[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN COMMONWEALTH SHIPPING BOARD . . . . . APPLICANT;

AND

THE FEDERATED SEAMEN'S UNION OF AUSTRALASIA AND OTHERS . RESPONDENTS.

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MELBOURNE, *Mar.* 11, 12, 13.

SYDNEY, *April* 9.

Isaacs, Higgins and Starke JJ.

Industrial Arbitration — Award — Party to award — Sufficient description — Contravention of Act—Breach of award—Strike—Inter-State dispute—Incitement or encouragement by organization — Injunction — Mandamus — Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 4, 6, 6A, 8, 29, 48—*Commonwealth Shipping Act* 1923 (*No.* 3 *of* 1923), *secs.* 3, 7, 13.

The "Commonwealth Government Line of Steamers" was named as a party to a dispute which was brought before the Commonwealth Court of Conciliation and Arbitration and as a party bound by an award made in respect of that dispute.

Held, on the evidence, that that term sufficiently described the Australian Commonwealth Shipping Board, created by the *Commonwealth Shipping Act* 1923, which was therefore a party to the award.

By the award it was provided that the Federated Seamen's Union of Australasia, the claimant, should not during the term of the award order, encourage or aid any strike or job control by any of its members. At a meeting held in Sydney of members of the Union a resolution was passed that a ballot should be taken to determine what members should be allowed to sign on for a voyage from Sydney of a ship of the Board; and a crew was accordingly chosen by ballot. The Board's representative refused to accept that crew, but himself chose a crew, which included five members of the Union who had not been successful in the ballot. Subsequently at Sydney members of the Union, acting in combination, refused to accept employment on another ship of the Board unless one of those five members, who had been engaged by the Board on that other ship, was dismissed.

Held, by *Isaacs*, *Higgins* and *Starke* JJ., on the evidence, that the refusal to accept work was a strike within the meaning of the award and was unreasonable.

Held, also, by *Isaacs* and *Starke* JJ., upon the evidence, that the members of the Union generally were in combination refusing to accept employment on ships of the Board in order to enforce compliance by the Board with the demand that the Board should accept crews chosen by ballot, and that that refusal constituted an inter-State dispute; that the Union by its Committee of Management and its officers had taken part in such refusal and had ordered, encouraged, advised or incited it; and, therefore, that an injunction should go under sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 to restrain the Union, its officers, servants and agents from ordering, encouraging or aiding the members to strike by refusing to accept employment or by ceasing work by reason of the employment by the Board of any of the five men.

Per Higgins J.: (1) Although certain members in Sydney were guilty of a strike, there was no evidence that the Union or (under sec. 8 (2)) the Committee of Management or any officer thereof ordered, encouraged, advised or incited members to refuse to accept employment, and the Union was therefore not proved to be guilty of a strike; (2) also, the dispute in aid of which the strike took place was a dispute confined to one State, and the strike was therefore not an offence under the Act or under the award.

MOTION.

An application was made, by motion to the High Court on behalf of the Australian Commonwealth Shipping Board, for an order in the nature of an injunction to restrain a breach or breaches of an award (in which the "Commonwealth Government Line of Steamers" was named as a party) of the Commonwealth Court of Conciliation and Arbitration dated 13th March 1924 by the Federated Seamen's Union of Australasia, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1921, the Sydney Branch of such Union, Thomas Walsh, Thomas Fleming, William Hussack, William Raeburn, Jacob Johnson, Edward Manning, William Casey and Henry O'Neil, their agents and servants; and to enjoin the respondents, their agents and servants from committing and continuing contraventions of the Act and of the award, and in particular from directly or indirectly doing or attempting to do anything in the nature of a strike within the meaning of the Act, and from being directly or indirectly concerned in doing or attempting to do anything in the nature of such a strike, and from counselling, taking part in or encouraging the doing of anything

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in the nature of such a strike; and to restrain the organization, its branches, officers, servants and agents from ordering, encouraging, advising or inciting the members of the organization to refuse to offer for or accept employment and from attempting so to do contrary to the provisions of the Act and the award. The motion also asked for an order that the organization and the other respondents should forthwith countermand and withdraw and render inoperative all incitements, instructions and/or directions given or authorized by them calculated to provoke or to cause to be continued breaches of the award and of the Act or to prevent compliance therewith. It was further asked that Walsh, Fleming, Hussack and Raeburn should be appointed to represent themselves and all other officers and members of the organization, and that Johnson, Manning, Casey and O'Neil should be appointed to represent themselves and all other officers and members of the Sydney Branch of the organization.

The material facts are stated in the judgments hereunder.

Owen Dixon K.C. and *Robert Menzies*, for the applicant. The applicant is a party to the award. At the time the award was made, namely March 1924, the Australian Commonwealth Shipping Board was in existence under the *Commonwealth Shipping Act* 1923, which came into operation on 1st September 1923. Either the term "Commonwealth Government Line of Steamers" is a description of the Australian Commonwealth Shipping Board which was sufficient to bring the Board within the award as a party, or the Board was a successor to the Crown or to the Government Department which had administered the affairs of the "Commonwealth Government Line of Steamers" and so was a party by reason of the provisions of sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act*. On the evidence, there was a "strike" within the meaning of the definition in sec. 4, there being a refusal by the members of the Union acting in combination to accept work and that refusal being unreasonable, and the Union by its officers ordered, encouraged, advised or incited that refusal (sec. 8). The Union is therefore guilty of an offence under secs. 6 and 6A, or under one of those sections. An order should be made similar in terms to that in *Waddell* v. *Australian*

Workers' Union (1). A representative order should be made as asked, in view of the difficulty caused by the provision in sec. 48 that "no person to whom" the order of this Court "applies" shall after notice of it be guilty of a contravention of the Act (*Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (2)).

[STARKE J. referred to *London Association for Protection of Trade* v. *Greenlands Ltd.* (3); *Mercantile Marine Service Association* v. *Toms* (4).]

A representative order could not harm any member, because he would not be liable under sec. 48 for anything done before he received written notice of the order of this Court.

Foster, for the respondents. The Australian Commonwealth Shipping Board is not a party to the award, for there was not at any material time an entity known as the Commonwealth Government Line of Steamers. If that term is to be taken as a description of the Crown at the time the plaint was issued, then the Board is not a successor, for under the *Commonwealth Shipping Act* there was no transfer of the business to the Board but only a transfer of ships and gear (sec. 13). At most the Board is a party bound by the award and not a party to the award, and it is only a party to an award that can take proceedings under sec. 48. There is no evidence upon which the Court can find that the Union has as such had anything to do with the strike. The rules of the Union must be looked at to see whether any specific act is the act of the Union.

[ISAACS J. referred to *Ho Tung* v. *Man On Insurance Co.* (5).]

The acts alleged are as consistent with personal action on the part of the individual members as with action on the part of the Union. There is no evidence of acquiescence in or adoption of any of the acts which were done. As a matter of discretion the Court should not make an order, for the law is adequate to enforce compliance with the Act in view of the provisions of sec. 7A of the *Crimes Act* 1914-1915 (see sec. 11 of the *War Precautions Act Repeal Act* 1920).

Owen Dixon K.C., in reply.

Cur. adv. vult.

(1) (1922) 30 C.L.R. 570, at p. 578.
(2) (1901) A.C. 426, at p. 438.
(3) (1916) 2 A.C. 15, at p. 30.
(4) (1916) 2 K.B. 243.
(5) (1902) A.C. 232.

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April 9.

The following written judgments were delivered :—

ISAACS J. This is an application by the Australian Commonwealth Shipping Board under sec. 48 of the *Commonwealth Conciliation and Arbitration Act* for orders in the nature of an injunction and a mandamus against the Federated Seamen's Union of Australasia, a registered organization under the Act, and against the Sydney Branch of the Union, and also against various individuals named who are officers or members of the Union, and for an order that certain of the individual respondents be appointed to represent all other officers and members of the Union.

The object of the application is, as it necessarily must be, directed to *the future conduct* of the respondents. It is not to punish for past conduct, but to prevent either committing what it is alleged would be, or continuing what it is alleged already is, a strike against the service of the applicant by members of the organization encouraged or incited by the Union and the Sydney Branch and by the individual respondents. The acts sought to be restrained are said by the applicant to be contraventions of the statute and breaches of the award within the meaning of sec. 48 of the statute.

The application is resisted on the grounds (1) that the applicant is not a party to the award and therefore has no standing under sec. 48 to make the application, (2) that the facts do not establish a strike by the men themselves within the meaning of the Act or award, (3) that if there was a strike the organization itself as a distinct entity was not connected with it and did not incite or encourage it, (4) that the individual respondents did not take part in or encourage or incite the strike, (5) that the Branch is not an entity to be restrained.

Party to the Award.—The material facts are as follows :—The award was made in March 1924 in respect of three disputes, Nos. 124, 131 and 301, all of 1923. The two first were the subject of plaints filed in April 1923 and the last was the subject of an order of reference in November 1923. The two first disputes, therefore, took place before the commencement of the Act No. 3 of 1923 constituting the present applicant, the actual date of such commencement being 1st September 1923. The first of these disputes and the plaint founded on it named as a respondent " Commonwealth Government

Line of Steamers." That was the name selected by the organization to represent the owners of the line of steamers. The second dispute was by the Commonwealth Steamship Owners' Association as claimant and the Union as respondent, and appears immaterial. The third dispute was after 1st September 1923, and in that dispute the present applicant, then the legal owner of the line, was the claimant and by the statutory name given to the line, namely, "The Australian Commonwealth Line of Steamers." Both sides clearly treated the designation in each case as representing the owners of the Shipping Line whoever the owners might be. Consequently, when the three disputes came on to be heard in November 1923, and an award was asked on both sides as to matters in dispute, and when the award was drawn up, selecting the designation "Commonwealth Government Line of Steamers" as appropriate for all three disputes —and therefore appropriate for a period after 1st September 1923, when the present applicants were the legal owners—it is clear that both sides accepted the designation as indicating the present applicant, and treating it as having taken up the first dispute as its own, as well as originating the third. In these circumstances I apply the observations of Lord *Halsbury* in *Simmons* v. *Woodward* (1) quoted in *Commonwealth* v. *Melbourne Harbour Trust Commissioners* (2). The first objection consequently fails, and we have to consider the substance of the case.

The Strike.—The award provides in the usual way for a minimum rate of wages to be paid by the respondents to members of the organization for hours of labour and various other conditions of employment. Clause 41 of the award is as follows:—"(a) The claimant organization and each of its branches and its members are bound by the terms and conditions of this award. (b) The members of the claimant organization are justified in endeavouring without a strike to obtain different rates or conditions by agreement or by variations of the award by the Court. (c) The claimant organization shall not during the term of the award order, encourage or aid any strike or job control by any of its members. (d) The members of the claimant organization shall not during the term of the award strike or join in any strike to enforce rates or conditions

(1) (1892) A.C. 100, at p. 105. (2) (1922) 31 C.L.R. 1, at p. 17.

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disallowed by the Court, or exercise job control to enforce manning conditions not approved by the Manning Committee provided by the *Navigation Act*, or appointed by the parties to deal with the manning of vessels." It is plain, therefore, that for the organization during the term of the award—which is still current—to "order, encourage or aid any strike" is a breach of the award itself. "Strike" there is unqualified by any accompanying words or definition and must have the same meaning as it has in the Act. Consequently it includes "the total or partial cessation of work by employees acting in combination, as a means of enforcing compliance with demands made by them or other employees on employers and the total or partial refusal of employees, acting in combination, to accept work, if the refusal is unreasonable."

Those being the relevant obligations of the award, it will be convenient to state the material circumstances affecting the alleged contraventions of the Act and the breach of the award. One of the applicant's ships is called the *Dilga*. On 21st February this year, at Sydney, the applicant's officers at the appropriate place, engaged a crew for the vessel, including eleven men who in 1924 had been members of the crew of another of the applicant's ships the *Fordsdale*. Three of the men so engaged as trimmers for the *Dilga*, namely, Brown, Rodgers and Kampen were members of the Union. They did not sign on or respond when called to do so. Two other members,—McLean and Sutherland—refused to sign on because the *Fordsdale* men were engaged. On 23rd February the applicant's officers again attempted to engage men for the *Dilga*, asking for three able seamen. One member of the Union, Baker, declined unless the *Fordsdale* men were paid off. Although there were over 200 members of the Union present, none offered; but some called out "Discharge the *Fordsdale* men." One of the officers then called for two trimmers for the *Dilga*. Rodgers, previously mentioned, asked: "Is Campbell sailing on this vessel?" The answer being in the affirmative, Rodgers said "I will not sign on the ship if he is a member of the crew." O'Neil, one of the respondents to this motion, was then present and was then a vigilant officer of the Union. He said to the applicant's marine superintendent: "There are plenty of men, but it does not look as if they want

employment on the *Dilga*." On that day the applicant's general manager wrote to the Sydney Branch stating the refusals to engage, and asking whether there was any reason why officers of the *Dilga* could not pick members of the organization to fill the vacancies. The letter was not replied to. On 24th February the applicant's officers again attended at the appropriate place and endeavoured to engage three able seamen for the *Dilga*. There were about 200 men present apparently looking for employment, and none offered.

These facts establish a very strong prima facie case of a "total or partial refusal of employees, acting in combination, to accept work," and therefore of a "strike" as defined by the Act "if the refusal is unreasonable." That prima facie case is not rebutted, and an actual strike is proved.

Unreasonableness.—The condition of unreasonableness is part of the description of a strike by refusing employment, and the onus of proving the unreasonableness rests on the applicant. In view of the provisions of sec. 46 and some subsequent sections of the *Navigation Act*, I do not regard the three men who are said to have been "engaged," but who refused to "sign on," as coming within the first portion of the statutory definition of "strike." There was no "cessation" of work, because no work was begun nor was any work compellable. Their conduct falls under the same legal category as that of the others who refused even verbally to promise to enter into the statutory agreement. I therefore confine my consideration to the refusal to accept work, remembering that that refusal is still persisted in.

The issue of unreasonableness turns on the position of the *Fordsdale* men, and, in order to understand that position, we have to go back just twelve months. In February 1924 the *Fordsdale* was about to make its first voyage from Australia to Great Britain. The Sydney Branch balloted among its members to determine who, and who alone, should be allowed to sign on for the voyage. This system was opposed by the management. Jacob Johnson, one of the present respondents, was acting-secretary of the Branch, and he addressed a meeting of members at the Shipping Office, telling them that any members of the organization who signed on the vessel

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and were not selected by ballot would be looked upon as non-unionists. The result was that, with the exception of five, no member of the Union offered. These five, who included Campbell already mentioned, did offer, and were engaged as members of the crew of the *Fordsdale* and sailed with her. On the return voyage these five men tendered their contributions as members of the organization to the Union at various places, but were refused on account of the *Fordsdale* incidents. Campbell was summoned to attend a meeting of the General Executive of the Union at Sydney in August 1924, and there and then tendered his subscription to the secretary of the Sydney Branch, Thomas Fleming, another of the present respondents. It was refused. The outcome of the meeting was that two letters were written as follows :—" Executive Council of the Federated Seamen's Union of Australasia, 12 Kent Street, Sydney, 12/8/24.—Dear Sir,—This is to notify you that at a meeting of the Executive of the Committee of Management of the Federated Seamen's Union of Australasia held at the above address this day a resolution was passed suspending you from membership of the above Union. Should you consider it necessary to appeal against this decision, you may in the first place appeal at the next stopwork meeting of the branch to which you belonged at the date of this suspension for a review of the Executive's decision in this matter. Should you consider that your branch will not have dealt fairly with any appeal you may feel called upon to make, you may then appeal to the General Meeting of the Union which, circumstances permitting, will be held in the month of March 1925.—Yours faithfully, Thos. Walsh, president ; Thos. Fleming, vice-president ; William Hussack, vice-president ; William Raeburn, general secretary." " Executive Council of the Federated Seamen's Union of Australasia, 12 King Street (corner of King and Day Streets), Sydney, 12th August 1924.—The General Manager, Australian Commonwealth Shipping Line, O'Connell Street, Sydney, N.S.W.—Dear Sir,—I am advised by my Executive Committee to notify you that the seamen whose names are on the list attached hereto have been suspended from membership of the Federated Seamen's Union. We understand that certain of those suspended members have been in the employ of your Line and are, we

understand, intending to offer themselves for employment in one of your Line's steamers, particularly the *Fordsdale*. From the inception of the Line to date it has been a principle that members of the Seamen's Union only in the deck department and the stokehold and engine-room department should be signed on in those ratings. We hope that this principle will be recognized when engaging seamen for the *Fordsdale*. There are numbers of seamen of good character and ability seeking engagement, and any of these men will be ready to offer their services to man the *Fordsdale*. In view of this we trust that the principle so long recognized will be adopted by the Line in the manning of the *Fordsdale*.—Yours faithfully, (sgd.) William Raeburn, general secretary." Then followed a list of the names of suspended members, including Thomas Campbell and others. This meant that the General Executive of the organization in August 1924 adopted the attitude announced by Johnson in February 1924, that the *Fordsdale* men were to be regarded as "non-unionists" and that the members of the Union would not sail with them. It also meant that the Executive adopted in advance whatever decision the Branch might give. In October 1924 Campbell instituted proceedings in the Supreme Court of New South Wales against the organization and the Sydney Branch and against five of the present individual respondents, namely, Walsh, Fleming, Hussack, Raeburn and Johnson, claiming (*inter alia*) an injunction. On 31st October 1924 *Harvey* J. granted an interlocutory injunction whereby it was ordered that "the defendants and each of them their officers servants and agents be and they are and each of them is hereby restrained until the hearing of this suit or further order from continuing to assert proclaim or publish that the plaintiff is no longer a member in full standing of the defendant the Federated Seamen's Union of Australasia hereinafter called the organization or that he has been suspended from membership thereof and from interfering in any respects with the plaintiff as regards his obtaining or seeking to obtain employment in his vocation as greaser and from preventing him obtaining the same and from interfering with or preventing his enjoyment of the benefits and privileges to which the members (including the plaintiff) of the organization are entitled under the rules of the organization and from refusing to receive

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his subscription to the organization." On 17th November 1924 Campbell, and at later dates down to 14th February 1925 others of the five *Fordsdale* men, tendered their subscriptions to the Union. These were received, but the receipts stated, in effect, that the subscriptions were received only in compliance with the injunction order. So far there was obedience to the order, because it did not profess to do more than preserve the status of Campbell until the final determination of the suit. But, it will be observed, the order was very explicit as to that status in the meantime. Apart from the receipts of subscriptions, there has been no retiring from the position already stated as taken up by the Executive of the organization respecting the *Fordsdale* men. On the contrary, at some period before 14th February 1925—probably in December 1924—it appears that a resolution had been passed by members of the Union in Sydney placing what has been called a "ban" on *Fordsdale* men, limited to ten years' deprivation of employment on the Commonwealth Line for those who had also joined the *Fordsdale* and afterwards left it, but perpetual as to Campbell and the others whose contributions were received as mentioned subject only to their being able to "justify their actions." This was expressly stated by Johnson on 14th February 1925 at the organization offices to Short, one of the men banned for only ten years. On 24th February, at a meeting of the Union to hear the appeal of Short and the other "*Fordsdale*" men, the "ban" was adhered to, and Short's appeal was rejected. The letter of 23rd February above referred to from the management of the Line was read by Johnson, He said: "We have not replied to this letter, and we do not intend to." Some members in the body of the hall where the meeting took place said: "They know why there is no crew for the *Dilga*; why are they so ignorant?"

These facts have been so fully stated for several reasons: first, to test the issue of unreasonableness as to the strike itself; next, to ascertain whether, judging from the attitude of the Union or the individual respondents in the past, it is to be inferred that in the future the Union or the individual respondents will, unless restrained, "encourage" or "incite" the members of the Union to "strike" in the necessary sense.

We were invited by Mr. *Foster*, who certainly made the best of a very difficult case, to regard the action of the members of the Union in refusing the employment from their standpoint. I entirely agree that, in order to judge of the reasonableness or unreasonableness of a strike, the standpoint of the employees is one essential consideration. If, for instance, it were from apprehension of danger to life or limb, or unwholesome surroundings, or criminal companionship of other employees, or tyrannical treatment, a refusal to accept the work might be easily justified. But the standpoint of the employees is not the sole consideration. The situation of others, whether employers or fellow members, or even the necessities of the public, may well enter into the problem, And certainly the decision of a Court of law on the point, unreversed and unchallenged, may be a most decisive factor. Mr. *Foster* urged that it was not unreasonable to refuse to work with Campbell and others who, after agreeing to stand by the result of the ballot and running their chance, had gone back on the mutual bargain and displaced some of their fellow unionists. That view also is not unnatural or devoid of weight. It does not in the least make the ballot system that was adopted defensible when the fair interests of the employers are given their proper consideration; but as between fellow employees it must create an unpleasant feeling of disloyalty and of being left in the lurch.

Whatever ultimate force, however, there might have been in that contention had the matter rested there—and as to that I pronounce no opinion—the injunction order of *Harvey* J. entirely displaces it, and cuts away all legal justification for making Campbell's exclusion a reasonable condition of accepting the employment offered. It is that which has decided my mind on this branch of the case, for Campbell's position is typical of all the *Fordsdale* men as far as this case is concerned. The order of the learned Judge was obeyed in one respect only, namely, by accepting the subscription. That was the least substantial part, and was guarded, I do not say improperly, by the terms of the receipt given. But the substantial part of that order, namely, the part restraining the Union, the Sydney Branch and the five individual respondents "from interfering in any respects with the plaintiff" (Campbell) "as regards his obtaining or

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seeking to obtain employment in his vocation as greaser and from preventing him obtaining the same," has been openly disregarded and contravened. "The injunction," as was said by the Privy Council in *Eastern Trust Co.* v. *Mackenzie, Mann & Co.* (1), "was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged." Thus, to refuse to obey the order, unappealed from, of the Supreme Court of New South Wales, leaves the refusal to accept employment on 21st, 23rd and 24th February as a matter of law without any reasonableness whatever.

Probability of Strike in Future.—I have stated what took place in the past. The first question I have to answer for myself, before determining whether an injunction is proper, is this: "Is a strike likely to continue?" I desire at this point to make one or two observations on the special nature of a case of this character. It is not an ordinary instance of litigation. It is a special process in aid of a great legislative remedy for industrial unrest. The Act by which this process is created takes as its very first principle the amicable settlement of all industrial strife by the parties themselves. It is only failing that, that intervention by arbitration is provided. And this proceeding is incidental to arbitration. I have therefore deemed it my duty on more than one occasion to carry out the prime policy of the Act by suggesting an amicable arrangement for the future. I do not speak of compromising anything that is to be dealt with as a past event constituting a right or a wrong; but where, as here, the direct question is as to what is to happen in the future, the position is that which I have stated. An amicable arrangement between the parties for the future would have entirely altered this case, no matter what had happened in the past. In view of the enormous interests involved—interests that directly concern both the nation and the vast organization of employees, and incidentally but very closely involve in every direction industries of Australia—I sincerely regret a way has not been found to arrive at a mutual understanding.

One circumstance, however, must not be overlooked or minimized. The source of the trouble we are dealing with was the balloting system. Mr. *Foster* told us that that originated in very special

(1) (1915) A.C. 750, at p. 760.

and pressing circumstances which have ceased to exist. He told us also, that that system has been abandoned. I am prepared to accept that statement. I find no trace of balloting in the events relating to 21st, 23rd and 24th February 1925. But, though the trouble so originated, the outcome was the suspension and "banning" of the *Fordsdale* men. And that—involving, as I have said, an open flouting of the unquestioned decision of one of the highest Courts of the country—is persisted in. That makes it clear beyond the possibility of a doubt that the strike within the statutory definition will, unless restrained, continue in the future.

Is it also a proper inference that, unless restrained, the organization will "incite" or "encourage" that strike? It is, of course, true that the act of a "branch" is not equivalent to the act of "the organization" (see *Davidson* v. *Australian Society of Progressive Carpenters and Joiners, Melbourne Branch* (1)). Nor is the act of an individual member or any number of individual members, as such, the act of the organization. But it does not follow that the act of an individual member or of individual members, or of a section of the members in a specified locality and called a "branch," may not by conjunction with other circumstances be shown to be the act of the whole Union. It must always be remembered that an "organization" such as the respondent organization is the creation of the Act and simply as incidental to its great purposes. It is permitted to come into existence for the very purpose, not of making the policy of the statute under the Constitution more difficult of attainment, but of assisting to carry that policy into effect. Its primary function is to help in the effort to maintain industrial peace as a convenient instrument to secure for those whose interests it represents industrial justice where necessary, but to secure that justice according to law. Those who become members of such an organization, and particularly those who undertake the duty of managing its affairs, whether in supreme or in subordinate authority, take a part more or less responsible in an association which is not merely a convenient method of obtaining their just rights but is also a public instrument for effectively administering an important statute of public policy for the general welfare. Such an

(1) (1917) 23 C.L.R. 143.

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organization secures rights and privileges, but it has also duties. I cannot accept the view presented on behalf of the respondents that what has happened in this case, and therefore what unless restrained is sure to happen in the future, is in nowise to be attributed to the organization. It does not follow that, because no rule can be pointed to which expressly or even impliedly says that the act of a member, or of a combined body of members, or of a branch, shall be deemed to be that of the whole organized body, the Union is absolved. Nor does it follow that, because there has been no formal resolution of the executive officers, or of the Committee of Management, or of the members in meeting assembled, the acts complained of have not had the authority, or sanction, or approval of the executive authority or the Union as a whole. Irregular acts are not likely to be regularly authorized or encouraged. Words are not always necessary to evidence authority or encouragement. Each case must depend on its own circumstances as to whether conduct, which may be either active or passive, is sufficient to prove the necessary authority or encouragement. This organization, to begin with, obtained a very valuable award. But by clause 41 it was expressly directed against a strike. When the circumstances above mentioned are viewed in succession, the number and close connection of the facts, the participation in some of them by the executive officers, the publicity of the material events, the disorganization thereby of public services, the formal and continued defence by the organization itself and some of the individual respondents in the Supreme Court of New South Wales in the Campbell suit, the open assertion that the strike was a step for the Union generally, and the attitude of the respondents in this proceeding, leave no doubt in my mind that the organization and some of the individual respondents—at all events in their official capacity—have approved and, unless restrained, will approve of the course complained of, namely, an unreasonable refusal of employment amounting to a strike.

It is not a sufficient answer in such circumstances that no actual personal intervention by the Executive is proved. The executive officers of the Union, by rule 51 of the Rules of the Union, "*shall also exercise general supervision over the affairs of the Union.*" I

assume, as I am bound to assume, that they performed their official duty in that respect. But, if that be assumed, how could they help knowing, or how could the whole Union help knowing, of the strike and its causes and that the order of *Harvey* J. was thereby being openly disobeyed by the Union? And, as the whole ground of this proceeding is to avert *future* breaches of the law, the attitude of the respondents upon this application is of the utmost importance. Even in the case of ordinary companies, where the Court is merely concerned with the past as determining rights and liabilities, the doctrine of adoption has received clear exposition. In one case (*Phosphate of Lime Co.* v. *Green* (1)) it became a question as to whether shareholders who had not expressly acquiesced in a compromise by directors which was *ultra vires* of the directors had nevertheless actually assented by their silence. The Court held they had, and principally on the ground that the facts were known, that information was available, that abstinence from seeking information was strong evidence of personal acquiescence and adoption and that the benefit of the directors' act could not be silently accepted without assuming the corresponding liabilities. One passage in the judgment of *Brett* J. (2) is: "It is sufficient to show that facts were made known to the shareholders, into the effect of which they might and ought to have inquired, and to which they ought to have objected at the time, unless they intended to adopt the transaction." That case, with others of a like nature, was approved by the Privy Council in *Ho Tung* v. *Man On Insurance Co.* (3), where registered articles of a company, even though not formally adopted by special resolution as the law directed, were held to bind the company as fully as if such a resolution had been passed.

Considering the whole circumstances, would not every member of the Union, from the attitude partly positive and partly negative taken up by the Executive, have the fullest reason to believe that the Executive and the Union as a whole approved of and were encouraging the strike? I can conceive of no reasonable answer but one distinctly affirmative. If so, then accepting the definition

(1) (1871) L.R. 7 C.P. 43.
(2) (1871) 7 L.R. 7 C.P., at p. 63.
(3) (1902) A.C. 232.

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of " encourage " in *R.* v. *Most* (1), the Union did " encourage " the strike. There *Huddleston* B. says: " ' Encourage,' which is to intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident."

The organization therefore has, in my opinion, conducted its affairs so as to " encourage " in the past, and, what is vital here, so as to satisfy my mind that, unless restrained, it will continue to encourage in the future, a strike by " the unreasonable total or partial refusal of employees, acting in combination, to accept work " if Campbell or any of the other *Fordsdale* men are employed. I regard the strike as one within the Act because there was a demand by the men upon the Management to pay off the *Fordsdale* men, and the strike was therefore " in relation to an industrial dispute," because it was on account of an " industrial dispute." There must be no misconception as to this. The demand of the men in Sydney to pay off the *Fordsdale* men did not create the inter-State industrial dispute. That was merely adhering to and enforcing the then existing industrial dispute that had arisen between the Union and the Management long before and that still continued.

Inter-State Industrial Dispute.—That there was an industrial dispute not confined to a single State is transparent, and was not even contested. That the strike at Sydney was on account of an inter-State industrial dispute was not contested, and appears to me to be free from any doubt. It is all-important in this connection to clear the mind of any confusion between the *strike*, which is a forbidden method of settling an industrial dispute, and the *dispute* itself. A strike may be confined to one State; but if it is " on account of " an inter-State industrial dispute, it is prohibited: and that was precisely the case here. The dispute, which commenced long before the strike, was between the organization as a whole and the Shipping Line, and was in relation to the whole Line and not confined to Sydney. The letter of 12th August 1924 above quoted is the *demand*. It will be seen from that letter that after notifying the suspension of Campbell and others from " membership of the Federated Seamen's Union "—that is, the whole organization —reference is made to the intention of some of those suspended

(1) (1881) 7 Q.B.D. 244, at p. 258.

members to apply for employment "in one of your Line's steamers *particularly* the *Fordsdale*." These words show that it is not confined to Sydney sailings, but extends to any "one" of the ships. Then the letter in effect insists, or at all events distinctly requests in no uncertain tones, that only "members of the Seamen's Union" are to be employed in "the Line"—that is, anywhere where the Line runs. "Members," of course, excluded Campbell and the other suspended men. That being the demand, there has been a constant and definite *refusal* to accede to the demand. In other words, there has existed, from August 1924 to February 1925 and after, an inter-State industrial dispute. The refusals at Fremantle, Adelaide and Melbourne, as well as Sydney, to recognize Campbell and others indicate the determination of the Union as a whole to persevere in the demand. The attitude of the Union in the Supreme Court of New South Wales is again the most signal proof of intention to maintain the demand. The qualified receipt given is still further proof, and the position taken on this argument shows that down to this moment the letter of 12th August 1924 is persisted in. The refusal of the Management of the Line to give way is also clear down to this moment. The retention of the suspended men and the attitude of the Shipping Board before this Court are equally proof that the refusal persists. How can it be doubted that there was and is a demand in the nature of an ultimatum on the part of the Union made upon the Shipping Board that the suspended *Fordsdale* men should not be employed, and that that demand has been persistently refused? If that is not an industrial dispute (and, if it is, it necessarily extends beyond the limit of one State), then many awards have, in my opinion, been made without jurisdiction. For myself, looking at the realities, I am unable to entertain any doubt about it, and in the interests of industrial peace by arbitration I am not prepared to hold that the arbitration tribunal would not have had, and would not even now have, jurisdiction to settle the very point in contention. I need hardly say that I express no opinion whatever as to who was in the right or was in the wrong in respect of the demand or the refusal. That is not within my province. I am concerned only with the undeniable fact that an all-Australian dispute existed and still exists between

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the Shipping Line and the whole organization as to whether the suspended *Fordsdale* men should be employed on the Commonwealth ships. The actual *strike* took place in Sydney. That was immaterial. It might have been in Melbourne, or Adelaide, or Fremantle, wherever the *Dilga* might happen to be. But the *strike*—necessarily at the place where the *Dilga* was—was plainly and avowedly "on account of" the standing industrial dispute extending over the whole of Australia. *The Union raised the dispute, and still maintains it.* The Sydney Branch members loyally acted in accordance with the demand of the General Committee of Management by striking rather than work with the men suspended by the official leaders of the Union acting within their general authority. The Union officials controlling its affairs were as well aware of these facts as was Nelson of his commander's signal at Copenhagen, and their attitude, already stated, could only be reasonably understood as an approval and encouragement of the course taken by the Sydney Branch and its members in obedience to the demand of the Executive.

But I am not prepared to base my decision granting the order on a "contravention of the Act," since I defer my final opinion as to the extent of those words in sec. 48. I rest my decision on the fact that the Union's encouragement of the strike is a breach of the 41st clause of the award—the word "strike" there not being limited to a strike in relation to the industrial dispute pronounced upon by the award, but extending to any inter-State strike against the respondents.

The order in the nature of an injunction should be granted against the organization.

Individual Respondents.—The individual respondents undoubtedly took some part in the events relevant to the strike or its causes. But I am prepared to believe that they did so in some representative capacity; and I am further prepared to believe that after the decision of this Court they will respect it. So believing, I am of opinion that justice does not require that they be named personally and individually as persons enjoined. It will be sufficient that the usual, and indeed the almost invariable, course be followed of restraining, not merely the organization but also its "officers,

servants, and agents" (see *Seton on Decrees*, 6th ed., p. 521). Branch officers are of course officers of the organization though subordinate officers.

Learned counsel for the applicant said he desired individual restraint to meet the doubt as to the final portion of sec. 48. Without entering more minutely upon the construction of that provision, I am clearly of opinion that when "officers, servants, and agents" are expressly added in the order, every person who answers that description is a "person to whom such order applies." And every such person though not personally and individually named is personally liable if he contravenes the order. Further, it is only fair to all concerned to say that I hold out no encouragement for thinking that personal responsibility created by the order could be avoided by attempting to discard official character and assuming to act on individual responsibility.

Representative Order.—The order asks that some of the named respondents be appointed to represent other members of the Union. I am of opinion this should be refused. It is entirely different in principle from adding "officers, servants, and agents." The latter identifies the classes mentioned as classes and as acting officially for the principal respondent; the representative order sought is based on separate identity and independent personal action. There is no real analogy between the ordinary representative order in equity, founded on the notion of convenience in deciding upon class interests in property, and the present case, which deals with individual responsibility for what in the event of disobedience would be in the eye of the law a criminal personal act punishable perhaps by imprisonment with hard labour.

Form of Order.—In my opinion the order of the Court should, when formally drawn, be sufficiently particular to indicate the actual thing proved to be fairly apprehended, and therefore in effect to restrain the organization and all its officers, servants and agents from encouraging its members or any of them in combination to strike by refusing to accept employment or by ceasing work in the service of the applicant by reason of the employment by the applicant of Campbell or any other of the men suspended from membership of the Union for engaging on the *Fordsdale*. This, in my opinion,

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is, in the circumstances, proper compliance with the established authorities relating to injunctions. I refer to *Low* v. *Innes* (1), *Parker* v. *First Avenue Hotel Co.* (2), *J. Lyons & Sons* v. *Wilkins* (3) and *Attorney-General* v. *Staffordshire County Council* (4). This is the course recognized by *Seton on Decrees*, 6th ed., at pp. 520, 521, and *Kerr on Injunctions*, 5th ed., pp. 662, 663.

HIGGINS J. 1.—In my opinion the corporation known as "The Australian Commonwealth Shipping Board," created by the Act No. 3 of 1923, is bound by the award made on 10th March 1924. The award purports to bind "The Commonwealth Government Line of Steamers," under which name the Government carried on the operations until the Act No. 3 of 1923. In this name the award followed the plaint, which was filed before that Act. The President must have found that both parties recognized under these words the Government as owner and manager of the line; and he had the duty to disregard technicalities, and make his awards on the substantial merits of the case (sec. 25 of the *Commonwealth Conciliation and Arbitration Act*). Indeed, I do not see why he could not make the award apply to a person under a nickname, subject to the risk of a mistake.

I am also of opinion that clause 41 of the award must be treated, on the evidence before us, as valid and binding on the Union. The award there orders (*inter alia*) that the claimant organization shall not during the term of the award encourage or aid any strike or job control by any of its members. This clause probably adds nothing to the statutory law (*Commonwealth Conciliation and Arbitration Act*, sec. 8; *Crimes Act* 1914, sec. 5); and it is curious that such a clause should be the outcome of a dispute in which the employees' union is claimant. There must have been a log of demands; and unions usually do not ask for restraint on themselves. But as neither the plaint, nor the reference into Court, nor the log of demands, has been put before us, in evidence or otherwise, it is our duty to assume that this clause in the award was within the ambit of the dispute, and valid.

(1) (1864) 4 DeG. J. & S. 286, at p. 295.
(2) (1883) 24 Ch. D. 282, at p. 286.
(3) (1896) 1 Ch. 811, at p. 826.
(4) (1905) 1 Ch. 336, at p. 342.

2.—I concur with my learned brothers in the view that there was a strike in fact of men who were members of the Union in Sydney. About 200 members, evidently acting in combination, refused to accept work on the *Dilga* unless men, who had previously shipped in the *Fordsdale* contrary to a resolution as to balloting, were dismissed by the Commonwealth line; and this refusal of work was, in my opinion, unreasonable. It was an unwarranted interference with the fundamental right of employers to select whom they wish as employees. There has been, therefore, a refusal of employees, acting in combination, to accept work, and the refusal is unreasonable within the second meaning of "strike" in sec. 4; and the Union is guilty of a strike if, for the purpose of enforcing compliance with the demands of any employees, it ordered, encouraged, advised or incited its members to refuse to accept employment (sec. 8 (1)). The Union is guilty if even its Committee of Management ordered, encouraged, &c., this refusal; or if an officer or officers of the Committee of Management ordered, encouraged, &c., this refusal, unless the tribunal is satisfied that the Committee of Management was not cognizant of the matter (sec. 8 (2)). But there is not any evidence—not one tittle of evidence has been suggested—that either the Union or the Committee of Management or any officer of the Committee of Management gave such order or encouragement, &c. There is some evidence against some officers of the Branch; but what the Branch officers did does not, for the purpose of sec. 8, affect the Union. Any writing or words or conduct of the Branch or its officers would be as inoperative as their signature to a cheque on the bank of the Union.

Even if this application for an injunction be treated as based on clause 41 of the award instead of on contravention of this Act, the position is the same. The Court of Conciliation, acting under this Act, must be assumed (in the absence of express words to the contrary) to use the words "strike" and "encourage or aid any strike" in the same sense as they have in the Act; otherwise, the refusal in combination to *accept* work would not be a strike at all. The ordinary meaning of strike is confined to ceasing work—"downing tools."

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I do not forget the two letters of 12th August 1924. These show that officers of the Committee of Management backed up the Sydney Branch in its resolution of February 1924 as to ballot for employment on the *Fordsdale*. The general president, two vice-presidents and the general secretary wrote to Campbell, who had taken employment on the *Fordsdale* without ballot, that he had been suspended from membership of the Union: and the general secretary (Raeburn) sent to the general manager of the Australian Commonwealth Shipping Line, a list of the men who had been suspended from membership. In this letter with the list Raeburn referred to some of the suspended members as seeking employment on the *Fordsdale*, and expressed the hope that the principle of employing only members of the Union would be still adopted. This hope involved a wish that the suspended members should be excluded from employment on the *Fordsdale*. But this conduct of the Committee of Management and its officers does not in itself amount to ordering or encouraging or advising or inciting the members to refuse to accept employment on the *Dilga* or elsewhere. For aught that appears, the men who refused in combination to accept employment may have taken this extreme step on their own initiative, or even against the advice of the officials of the Committee of Management. It must be difficult, often, to prove a connection between the action taken by the members and the attitude of the Union; but the difficulty of proof does not relieve from the necessity of proof. It may be that the proof would have been forthcoming if the applicant had not failed to cross-examine on the affidavits. As I said in the case of *Metropolitan Gas Co. v. Federated Gas Employees' Industrial Union* (1), it is not enough for the applicant to show even that the course taken by the Committee of Management is consistent with encouraging the strike; in my opinion it must be shown that it is inconsistent with any other rational conclusion (*R.* v. *Hodge* (2)). Anyone who knows the want of discipline within unions in recent times, the insubordination of members and often of branches, the contempt with which self-willed members treat their own elected officials, will readily admit that it is not justifiable, without specific proof, to treat the acts and defaults of the members as sanctioned or encouraged by the union.

(1) *Ante*, at pp. 460, 461. (2) (1838) 2 Lew. C.C. 227.

The position is, shortly, that the dispute was as to the demand of Sydney members for the dismissal from the *Dilga* of the suspended members; the effort to prevent them from being *employed* on the *Fordsdale* had failed; and the strike consisted of the refusal of Sydney members, in combination, to accept employment in the *Dilga*, in order to gain their cause in this dispute. There is no evidence whatever that the Union or the Committee of Management encouraged this strike.

But there is another reason why this application should fail. For there is no dispute extending beyond the one State of New South Wales. The fact that counsel for the Union did not take this point does not affect our duty not to exceed our jurisdiction. The dispute with the Government Line was as to the claim of the Union that the suspended members be dismissed from a vessel; and that dispute was confined to Sydney—the port where the crew were to be hired and from which the vessel was to sail. The ballot, of course, was necessarily restricted to one port, Sydney, but we must look at the issue ultimately in dispute. There is not in the evidence any mention of members in other States. The refusal of officials in Perth to accept a suspended man's subscription to the Union has nothing to do with the demand for the dismissal of men actually employed. The men who refused in combination to accept employment refused in Sydney. The men in other States made no demand on the employer as to dismissing the suspended members. To say that the men in other States made the demand because the Union made it for all its members without distinction seems to me to beg the whole question—*Did* the Union make the demand? If the Court of Conciliation were to treat itself, on such materials as are before us, as having jurisdiction over the dispute, it is easy to imagine the speed with which it would be prohibited from exceeding its jurisdiction. As unions have not the privilege of access to the Court of Conciliation unless the dispute extend to more than one State, they cannot be punished under the Conciliation Act for a strike in a one-State dispute. Such a strike is not illegal under the common law or any statute.

In my opinion the application should be dismissed.

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STARKE J. The Commonwealth Court of Conciliation and Arbitration made an award in March 1924 in relation to certain industrial disputes then pending before it between the Federated Seamen's Union of Australasia, an organization registered under the Arbitration Act, and a number of steamship owners. The Commonwealth Government Line of Steamers was named as a party to these proceedings, and *eo nomine* bound by the award. The Union, and each of its branches, and its members were also, by an express provision of the award, bound by it.

One of the terms of the award prescribed that the organization "shall not during the term of the award order encourage or aid any strike . . . by any of its members." Another was that the members of the organization "shall not during the term of the award strike or join in any strike to enforce . . . conditions disallowed by the Court." This award is still in full force and effect. Further, the Arbitration Act by sec. 6 provides that no person shall on account of any industrial dispute do anything in the nature of a strike, and by sec. 6A that no person or organization bound by an award of the Court or entitled to the benefit of such an award shall do anything in the nature of a strike. Then sec. 8 enacts that any organization of employees which, for the purpose of enforcing compliance with the demands of employees, orders, encourages, advises or incites its members to refuse to accept employment shall be deemed to be guilty of a strike. And it is deemed to have ordered, encouraged, advised or incited its members to refuse to accept employment if (a) the Committee of Management of the organization has ordered, encouraged, advised or incited members of the organization to refuse to accept employment, or (b) an officer or officers of the Committee of Management has or have ordered, encouraged, advised or incited members of the organization to refuse to accept employment, unless the Court before which the proceedings are brought is satisfied that the Committee of Management was not cognizant of the matter.

The Australian Commonwealth Shipping Board, in which are vested the Commonwealth Government Line of Steamers and also their management and control (*Commonwealth Shipping Act* 1923, No. 3), has applied to this Court, pursuant to sec. 48 of the Arbitration

Act, for an injunction restraining the organization, its branches and certain named members, from committing breaches of the award and from contravening the Act.

The Commonwealth Government built a steamer called the *Fordsdale*, and, in the early part of 1924, required a crew for the maiden voyage of the vessel to England. But at a stopwork meeting of members of the Union held in Sydney in February 1924, a resolution was passed that a ballot be taken for the crew of the *Fordsdale*. Raeburn, the general secretary of the Union, states that the vessel was in an outlying position in Sydney Harbour, and that the resolution was passed "in order that a great number of men should not be kept waiting about in the hope of getting employment on the ship." But the subsequent acts of the organization and its members establish, beyond all reasonable doubt, that the resolution was an attempt to deprive the owners of the *Fordsdale* of the right to select a crew and to foist upon them a crew selected or balloted for by the Union or its members. The owners' representatives refused to accept as a crew the men successful in the Union ballot, and proceeded to pick up a crew selected by themselves, which included men who had been unsuccessful in the ballot, but who had not minded "waiting about in the hope of getting employment on the ship." The ship sailed for England with these men; but when she returned to Australia their subscriptions as members of the Union were refused, and in August 1924 they were suspended from membership of the Union. Walsh, the general president, Fleming and Hussack, vice-presidents, and Raeburn, the general secretary, signed the notice of suspension. Further, in the same month, the manager of the Commonwealth Line of Steamers was informed of the fact that these men had been suspended, and was reminded that "from the inception of the Line to date it has been a principle that members of the Seamen's Union only in the deck department and the stokehold and engine-room department should be signed on in those ratings." What is that but a demand that the principle should be observed by the owners of the Shipping Line throughout Australia and in every State of Australia?

The next step was taken when Campbell, one of the *Fordsdale* men, obtained in October 1924, despite the opposition of the Union

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and its officers, an interim injunction from the Supreme Court of New South Wales, restraining the Union and several of its officers from asserting that he was no longer a member of the Union, from interfering in any respect with his obtaining or seeking to obtain employment, from interfering with or preventing his enjoyment of the benefits and privileges of the members of the Union, and from refusing to receive his subscriptions. Though the Union accepted subscriptions in compliance with the order of the Court, the position of Campbell and the other *Fordsdale* men who had been suspended was but little improved. Another stopwork meeting of the members of the Union was held in Sydney in December 1924, and a resolution was passed that the members of the *Fordsdale* crew should not be allowed to work on any vessel of the Australian Commonwealth Line of Steamers for ten years. And apparently it was agreed to treat Campbell as a non-unionist and to refuse to sail with him. It is clear beyond doubt, since that date, that no members of the Seamen's Union will sail with Campbell in any ship whatever, and that no member of the Union will sail with the other *Fordsdale* men in any ship of the Commonwealth Line so long as the ban of ten years subsists. And this policy is enforced by the refusal of the Union men, acting in combination, to accept work if the *Fordsdale* men are employed. This action was but a method of compelling compliance with the demand already made upon the owners of the Shipping Line by the Committee of Management of the Union. And when the owners rejected the demand—as is clear from their conduct—then an industrial dispute extending beyond the limits of any one State existed, and was within both the constitutional power of the Commonwealth and the jurisdiction of the Arbitration Court. So far from the Arbitration Court being prohibited in such a case, this Court would, as its decisions clearly show, support that Court in the exercise of its jurisdiction. Only a misunderstanding of facts or a misapplication of law could lead to a contrary conclusion.

Now, a "strike," as defined in the Arbitration Act (sec. 4), includes the total or partial refusal of employees acting in combination to accept work, if the refusal is unreasonable, and the word must be given the same meaning in the award (see *McCawley* v. *The King* (1)).

(1) (1920) A.C. 691, at pp. 716-717.

The facts already narrated clearly establish that the employees in the shipping industry, members of the Seamen's Union, acting in combination, did refuse to accept work in the Commonwealth Line of Steamers unless the *Fordsdale* men were excluded. If an industrial dispute extending beyond the limits of any one State exist, the Parliament of the Commonwealth has ample power to prohibit a strike in that dispute in any place within its jurisdiction. The strike, in other words, need not be a strike extending beyond the limits of any one State, though the industrial dispute must be of that character. And so also the Parliament may enable the judicial organs of the Commonwealth to restrain organizations and persons from entering upon or committing any such strike. There would be no difficulty in the present case, however, even if the strike must be of an inter-State character, for it is clear to my mind that the refusal to accept work is not confined to the State of New South Wales but operates throughout and in every State of Australia. It is equally clear, I think, that this refusal to accept work is unreasonable: it is simply an attempt to coerce the Commonwealth Government and the Australian Shipping Board into compliance with the Union's demand by the refusal of work with *Fordsdale* men. Such conduct could not, in my opinion, be reasonable in any circumstances, and cases such as *Giblan* v. *National Labourers' Union* (1) and *Sorrell* v. *Smith* (2) suggest that it is an actionable wrong. Moreover, it is in flagrant opposition to the interim injunction granted by the Supreme Court of New South Wales. It may be that the Union and some of its officers and members are in contempt of the Supreme Court, but that is a matter for that Court and does not directly concern this Court. It is quite impossible, however, to regard a refusal to work as reasonable in such circumstances. There has therefore been, in my opinion, a "strike" within the meaning of the award. It is unnecessary, for practical purposes, to determine whether there has been a strike within the meaning of the Act. The construction placed upon secs. 6 and 6A of the Act in *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (3) may settle the question, but it need not be resolved in this case.

(1) (1903) 2 K.B. 600. (2) (1923) 2 Ch. 32. (3) *Ante*, 449.

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The Union—the organization—is not an employee: it does not work or refuse work. Nor are the individual defendants—officers of the Union—employees, so far as the evidence goes: they do not accept work on ships—they carry on the executive functions of the Union. The charge is not that the Union or the individual defendants struck, or refused to accept work, but that the Union and these individuals ordered, encouraged, advised, incited or aided members of the Union to refuse to accept work, contrary to the award. It was argued that the acts complained of in this case were acts of the Sydney Branch and not acts of the Union, and reliance was placed upon *Waterside Workers' Federation of Australia* v. *Burgess Brothers Ltd.* (1), *Davidson* v. *Australian Society of Progressive Carpenters and Joiners, Melbourne Branch* (2), and *Commonwealth Steamship Owners' Association* v. *Federated Seamen's Union of Australasia* (3). Again, it was urged that the refusal to work was the act of individual members of the Union contrary to and in spite of the Committee of Management. I cannot agree with these arguments. The acts and omissions proved establish "such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts" and omissions "were the outcome of pre-concert" or are "manifestations of mutual consent to carry out a common purpose" on the part of the individuals who refused to accept work, the Committee of Management, and the officers of the Sydney Branch of the Union (see *The Vend Case* (4)). The resolution at the stop-work meeting, in February 1924, that a ballot should be taken for the crew of the *Fordsdale* was promptly acted upon by Jacob Johnson, the assistant secretary of the Sydney Branch, who informed members of the organization that any of them "who signed on the vessel and were not selected by the Seamen's Union by ballot would be looked upon as non-unionists." Shortly after the *Fordsdale* returned from her voyage to England, Walsh, the general president of the Union, Fleming and Hussack, vice-presidents, and Raeburn, the general secretary, suspended the members of the Union who had ignored the ballot resolution,

(1) (1916) 21 C.L.R. 129.
(2) (1917) 23 C.L.R. 143.
(3) (1923) 33 C.L.R. 297.
(4) (1911) 14 C.L.R. 387, at p. 400.

and the manager of the Commonwealth Government Line of Steamers was notified of this action, and it was in substance demanded that these men should be treated as non-unionists and refused work. These were acts within the capacity of the organization, and it cannot escape responsibility for them by suggesting that they were not regularly done or that the procedure set forth in the rules of the organization was not strictly followed (cf. *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1)). Moreover, the acts show how the organization conducted or carried on its affairs, and reveal a clear intent to punish the *Fordsdale* men for disobedience of the ballot resolution. Further, Casey, a former acting-secretary of the Sydney Branch, and Manning, a former official of the Sydney Branch and a member who acted as chairman of the meeting of members in Sydney in February 1925, have allowed the truth to peep out in an affidavit filed on behalf of the Union. They swear that they do not take any active part in the management or conduct of the affairs of the said organization. "*The business and policy of the Union is laid down by the members in meetings assembled at the monthly stopwork meetings.*" When Campbell, one of the *Fordsdale* men, attacked the resolution suspending him, it was promptly justified by the organization. And, when the interim injunction was obtained, the resolution of December 1924 was immediately passed, at another stopwork meeting—that the disobedient members of the *Fordsdale* crew should not be allowed to work on any vessel of the Commonwealth Line of Steamers for ten years, and, apparently, that Campbell should be treated as a non-unionist. Johnson, the assistant-secretary of the Sydney Branch, was, according to the affidavit of Ernest Terence Short, very active in support of this resolution and in advising members of the Union how to act upon it. And we find the members of the Union acting strictly in support of the resolution and refusing to accept employment with the *Fordsdale* men.

What of the Committee of Management of the Union? It consists of the general president and the general secretary, together with the secretary of each branch of the Union. According to the Rules of the Union, which have been so stressed in this case, it is the

(1) (1895) 1 Ch. 629, at p. 633.

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Starke J.

duty of the executive officers of the Union to exercise general supervision over the affairs of the Union (r. 51), and of the general president to direct its operations, and, between meetings of the Union, to take immediate steps to give effect " to all resolutions of the members of the Union in *any meetings* of the Union " (r. 52). Now, a valuable ship was laid up because of the actions of a large number of members of the Union, and the trouble was likely to extend to other ships of the same Line, with a probable loss of employment and of wages to many members. Yet the Committee of Management, which was so active in disqualifying the *Fordsdale* men for disobedience of the ballot resolution, was suddenly struck with paralysis when it was its duty to speak and act decisively in relation to the resolution of the second stopwork meeting banning the *Fordsdale* men and refusing to accept work with them. It is not pretended that the Committee of Management did not know the facts or that it has ever disowned or expressed disapproval of the resolution of the stopwork meeting or of the action of the members of the Union in refusing work. Inaction on the part of the Committee of Management indicated to members of the Union who refused to accept employment that their action was countenanced by, and had the approval and support of, that Committee. Express approval or encouragement would have been dangerous, for the Arbitration Court might deprive the Union of its award and it might be otherwise penalized. Hence silence was advisable, and it was hoped that Justice would be so blind that she could not see through the scheme. For myself, I have little doubt that the Committee of Management and various branch officers of the Union, particularly Johnson, organized the strike and have always approved, encouraged and supported it. It is quite impossible in the circumstances of this case to accept the assertion of Walsh, the general president, and of Raeburn, the general secretary, that neither the executive nor they themselves as individuals have encouraged the strike.

Two minor matters remain for consideration :—One, a contention on the part of the Union that the Shipping Board is not a party to the award and consequently unable to avail itself of the provisions of sec. 48 of the Arbitration Act. The award prescribes

that the parties bound by it are those whose names are set out in a list attached to it. And in this list is set forth the description "Commonwealth Government Line of Steamers." Certainly, want of care has been shown in so naming the party, but the intention to be gathered from the words and from the surrounding circumstances admissible on a question of construction and identification leaves no doubt that the body owning and carrying on the Line is the party bound by the award, namely, the Australian Commonwealth Shipping Board. *Hillman* v. *The Commonwealth* (1) is an authority in favour of this view. The other, an application on the part of the Board for an order that Walsh and others be appointed for the purposes of the proceedings in this case to represent themselves and all other officers and members of the Seamen's Union. Even if this Court has jurisdiction to so order, which I doubt, still the order would be so oppressive and unjust that it ought not to be made. No community of interest or common action on the part of this large class is established by the evidence. And it may well be that many are quite opposed to the strike that has been organized, incited and encouraged by executive officers of the Union and its branches.

The result is that an injunction must be granted; and in my opinion it should be modelled on the form settled by this Court in *Waddell* v. *Australian Workers' Union* (2), and it should be directed to the Union, its officers, servants and agents, and also to certain individuals, namely, Walsh, Fleming, Hussack, Raeburn and Johnson.

ISAACS J. In view of the varying opinions of the majority of the Court as to the form and extent of the order which should be made, the order of the Court will necessarily be confined to what is included in both opinions of the majority.

> *Order that the respondent organization and its agents and servants and its officers, including the officers of the branches of the respondent organization, be enjoined and restrained from ordering, encouraging or aiding*

(1) *Ante*, 260. (2) (1922) 30 C.L.R. 570.

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the members or any member of the respondent organization to strike by refusing to accept employment or by ceasing work in the service of the applicant by reason of the employment or continued employment by the applicant of Thomas Campbell or any other of the men suspended from membership of the respondent organization and named or referred to in the letter dated 12th August 1924 from William Raeburn to the general manager of the applicant. The organization to pay the costs of this application.

Solicitors for the applicant, *A. J. McLachlan, Westgarth & Co.*, Sydney, by *Blake & Riggall.*

Solicitors for the respondents, *Dawson & Herford*, Sydney, by *Frank Brennan & Co.*

B.L.

Dist *Langman v Handover* (1929) 43 C.L.R. 334

[HIGH COURT OF AUSTRALIA.]

SCHNELLE . . . . . APPELLANT;
DEFENDANT,

AND

DENT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1924-1925.

SYDNEY, *Dec.* 1, 2, 3, 1924; *May* 7, 1925.

KNOX C.J., ISAACS and GAVAN DUFFY JJ.

Money-lender—Bill of sale—Validity—Consideration—Transaction not at registered premises—Suit in Supreme Court of New South Wales in equity—Jurisdiction—Relief—Declaratory order—Bill of sale declared void—Imposing condition on relief—Payment of debt—Money-lenders and Infants Loans Act 1905 (*N.S.W.*) (*No.* 24 *of* 1905), *secs.* 1, 2—*Equity Act* 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *secs.* 8, 9, 10.

The plaintiff had given a bill of sale to the defendant, a money-lender, to secure repayment of advances made by the defendant to the plaintiff's husband. An arrangement was subsequently made between the plaintiff and the defendant