for, among other things, "(*d*) the mode in which industrial agreements and other instruments may be made by or

(1) 110 U.S., 421, at p. 450. (2) 4 Wheat., 316, at p. 423.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Barton J.

on behalf of the association." The appellants urged that this requirement was beyond the powers of Parliament, and in fact challenged the whole of the provisions of the Act relating to industrial agreements. Sec. 73, which is at the head of that Part, provides that: "Any organization may make an industrial agreement with any other organization or with any person for the prevention and settlement of industrial disputes by conciliation and arbitration." The attack centres on this section. The remaining sections of this Part are ancillary to sec. 73. It is urged that agreements for the prevention and settlement of industrial disputes cannot be authorized by this section. But the agreements are to be for the prevention of such disputes by conciliation and arbitration, and I see no reason why parties should not be allowed thus to bind themselves to resort to the authorities provided by the Act, so that they may prevent disputes by the aid of the one authority, or settle them by the aid of either, or, if necessary, both. The disputes to be prevented or settled are "industrial disputes"—that is (sec. 4) disputes in relation to industrial matters . . . . extending beyond the limits of any one State. So far I have no difficulty. But it is contended that "industrial matters" depend upon the meaning given by the Act to the term "industry," in the same section, and that this meaning is wider than the Constitution sanctions, so that "industrial disputes" acquire also too wide a meaning. It is true that this Court has decided that an "industrial dispute" as defined cannot include a dispute in relation to employment on State railways. But that portion of clause 4, preceded as it is by the word "including," is not essential to the definition, and though we have held that it is not *in se* severable so as to distinguish between employment in intra-state and employment in inter-state traffic (see the *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1)), still that segment as a whole is clearly separable from the rest of the definition section, even under the test exacted by the reasoning of *Miller* J. in the *Trade Mark Cases* (2), quoting *United States* v. *Reese* (3).

(1) 4 C.L.R., 488.

(2) 100 U.S., 82, at pp. 96, 98, 99.

(3) 92 U.S., 214.

Without "making a new law," these objectionable words can as a complete part be dropped out so as not to be "included" in "industrial disputes," and so, if they were held to be unauthorized, could the subsequent references to industries carried on by or under the control of a State Government or a State authority. Hence it is not necessary, in order to bring the provision within bounds, to introduce words of limitation "into the Statute so as to make it specific when, as expressed, it is general only." In that respect, then, I think sec. 55 stands. If, however, Schedule B (*d*) referred to industrial agreements generally, it might in a certain view affect fatally the whole of the registration provisions. But by definition an "industrial agreement" means such an agreement "made pursuant to this Act," which, as to essentials, means pursuant to sec. 73. Moreover, assuming that I have taken too liberal a view of sec. 73 as to the meaning of "industrial dispute" as there used, it does not follow that Schedule B (*d*) is fatal. It is true that it may in that case be looked at as providing for agreements as to matters outside the powers of the Parliament. But the other construction is equally open that this is a limitation by Parliament of the privilege of registration to associations whose members have agreed by rule to give them leave to deal with matters similar to, if not connected with, the matter authorized, though not quite within their scope. Such a limitation or restriction the Parliament could impose, as it would amount to a grant of a privilege less extensive than it might have validly accorded. In that view Schedule B (*d*) is constitutional and, as between two constructions, equally open and equally within reason, it is our duty to accept that one which makes for the validity of the enactment. Before we construe an enactment as transcending the powers of Parliament, it should appear that such a construction is the only reasonable one. The legislature are to be considered as conferring nothing but what they had a reasonable right to grant. "A doubt of the constitutional validity of a Statute is never sufficient to warrant its being set aside:" *Cooley, Principles of Constitutional Law*, 3rd ed., p. 171, quoted by *Thayer*, 1 Const. Cases, 174.

A very strong assault was made on the provisions of sec. 58, and I must admit that I was during the argument much disposed

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Barton J.

to admit its success. That section gives to every registered organization for the purposes of the Act perpetual succession and a common seal, and power "to purchase take on lease hold sell lease mortgage exchange and otherwise own possess and deal with any real or personal property." It was truly urged that the grant of these powers and privileges amounted to the exercise by Parliament of power to create corporations and regulate the holding and use of property, and that such a grant was beyond the competence of Parliament. And it does seem difficult to find in the Act any very substantial purposes to which these grants can be applied. If the enactment is invalid, say the appellants, it brings down with it the whole fabric of registration, for every association otherwise capable of engaging in a dispute will be created as soon as registered a corporation in breach of the Constitution. The section was defended on the ground that the powers and privileges conferred were incidental or ancillary to legislation for the main and authorized ends of the Statute, and that they would have been "necessary and proper" provisions in relation to a similar power if existing in the United States Constitution. Hence, it was argued, they were "incidental" provisions within the meaning of sec. 51, sub-sec. xxxix. Having regard to the reasoning I have cited and endeavoured to apply, I am of opinion, though not with great confidence, that this is the correct view. The power to use a common seal and to hold land (to summarize the section) is helpful in some measure to the efficiency of the bodies, representing employers as appropriately as employés. It is of some consequence that their collection of fees and fines and any lands they may acquire should be held in some way conveniently to be reached and dealt with by the Court. The degree to which this is a necessity and the question whether the instrument is wisely selected are, as I have shown, political questions. If in our judgment the enactments of sec. 58 are means to a constitutional end, if they exist in respect of a matter or matters incidental to the execution of a constitutional power, then the degree of their mere suitability, if they are applicable at all, and the wisdom of their selection, if other methods could have been adopted, are matters beyond our jurisdiction and therefore immune from our criticism. We must assume also that Parlia-

ment has acted from a deep sense of responsibility and in full consciousness of the limits of its powers, and of its sacred obligations to the Constitution which they whom it has called into legislative existence would surely be the last to violate.

I am of opinion that the respondent association was duly registered, and that the appeal fails.

O'Connor J. The respondents, an association of employés in the coal mines of Victoria, applied under the *Commonwealth Conciliation and Arbitration Act* 1904 for registration as an organization. The appellants, two companies working coal mines in that State, objected on certain grounds which they urged before the Industrial Registrar. That officer having decided that the appellants were entitled to registration, the companies appealed to the President of the Court, who, having considered the original grounds of objection together with a new ground which he permitted to be added, upheld the Registrar's decision. From the President's judgment the appellants have now come to this Court, which has determined on a preliminary objection that the appeal will lie. The grounds of appeal are as follows:—

1. That the said association is not an association capable of being registered under the said Act, inasmuch as it is not capable of being concerned in an industrial dispute extending beyond the limits of any one State.

2. That the provisions of sec. 55, sub-sec. (1) (*b*) of the said Act and all other relevant provisions of Part V. of the said Act are *ultra vires* the provisions of the Commonwealth Constitution and invalid.

Although the first ground is concerned more immediately with the interpretation of the Act, both involve the interpretation of the Constitution. Before adverting to them in detail it will be convenient to refer, in so far as is material to this controversy, to the language in which the Constitution has conferred the power to legislate, and to the statutory provisions by which the power has been exercised by the Commonwealth legislature.

The Constitution, by sec. 51, sub-sec. xxxv. enacts that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order, and good government of the

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

Commonwealth with respect to : " conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." With this must be read sub-section xxxix., which empowers the Parliament to make laws with respect to " matters incidental to the execution of any power vested by this Constitution in the Parliament," &c. It was open to the Commonwealth Parliament to exercise the power so conferred in such method as they deemed advisable so long as they kept within the limits so laid down. The method they have chosen is embodied in the *Commonwealth Conciliation and Arbitration Act* 1904, which by sec. 2 declares concisely the objects of the enactment.

It will be noted that the scope of the Act is expressly limited to disputes extending beyond the limits of any one State, and generally throughout this judgment I shall use the word " disputes " in that limited sense. The central idea of the enactment is the constitution of a Court, which consists of a President, and is invested with the twofold power of conciliation and of arbitration. By sec. 16 the President is " charged with the duty of endeavouring at all times by all lawful ways and means to reconcile the parties to industrial disputes, and to prevent and settle industrial disputes, whether or not the Court has cognizance of them, in all cases in which it appears to him that his mediation is desirable in the public interest." The Court is also invested with all necessary judicial powers for the investigation and determination of disputes brought before it and for ensuring obedience to its awards.

The provisions most directly challenged in this case are those creating the machinery by which the Court obtains cognizance of the dispute and gets and keeps in touch with the disputants, and by which is secured the permanent settlement of disputes by agreement or by judicial decision and the effective enforcement of awards. An industrial dispute is something more than a dispute between an employer and his individual workmen. It is a dispute between a combination of workmen and their employer or employers. The questions involved generally affect the whole trade, and a settlement is seldom adequate unless it binds the whole trade. It is not practicable to bring all employés in a

trade before the Court, nor all the masters. Some method of representation of the disputants is therefore essential for the purpose of dealing with the dispute in its initial stages, of bringing the parties before the Court, and of enforcing observance of the award.

Part V. creates a system by which associations of employers and associations of employés may, on complying with certain conditions, be registered as organizations. By registration they become corporations with powers specifically limited to the purposes of the Act. They represent their members collectively, and thus constitute the parties with whom the Court deals for purposes of conciliation, arbitration, and the enforcement of awards. In respect of employés the organizations are in general the only parties that have a *locus standi* in Court, for it will not, except in special circumstances, entertain a dispute between individual workmen and an employer. An organization when so constituted may make an industrial agreement with individuals or with other organizations for the prevention and settlement of industrial disputes by conciliation and arbitration (sec. 73).

As an organization is constituted for the purpose of representing its members in combination and stands for them in all the procedure of the Court, it is essential, if it is to be effectively representative, that it should be invested with certain powers, duties, obligations, and liabilities. The Act therefore provides that an organization may hold property, may sue members for fees and fines; being party to an award it becomes subject to penalties for disobedience, and the penalties may be enforced against its property and funds.

Having thus described in so far as is material the method by which the legislature has exercised the powers conferred by the Constitution for the prevention and settlement of industrial disputes, I shall now consider the grounds of appeal.

The appellants' first contention is that the registration is invalid because the respondent association is one which could not be concerned in a dispute extending beyond the limits of any one State. That position involves the assumption that no organization can be validly registered which is not at the time of registration capable in itself of being concerned in a dispute extending

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

beyond the limits of any one State. There is no such qualification of the right to register on the face of the Act, nor can it be implied from any of its provisions. The objection is therefore really to the constitutionality of the enactment, and may be thus stated. Parliament is empowered by the Constitution to legislate only with respect to disputes extending beyond the limits of any one State. It is conceded that legal bodies might be created to represent groups of employers and of employés for purposes of procedure. But the authority of Parliament extends only, it is contended, to the creation of such bodies as are in themselves capable from the moment of their existence of being parties in such a dispute.

In examining this contention it becomes necessary to inquire into what amounts to an industrial dispute extending beyond the limits of any one State within the meaning of the Constitution. That the parties on either side should be organized in any permanent form of combination is not essential. If all the workmen of an employer in a particular trade take concerted action in demanding and endeavouring to enforce from him some alteration in their conditions of employment, there is an industrial dispute. If all the workers throughout the State in the same trade unite in the making and endeavouring to enforce the same demand from their respective employers, there is an industrial dispute involving the whole trade throughout the State. If the workers so united obtain the co-operation of their fellow-workers in the same trade in another State in such a way that the combined workers in the trade in both States take concerted action against their respective employers in both States for the making and enforcing of the same demands, there is an industrial dispute extending beyond the limits of one State. It is not at all essential to the concept of such a dispute within the meaning of the Constitution that the workmen should be combined in any formal inter-state union any more than it is necessary to constitute an industrial dispute within the limits of a State that it should be carried on by a trade union representing the workers in that trade.

On the other hand, the workers in the trade in both States may be combined in some permanent form of inter-state union; or

the workers in each State may be combined in some permanent form of State union, and the two State unions may combine and agree upon joint action against their respective employers for the purpose of making and enforcing the same demands in both States. In each case the industrial dispute is between the united body of workmen and their employers. Where the workmen of both States combine to take united action for the purpose of gaining the same alteration of conditions of employment in both States it is immaterial whether the combination is of individuals or of unions, whether the unit of the combination is the workman or the union.

Such being the nature of the disputes covered by the Constitution, it was open to the legislature to adopt any method which they deemed effective for prevention and settlement by conciliation and arbitration. They might, if they had thought fit, have dealt with the individual workman or employer as the unit of combination, and provided for the registration of all workmen and all employers in a trade as a step in aid of procedure. It was equally open to them to take the State trade union or association as the unit of combination, and provide for their registration as a step in the same direction. For, as the individual workman may in combination with other workmen in his own or another State become concerned in an industrial dispute extending beyond the limits of any one State, so a State trades union or State association of workmen may, by combination with trade unions or associations of workmen in another State, become concerned in such a dispute.

It follows that the power of Parliament would extend to the creation of organizations such as those contemplated by the Act, even though they might be incapable at the time of registration of being in themselves parties to an industrial dispute within the meaning of the Constitution, provided that they are so constituted as to be capable of becoming at any time parties to such a dispute as members of a combination of the organizations of more than one State acting together in carrying on an industrial dispute for the attainment of a common end. In reference to this objection, therefore, only one question can arise in this case, and that a question of fact: namely, is the Victorian Coal

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

Miners' Association capable of being at any time one of a combination of organizations engaged in a dispute extending beyond the limits of any one State? It is hardly necessary to say that the answer must be in the affirmative. It would, for instance, be within the rights of the Victorian Coal Miners' Association to combine with one or more of the Coal Miners' Associations of New South Wales in taking united and simultaneous action in both States for the attainment of some common end by raising in each State the same dispute with their respective employers. In readiness for such a contingency the respondent association is, in my opinion, entitled to be registered as an organization, and thus to obtain at once the advantages which registration confers.

The appellants next attack the constitutionality of the Act upon various other grounds, each of them of such importance as to demand separate consideration.

It is contended that Parliament has exceeded its rights in conferring on registered associations the status of corporations and investing them with the power of holding property and of suing for fees and fines and contributions and penalties as provided by secs. 58, 66, 68 and 69, and that the whole enactment is therefore unconstitutional and void, inasmuch as these incidents and powers are inseparable from the scheme of registration, which is a vital part of the Act.

Sec. 58 is as follows:—"Every organization registered under this Act shall for the purposes of this Act have perpetual succession and a common seal, and may purchase take on lease hold sell lease mortgage exchange and otherwise own possess and deal with any real or personal property."

Sec. 66 provides that the organization may sue or be sued for the purposes of the Act, and deals with details of procedure.

Sec. 68 provides that the organization may recover "all fines fees levies or dues payable to an organization by any member thereof under its rules, ... in any Court of summary jurisdiction constituted by a Police, Stipendiary, or Special Magistrate."

Sec. 69, which gives power to the Commonwealth Arbitration Court to determine disputes between the organization and its

members, also authorizes that Court to order payment by any member of his contribution towards a penalty incurred by the organization for breach of an award.

Secs. 44, 45, and 46 provide for the recovery from the organization of penalties incurred by them for breaches of an award or order of the Court.

Sec. 47 (1) is as follows:—"For the purpose of enforcing compliance with any order or award, process may be issued and executed against the property of any organization or in which any organization has a beneficial interest, whether vested in trustees or howsoever otherwise held, in the same manner as if the organization were an incorporated company and the absolute owner of the property or interest."

And sub-sec. (3) of the same section provides that: "where the property of an organization or execution is insufficient to satisfy fully any process for enforcing any order or award, the members of the organization shall, to the extent of the maximum penalties defined in paragraph (c) of sec. thirty-eight, be liable for the deficiency."

Sec. 58 adopts a somewhat unusual form of limiting the powers conferred upon the organization as a corporation. But there can be no doubt as to its meaning. It does create a corporation, but of powers strictly limited to the purposes of the Act. The sections I have quoted and referred to indicate sufficiently for the purposes of this case the constitution and the powers of the representative body which the Act has created under the name of "organization."

The Constitution, it is urged, confers upon the Parliament no general power to create corporations; it gives express power to create them only in the instances set forth in sub-secs. xiii. and xx. of sec. 51. For the purpose of exercising the powers conferred in sub-sec. xxxv. there is no justification for creating corporate bodies with such rights and incidents. Such is the appellants' argument. The respondents answer, in this way: it is true that the organization is a corporation, but it is invested only with such powers as are necessary for carrying out the Act, which, in its turn, is limited to the subject matter of industrial disputes as set forth in sub-sec. xxxv., and further that the

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

creation of a corporation with powers so limited is proper and necessary for the effective exercise of the authority to make laws in respect of "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," and is therefore incidental to the exercise of that power within the meaning of sub-sec. xxxix. That contention brings to a point the whole matter for consideration in this part of the case, namely, whether the legislation complained of is really incidental to the effective exercise of the powers conferred by sub-sec. xxxv.

All powers of legislation granted to Parliament by the Constitution are necessarily conferred in broad general terms. Mr. Justice *Gray*, in delivering judgment in the *Legal Tender Cases* (1), makes some observations on the same feature in the American Constitution which are worthy of consideration:—"The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution."

The extent of the power conferred must, of course, be ascertained by the words which the legislature has used, but in their interpretation the maxim referred to by this Court in *D'Emden* v. *Pedder* (2) must always be kept in mind:—"In other words, where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case, to all to whom is committed the exercise of powers of government."

But the framers of the Constitution were not satisfied to leave the grant of ancillary powers to be inferred. They have by sub-

(1) 110 U.S., 421, at p. 439.

(2) 1 C.L.R., 91, at p. 109.

sec. xxxix. of sec. 51 expressly authorised the making of laws with respect to: "matters incidental to the execution of any power" vested by the Constitution in the Parliament. In this they follow, though in different language, the Constitution of the United States, which empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." In considering whether the legislation challenged is incidental to the execution of the power conferred by sub-sec. xxxv. it must be conceded that it is for the Parliament to determine by what means and in what method the exercise of the power shall be made effective, and it is for the Court to decide whether the means and the method are "incidental to the execution of any power" within the meaning of the Constitution. This raises the exceedingly important question how is the word "incidental" to be interpreted, and at what point and on what principle will the Court interfere with the discretion of the legislature? The same question arose very early in the history of the American Constitution in reference to the corresponding provision to which I have already referred, and which is in substance and meaning identical with that now under consideration. The principles laid down in *M'Culloch* v. *Maryland* (1) by Chief Justice *Marshall* in 1819 have ever since been followed by the American Courts. "We admit," he says, "as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Again (2):—"But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be

(1) 4 Wheat., 316, at p. 421.

(2) 4 Wheat., 316, at p. 423.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power."

That reasoning is unanswerable, and is as applicable to the Australian as to the American Constitution. It furnishes, as it seems to me, a reasonable test to be applied in the determination of the matter now under consideration. Is the end aimed at by the legislature within its powers? Are the means which it has devised appropriate and plainly adapted to that end? If the answer to both these questions is in the affirmative, the Court cannot interfere. If the answer to either of them is in the negative, the legislation challenged cannot stand. The end aimed at by the Act in question here is the prevention and settlement of industrial disputes extending beyond any one State by conciliation and arbitration. It may well be conceded that there is no general power to prevent and settle industrial disputes by any means the legislature may think fit to adopt. The power is restricted to prevention and settlement by conciliation and arbitration. Any attempt to effectively prevent and settle industrial disputes by either of these means would be idle if individual workmen and employés only could be dealt with. The application of the "principle of collective bargaining," not long in use at the time of the passing of the Constitution, is essential to bind the body of workers in a trade and to ensure anything like permanence in the settlement. Some system was therefore essential by which the powers of the Act could be made to operate on representatives of workmen, and on bodies of workmen, instead of on individuals only. But if such repre-

sentatives were merely chosen for the occasion without any permanent status before the Court, it is difficult to see how the permanency of any settlement of a dispute could be assured. Even when the dispute is at the stage when it may be prevented or settled by conciliation, the representative body must have the right to bind and the power to persuade not only the individuals with whom the dispute has arisen, but the ever changing body of workmen that constitute the trade.

It has been contended that it was unnecessary for this purpose that the Court should do more than give to the trade unions and other associations constituted under the State laws a *locus standi* before the Commonwealth. But such a course would very much limit the effective exercise of the power. All employés likely to seek the aid of the Court are not in State unions or associations. Besides, it may be fairly said that it is essential to the proper control of the organization by the Court that their rules and constitutions should be under the control of the Court, and that the constitution of all organizations having a status in the Court should, in certain respects at least, be uniform. Every effective agreement for the settlement of disputes brought about by conciliation and by compromise must regulate the working relations of the parties for a definite period. Similarly, an award must be for a definite period. In either case it is essential that the representative body should be strong enough to secure obedience by individual workers of the conditions of the agreement or award, and, in the case of an award, it is essential not only that the Court should have the representative body before it in the hearing of the dispute, but that it should be able to make that body responsible for the observance of that award by those whom it represents.

Again, if the award is to have any value, the Court must be able to enforce obedience on the representative bodies. That can only be accomplished by the infliction of penalties. But the award of penalties is a mere form unless there are funds available for the payment of penalties, and property which may be levied on if penalties remain unpaid. Without any further examination of the requirements essential in the representative body which is to stand for the workmen in the industrial dispute, I have said

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

enough, I think, to lead fairly to the inference that, if the judicial power of the Commonwealth is to be effectively exercised by way of conciliation and arbitration in the settlement of industrial disputes, it must be by bringing it to bear on representative bodies standing for groups of workmen. Further, that the representative body must have some permanent existence, irrespective of the change in personnel of its members from time to time which is always going on. That it must have a power to control by enforcement of its rules, and so to influence its members individually to perform the conditions of agreements and awards made in settlement of industrial disputes. That it must be endowed with the legal capacity for holding moneys for purposes of its business and of investment.

It is obvious that a representative body of the kind I have indicated could be constituted only by the creation of some legal entity, whether it be of the nature of trade union, friendly society, or corporate body with limited powers. It being once established, as I think it has been, that it is essential for effective exercise of the power conferred by the Constitution that provision should be made for the creation of some such legal entity invested with the necessary incidents and rights, it is for the Parliament, not for this Court, to determine the particular form in which the legal existence should be conferred. If it were necessary to decide the question, I am disposed to think that the form adopted by the legislature is perhaps the most convenient that could have been chosen. But it is not necessary to decide that question. The choice which Parliament has made of several means for effecting the same end cannot be questioned if the means chosen are appropriate and plainly adapted to the end.

The appellants' counsel has urged it as an objection that the organizations have been constituted corporations. I am unable to understand why the creation of a corporation as incidental to the exercise of a power within the competency of Parliament should not be constitutionally as valid as the creation of any other legaly entity. *Story's* comment on a similar argument on the corresponding American clause is very much in point. (*Story's Commentaries on the Constitution*, vol. II., sec. 1,263):—

"A strange fallacy has crept into the reasoning on this subject.

It has been supposed, that a corporation is some great, independent thing; and that the power to erect it is a great, substantive, independent power; whereas, in truth, a corporation is but a legal capacity, quality, or means to an end; and the power to erect it is, or may be, an implied and incidental power. A corporation is never the end, for which other powers are exercised; but a means, by which other objects are accomplished."

So here, the constitution of these representative bodies as legal entities in the corporate form is merely the adoption of a means for effectually carrying out the powers expressly conferred by sub-sec. xxxv. Being, therefore, according to the test I have laid down, means appropriate and plainly adapted to that end, their creation in the form enacted is within the power conferred on Parliament by sub-sec. xxxix.

It was further objected that, even if the creation of the organizations as constituted by the Act was within the competence of the Parliament, the power did not extend to investing them with the capacity to make and enforce industrial agreements as provided by sec. 73 of the Act. The section is somewhat obscurely worded, but it may be fairly construed as extending, either to agreements made in the course of conciliation or arbitration proceedings, or to agreements for voluntarily referring matters in difference which may result in disputes to arbitration and conciliation under the Act. In either case the dispute either to be prevented or settled must, according to the definition clause, be one extending beyond the limits of any one State.

The aim of conciliation is the voluntary agreement of the parties. If the agreement is to be an effective settlement of differences, it seems reasonable to provide that it may be made for a definite term and shall be enforceable by any of the parties in the Court constituted by the Act. For all these purposes the provisions of Part VI. relating to industrial agreements are, in my opinion, appropriate and plainly adapted to the end which the Act is seeking to obtain.

One further objection was urged by the appellants to the status and powers of organizations under the Act, but it stands on a different footing from those which I have been considering. Sec. 9 provides that "no employer shall dismiss any employé from

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

his employment by reason merely of the fact that the employé is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award." It was contended that such an interference with the employer's liberty to carry on his business in his own way could not be authorized under the power to prevent and settle industrial disputes by conciliation and arbitration, particularly as it was a prohibition which applied permanently, and not merely during the pending of a dispute before the Court. There is considerable force in the answer that, without such protection to its members, it would be difficult to ensure that the organization would be sufficiently strong to influence any considerable body of workmen in the observance of industrial agreements and awards. But it is not necessary to express any opinion upon the matter. The point does not arise in this case, and the section is so clearly separable from the rest of the Act that, even if it were beyond the competency of Parliament to enact, the validity of the Act generally is not thereby affected.

I pass now to the next objection arising under sec. 55. That section, in so far as it is material, is as follows :—

"(1) Any of the following associations may, on compliance with the prescribed conditions, be registered in the manner prescribed as an organization :—

"(*a*) Any association of employers in or in connection with any industry, who have in the aggregate, throughout the six months next preceding the application for registration, employed on an average taken per month not less than one hundred employés in any industry ; and

"(*b*) Any association of not less than one hundred employés in or in connection with any industry."

I omit here a proviso relating to preference to unionists, the terms of which are not material in the questions now under consideration. The section goes on :—

"(2) The conditions to be complied with by associations so applying for registration shall, until otherwise prescribed, be as set out in Schedule B.

"(3) Upon registration, the association shall become and be an organization."

Schedule B sets out a code of rules for the regulation of the affairs of the association. "Association" is defined in sec. 4 as follows:—"'Association' means any trade or other union, or branch of any union, or any association or body composed of or representative of employers or employés, or for furthering or protecting the interests of employers or employés." "Employer" and "employé" are also defined as employer and employé in any industry. "Industry" is also defined, and it will be necessary to examine that definition in considering the next objection.

Under these circumstances it is contended by the appellants that the words of the section are not on the face of them limited so as to restrict the right of registration to associations which could be concerned in an industrial dispute extending beyond the limits of one State, that there is nothing in the Act to confine the application of the general words of the section within constitutional limits, that the whole section therefore, and consequently the whole Act, is unconstitutional and void on the principle laid down in the *Trade Mark Cases* (1); *Illinois Central Railroad Co.* v. *McKendree* (2), and other cases cited.

It will no doubt be admitted that, if the general words "any association" must be construed so as to include associations which are not within the purview of the Constitution as well as those that are, the whole section and, as the section is vital to the scheme of the enactment, the whole Act must be declared *ultra vires*. The validity of the objection therefore depends upon the proper construction of sec. 55.

In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most Statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being *primâ facie* restricted in their operation within territorial limits. Under the same general presumption every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law: *Maxwell on Statutes*, 3rd ed., p. 200. The same principle of interpretation is applied to enactments of a legislature

(1) 100 U.S., 82, at p. 89. (2) 203 U.S., 514, at p. 529.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

of limited jurisdiction. In America the principle is well established as a rule of interpretation when the constitutionality of Statutes is in question. In *Grenada County Supervisors* v. *Brogden* (1) Mr. Justice *Harlan* in delivering the judgment of the Court adopts with approval the following statement of the law:—"Such is the rule recognized by the Supreme Court of Mississippi in *Marshall* v. *Groves* (2), in which it was said: 'General words in the Act should not be so construed as to give an effect to it beyond the legislative power, and thereby render the Act unconstitutional. But, if possible, a construction should be given to it that will render it free from constitutional objection; and the presumption must be that the legislature intended to grant such rights as are legitimately within its power.'"

The principle would appear to be equally applicable in the interpretation of Commonwealth Acts when the question to be considered is whether the legislature has used general words in a sense which will extend their powers beyond constitutional limits. The proviso, which applies to all associations authorized to register, clearly contemplates that the association when registered will be a party to a dispute within the meaning of the Act, that is by definition a dispute within sub-sec. xxxv. of the Constitution. Fairly construed, therefore, the general words in the main body of the section must, I think, be read as so restricted. An examination of the rest of the section, of the Schedule B, and of the whole Act, would seem to support the same view. I am therefore of opinion that the general words of sec. 55 must be read in the restricted sense I have mentioned, and that it therefore does not permit registrations which it would be beyond the competence of the Parliament to authorize.

The remaining objection is that the enactment expressly extends to persons and employments which are not included in the term "industrial" as used in the Constitution. Sec. 4 contains a series of definitions which, in effect, mark out the scope of the Act. "Employé" means an employé in an industry. "Industry" means "business, trade, manufacture, undertaking, calling, service, or employment, on land or water, in which persons are employed

(1) 112 U.S., 261, at p. 269. (2) 41 Miss., 31.

for pay, hire, advantage, or reward, excepting only persons engaged in domestic service, and persons engaged in agricultural, viticultural, horticultural, or dairying pursuits."

The right of registration is given by sec. 55 to any association of not less than one hundred employés in or in connection with an industry. If, therefore, "industry" includes classes of labour not covered by the word "industrial" in sub-sec. xxxv. of sec. 51 of the Constitution, it is clear that the Act has gone beyond the limits within which the Parliament has power to legislate. I cannot assent to Mr. *Duffy's* very ingenious construction of the definition of "industry" in the Act. The words are free from ambiguity, and must be construed with their ordinary grammatical meaning. So construed, the definition includes within the term "industry" every kind of employment for pay, hire, advantage, or reward except agricultural, viticultural, horticultural, or dairying pursuits.

The appellants contend that the word "industrial" in the Constitution does not cover so wide a field, that it is restricted to work connected directly or indirectly with production and manufacture. "Industrial dispute" was not, when the Constitution was framed, a technical or legal expression. It had not then, nor has it now, any acquired meaning. It meant just what the two English words in their ordinary meaning conveyed to ordinary persons, and the meaning of these words seems to be now much what it was then. Taking first the authority of dictionaries: *Webster's International Dictionary*, in the 1892 edition, defines "industrial" as follows:—"Consisting in industry; pertaining to industry, or the acts and products of industry; concerning those employed in labour, especially in manual labour, and their wages, duties, and rights." The *Standard Dictionary* (1893) defines "industry":—"Labour employed in production, especially in manufacturing; useful labour in general; also, labourers as a body; as organized industry. Any single branch of productive activity; the labour and capital employed in a trade or department of business; as, the iron industry; the farming industry; American industries." *Murray's New English Dictionary* of later date and high authority gives many uses of the word, but that bearing on the question in controversy is:—"Industry;

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

systematic work or labour; habitual employment in some useful work, now especially in the productive arts or manufactures." The dictionaries apparently agree in recognizing both uses of the words "industry" and "industrial" as referring to labour in the production and manufacture of goods, and as referring to labour of any kind.

While the Constitution was being framed by the Convention there were two Industrial Arbitration Statutes in force in Australia. The New South Wales Act was passed in 1892 and was entitled "An Act to provide for the establishment of councils of conciliation and arbitration for the settlement of 'industrial disputes.'" It does not define "industry" or "industrial," but the provisions of the Act are extended to every kind of employment. The South Australian Act was passed in 1894. In its title it is described as "An Act to facilitate the settlement of 'industrial disputes.'" The definition of "industry" includes any kind of employment. The early New Zealand Act, which purports to deal with industrial disputes, defines "industry" in the restricted sense of labour engaged in production and manufacture, but late in 1900 it was amended so as to extend to employment of any kind. In the same year the Colony of Western Australia, in an Act purporting by its title to deal with industrial disputes, defined "industry" in the wider sense as covering any kind of employment.

These instances of the legislative use of the expression are not, of course, conclusive, but they furnish strong evidence that the legislatures of New South Wales, South Australia, West Australia and New Zealand, considered that enactments constituting a Court for the settlement of disputes between employer and employé in every kind of employment might properly be entitled as Acts for the settlement of industrial disputes. And it is certainly fair to assume that the expression "industrial disputes" was at the time of the passing of the Acts commonly used in Australia to cover every kind of dispute between master and workman in relation to any kind of labour.

During the six or seven years preceding the enactment of the Constitution in 1900 the subject of industrial disputes had been much discussed in England. The great Commission of Labour in

1894 brought up a report dealing with the relation of employers and employés in every branch of labour. Throughout the reports of that Commission the word "industrial" is frequently used as applying to every kind of employment.

After an examination of all these sources of information as to the sense in which the word "industrial" in connection with labour disputes was used at the time of the passing of the Constitution, I have come to the conclusion that it was used in two senses—in the narrower sense contended for by the appellants, and in the broader sense contended for by the respondents. There is nothing in the Constitution to show that the word was intended to be used in the narrower sense. On the contrary, the scope and purpose of sub-sec. xxxv. would lead to an opposite conclusion. The use of the word in its wider sense does not offend against any prohibition of the Constitution, nor is it inconsistent with any of its provisions. The control and regulation of employment and the relations of employers and employés within the State are, no doubt, within the exclusive powers of the State Parliaments, but disputes extending beyond the limits of a State are within State cognizance only in so far as the parties are within State territory. Such disputes cannot be reached effectively except by Commonwealth authority.

It was to remedy the evils of industrial disturbances extending beyond the territorial limits of any one State that the power in question was conferred. It must have been well known to the framers of the Constitution that such disturbances are not confined to industries connected directly or indirectly with manufacture or production. The case of cooks, stewards, waiters, hairdressers, are instances of trades which would not come within the narrower sense of the term "industry." Yet it is well known that unions existed in those trades long before the enactment of the Constitution. There seems to be nothing in the Constitution itself to indicate that the power conferred was intended to cover part only of the evils aimed at. The words used are large enough to cover all of them, and where it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

O'Connor J.

general in its terms, intended to apply to the varying conditions which the development of our community must involve.

For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose. There is no such indication in any part of the Constitution : on the contrary, I do not see how its object in this respect can be effectually attained unless the broader interpretation is adopted. I am therefore of opinion that the definition of "industry" in the Act is within the terms of the Constitution, and that that objection also must fail.

For these reasons I am of opinion that Mr. Justice *Higgins* arrived at a right conclusion in upholding the registration of the respondent union, and that this appeal must be dismissed.

ISAACS J. The first objection with which I shall deal goes to the validity of the whole *Commonwealth Conciliation and Arbitration Act* 1904.

The appellants say that the definition of "industry" is too wide as including occupations which are not "industrial" in the sense used in the Constitution, and that the words being altogether general cannot be separated by construction (as may be done in the case of State railways), and so the whole must stand or fall together. That being so, it is further said that sec. 55 under which the respondents seek to register inseparably adopts this definition of industry, and must fall with it.

In the first place, supposing the words are capable of bearing an interpretation which would carry the definition of "industry" beyond the constitutional power of Parliament, there is nothing in the Act which prevents the application of the well known rule of construction *ut res magis valeat quam pereat*, a rule especially applicable to Acts of the legislature.

It is a well established principle of construction that Parliament is presumed to act within its powers until the contrary is shown, and every intendment is in favour of its validity (*per*

Strong J. in *Legal Tender Cases* (1); *Miller* J. in *Trade Mark Cases* (2); *Peckham* J. in *Nicol* v. *Ames* (3); *White* J. in *Buttfield* v. *Stranahan* (4).

I adhere to my own observations on this point in *Irving* v. *Nishimura* (5), where English precedents are cited, and add one quotation from the judgment of *Story* J. in *United States* v. *Coombs* (6):—"If the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous."

There is certainly no unambiguous excess of the limits imposed by the Constitution. Looking at sec. 2 stating the chief objects of the Act, which are, substantially, the prevention and settlement of industrial disputes, and to the definition of "industrial disputes" in sec. 4, which are carefully limited, as in the Constitution, to those extending beyond the limits of one State, I feel no difficulty, if necessary, in similarly limiting the incidental expressions such as "industry." "Industry" I take, whatever the generality of the words in the clause defining it if that were read by itself, to be intended by Parliament as industry of a class within the ambit of which an industrial dispute, within the meaning of the Constitution, might arise.

This is strongly supported by the words of Schedule B. of the Act, which prescribes, among the conditions to be complied with by associations applying for registration as organizations, that the rules must provide that the name of the association shall contain the name of "the industry" in connection with which it is registered.

I, therefore, am of opinion that, whatever be the meaning of "industrial dispute" in the Constitution, the definition of industry in the Statute is not necessarily wider when read in conjunction with the rest of the Act, and this consideration alone would end the objection as to total constitutional invalidity.

(1) 12 Wall., 457, at p. 531.
(2) 100 U.S., 82, at p. 96.
(3) 173 U.S., 509, at p. 514.
(4) 192 U.S., 470, at p. 492.
(5) 5 C.L.R., 233, at p. 238.
(6) 12 Pet., 72, at p. 76.

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Isaacs J.

But I am also of opinion that the power under sub-sec. xxxv. of sec. 51 of the Constitution extends over the whole range of Australian industry in the largest sense without qualification, wherever, by reason of the numbers engaged in it and the area of its distribution, it does or may give rise to a dispute extending beyond the limits of any one State, and thereby, in a manner beyond the control of any single State, disorganise the general operations of society or interfere with the satisfaction of public requirements in relation to the service interrupted.

The statutory definition of industry is consequently sanctioned by the Constitution even if read in the most extensive manner suggested. I am not at all sure, however, that the Act does not even limit its signification somewhat more narrowly than the Constitution would warrant.

An industry contemplated by the Act is apparently one in which both employers and employés are engaged, and not merely industry in the abstract sense, or in other words, the labour of the employé given in return for the remuneration received from his employer. As suggested, not only by the words defining "industry" itself, but also by Schedule B, and by such a phrase in the definition of "industrial dispute" as "employment in industries carried on by or under the control of the Commonwealth," &c., an "industry" as intended by Parliament seems to be a business, &c., in which the employer on his own behalf is engaged as well as the employés in his employment. Turning to the specific definition of "industry," it rather appears to mean a business (as merchant), a trade (as cutler), a manufacturer (as a flour miller), undertaking (as a gas company), a calling (as an engineer) or service (as a carrier) or an employment (a general term like "calling"—embracing some of the others, and intended to extend to vocations which might not be comprised in any of the rest), all of these expressions so far indicating the occupation in which the principal, as I may call him, is engaged whether on land or water. If the occupation so described is one in which persons are employed for pay, hire, advantage, or reward, that is, as employés, then, with the exceptions stated, it is an industry within the meaning of the Act. An industry so defined is one in which even in the narrower sense an industrial dispute within

the words of the Constitution may arise, and would therefore be in any case supported by sub-sec. xxxv. of sec. 51 of the Constitution.

But I do not rest my judgment on the narrower view, as in my opinion the constitutional power is broad enough to include even the larger sense of industry.

The next question is also one of constitutional power, and although not so wide as those already dealt with, is of great importance. Conceding that the Act is not wholly void by reason of the extensive meaning given to "industry," the appellants first contend that an association of employés wholly engaged in one State cannot be recognized as a possible disputant in an industrial dispute extending beyond the limits of that State, and therefore it is *ultra vires* of the Parliament to admit such an association even to registration. Still further, and as a second point, it is urged that it is outside the province of the Parliament to incorporate the associations, and confer upon them such capacities as are given by sec. 58 of the Act.

The first point necessitates a general view of the nature of an industrial dispute.

It is evident that the power as to industrial disputes contained in sec. 51, sub-sec. xxxv. of the Constitution, like most other powers conferred, was given to the Commonwealth Parliament, because it was recognized that the subject could be thereby better dealt with than if it were left to the differing counsels of the States. But that does not necessarily lead, as the appellants contend, to the conclusion that only such disputes are within the cognizance of the Federal Parliament as could not be dealt with at all by the the States, separately or in conjunction. If pressed to its logical result it would entirely obliterate the Commonwealth power, because prior to federation there was no industrial dispute that could not be dealt with by the States singly, if confined to one State, or in conjunction or co-operation, if extending beyond one State. But if the argument is that the Commonwealth power is limited to such disputes as no one State could singly deal with as a whole, I agree with it, because that is tantamount to the expression "extending beyond the limits of any one State," and

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Isaacs J.

the various objections and arguments depend, as it appears to me, on the meaning of that phrase.

It is urged by the appellants that an industrial dispute extending beyond the limits of any one State involves the condition that the disputants, employers and employed, are engaged in more than one State, and conceding somewhat illogically, as I think, that an organization of employers or employés in two States is equivalent to employment of their members in both States, it is claimed that therefore such disputes can exist only in the following cases:—

(1) Where there are through contracts by sea and land from State to State.

(2) Where seamen are engaged in inter-state navigation; and

(3) Where disputants on both sides, employers or employés, are organizations whose members are engaged in their occupations in more than one State.

This contention appears to me to fundamentally misapprehend the meaning of an industrial dispute. It looks at the question from the contracted view of a tradesman's dispute with a customer. If fifty tradesmen have as many disputes with their respective customers, though it be in relation to identical causes of difference, there are fifty disputes, separate and independent, and a Court of law must in the last resort determine each separately. And so it is said that, no matter how many employers are at variance with their respective employés in relation to industrial conditions of employment, then, at all events in the absence of an organization, there are so many industrial disputes. It may be, they say, that there is actual concert among the various individual employés to demand, and the employers to deny, the contested conditions, still, it is urged, that it is not one but a number of distinct industrial disputes, and—just as though the employés were respectively suing in a Court of law for their wages—the quarrels are separate and independent, and do not in the aggregate constitute "an industrial dispute."

In my opinion this is not in any sense the meaning of an industrial dispute. An industrial dispute under the Act, and within the constitutional power, is a dispute in some "industry." It may be between employers and employés, or employés and

employés, as, for instance, the well-known "demarcation" disputes in the ship-building trade. It must, of course, have reference to industrial conditions. The connecting link is the industry, and not the particular contract of employment between specific employers and specific employés.

The Constitution and the Act alike look to a dispute that dislocates or may dislocate a particular industry—the extent of dislocation being immaterial; but the governing idea is primarily the preservation of peace in the industry generally, and its uninterrupted progress, and not the settlement of individual quarrels as such. If, say in New South Wales, there is a simultaneous general demand by employés in a particular industry for certain wages, hours and conditions, and a refusal by the employers to grant it, there is "an industrial dispute" in New South Wales; and it would be a complete misunderstanding of terms, thoroughly well known and understood at the time the Constitution was framed, in Parliament and out of it, to call this general trouble affecting the industry as a whole so many separate industrial disputes. If the men struck, or the employers locked them out, it would be said there was "a strike,"—or "a lock out," and not so many separate strikes or lock-outs. There would then be in that State an industrial dispute, apart from any organization on either side. So, if the industry were carried on in Victoria as well as New South Wales, there could be similarly "an industrial dispute"—without any organization. The current acceptation of the term "dispute" in this connection is evidenced by innumerable references—among which it is sufficient to instance the Fifth and final Report of the Royal Commission on Labour (*House of Commons Parliamentary Papers* 1894, vol. 35, *e.g.*, at pp. 144 and 145); *Webb's History of Trade Unionism* (1894, pp. 210, 329, 390); *The Trade Disputes Conciliation and Arbitration Act* 1892 (N.S.W.); *The Conciliation Act* 1894 (S.A.); *The Conciliation Act* 1896 (England); and *The Industrial Conciliation and Arbitration Act* 1900 (W.A.); the last mentioned being after the framing of the Constitution, but so close to it as to be good evidence of the pre-existing meaning of the terms employed. See also *Murray's Dictionary*, "Dispute," col. 498, No. 2. If then, for instance, the

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Isaacs J.

industrial demands were made and refused simultaneously in the two States, can anyone doubt that the mutual antagonism existing between employers and employed, the demands on the one side of the industry in the two States, and the refusal on the other, would constitute what was and is ordinarily known as "a dispute" in that industry, or, in other words, "an industrial dispute" actually extending beyond the limits of one State and within the jurisdiction of the Commonwealth Court. Organization is immaterial. The public in the two States are as much inconvenienced, and persons, indirectly dependent upon the uninterrupted course of the industry immediately concerned, are as greatly prejudiced by a strike or lock out where there is no organization of employers and employés as where the most elaborate system of organization prevails. To introduce by implication into the Constitution a condition that, apart from perhaps inter-state navigation, and a few comparatively rare and insignificant exceptions such as a station-holder in two States and employing the same men in both, or a merchant in two States and employing the same commercial travellers in both, there must be organization of disputants on both sides, would practically reduce the admitted Commonwealth power to a nullity.

Employers or employés by merely abstaining or discontinuing from inter-state organization could remain or move clear outside the reach of the power. Their mere passivity would neutralise the manifest intention of the Constitution.

Besides, an organization is not an employé, nor is it a party to an agreement of employment. The contracting parties to such agreement are the individual employers and employés; and, though collective bargaining may take place, that is only true in the larger sense—the same large sense in which a collective dispute takes place. The strict and narrow sense would confine bargain and dispute alike to individuals; the broader extends both. Organizations of employers may agree with organizations of employés that they will pay certain wages to any person employed, and that employés will work a certain number of hours, but that is not the contract of employment. If in breach of that arrangement an employer employs a man on other terms, the employé can claim no more than he has individually agreed

to take. And if the employé agrees to work and works longer hours, that is no breach of any contract of employment made by him. The dispute in the industry generally, which is an industrial dispute in the large economic sense, must be carefully distinguished from an individual dispute between a specific single employer and one of his employés. The latter may be an industrial dispute too but in a narrower sense, and not in the broad national sense which the Constitution intended. Compare sec. 24 of the New South Wales Act of 1892. However numerous may be the individual instances of the same, or substantially the same, point of difference, they together constitute one "industrial dispute" between the two classes of disputants. The result of these considerations is that, apart from any organization at all, and assuming the workers and employers were alike unassociated, each of them, though his own occupation were confined to one State, could conceivably be involved in an industrial dispute extending or capable of extending beyond the limits of one State. He might not be one of the parties to the dispute so extending because the parties might consist of two, namely, all the employés demanding and all the employers refusing the conditions. But he would be a component portion of one of the parties, and as there is nothing in the Constitution requiring only complete parties to be registered; there is no reason why a legislature having plenary power over the subject matter of such industrial disputes cannot permit him to be registered. And if one employé in one State may be registered, an association of ten, or ten thousand in that State may equally be registered.

There now only remains to be considered the second point of this objection, namely, whether the incorporation of the association and its investiture with the capacities mentioned in sec. 55 are provisions *ultra vires* of the Parliament. It is urged that, there being no independent federal power of creating industrial corporations, the incidental power is the only source of authority. To this I agree. Unless the provisions are incidental to the main power they cannot stand.

The right to incorporate these organizations was not strenuously contested at the bar. Reliance was mainly placed by learned counsel for the appellants on the powers and privileges, as they

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Isaacs J.

were called, given to the organizations by the Federal Parliament; secs. 9 and 58 were the chief instances advanced. I pass by sec. 9 with this observation, that if the other objections fail—if an organization can be created, incorporated, and endowed with powers under sec. 58—the provisions of sec. 9 are obviously permissible to render the scheme effective.

It is said that it cannot reasonably be regarded as incidental to the main purpose to enact the challenged provisions.

But why is it not incidental? "Incidental" is certainly not a narrower term than "necessary;" and the considerations stated by this Court in *Perth Local Board* v. *Maley* (1), and supported by the authorities there cited, apply with stronger force to the opinion of a national Parliament than to that of a municipal Board.

Whether a given provision is auxiliary to a main power or necessary or conducive to its effective exercise, or, in other words, incidental, is mainly a question of fact, dependent possibly upon a variety of circumstances, commercial, industrial, social, and political. Parliament is primarily the tribunal to determine this fact, and is so constituted and equipped as to be infinitely more capable than the Court to arrive at a proper conclusion.

The Court has necessarily the ultimate duty and power of protecting the Constitution from excess in this respect as in every other, but unless it can be shown that Parliament has infringed some positive restriction or prohibition of the Constitution, or has enacted as incidental to a main power some provision which no reasonable men could in any conceivable circumstances honestly regard as incidental, no Court has, in my opinion, any justification for attempting to review the action of the legislature and declaring that to be impossible of attainment, which Parliament has in its discretion thought and declared to be desirable for the public welfare.

Had no precedents existed for the course taken by the federal legislature with regard to these organizations, I should still have thought that the enactments in secs. 9 and 58 were beyond the power of this Court to question. But there are precedents which,

(1) 1 C.L.R., 702.

though unnecessary in point of law, may tend to satisfy any doubts that might otherwise linger.

The State legislatures could, had they so desired, have provided for the settlement of every industrial dispute without the aid of organizations at all. But it would obviously have been impracticable as well as harrassing even in one State to deal with every difference between each single employer and employé separately; and therefore organizations were made part of the scheme. Not only were they considered auxiliary, but evidently some of the colonial legislatures dealing with the subject regarded them as essential to a practical, just, and equitable working of the system. The Western Australian Act by sec. 7 incorporated them, and by sec. 8 invested them with powers to purchase or lease land and dispose of it. In this it followed the provisions of the New Zealand Act of 1894 (No. 14), secs. 6, 7. The New South Wales Act of 1892 did not make independent provision for incorporation or formation of organizations, but adopted those registered under the trade union or friendly societies law, and though not technically incorporated, they have a recognized collective status, and can hold and dispose of property.

The South Australian Act did not incorporate industrial unions or associations, but attached to registration certain collective consequences, and, while insisting on certain requisites in the rules, permitted the rules to provide for any other matters not contrary to law; sec. 58 also provided that for the enforcement of awards execution could be levied against the property of an organization as if it were incorporated, and whether the property were vested in trustees or otherwise held. See also the later New South Wales Act 1901 (No. 59), sec. 7.

These provisions indicate how the various legislatures in dealing with the subject of industrial conciliation and arbitration have found it most advantageous and desirable, if not practically necessary, to require the collective grouping of labour for the purpose of the Act and to enable the groups to acquire or possess property, and in some cases this has been carried as far as independently to provide for incorporation. It cannot, therefore, be said that, when the Federal Parliament also adopted the expedient of incorporating organizations and empowering them

H. C. OF A. 1908.

JUMBUNNA COAL MINE, NO LIABILITY v. VICTORIAN COAL MINERS' ASSOCIATION.

Isaacs J.

to acquire property for the purposes of the Act, it was introducing anything of a novel character or enacting more than experience had already shown was a valuable auxiliary or incidental provision to aid in the effective operation of the main purpose. Nor can it be validly urged that the Commonwealth Parliament ought to content itself with accepting such organizations as the States choose to create. Some States might differ from others, some might have no such provision at all, and the effective exercise of federal powers cannot be left dependent on State action.

The provisions questioned are therefore, in my opinion, perfectly within the auxiliary power.

I would add that, reading sec. 58 as part of an Act having a definite and limited purpose, and particularly with the concluding words of the sixth paragraph of sec. 2, I am of opinion that the powers it confers on organizations do not go beyond the purposes of the Act itself.

Other questions were discussed during the argument as to the extent of the jurisdiction in relation to prevention and conciliation, and as to industrial agreements and other matters; but these, though important, are not necessary to be decided in this case. Consequently I offer no opinion respecting them, except to say that, as at present advised, I am not convinced of the unconstitutionality of any provision in the Act.

In the result the determination of *Higgins* J. was in my opinion correct, and this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellants, *Derham & Derham.*

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

B. L.