[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

TAYLOR;

EX PARTE THE FEDERATED IRONWORKERS ASSOCIATION OF AUSTRALIA.

THE KING

AGAINST

THE COMMONWEALTH;

EX PARTE THE AUSTRALASIAN COAL AND SHALE EMPLOYEES FEDERATION.

THE KING

AGAINST

THE COMMONWEALTH;

EX PARTE THE AMALGAMATED ENGINEERING UNION (AUSTRALIAN SECTION).

H. C. OF A. 1949.

SYDNEY, *July* 5, 6.

Rich, McTiernan and Williams JJ.

Constitutional Law (Cth.)—Conciliation and arbitration—Industrial dispute—Coal-mining industry—Strike—Financial assistance—Prohibition—Funds drawn from bank accounts by industrial unions—Order directing payment thereof into Court—Statute—Order—Validity—The Constitution (63 & 64 *Vict. c.* 12),

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s. 51 (*xxxi.*), (*xxxv.*), (*xxxix.*)—*National Emergency* (*Coal Strike*) *Act* 1949 (*No.* 20 *of* 1949), *s.* 9*—*Coal Industry Act* 1946 (*No.* 40 *of* 1946).

The *National Emergency* (*Coal Strike*) *Act* 1949 is within the power conferred upon the Commonwealth Parliament by s. 51 (xxxv.) of the Constitution to make laws with respect to conciliation and arbitration in industrial disputes, and is also within the "incidental" powers conferred by s. 51 (xxxix.).

Industrial organizations, which had withdrawn from their respective bank accounts funds which, upon a reasonable inference, were to be used for the purpose of defeating the provisions of the *National Emergency* (*Coal Strike*) *Act* 1949, were ordered by the Commonwealth Court of Conciliation and Arbitration to pay the moneys so withdrawn to the Industrial Registrar.

Held, that the orders were authorized by s. 9 of the Act.

PROHIBITION.

An order was made on 2nd July 1949 by his Honour Chief Judge *Kelly*, in the Commonwealth Court of Conciliation and Arbitration, at Sydney, restraining the Federated Ironworkers' Association of Australia from committing acts constituting a breach of the *National Emergency* (*Coal Strike*) *Act* 1949 and, in effect, prohibiting that Association from making any contribution to assist a strike then being engaged in by members of the Australasian Coal and Shale Employees' Federation; and on 5th July a further order was made by his Honour under s. 9 of the Act directing the Association to pay to James Edward Taylor, the Industrial Registrar, a sum of £25,000, being funds of the Association which it had withdrawn from its bank account immediately prior to the coming into force of the Act.

The Association and three of its officers applied to the High Court for an order nisi for a writ of prohibition directed to Chief Judge *Kelly*, the Industrial Registrar and the Commonwealth restraining each of them from further proceeding with the application made by the Industrial Registrar and the Commonwealth, or, alternatively, from enforcing the order made on 5th July.

An order was also made by the Chief Judge directing the Australasian Coal and Shale Employees' Federation to pay to the

* The *National Emergency* (*Coal Strike*) *Act* 1949, which is "an Act to prohibit, during the period of National Emergency caused by the present General Strike in the Coal-Mining Industry, the contribution, receipt or use of funds by organizations registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1948 for the purpose of assisting or encouraging the continuance of that strike and for other purposes", by s. 9 provides:—

"(1) The Court shall have jurisdiction to make such orders for injunctions as it thinks necessary for the purpose of ensuring compliance with the provisions of this Act.

(2) The jurisdiction of the Court under this section may be exercised by a single Judge."

Industrial Registrar a sum of £15,000 which, immediately before the Act came into operation, had been withdrawn by that Federation from its account with the Commonwealth Bank.

An application by the Industrial Registrar was also pending before Chief Judge *Kelly*, for an order directing the Amalgamated Engineering Union (Australian Section) to pay to the Industrial Registrar a sum of £4,000 which, immediately prior to the coming into operation of the Act, had been withdrawn by that union from its bank account.

The Federation and three of its officers and the Union and five of its officers applied to the High Court for orders nisi for writs of prohibition in terms similar to those asked for by the Federated Ironworkers' Association.

The three applications were heard together.

Hardie K.C. (with him *Isaacs* and *Mahoney*), for the Federated Ironworkers' Association of Australia and its officers. Having regard to the fact that many members of the Association were unemployed the sum withdrawn from its bank account by the Association was not disproportionate to its needs. The *National Emergency* (*Coal Strike*) *Act* 1949 is invalid. Alternatively, the Chief Judge did not have any power under the Act to make the order. In effect, the Act is an amendment of the *Coal Industry Act* 1946. It is recited in the preamble to that Act that the Federal and State Governments had undertaken not to take any action, without the prior concurrence of the other, to repeal or amend any of the legislation covered by the agreement. Although the *National Emergency* (*Coal Strike*) *Act* 1949 confers power upon the court to order repayment by an organization of moneys received or paid in contravention of its provisions, there is not any authority to restrain the organization from withdrawing moneys from its bank account and using those moneys in a manner permitted by its rules. The prohibition restrains an organization which is not participating in the strike from paying moneys to an organization which is so participating; and although certain powers are conferred upon the Industrial Registrar he has no power to retain the moneys in his custody until such time as the Commonwealth Court of Conciliation and Arbitration directs that such moneys shall be restored to the owner. Upon the cessation of the strike and the return to work of the miners, the Act ceased to operate. The jurisdiction is limited to injunctions to ensure compliance with the Act, e.g. restraining a union from withdrawing moneys from its bank account for purposes of a strike. The subject order is not an

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injunction. Section 51 (xxxv.) of the Constitution does not authorize the imposing of these obligations on non-participating unions. The imposition is limited to parties to the dispute. The members of the Association are not on strike.

Sullivan, for the Australasian Coal and Shale Employees Federation and its officers. The power conferred upon the Arbitration Court by s. 9 of the *National Emergency* (*Coal Strike*) *Act* 1949 "to make such orders for injunctions as it thinks necessary for the purpose of ensuring compliance with the provisions of this Act" does not include an order such as the subject order, but only authorizes orders for ensuring compliance with the Act by means of the prescribed penalties. The subject order is in the nature of a supplementary penalty. The moneys were withdrawn before the Act came into operation, therefore as the Act has not any retrospective operation, the order is bad. The Act is not authorized by s. 51 (xxxv.) of the Constitution (*Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (1)). The Act is not an Act to further conciliation and arbitration. A strike is not made illegal by the Act. The Act is an Act for interfering with the property of other persons; it deals with one subject, namely, union funds. Nor does the Act deal with an "incidental matter" within the meaning of s. 51 (xxxix.) of the Constitution (*Bank of New South Wales* v. *The Commonwealth* (2)). Section 6 and other sections implicate persons not involved in the dispute and are therefore beyond the power and are invalid (*R.* v. *The Commonwealth Court of Conciliation and Arbitration*: *Ex parte Whybrow & Co.* (3)).

Bailey (Solicitor-General for the Commonwealth) (with him *Weston* K.C., *Dovey* K.C., *Miller* K.C., *E. J. Hooke* and *Conlon*), for the Chief Judge, the Industrial Registrar and the Commonwealth. This is not a proper case for prohibition. The question of validity should be determined by a superior court of record. From such determination the applicants could appeal to this Court. The Act was designed to discourage the settlement of industrial disputes by methods which are unconstitutional, and to do so by controlling the funds of industrial organizations. In such cases as this a prohibition would be injurious to the community and contrary to the balance of convenience. The subject order was within the power of the Commonwealth Court of Conciliation and Arbitration to determine matters arising in the exercise of its jurisdiction.

(1) (1917) 23 C.L.R. 226.
(2) (1948) 76 C.L.R. 1.
(3) (1910) 11 C.L.R. 1.

A possible error in interpreting the Act is not a sufficient basis for a prohibition. The order is authorized by s. 51 (xxxv.) of the Constitution (*Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (1)) and it is also within s. 51 (xxxix.) as furthering the objects of conciliation and arbitration by the established tribunals (*Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (2)). The Act has no reference to, nor does it involve in any way, the acquisition of property. The power to issue injunctions includes a power to issue mandatory injunctions.

C. M. Collins, for the Amalgamated Engineering Union (Australian Section) and its officers. The Industrial Registrar did not have power to apply for an order of the nature of the subject order; his power was limited to an order incidental to a matter under s. 8 of the Act by reason of some wrong done. The Commonwealth has no interest in the moneys, therefore it is not a competent party.

Cur. adv. vult.

July 6.

The following written judgment of the COURT was delivered by :—

RICH J. These are applications for orders nisi for writs of prohibition restraining Chief Judge *Kelly* sitting as the Commonwealth Court of Conciliation and Arbitration, the Industrial Registrar of that Court and the Commonwealth of Australia from further proceeding under the provisions of the *National Emergency (Coal Strike) Act* 1949 with the hearing of the application of the Industrial Registrar and the Commonwealth of Australia for certain orders and from making certain orders. The first applicant is the Federated Ironworkers' Association of Australia and three of its officers and the orders already made by his Honour complained of are two orders purporting to have been made under the provisions of s. 9 of the *National Emergency (Coal Strike) Act* 1949, one in effect prohibiting that organization from making contributions to assist the strike which is at present being engaged in by members of the Australasian Coal and Shale Employees' Federation, and the second an order directing the applicant to pay into court the sum of £25,000 withdrawn from its bank account immediately before the Act came into force. The applicants in the second application are the Australasian Coal and Shale Employees' Federation and some of its officers and the order complained of in their case is an order directing them to pay into court the sum of £15,000 withdrawn from its bank account immediately before the Act came into

(1) (1917) 23 C.L.R. 226.

(2) (1908) 6 C.L.R. 309.

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operation. The orders nisi were originally sought on three grounds that can be summarized as follows : (1) that the *National Emergency (Coal Strike) Act* is *ultra vires* the Commonwealth Constitution ; (2) that if the Act is *intra vires* the orders made by the Chief Judge under s. 9 of that Act are beyond his jurisdiction under that section ; (3) that the *National Emergency (Coal Strike) Act* is an amendment of the *Coal Industry Act* 1946, and that Act is a joint Act with a similar Act of the New South Wales Parliament and the former Act provides that each of the two Governments has undertaken not to take action without the prior concurrence of the other to repeal or amend any legislation covered by the agreement. The third ground can be disposed of immediately because it has no substance. It is quite clear that one Commonwealth Parliament cannot prevent a subsequent Parliament from passing any Act within its constitutional powers amending or repealing any earlier Act. We are also of opinion that there is no substance in the two earlier points. It appears from the recitals to the *National Emergency (Coal Strike) Act* to which we are entitled to attach importance, and it is a notorious public fact of which we are entitled to take judicial notice, that a general strike in the coal-mining industry was decided upon on 16th June and commenced on 27th June 1949, and that in the words of one of the recitals that strike is prejudicing or interfering with the maintenance of supplies and services essential to the life of the community and has caused a grave national emergency. Section 51, par. (xxxv.) of the Constitution provides that the Commonwealth Parliament shall have power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Section 51, par. (xxxix.) provides that the Commonwealth Parliament shall have power to make laws with respect to matters incidental to the execution of any power vested by this Constitution in the Parliament. The purpose of the *National Emergency (Coal Strike) Act*, to be gathered from its provisions, is to prevent the organization which is participating in the strike, in this case the Australasian Coal and Shale Employees' Federation, making payments to its members to assist the strike ; and also to prevent other organizations such as the Federated Ironworkers' Association of Australasia assisting the members of the participating organization by providing financial assistance to carry on the strike. The Act defines " organization " to mean an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1948. In our opinion it is within s. 51, par. (xxxv.) of the Constitution ; or if it is not within this power, then it is within s. 51, par. (xxxix.) of

the Constitution as plainly incidental to the exercise of the former power that the Commonwealth Parliament should be able to enact legislation preventing financial assistance being given to members of any union who refuse to accept conciliation and arbitration and prefer to go on strike. The Act carries this purpose into effect by providing penal sanctions for those persons and organizations who make and receive payments in breach of its provisions, but it also includes means to prevent payments being made and received contrary to the Act. Accordingly s. 9 provides that the court shall have jurisdiction to make such orders for injunctions as it thinks necessary for the purpose of ensuring compliance with the provisions of this Act. The jurisdiction of the court under this section may be exercised by a single judge. We are of opinion that the orders for injunctions made by his Honour were authorized by this section. The section is couched in wide terms and authorizes the court to make any injunction of a negative or positive nature necessary for the purpose stated. In the present case it is plainly a reasonable inference, and indeed it does not appear to be contested, that the applicant organizations each withdrew from their bank accounts the funds, which they have been ordered to pay into court, for the purpose of defeating the provisions of the Act. These orders are intended to restore in substance the *status quo* at the time the Act came into force. We are not concerned with the question whether it was advisable for his Honour in the exercise of his statutory power to order these moneys to be paid into court instead of into the previous bank accounts. We are only concerned with the question of his jurisdiction to grant them. We have no doubt that the orders made were orders for injunctions within the meaning of and for the purpose stated in the section.

At a late stage of the argument two further grounds were raised in support of the applications : (1) that the orders were acquisitions of property and did not comply with the requirements of s. 51 par. (xxxi.) of the Constitution ; (2) that there were no proper applicants before his Honour. We are of opinion that there is no substance in either of these grounds. As to (1) the case in no way resembles *Minister of State for the Army* v. *Dalziel* (1) relied upon in argument because the Commonwealth did not acquire any proprietary interest in the moneys paid into court. The submission made in the argument that the orders confiscated the moneys of the applicants is absurd. As to (2) the Act carries a plain and necessary implication that the registrar is a proper person to move the court for an

(1) (1944) 68 C.L.R. 261.

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injunction. It is therefore unnecessary to consider whether the Commonwealth of Australia could made the application.

For these reasons we refuse the applications.

At a late stage of the hearing a similar order nisi was applied for on behalf of the Amalgamated Engineering Union (Australian Section) and some of its officers. The same grounds were relied upon and for the same reasons we refuse this application.

Applications refused.

Solicitors for the applicants, *C. Jollie Smith & Co.*

Solicitor for the respondents, *K. C. Waugh*, Acting Crown Solicitor for the Commonwealth.

J. B.