HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE DEPUTY INDUSTRIAL REGISTRAR OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION, NEW SOUTH WALES REGISTRY.

Ex parte J. C. WILLIAMSON, LIMITED AND OTHERS.

H. C. of A. 1912.

Sydney, *Dec.* 9, 10, 13.

Griffith C.J., Barton and Isaacs JJ.

Prohibition—Tribunal having jurisdiction to make an order—Order improperly made under the circumstances—Deputy Industrial Registrar—Application to register organization—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *sec.* 55.

Prohibition will not lie if the tribunal sought to be prohibited could under some circumstances properly make the order which that tribunal is asked to make, although that order might be improperly made under the circumstances of the case.

On an application to the Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration to register an association as an organization under the *Commonwealth Conciliation and Arbitration Act*, he has authority to inquire whether the association is entitled to registration.

Held, therefore, that prohibition would not lie to prohibit the Industrial Registrar from proceeding with such an application, the ground of the application for prohibition being that the association was not entitled to be registered because its members were not engaged in an industry.

Order *nisi* for prohibition.

An application was made, on 13th August 1912, to the Deputy Industrial Registrar at Sydney of the Commonwealth Court of Conciliation and Arbitration, by an association called the "Aus-

tralian Actors' Union," for registration as an organization of employés under the *Commonwealth Conciliation and Arbitration Act* 1904-1909.

On the application of J. C. Williamson, Ltd., Geo. Marlow, Ltd., Hugh D. McIntosh, Brennan's Amphitheatres, Ltd., William Anderson, Allan Hamilton and Julius Grant, an order *nisi* was obtained on 15th October 1912, calling upon the Deputy Industrial Registrar and the Australian Actors' Union to show cause why a writ of prohibition should not issue to prohibit the Deputy Industrial Registrar from proceeding with the application for registration on the grounds:—

1. That an association of actors is incapable of being a party to an industrial dispute within the meaning of those words in (*a*) the Constitution or (*b*) the *Commonwealth Conciliation and Arbitration Act.*

2. That an association of actors in or in connexion with the Theatrical Industry, if such an industry exists or is known to the law, is incapable of registration either (*a*) by virtue of the Constitution or (*b*) under the *Commonwealth Conciliation and Arbitration Act.*

3. That the alleged industry is not an industry within the meaning of the Constitution or of the *Commonwealth Conciliation and Arbitration Act.*

The Actors' Association of Australasia obtained leave to intervene.

Knox K.C. (with him *Pickburn*), for the applicants. Acting is not an industry. Industry, within the meaning of the Constitution, is limited to production, distribution and transportation: *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (2). There is a recognized distinction between professions and industries. The Deputy Registrar has judicial functions to perform in deciding on an application for registration, and prohibition will lie to him.

(1) 6 C.L.R., 309, at pp. 327, 332, 364. (2) 12 C.L.R., 398, at p. 445.

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Bavin, for the Actors' Association of Australasia. An industrial dispute is not the same thing as a dispute between employers and employés, nor does the term industry mean the supplying of any human requirement. An industrial dispute is a dispute in relation to employment which is directed to the production or distribution of material wealth including services. See *Palgrave's Dictionary of Political Economy*, Bk. I., Ch. III., secs. 3, 4; *Re Employment of Ministers of the United Methodist Church* (1).

[ISAACS J. referred to *Webb's Problems of Modern Industry*, pp. 46 *et seq.*; *Report on English Trade Unions*, 1899, p. 8, No. 900; *Webb's History of Trade Unionism*, p. 427.

BARTON J. referred to *Federated Saw Mill &c. Employés' Association of Australasia* v. *James Moore & Sons Proprietary Limited* (2).]

The contract between an actor and a manager is a contract for services and not a contract of service, and there is not between them the relationship of master and servant: *Simmons* v. *Heath Laundry Co.* (3). [He referred to *Simpson* v. *Ebbw Vale Steel, Iron, and Coal Co.* (4).]

[ISAACS J.—The meaning of these words in the Constitution is a question of fact, and, if Parliament has placed a particular meaning on them, this Court should not interfere unless that particular meaning is plainly wrong.]

Windeyer, for the Deputy Industrial Registrar. Prohibition will not lie here: *R.* v. *Justices at Rockhampton*; *Ex parte Petersen* (5). The question whether the members of this association are persons who should be excluded from the professional class and included in the industrial class, is one for the determination of the Deputy Registrar.

Perry, for the Australian Actors' Union. An industrial dispute is a collective dispute between employers and employés. The members of this association are in the position of employés

(1) 28 T.L.R., 539.
(2) 8 C.L.R., 465, at p. 505.
(3) (1910) 1 K.B., 543, at p. 547.
(4) (1905) 1 K.B., 453.
(5) (1903) St. R. Qd., 71.

engaged in an industry: *Walker* v. *Crystal Palace Football Club, Ltd.* (1).

[ISAACS J. referred to *Burr* v. *Theatre Royal, Drury Lane, Limited* (2); *Hall* v. *Lees* (3).]

Knox K.C., in reply. Prohibition will lie here. The organization can only come into existence in consequence of the exercise by the Deputy Registrar of the jurisdiction which he has under the Act. On the face of the application he has no jurisdiction. The whole question is whether there can be an industrial dispute between persons following the profession of actor and persons said to be their employers. [He referred to *Final Report of Royal Commission on Labour* (England), pp. 3, 376.]

Cur. adv. vult.

GRIFFITH C.J. This was an application for prohibition directed to the Deputy Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration, at Sydney, to prohibit him from proceeding upon an application made by the Australian Actors' Union to be registered as an organization under the *Commonwealth Conciliation and Arbitration Act*, the objection taken being, of course, that he had no jurisdiction to entertain the application. The Act provides, sec. 55, that certain associations "may, on compliance with the prescribed conditions, be registered in the manner prescribed" as organizations, and upon registration as an organization certain privileges attach to the association which it would not otherwise have, the most important, perhaps, being that they can institute proceedings in the Court and bring employers there as litigants.

The objection taken in the present case is that the Actors' Union was not an association entitled to be registered because its members are not engaged in an industry.

The first question to be determined, since the objection has been taken, is whether prohibition will lie, that is, whether the Industrial Registrar has jurisdiction to entertain the application

(1) (1910) 1 K.B., 87.
(2) (1907) 1 K.B., 544.
(3) (1904) 2 K.B., 602.

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for registration. The Statute does not prescribe very clearly what the duties of the Registrar are. Sec. 55 provides certain conditions to be complied with by an association applying for registration. They are set out in Schedule B, and are principally formal. I suppose the Registrar's first duty is to see that those conditions are complied with. The section then provides that "upon registration, the association shall become an organization." The objection now taken is that the applicants are not such an association as is allowed to be registered. The question then is: Can the Registrar inquire into that matter? He certainly can refuse to register. The rule as to granting prohibition was laid down very clearly by *Brett* L.J. in *South Eastern Railway Co.* v. *Railway Commissioners* (1). That was an application for a prohibition directed to the Railway Commissioners, and, as the matter was one of great importance, the Court directed the old procedure to be followed, that is, that the prosecutors, as they are called, should declare in prohibition. The objections were then stated in the form of a declaration, and the defendants demurred to the whole declaration. The Court differed upon a purely technical point as to whether the demurrer was severable, but *Brett* L.J. laid down the rules as to the exercise of the power to grant prohibition. He said (2):—"A question upon the demurrer then is whether it is within the jurisdiction of the defendants to make all or any part of that order." (They had not made an order, but intended to make one).

"This raises first, the question what would cause such an order, or part of it, to be beyond jurisdiction as distinguished from being merely erroneous. If no part of the order could legally be made under any circumstances in any form, the whole is beyond jurisdiction. If there are separate parts which could under no circumstances in any form be legally made, those parts are beyond jurisdiction. But if the whole, or any part, could under some circumstances be properly made, though they would be improperly made under the circumstances of the particular case, that would be error and not excess of jurisdiction." That I think, with respect, correctly expresses the rule. The question then is whether an order to register these applicants could under some

(1) 6 Q.B.D., 586. (2) 6 Q.B.D., 586, at p. 599.

circumstances be properly made, although it might be improperly made under the circumstances of this case. In order to dispose of the application the Registrar must enter upon some inquiry. He may, for instance, come to the conclusion that the applicants are not sufficient in number, and there are many other things upon which he may come to a conclusion adverse to them. He must, necessarily, have jurisdiction to inquire whether he ought to grant or refuse the application. If he erroneously comes to the conclusion that he should grant it, that does not show that he had no jurisdiction to make the inquiry, but only that he had made a mistake in the exercise of his jurisdiction to inquire. An appeal lies from his determination to the President of the Court, and, as we held in the *Jumbunna Case* (1), an appeal lies from the President's decision to this Court.

I have had some doubt whether the function of the Registrar in registering an association as an organization is judicial, but, assuming it to be judicial, I think that he was bound to inquire who the applicants are, and whether they are entitled to registration. If he comes to an erroneous conclusion on that matter, it does not prove that he had no jurisdiction, but only that his decision was wrong.

As I have said, an appeal lies from his decision, and this Court held in the *Federated Engine-Driver's Case* (2) that if the Registrar registers as an organization an association which is not entitled to be registered, the registration is ineffectual. The applicants are, therefore, not concluded by this decision; the question is only postponed. They do not in any way lose their right to object to the capacity of the Actors' Union to bring them into litigation.

For these reasons I think that the rule should be discharged.

I express no opinion on the merits of the case. The point sought to be raised is a very interesting one, and the rights of the present applicants to raise it are not in any way interfered with.

BARTON J. I am of the same opinion. The Registrar has jurisdiction, before deciding whether to register an association or

(1) 6 C.L.R., 309. (2) 12 C.L.R., 398.

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not, to inquire into certain questions of fact, and on his being satisfied that such facts exist, he may grant registration. The Registrar cannot be forbidden to make the investigation which the Act, in effect, prescribes. Mr. *Windeyer* referred to the case of *R.* v. *Justices at Rockhampton*; *Ex parte Petersen* (1), in which my learned brother the Chief Justice, who delivered the judgment of the Court, cited a passage from the judgment of *Brett* L.J. in *South Eastern Railway Co.* v. *Railway Commissioners* (2). I think that passage is conclusive.

ISAACS J. read the following judgment:—The applicants' case rests on the position that the Registrar has no jurisdiction to entertain the association's application for registration as an organization, because, as it is contended, such an association is not, and cannot possibly be, "in or in connexion with any industry." It is evident that whether that contention is correct or not, depends, as a matter of law, on the connotation of the term "industry," and, as a matter of fact, upon, *inter alia*, the true nature of an actor's avocation, its ordinary attributes, how it is regarded or classified in the mind of the community, and the terms and conditions usually attached to its exercise. We have then to inquire what are the Registrar's functions: Do they include the ascertainment and determination of the question whether the vocation of acting, as it is ordinarily understood in Australia, comes under the designation of "industry" within the meaning of the Act and the Constitution?

Looking at the express provisions of the Statute alone, I should have some hesitation in saying he had any such function allotted to him. But sec. 92 expressly provides also for regulations prescribing all matters and things necessary or convenient for giving effect to the Act. It is manifest some of those regulations may prescribe duties of a judicial nature, as well as duties of a non-judicial nature.

This is recognized by sec. 17, which provides that the President may review, annul, rescind, or vary any *act or decision* of the Registrar in any manner which he thinks fit.

When we turn to the regulations of 12th January 1910

(1) (1903) St. R. Qd., 71.

(2) 6 Q.B.D., 586, at p. 599.

(Statutory Rules 1910, No. 3), we find a most elaborate set of provisions in connection with the application to register an association. Rule 9 enables objections to be lodged with the Registrar, the first of which is all-important. It is in these words:—"That the association is not an association capable of registration under the Act." Particulars have to be given. Statutory declarations are lodged on both sides, a day is fixed for hearing the objection, and, says rule 12:—"On the hearing the Registrar shall hear the parties if they are present and desire to be heard, and shall decide the matter." Rule 23 enables the Registrar to call witnesses and take evidence on oath.

It is, therefore, beyond controversy that the Registrar has been invested with power to determine whether or not the persons coming before him and asking for registration are or are not capable of registration under the Act.

He therefore has jurisdiction with respect to the persons, and the subject matter of their request; and, if so, how can he be prohibited from entertaining the application? The two opposite legal situations, the first where prohibition does lie, and the second where it does not, are stated with careful precision by Lord *Esher* M.R. in *R.* v. *Commissioners for Special Purposes of the Income Tax* (1):—"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may, in effect, say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a

(1) 21 Q.B.D., 313, at pp. 319, 320.

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tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction." This distinction has recently been confirmed by the House of Lords.

In *Wakefield Corporation* v. *Cooke* (1) it was held that the determination of justices that a street was a highway was a judgment *in rem*, and conclusive as to the status of the street. A somewhat similar case had arisen some years earlier under another Act, the *Public Health Act*, in which the opposite decision was given, and the ground upon which the House of Lords based the distinction is decisive of the present case. Lord *Halsbury* L.C. said (2):—"A whole machinery is created by which the question of whether or not the street is repairable by the parish shall be determined by a particular tribunal—a tribunal erected for this express purpose; and when one looks to see what that particular forum erected for that purpose is to determine, it is sufficient to see the number of objections which can be made and what has to be determined: '(*a*) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act' (that is a question which relates to a different class of things that the urban authority have got to do). '(*b*) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large.' So that, instead of being, as it is, under the *Public Health Act*, something removed from the jurisdiction of the justices, who have only power to issue process and enforce the payment of a sum of money payable under the circumstances stated in the 150th section, in this Act the very question whether or not a particular road is or is

(1) (1904) A.C., 31.

(2) (1904) A.C., 31, at p. 35.

not a highway repairable by the parish is remitted to that tribunal, and remitted to that tribunal for the purpose of determination."

Then the result is clear. As the Judicial Committee said in *Malkarjun* v. *Narhari* (1):—"A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course presented by law for setting matters right; and if that course is not taken, the decision however wrong, cannot be disturbed."

In these circumstances, it seems to me impossible to maintain the position that the Registrar is without jurisdiction to determine the matter, and I agree, therefore, that the application should be dismissed.

Order nisi discharged with costs to the respondent association.

Solicitors, for the applicants, *Minter, Simpson & Co.*, for *Morgan & Fyffe*, Melbourne.

Solicitor, for the Commonwealth, *C. Powers*, Crown Solicitor for the Commonwealth.

Solicitor, for the Australian Actors' Union, *W. M. Daley.*

Solicitor, for the Actors' Association of Australasia, *K. W. Montagu.*

B. L.

(1) L.R. 27 I.A., 216, at p. 225.