[HIGH COURT OF AUSTRALIA.]

THE METROPOLITAN COAL COMPANY OF SYDNEY LIMITED AND OTHERS . } APPLICANTS;

AND

THE AUSTRALIAN COAL AND SHALE EMPLOYEES' FEDERATION . . . } RESPONDENTS.

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SYDNEY, *Nov.* 21, 22, 30.

Barton, Isaacs, Higgins, Powers and Rich JJ.

Industrial Arbitration—Offence—Strike "on account of industrial dispute"—Strike in sympathy with intra-State dispute—Whether strike an "industrial dispute"—Cancellation of registration of organization—"Person interested"—Employers whose employees have struck—Application for re-registration of organization—Power of Registrar to refuse registration—Commonwealth Conciliation and Arbitration Act 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *secs.* 4, 6, 18, 55, 60 —*Conciliation and Arbitration Regulations* 1913 (*Statutory Rules* 1913, *No.* 331), *regs.* 5, 9, 15.

Proclamation—Validity—Royal prerogative—Right of eminent domain—Possession taken by Crown of private property—Proclamation of 23rd August 1917 *of Governor in Council of New South Wales.*

Members of an organization of employees who were employed by certain owners of coal mines in New South Wales and in Victoria struck work in sympathy with employees of the New South Wales Railway Commissioners, who also had struck work. Except as stated, there was no dispute between the mine-owners and their employees.

Held, by *Barton*, *Isaacs*, *Higgins*, *Powers* and *Rich* JJ., (1) that the strike of the members of the organization was not an offence against sec. 6 of the *Commonwealth Conciliation and Arbitration Act* since it was not on account of an industrial dispute extending beyond one State; (2) that that strike did not constitute an "industrial dispute" within the meaning of the Act; and (3) that the mine-owners were "persons interested" within the meaning of sec. 60 (1) of the Act, and therefore might apply for the cancellation of the registration of the organization.

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Shortly after the commencement of the strike the Government of New South Wales, under the hand of the Lieutenant-Governor, issued a Proclamation which recited the existence of the War and of certain strikes, that the operations of the Government and the Railway Commissioners had been impeded by the War and the strikes, and that it was considered necessary and expedient for carrying on such operations that the Government, in virtue of the prerogative of the Crown and its right of eminent domain and of all other powers thereunto it enabling, should take possession and control of all coal mines in the State and of the fixtures and other plant and appliances used in working them. The Proclamation then proclaimed that the Government "has assumed possession and control" of all coal mines in the State and all fixtures, &c., used in working them with full power to use them in any manner which should seem fit to the Government, and required the owners and all persons having possession or control of the mines and fixtures, &c., to hold the same at the disposal of the Government to be used in such way as the Acting Premier of the State might direct. There was no evidence of any actual change of possession consequent on the Proclamation nor of any order made thereunder by the Acting Premier.

Held, by *Barton*, *Isaacs*, *Powers* and *Rich* JJ., that even if the Proclamation was valid the mine-owners remained "persons interested" within the meaning of sec. 60 (1).

Per Higgins J.: The Proclamation was invalid; and the question who were "persons interested" in case the Proclamation were found to be valid did not arise.

Held, also, by *Barton*, *Isaacs*, *Powers* and *Rich* JJ. (*Higgins* J. dissenting), that where the registration of an organization has been cancelled under the provisions of sec. 60 of the *Commonwealth Conciliation and Arbitration Act*, the Registrar is not in all cases bound under section 55 to again register the same organization upon its complying with the prescribed conditions, but that the question whether in a particular instance the Registrar is bound to again register the organization depends upon the circumstances appearing on the new application for registration.

CASE STATED.

On an application by the Metropolitan Coal Co. of Sydney Ltd. and several other owners of coal mines in New South Wales to the Commonwealth Court of Conciliation and Arbitration for an order cancelling the registration of an organization called the Australian Coal and Shale Employees' Federation, *Higgins* J. stated a case for the opinion of the High Court which, as amended at the hearing, was as follows:—

1. An application is made by the above-named Company and

several other owners of New South Wales coal mines, for an order cancelling the registration of the above-named organization.

2. Members of the organization who were employees of the said mine-owners and of coal mine owners in Victoria struck work on and after 4th August 1917, ceasing their work against the wishes of their employers.

3. The strike was in sympathy with certain engineering and other employees of the New South Wales Railway Commissioners, the said employees having struck work because the Railway Commissioners insisted on a certain "card system" for checking the operation of the employees.

4. Except as hereinbefore stated there was no dispute between the said mine-owners and their employees.

5. Annexed hereto and marked "A" is a copy of a proclamation issued by the Governor in Council of New South Wales on 23rd August 1917.

6. There is no evidence of either assent to or dissent from the Proclamation on the part of the New South Wales mine-owners or of any actual change in possession (apart from the statements in the Proclamation) or of any order made by the Acting Premier of New South Wales under the Proclamation.

I state this case for the opinion of the High Court upon these questions arising in the proceedings—questions which, in my opinion, are questions of law:—

(1) Is the strike of the coal miners an offence under the Act?

(2) Does the strike of the coal miners constitute an industrial dispute of which this Court can have cognizance for the purpose of prevention or of settlement?

(3) Are the applicants (apart from the Proclamation) "persons interested" within the meaning of sec. 60 (1) of the *Commonwealth Conciliation and Arbitration Act*?

(4) Is the Proclamation marked "A" valid to any and what extent?

(5) If the Proclamation is valid, are the applicants "persons interested" within the meaning of sec. 60 (1)?

(6) If the registration of the organization be cancelled and the Federation apply subsequently for registration, complying with the

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prescribed conditions, has the Registrar or has the Court power to refuse registration ?

The Proclamation referred to in the case was, so far as is material, as follows :—

"Whereas a state of war exists between Great Britain and her Allies and the Empire of Germany and her Allies : And whereas certain Government employees and others in the State of New South Wales have unlawfully ceased work and omitted to perform their duties, and a strike of such employees and others is now in progress : And whereas the operations of the Government of New South Wales and the Railway Commissioners in regard to transit and otherwise in the said State have been seriously imperilled and disorganized by the said war and the said strike : And whereas it is considered necessary and expedient for carrying on such operations that the Government of the said State, in virtue of the prerogative of the Crown and its right of eminent domain, and of all other powers thereunto it enabling, should take possession and control of all coal mines in the said State and of the fixtures and other plant and appliances used in working the same : Now, therefore, I, Sir William Portus Cullen, the Lieutenant-Governor aforesaid, by and with the advice of the Executive Council, do hereby proclaim that the said Government has assumed possession and control of all coal mines in the said State, and all fixtures, fittings, engines, trucks, appliances, machinery, plant, horses, timber, and other materials and things used in and for working the said coal mines, with full power to use the same in any manner which seems fit to the said Government : And all persons whomsoever, being the owners, or having possession or control of the said coal mines, fixtures, fittings, engines, trucks, appliances, machinery, plant, horses, timber, and other materials and things used in and for working the said coal mines, are hereby required to hold the same at the disposal of the said Government to be used in such way as the Honourable George Warburton Fuller, the Acting Premier of the said State, by order under his hand, may from time to time order or direct."

Bavin, for the applicants. As to the first question, the strike of the coal miners, being on account of another strike in New South

Wales only, was not an offence against the *Commonwealth Conciliation and Arbitration Act*, because it was not on account of an "industrial dispute" within the meaning of sec. 6, an "industrial dispute" being defined by sec. 4 as a dispute extending beyond any one State. As to the second question, the mere fact that employees cease work without making any demand upon their employers is not an industrial dispute within the meaning of the Act. As to the third question, although the employees of the applicants had struck they still remained employees of the applicants within the meaning of the Act. Unless the applicants are "persons interested" within the meaning of sec. 60, no person on the side of the employers can be "persons interested." An employer has a vital interest in the conduct and membership of an organization of which his employers are members. [Counsel did not argue the fourth question.] As to the fifth question, assuming the validity of the Proclamation it does not affect the interest which the applicants then had under sec. 60. The Proclamation did not by itself effect any change in the relationship of the mine-owners and their employees; it did not affect the mine-owner's right to employ miners or to take coal out of the mine. [Counsel referred to the *Saltpetre Case* (1).] As to the sixth question, it is a hypothetical question, and should not be answered. The word "may" in sec. 55 imports a discretion in the Registrar to grant or refuse registration. The fact that sec. 60 gives the Court power to cancel the registration shows that there must be such a discretion, otherwise the power to cancel would be nugatory. See *Smith* v. *Watson* (2).

Watt (with him *Halse Rogers*), for the respondents. The first question should be answered in the negative. As to the second question, in view of the purpose for which the Act was passed the words "industrial disputes" in sec. 18 should not be so limited by the definition section as to deprive the Court of Conciliation of power to deal with a strike extending beyond one State. A strike is a dispute, because there is by implication an assertion on the part of the employees of a right to cease work. See *Clemson* v. *Hubbard* (3). As

(1) 12 Rep., 12.
(2) 4 C.L.R., 802, at p. 811.
(3) 45 L.J.M.C., 69.

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to the third question, the applicants are not "persons interested" in the organization or in its registration. An interest will not be implied from the mere relationship of employer and employee. There is no such interest as there might have been if there had been an award or a strike within the terms of sec. 8. [Counsel referred to *Hull* v. *Macfarlane* (1).] As to the fourth question, the Proclamation is invalid. It is based on the royal prerogative, but the only delegate of the King who can exercise the royal prerogative within the State is the Parliament or the Governor acting within his instructions. As to defence the Commonwealth Parliament or the Governor-General alone can exercise the royal prerogative. [Counsel referred to *The Zamora* (2).] As to the fifth question, the Proclamation must be read as stating that as a fact possession had been taken by the Government. If that be the fact, the applicants lost any interest that they might have theretofore had. As to the sixth question, an organization has, under sec. 55, an absolute right to registration on complying with the prescribed conditions. The Registrar on the new application for registration would have only the same power as he had on an original application. He would have no right to question or in any way to deal with an order of the Court cancelling the registration. The position is not the same as if there were a provision disqualifying an organization whose registration had been cancelled from again applying for registration, similar to the provision in New South Wales legislation as to licensed premises disqualifying premises, the licence of which has been cancelled, from again being licensed. The only matter as to which the Registrar can inquire is whether the prescribed conditions have been complied with.

Bavin, in reply.

Cur. adv. vult.

Nov. 30.

The following judgments were read :—

BARTON J. The whole of the Court are of opinion that the first three questions should be answered as follows :—(1) No. (2) No. (3) Yes.

(1) 27 L.J.C.P., 41.

(2) (1916) 2 A.C., 77.

I am of opinion that questions 5 and 6 should be answered as follows:—(5) Yes. (6) This question was amended before this Court, at the instance of the learned President, by substituting for the words "the condition in Schedule B" the words "the prescribed conditions." Whether the Registrar has in any particular case power to refuse re-registration must depend on the circumstances then appearing. Further than this the facts do not enable me to answer.

In view of the answer to question 5 it becomes unnecessary to answer question 4.

I proceed to give my own reasons for these answers.

(1) The only section of the Act which appears to make a lock-out or a strike punishable is sec. 6 (1), namely: "No person or organization shall, on account of any industrial dispute, do anything in the nature of a lock-out or strike, or continue any lock-out or strike." By sec. 4 "industrial dispute" means an industrial dispute extending beyond the limits of any one State. Like all other definitions, this is to apply "except where otherwise clearly intended," and I find nothing in the Act to show a different intention. The Act indeed deals and can deal only with industrial disputes so extending. The special case does not indicate that there was any such extension. It follows that the strike is not an offence punishable under the Act.

(2) As the special case gives no indication of any two-State dispute or of any dispute at all in the only relevant sense, namely, a claim in respect of an industrial matter made by employer or employees upon the other party, and as the special case rather indicates that the strike was quite independent of any dispute at all with the employers of the coal miners or their organization, it could not of itself and by itself constitute such a dispute.

(3) The applicants, who were the employers, asked apparently under sec. 60 (1) (*a*) for an order cancelling the registration of the respondent organization. To my mind they were manifestly "persons interested" within the meaning of the sub-section. That term cannot mean that it is sufficient for the persons concerned to have or claim a mere personal interest in the colloquial sense that their interest is aroused. It is equally clear that it does include

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persons who have a direct and absolute pecuniary or proprietary interest, by reason, for instance, of the fact that they stand in the relation of employer or employee to those against whom they claim. Here the respondents had renounced their employment, at any rate for the time, and I do not discuss whether the applicants continued to be interested in the way of which I have last spoken. It seems to me that, while a mere stranger cannot claim to have an interest within the meaning of the sub-section, it was the intention of Parliament that the term should not be narrowly construed. The mines of the applicants were laid idle, at any rate for the production of coal, by the strike; of course their pecuniary and proprietary interests were gravely affected by the cessation of work itself. They could not but intend to work the mines again as soon as they were enabled to do so, for their interest in the resumption of that work was necessarily vital. If they could not be held to be "persons interested," it is difficult to see who could be more interested so as to be fit persons to make the application; and of course we are bound to avoid the conclusion that Parliament enacted a futility, for such the section would be, in part at least, if while a strike continued there were no persons interested within its meaning, who could ask the Court to act under the sub-section.

(5) If I am right in my answer to question 3, I think that the owners continued to be persons interested even after the Proclamation, and that whether the Proclamation is valid or invalid. Assuming its validity, the question of its effect remains. The special case shows that there was no evidence of any actual change in the possession of the mines, unless the statements in the Proclamation effected such a change: nor was there any order made by the Acting Premier of New South Wales under the Proclamation. On the other hand, the owners or persons "having possession or control" of the mines and plant are required by the Proclamation "to hold the same at the disposal of the said Government," to be used as the Acting Premier should by order under his hand direct. If the Proclamation gave any real powers they were not exercised. The order is not stated to have been issued, and the ownership and possession remained as before, unless the mere statement that the Government had assumed possession and control divested the ownership and actual

possession, which seems to be a result inconsistent with the terms of the Proclamation itself. The statement in the Proclamation that it was made "in virtue of the prerogative of the Crown and its right of eminent domain, and all other powers thereunto it enabling" does not carry the matter any further for the purposes of this case while the owners were allowed to remain in actual possession and control and in the absence of any order under the Proclamation. I wish to make it clear that these remarks are not directed at the validity of the Proclamation, but relate solely to the question whether its bare making and publication annulled or suspended all the interest that the owners had within the meaning of sec. 60 (1). Looking at the result of the acceptance of a contrary view, could it be said that if the members of the organization had asked to return to their work, no order under the Proclamation having in the meantime been made, the owners would have been powerless to restore their employment to them? Would they have broken the law if they had done so? Whatever relationship between them and their employees existed between the strike and the Proclamation continued afterwards in at least a sufficient degree for the purpose of the subsection. For these reasons I think that if the Proclamation is valid, the applicants, whether their interest was in some degree affected or not, still retained an interest sufficient to give them a *locus standi* as applicants.

In view of this answer it is quite unnecessary to answer question 4. It is well that the Court is relieved of any necessity to answer it, for the Government of New South Wales has not asked leave to intervene in this argument, and in fact has, in answer to the Court, disclaimed any intention to intervene or to be in any way represented.

(6) I cannot accept the construction that under sec. 55 (1) the Registrar has no power under any circumstances to refuse to restore to the Register an association which, on its removal from the Register by the Court, has ceased to be an organization, provided only that on its application it shows compliance with what are called in the section "the prescribed conditions." It is true that on the original application an association may perhaps be entitled to be constituted an organization by that compliance. I am not called upon to say that it is so in all cases. But, assuming that,

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it cannot be equally true that if the organization has been removed from the Register under circumstances which show its unfitness to continue its place upon it, the Registrar is bound to replace it automatically. Such a result would lead to the position that if the unfitness for registration which had caused the cancellation continued, not only would the Registrar be helpless, but the Court must submit to the virtual overriding of its decision : unless indeed the Court on appeal were involved in a fresh application for cancellation as often as the helpless Registrar replaced the offending body on his Register. It is not strictly correct to say that such a result means that in such a case the Registrar would be acting as a Court of appeal from the Court itself. That can scarcely be said of action on the part of the Registrar if it is automatic. But the decision of the Court would, in effect, be none the less overridden, and could be overridden as often as the Court exercised the power given it by sec. 60, sub-sec. 1. Between the construction that the Registrar must grant such an application as often as a de-registered body applies, complying with the prescribed conditions, and the construction that cancellation has a permanent effect, so that a registration once lost can never be restored, there lies a wide gulf. The first of these positions cannot be allowed, because, against the manifest intention of the Statute, it would render de-registration nugatory. But the second position, although the Act does not directly negative it, cannot be allowed, because sec. 60 (1) can scarcely be read so as to show that the Parliament had any intention of inflicting an irremovable disability. Of the lettered paragraphs of that sub-section (*b*) to (*h*) several evince that where the cancellation arises upon a defect or default, not wilful, in the rules or in the conduct of the officials it would be monstrous to attribute to Parliament an intention to inflict an unending exclusion. There are other cases where the cause of cancellation may, in itself or because of the extraordinary circumstances, justify the prolonged or possibly indefinite exclusion of the offending body from the roll. Such cases may arise under par. (*a*), the latter part of par. (*c*), or par. (*g*), and conceivably under other paragraphs. In such cases we cannot impute to Parliament the intention of providing for a cancellation that could immediately be rendered nugatory. In other classes

of cases we cannot say that Parliament intended that exclusion from the Register should continue, at any rate indefinitely, notwithstanding that a curable defect has been cured or that a blundering or over-zealous official has been got rid of. These are merely illustrations which show the necessity of reading the sections together. In that case sec. 55 must be read, to the extent necessary, as subject to sec. 60. Seeing that there is no provision in the Act that de-registration should be permanent, this becomes the more necessary. I agree with my brothers *Isaacs* and *Rich* that the Registrar's powers under sec. 55 are necessarily subject to any order made by the Court, and may in any given case be controlled by any other existing legislative provision affecting registration. Under the circumstances I find myself unable to give question 6 any fuller answer than that which appears in the early part of this opinion.

The above are the reasons for my answers.

It is not my habit to recommend alterations in the Statute law, which are solely within the province of Parliament. But a careful reading of the sections in this part of the Act indicates the great difficulty of judicial construction in respect of them, a difficulty which cannot, however, be removed by us. Its removal rests with the legislative authority.

ISAACS AND RICH JJ. We think the answers to the several questions stated should be respectively as follows :—(1) No. (2) No. (3) Yes. (4) No answer. (5) Yes. (6) It depends on the circumstances as appearing on the application to re-register.

Our reasons for the respective answers are :—

(1) The strike was not on account of an "industrial dispute" within the meaning of sec. 6 of the Act, that expression importing an interstate industrial dispute either between the strikers and their employers or between other employers and their employees.

(2) This strike is entirely unconnected with any industrial dispute between the employees striking and their employers.

(3) The applicants are clearly interested in an industrial sense.

(4) In view of our opinion respecting the fifth question, it is unnecessary to answer this question. It does not "arise" (see *Weed* v.

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Ward (1)). The word "arising" necessarily excludes hypothetical questions.

(5) The Proclamation alone did not alter the industrial relations between the employers and their employees, and the facts stated show that no further action was taken under the Proclamation.

(6) Sec. 55 must be read and applied in the light of the group of sections (51 to 72) constituting Part V. and headed "Organizations." Sec. 51 provides for a Principal Registry and District Registries, equally "for the registration of organizations." It also provides for an Industrial Registrar and Deputy Industrial Registrars. "Registrar" means (sec. 4) either the Industrial Registrar or a Deputy Industrial Registrar. Every Registrar is an "officer of the Court" (sec. 43).

Sec. 55 imposes no duty on a Registrar *nominatim*. It confers a right on certain "associations or persons." The word "may" is used in that section and is predicated of the "associations" and "persons," and not of any officer. It is suggested that the word "may" should be translated "must" or "shall," and it is said that *Julius* v. *Bishop of Oxford* (2) is an authority for this. It is observable that the word "may" is used in other sections in the group. We pass by sec. 51 in this connection as that concerns the Crown. Sec. 56 says that "any association applying to be registered *may* on application to the President obtain power" &c. Will it be contended that "may" there means "shall" or "must," leaving the President no discretion to refuse the rules applied for, whatever the circumstances may be? Similarly in sec. 70. On the other hand, the Legislature has used the word "shall" in secs. 57 and 59 where it makes a duty imperative.

The rule in *Julius* v. *Bishop of Oxford* (2) is not that wherever the word "may" is used in connection with a public office it means "shall." Nor, if the Legislature confers a right by the same word and states certain conditions, does it necessarily follow that the word imposes a duty on the proper officer, irrespective of all other considerations. The true rule is thus stated by *Lindley* M.R. in *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works* (3),

(1) 40 Ch. D., 555.
(2) 5 App. Cas., 214.
(3) (1898) 2 Ch., 603, at p. 607.

speaking of the words "it shall be lawful":—"These words may, no doubt, under certain circumstances impose a duty as well as confer a power, but it is for those who contend that they do both to make good their contention. Nothing can be clearer on this point than the judgment of Lord *Cairns* in *Julius* v. *Bishop of Oxford*."

The Privy Council, in *Delhi and London Bank Ltd.* v. *Orchard* (1), said that in interpreting Statutes the words "must" and "shall" may in some cases be substituted for the word "may," but "only for the purpose of giving effect to the intention of the Legislature; but, in the absence of proof of such intention, the word 'may' must be taken to be used in its natural, and therefore in a permissive, and not in an obligatory sense."

Now, the intention of the Legislature here as to whether re-registration after cancellation is imperative must be ascertained upon a reading of sec. 60 as well as sec. 55. One consideration meets us at the outset. It is this: if the Registrar, on mere compliance with prescribed conditions and irrespective of any conduct bringing an association within sec. 60, is compelled in every case to re-register; and if that compulsion is a proper ground in any case for the Court refusing to exercise its powers under sec. 60, because its order would be futile; then that must be so in every case, and the Court should never order de-registration. If that was the legislative intention, then sec. 60 must have been enacted as a placard only, without any real significance, even as it stood originally. Its original form is an excellent test of the meaning of sec. 55, because sec. 55 must mean the same now as it meant before sec. 60 was amended.

The scheme of Parliament as originally framed was clear that compliance with prescribed conditions should confer an original right upon the specified associations or persons to be registered. In such cases the word "may," accompanied by the words "on compliance with the prescribed conditions" so far conferred a right calling upon the proper officer—Principal Registrar or Deputy Registrar, as the case may be—to register the applicant as an organization. But that right was defeasible by the operation of sec. 60; and sec. 55 must be read as subject to sec. 60 (*inter alia*). Sec. 60 conferred the most ample power in the Court to cancel the registration. In sub-clause

(1) L.R. 4 Ind. App., 127, at p. 135.

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1 (*a*) the Court is left at large as to its reasons, so far as no specific direction was given by Parliament itself. But in the rest of the subclause are stated circumstances, which, though in some instances they are left to be established as facts by the Court, yet, when established, are expressly enacted as mandatory circumstances compelling the Court to *order* the registration to be cancelled. If any one of the circumstances (*b*) to (*h*) be established, then, said sec. 60 as originally framed, the Court "*shall*" *order* the cancellation. That is an order to its officer the "Registrar" to cancel the registration of the organization.

The suggestion is that though the Registrar as an officer of the Court was, and is, compelled to obey the order to cancel, because the Legislature in that case insists that the association shall no longer be registered, yet that the Legislature at the same time intended, even as sec. 60 stood, that the next moment the association might, without change of circumstances, entirely disregard the mandate of the Court in obedience to the mandate of Parliament itself, and insist on the Registrar re-registering the association under sec. 55. So senseless, contradictory and self-destructive an intention ought not to be ascribed to any legislature in the absence of words which leave the Court without escape from the absurdity. It can only be reached by interpreting "may" as "shall" by considering part only of the context, namely sec. 55, instead of the whole context, which includes sec. 60.

Now, if sec. 55 did not, as the Act originally stood, give an absolute right to re-registration after an order made under sec. 60, it still has to be read subject to an order made under the amended sec. 60, the discretionary order when made now standing in the same place as formerly a compulsory order would have stood. If sec. 55 is read in this way as conferring an absolute right of original registration, qualified only (so far as this Act is concerned) by sec. 59 and qualified also by what may afterwards be in fact done under sec. 60, two extreme absurdities are avoided, and the scheme of the Act as a sensible consistent scheme is preserved. On the one hand, the absurdity already indicated cannot arise. On the other, the equal absurdity of excluding the association for ever because of some temporary reason is excluded.

To illustrate what is meant, take pars. (*d*) and (*g*). If under par. (*d*) the Court makes an order but the association alters the rules so as to meet the views of the Court, then to re-register is not in any way to conflict with the decision of the Court, and consequently not to conflict with the intention of the Legislature. But, so long as the objectionable rules are retained, re-registration would obviously conflict with the decision and the legislative intention. If under par. (*g*) the society persists in its wilful disobedience of the Court's order, the intention of Parliament by its own express words was that the association "shall" not be a registered organization. The amendment of sec. 60 merely interposes the discretion of the Court, but once that discretion is exercised against the organization, the same result is reached, and de-registration follows, because the Registrar *must* de-register. But if that disobedience is removed, then the circumstances in which the Legislature intended non-registration no longer exist and, the statutory bar being removed, the association may re-register.

In construing an instrument where its words are susceptible of two meanings, it is always legitimate to take into account reasonableness, justice and consistency on one hand, and unreasonableness, injustice and absurdity on the other. See, for instance, *Countess of Rothes* v. *Kirkcaldy and Dysart Waterworks Commissioners* (1), per Lord *Blackburn*, and *Perth Gas Co.* v. *Perth Corporation* (2). Therefore, we think that the Registrar's powers under sec. 55 are necessarily subject to any order of the Court, and may in any given case be controlled by any other existing legislative provision affecting registration. Whether he has in any particular case power to refuse re-registration must depend on the circumstances then appearing. Further than this, the facts do not enable the Court to answer.

One further observation is material. If the word "may" in sec. 55 imposes a rigid obligation on the Registrar to re-register provided the prescribed conditions are complied with, irrespective of what the Court has done under sec. 60, it is manifestly clear that it is mandatory upon the Court under sec. 60—irrespective of what the Registrar might do under a possible application under sec. 55—to order the cancellation of an existing registration, provided the

(1) 7 App. Cas., 694, at p. 702. (2) (1911) A.C., 506, at p. 517.

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circumstances brought before it either are such that under par. (*a*) the registration ought to be cancelled, or are such as under any other paragraph answer the legislative description. If that conclusion be reached, the questions as to the Registrar's powers under sec. 55 are hypothetical, and immaterial to this case. It would be consistent with our views of the Act as it stands at present if some provision were made to the effect that after an order for de-registration is made by any competent authority, a condition of registration should be a declaration by that authority that the circumstances under which the order was made have so changed that the order should no longer be a bar to registration.

HIGGINS J. I concur with the opinions which have been expressed as to questions 1, 2 and 3—that the strike of coal miners is not an offence under the Act, that it does not constitute an industrial dispute of which the Court of Conciliation can have cognizance, that the applicants are (apart from the New South Wales Proclamation) "persons interested" within the meaning of sec. 60 (1). As for the third question, the phrase "persons interested" ought, in my opinion, in view of the nature and object of the application, to receive a liberal construction. I take it that Parliament wanted to have the registration cancelled of any association that, for any of the numerous objections specified, ought not to remain on the Register, but that it did not want to have the Court's power invoked by a mere intermeddler or common informer. In this case, the application is made by New South Wales employers whose mines were brought to a standstill by the strike of members of this organization, and who hope to resume operations with the aid of employees. In my opinion they are "persons interested" within the meaning of the section.

As for question 4, I am of opinion on the facts and arguments before us that the Proclamation of the New South Wales Government is wholly invalid. I agree substantially with the argument of the solicitor who appeared for the employers before me that the Proclamation is "not worth the paper it is written on." Unfortunately the Government of New South Wales is not represented here. Though invited by this Court to intervene and defend the

Proclamation, it has intimated that it does not intend to be represented, or to seek permission to intervene. We have, therefore, for the guidance of the Court of Conciliation, to express our view on the materials before us, although our opinion may not be binding on the Government as a *res judicata*. The Proclamation is not supported by the "prerogative of the Crown," or by the Crown's "right of eminent domain," on which the Proclamation expressly purports to be based; and I know of no other adequate ground on which it can be based.

Under this view of the Proclamation it becomes unnecessary to answer question 5. Question 4 has been asked, and, as I venture to think, it is the duty of the High Court to answer it. The words of sec. 31 are: "The High Court *shall* hear and determine the question"—not "may if it think fit." Question 5 is not asked unless the High Court find the Proclamation valid.

As for the sixth question, I am of opinion that if the registration be cancelled, and if the Federation apply subsequently for registration, complying with the conditions prescribed, the Registrar has not, nor has the Court of Conciliation, power to refuse re-registration.

It has been urged that this question is hypothetical, and in a sense it is; but it is not hypothetical in the sense of dealing with problems which have not arisen and may never arise. The problem is actual and present, from the point of view of the Court of Conciliation. That Court is asked to exercise a discretionary power to cancel the registration of this organization; and before exercising its discretion, it wants to know what the effect of cancelling is. This is a question of law "arising in the proceeding," within the meaning of sec. 31. It is to be noted that the section does not expressly exclude hypothetical questions.

Now, sec. 55 provides that "any of the following associations" (described) may "on compliance with the prescribed conditions" be registered; and "*the* conditions to be complied with by associations so applying for registration shall, until otherwise prescribed, be as set out in Schedule B. There are no conditions applicable other than those in Statutory Rules 1913, No. 331 (see regs. 5, 9, 15); and this rule contains no condition to the effect that the association

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shall not be one that has previously been de-registered. The grounds of objection to registration are expressly "confined" to the three grounds set out in rule 9. Every organization has to be an association before it is registered; and when registration is cancelled it still remains an association. Provided that this association comply with the description in sec. 55 and with the Statutory Rules and provided that there is no other organization registered to which the members might conveniently belong, it comes literally within the words of sec. 55, and may be registered. On the principles laid down in *Julius* v. *Bishop of Oxford* (1) and other cases, it is the duty of the Registrar, not a mere discretionary power, to register the association. The Registrar is a statutory officer whose primary duty is to register and keep the Register (secs. 54, 55); he has no discretionary or judicial functions except such as are given him by or under the Act; and he is not given the function of granting or refusing registration at his discretion. The only exception is in the case mentioned in sec. 59—when there is another organization already registered to which the members might conveniently belong. The fact that he is expressly given a discretion in such a case implies that, without it, he would have to register, and that he has no other discretion.

But it is urged that when the Court has cancelled a registration, the Registrar would be reversing or acting contrary to the order of the Court by registering the association. In my opinion this is a mistaken view. The Court has ordered the deletion of an entry on some page of the Register; and the Registrar, after making the deletion, on a new formal application, on payment of the prescribed fees, and on compliance by the association with the prescribed conditions, makes an entry on another page—"turns over a new leaf." As Mr. *Watt* has aptly reminded us, there is no provision in this Act such as there is in Licensing Acts as to disqualifying the person or the public house, as well as for taking away the licence.

It is to be noticed that there is no indication of an intention in the Act to make de-registration permanent. Sec. 60 allows de-registration on any one of numerous grounds. One is that the rules do not provide reasonable facilities for the admission of new members. It can hardly be intended that if the rules are altered so as to provide

(1) 5 App. Cas., 214.

such facilities the association is to be excluded for ever from registration. If an association in such a case can secure re-registration, it can in any case—provided that the conditions are fulfilled; for sec. 55 makes no distinction between associations so far as the Registrar's duty is concerned. It is also to be noticed that all that would come before the Registrar, officially, on de-registration under sec. 60 (1) (*a*) would be the formal order cancelling registration. He would not be officially cognizant of the grounds. There would be nothing to show whether the registration was cancelled by the Court for misconduct or for the convenience of the organization. Probably it would be well to have a provision that if an association be de-registered it is not to be registered again without the sanction of the Court; but there is no such provision as yet. At present if an association be de-registered because its rules are "tyrannical or oppressive" (sec. 60 (1) (*d*)), and be registered again with the same rules, the remedy would seem to be a second de-registration—a clumsy mode of procedure.

To give any other construction to the words of the Act on this subject involves the insertion of words in sec. 55 by implication. We should have to say that when Parliament said "any of the following associations . . . may on compliance with the prescribed conditions be registered" it must have meant "any of the following associations . . . may on compliance with the prescribed conditions be registered *unless their registration has been cancelled*" or "unless their registration has been cancelled on the grounds (to be specified)." Whatever opinions we may have as to the expediency of inserting such words, they have not been inserted; and I cannot honestly say that the insertion of such words is a matter of necessary implication.

POWERS J. I agree that the questions stated should be answered in the way mentioned by my learned brother *Barton*. I concur in the answers to the first five questions for the reasons set out in the judgments of my brothers *Barton*, *Isaacs* and *Rich*.

Question 6.—The question as amended reads: "If the registration of the organization be cancelled and the Federation apply subsequently for registration, complying with the prescribed

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conditions, has the Registrar or has the Court power to refuse registration ? "

The Registrar, not the Court, is empowered to register organizations. The question, as I understand it, means : Can the Registrar lawfully refuse to register a second time an association after its registration has been cancelled by order of the Court under sec. 60, if it complies with the conditions prescribed in the Regulations (which now take the place of Schedule B) as if secs. 59 and 60 had not been passed ?

Sec. 59 clearly sets out one reason why the Registrar must not register an association whose registration has been cancelled by the Court, even if it does comply with all the conditions prescribed by Regulations. Sec. 60 also appears to me to prescribe conditions which associations must observe to be entitled to be on the Register. The breach of any of the conditions mentioned may, if proved before the Court, and, in the clause as originally passed, did, take away the right an association had under sec. 55 to be a registered association. The conditions precedent to registration prescribed in the Act were set out in Schedule B to the Act until otherwise prescribed (sub-sec. 2 of sec. 55). On 17th December 1913, Statutory Rules 1913, No. 331, were made prescribing, amongst other things, conditions in lieu of Schedule B (see reg. 5). The Rules also prescribed conditions as to the steps to be taken by associations to obtain registration and by persons desirous of opposing the registration, &c.

Reg. 9 provides that, in addition to the objection (1) "that the prescribed conditions for registration have not been complied with by the association," persons interested may object to the registration on the following grounds : (2) "that the association is not an association capable of registration under the Act;" (3) "that an organization to which the members of the association might conveniently belong has already been registered." The Registrar could refuse registration if objections 2 or 3 were proved even if the objection as to ground No. 1 failed.

If the Court has held that the association is disqualified through any act or neglect from remaining on the Register and made an order to that effect, would not the Registrar be justified in refusing

registration under objection No. 2 above referred to so long as the ground for disqualification exists ?

Reg. 15 also requires the Registrar to be satisfied before he registers an association : (1) "that it is a voluntary and *bonâ fide* association within the meaning of the Act;" (2) "that it is an association for furthering or protecting the interests of its members;" (3) "that it is not wholly or partially formed, organized, supported, maintained, or conducted, directly or indirectly, for the purpose, or with the view, of opposing, injuring, or prejudicing the interests of employers or employees, as the case may be, whose interests it purports to represent, further, or protect."

Reading secs. 55, 56, 59 and 60 together and regs. 5, 9 and 15 of Statutory Rules 1913, No. 331, the Registrar can, in my opinion, refuse registration of an association whose registration has been cancelled under sec. 60, so long as it continues to contravene any of the conditions prescribed or acts referred to in sec. 60 (*a*) to (*g*), for which contravention the Court has cancelled its registration.

An association which has committed breaches of conditions of registration prescribed in sec. 60, so long as it continues to commit them cannot be said to have complied with all conditions prescribed by the Act to entitle it to registration. To read the Act and Regulations otherwise would mean that after the Court has found (say) that the rules are contrary to the law entitling the association to be a registered association, or that it is wilfully disobeying an order of the Court, the Registrar must ignore that order and register an association which in his opinion complies with the conditions prescribed in Statutory Rules 1913, No. 331.

My brother *Higgins*, in his judgment, appears to take the view that it is futile to de-register an association because the Registrar must re-register it on an application made next day. If his interpretation of the section is right, I think it is so. He says (1): "The Court" (if it de-registers) "has ordered the deletion of an entry on some page of the Register; and the Registrar, after making the deletion, on a new formal application, on payment of the prescribed fees, and on compliance by the association with the prescribed conditions, makes an entry on another page—'turns over a new leaf.'" Looking at sec. 60, and particularly at sub-secs. (*a*), (*c*), (*d*) and (*g*), I

(1) *Ante*, at p. 102.

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cannot possibly adopt those words as expressing the intention of Parliament.

This Court will assume that Parliament did not intend to pass a futile Act or section. The words used in the Act, if open to one construction only, may compel it to come to the other conclusion, but I do not think secs. 55, 56, 59 and 60, read together, do compel the Court in this case to come to such a conclusion. The intention of Parliament that an association, even after it has complied with all prescribed conditions, should not be a registered organization under certain circumstances is, I think, clearly expressed in sec. 60. If the de-registration only amounts to ordering the Registrar to scratch out a name on the Register and he is compelled to put it on again next day, the Court would probably not make a futile order. On the other hand, if de-registration could be held to be permanent, the Court might in all cases exercise its discretion in refusing to de-register, because the policy of the Act is to encourage the registration of associations who comply with the provisions of the Act and Regulations, including sec. 60.

Suggestions have been made by my learned brothers as to the advisability of removing the difficulty that has arisen in the judicial construction of secs. 55 and 60. Personally I agree with the suggestion that has been made by my brothers *Isaacs* and *Rich*.

I agree that the Registrar can refuse registration in certain circumstances, including (1) those set out in sec. 59; (2) on any of the grounds set out in regs. 9 and 15 of Statutory Rules 1913, No. 331, even if the conditions prescribed by reg. 5 in lieu of Schedule B have been complied with; (3) so long as the reasons exist for which the Court has decided under sec. 60 that the association should not be on the Register and has therefore cancelled its registration.

Questions answered accordingly.

Solicitors for the applicants, *Sly & Russell.*

Solicitors for the respondents, *Coghlan & Co.*

B. L.