AN INDUSTRIAL LAW GOLDMINE: THE HURSEY CASE*

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This case, which came on for hearing before Burbury C.J. of the Supreme Court of Tasmania in July, 1958, and judgment wherein was delivered on 7th November, 1958, is notable not only for the questions it raises concerning the validity of a political levy made by a trade union and the status of employee organizations registered under the Federal Conciliation and Arbitration Act 1904-1958, but also as being one of the very few cases in Australia where the issues arising from industrial economic pressures have been fought out on a tort basis in the ordinary courts.

THE FACTUAL AND LEGAL BACKGROUND

The plaintiffs, father and son, were both members of the Hobart Branch of the Waterside Workers' Federation of Australia (and members of the Federation itself)[1] and were also registered waterside workers under the provisions of the Stevedoring Industry Act, 1956, the present statute which (in part) regulates the much-regulated industry of stevedoring.

Francis John Hursey (hereinafter referred to as 'Hursey Senior') had political aspirations and had previously unsuccessfully endeavoured to secure Labor Party endorsement for an election in 1954. In August, 1956, both plaintiffs became members of the Anti-Communist Labor Party which is now the Democratic Labour Party, and in September, 1956, Hursey Senior announced his candidature for the Anti-Communist Labor Party at the elections for the Tasmanian lower house.

The Waterside Workers' Federation is of course a federally organized trade union of employees which was at the relevant times registered under the provisions of the Commonwealth Conciliation and Arbitration Act, but was not otherwise registered. Its Hobart Branch was not registered at all. It was not registered under the federal Arbitration Act, and as Tasmania is a 'wages board' State not possessing a State system of industrial arbitration, there could be no registration as an industrial organiza-

*Hursey v. Waterside Workers Federation and Ors. (Supreme Court of Tasmania—as yet unreported). It is regretted that this article had to go to print before the decision of the High Court on appeal had been announced.

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[1] Whether there was a dual membership or not, it is clear from Rule 6 of the Federal Federation Rules that a person became a member of the Federal body only by being enrolled in a Branch, so that all persons who 'joined' a Branch thereby became members of the Federal body.

tion under State law. Nor was it registered under the Tasmanian Trade Union Act, 1889.[2]

Both the Federation and the Hobart Branch had Rules to govern their workings. The Rules of the Federation of necessity were 'registered' under the provisions of the federal Act. It is not clear whether the Branch Rules were 'registered' thereunder.[3] The federal Rules were clearly the dominant set. They provided that Rules could be made by a Branch but should not be inconsistent with the Rules of the Federation and should not have any validity or effect unless approved in writing under the seal of the Federation. The Branch Rules therefore could be said to have come into existence as such only by virtue of the permission given in the Federal Rules. So far as objects are concerned, there was little difference between the two sets of Rules. The general purpose of the Federation was expressed to be to combine in one body all persons engaged in the loading, discharging and coaling of vessels in order that their interests might be protected, their status raised and their conditions improved, and the corresponding Branch Rules were in identical terms. The objects were in Rule 3 of the Federal Rules more particularly stated as, *inter alia*, to regulate and protect the wages and conditions under which members may be employed, to control the supply of labour, to take such steps as may be necessary for the efficient operation of the stevedoring industry and to improve and foster the best interests of the members of the organization, to establish, maintain and contribute to labour and trade union papers and wireless broadcasting stations, to amalgamate with, co-operate, or combine with any trade or industrial union or association or other organization having objects similar to the organization, to provide financial assistance to any other union or unions or to a Branch of the organization, to secure preference of employment for members of the organization, to raise funds for the furtherance of the previously listed objects. The objects of the Branch were more circuitously stated by reference to the purposes of raising a fund for such objects but, *mutatis mutandis*, they were otherwise to the same effect as the Federal Rules.

One of the Federal Rules provided that it should be competent for any Branch with the consent of the Federal Council to increase the amount

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[2] It will be realised, of course, that this is a system of registration (copied from England) different altogether from that effected under either the Federal arbitration statute or under State arbitration statutes, viz., those in existence in New South Wales, Queensland, South Australia and Western Australia. Each Australian State has a Trade Union Act closely similar to the English model, though its registration provisions have been but little availed of in some States. Thus, in Victoria there are only three registrations of employee unions. In Tasmania there are at present twelve.

[3] There appears to have been no evidence that they were. However, the rules of an organization are technically not registered. They are filed and Regulation 116 (1) (d) of the Conciliation and Arbitration Regulations of 1956 (S.R. No. 60 of 1956) requires an application for registration to be accompanied by two copies of the rules of the association and of every branch. Assuming this requirement was met, then it seems that the rules of the Branch could be said to be as much 'registered' as those of the parent Federation. See Barrett v. Opitz (1945) 70 C.L.R. at 157 (per Latham C.J.).

of the annual contributions *or to impose levies on its members* and that it was also competent for the Federal Council to increase the contributions or to otherwise impose levies upon members or branches. Rule 3 (1) of the Branch Rules also provided that one of the powers of the Branch was 'to impose levies or fines upon members in order to carry out the objects of the Branch or for such other purpose as the Committee of the Branch may decide or direct.'

Rule 7 of the Federal Rules provided that any member who 'for twelve calendar months commencing in January of each year has during that period . . . (ii) failed to pay any contribution, fees, fines, levies or dues as and when they become payable in that year under the Rules of the organization or of his Branch . . . shall at the end of such twelve calendar months cease to be a member of the organization.' The corresponding Branch Rule was identical.

The statutory regulation of labour on the waterfront is contained partly in the Stevedoring Industry Act, 1956, partly in the Conciliation and Arbitration Act, partly in the Waterside Workers' Award, 1936, and variations thereof,[4] and partly in certain Port Orders issued from time to time by the various Authorities which from time to time have operated the registration and roster system designed to foster the policy of the 'decasualization' of labour on the waterfront. The essentials of this system are that the selection of labour is performed not by the stevedoring employer but by the Authority by means of a roster system from a pool of registered labour maintained in accord with a port quota system. The Stevedoring Industry Authority set up by the Stevedoring Industry Act 1956 is stated by the Act to have the function of regulating the performance of stevedoring operations and ensuring that sufficient waterside workers are available for stevedoring operations at each port and *inter alia* of establishing and administering employment bureaux for waterside workers and of making 'arrangements for allotting waterside workers to stevedoring operations so as to ensure, as far as practicable, a fair distribution of work in stevedoring operations among registered waterside workers. . . .' [section 17 (1) (f)]. The Act proceeds to provide for the determination by the Authority of port quotas and for registration of employers and waterside workers. Section 31 provides that the Authority shall not register a person as a 'waterside worker' at a port unless the applicaton for registration of that person has been submitted to the Authority by the Union (a term which in relation to ports other than Darwin means the Waterside Workers' Federation).[5] This last provision is made subject to other parts of the same section whereby the Authority may, in circumstances where the number of registered workers is less than the quota for the port and the Authority is of the view that this situation will continue to exist unless action is taken, invite by notice

[4] It is a commentary on the chaotic condition of the scheme of waterfront regulation that no official consolidation of this Award and its variations has ever been issued.

[5] This provision is less wide than might appear by reason of the restricted definition of 'waterside worker'.

other persons to be registered. Section 36 provides that the Authority set up under the Act may cancel or suspend the registration of a waterside worker for various stated reasons. Those reasons include misconduct and acting in a manner whereby the expeditious, safe, or efficient performance of stevedoring operations has been prejudiced but does not include the circumstance that a waterside worker has ceased to be a member of the union. With certain exceptions mentioned in section 40, a person commits an offence who engages a person for employment as a waterside worker for work in stevedoring operations unless the latter is registered as a waterside worker. The Act gives power to the Authority to make 'orders' for the performance of its functions under section 17, which orders are to have the force of law and contravention of which is an offence. Section 44 of the Act provides that a person shall not, by violence to the person or property of a person, by threat, intimidation or incitement of any kind to any person, or without reasonable cause or excuse, by boycott or threat of boycott of a person or property or discriminatory action, prevent, hinder, or dissuade *inter alia* a registered waterside worker from offering for, obtaining or accepting employment, or working, as a waterside worker in stevedoring operations, or a person from employing or offering to employ a registered waterside worker as a waterside worker in stevedoring operations. Section 44 (2) provides that a registered waterside worker shall not without reasonable cause or excuse refuse to accept employment or perform work in stevedoring operations with another person who is a registered waterside worker. The definitions of 'stevedoring operations' and 'waterside worker' are far from simple.

The provision of power to the Authority to issue Port Orders was a continuation of the pattern preserved under prior legislation and, so far as Hobart was concerned, the conditions regulating the method of engagement of waterside labour was that set out by Order No. 16 of 1956 which was made by the Stevedoring Industry Board, the predecessor of the present Authority. This Order was continued in force by virtue of the provisions of the 1956 Act.[6] It embodied the system of engaging waterside workers by announcements in the press and on the radio. It authorized the making of such announcements and provided that 'each of these announcements will be a notification of details of engagement of waterside workers . . .' and that 'waterside workers so engaged must report direct to the place and at the time indicated in the announcements.' With these provisions should be read clause 26 (g) (1) of the Waterside Workers' Award 1936 which states that any refusal by employees to start work for which they have accepted engagement shall be a breach of the Award.

The provisions of Order No. 16/1956 replaced the old system of engagement of labour at the 'pick-up' centre. Under the new system of press and radio announcements, which was further authorized by clause

[6] See R. v. Spicer ex parte Waterside Workers Federation (No. 2) [1958] A.L.R. 417 dealing with a similar order made in respect of the port of Melbourne.

4 of the Waterside Workers' Interim Award of 1956, the procedure at the 'pick-up' point does not involve any actual selection; the worker merely presents himself to answer a roll-call at a 'pick-up' point on the wharf and the gangs are then despatched to the ship. The position is, however, different in the case of men directed by the announcement to attend at the general 'pick-up' centre as these constitute a reservoir to supply replacements for any man not answering his name in accord with his notified engagement at the 'pick-up' point on the wharf.

Of relevance to some of the submissions made by the defendants in the case was an Order made in 1948 under the provisions of the Stevedoring Industry Act 1947-8 by the Stevedoring Industry Commission which was the first of the statutory bodies set up to administer the system of engagement of waterfront labour. Clause 15 of this Order, No. 38 of 1948, provided in substance that all union labour must be utilised before recourse is made to non-union labour save in the case of men under penalty. The provisions of the Stevedoring Industry Act 1956 regarding the position of prior Orders was that the Act provided that certain awards and orders should not cease to be in force 'by reason of the enactment of this Act' [s. 6 (4)]. Included among this specification was an award or order continued in force by virtue of the Stevedoring Industry Act of 1949. The latter Act continued in force all orders and directions made or given under the Stevedoring Industry Act 1947-8. Both the 1949 and 1956 Acts contained provisions authorizing the Stevedoring Industry Board and the Stevedoring Industry Authority respectively to vary or revoke by order the orders which were respectively continued in force by the provisions contained in those Acts. No specific action was taken by the Stevedoring Industry Board to vary or revoke the Port Order of 1948, nor by the Stevedoring Industry Authority under the present Act until 17th June 1958, when the Authority purported to revoke such Port Order.

It remains to add that it is well known that over the years considerable bitterness developed within the Labor Party and the unions regarding the activities of Industrial Groups and that when the Anti-Communist Labor Party and later the Democratic Labour Party were formed, the animosities between these breakaway parties and the official Australian Labor Party became intensified. It is also well known that certain officials of the Waterside Workers' Federation were members of the Communist Party.

THE FACTS

The story, as distinct from the background, begins with the decision by the Hobart Branch of the Federation to impose a levy of ten shillings per head for the purpose of assisting the Australian Labor Party in its Tasmanian State election campaign. This levy was decided upon at a stop-work meeting held on 2nd October 1956. It may be interpolated here that, though there are difficulties in interpretation, it would seem on the construction of Rule 7 of the Federal Rules and Rule 19 of the Branch Rules that the membership of a member who refused to pay

(assuming that the levy was valid) would cease on 1st January 1957. The executive committee of the Hobart Branch extended payment of the annual contribution and levies to the 12th April 1957. On 11th April 1957 the plaintiffs attended at the office of the Branch Secretary and inquired as to the amounts owing by them. There was conflicting evidence as to what happened, but the clear upshot was that plaintiffs were then willing to pay their ordinary contributions but not the political levy and that the union secretary would not accept the dues without the levy.

The first instance of direct action occurred on 29th April 1957 when the plaintiffs had been allocated to a particular vessel, the 'Empire Star.' On being told by the President of the Branch that the plaintiffs were unfinancial the members of the gang walked off and the plaintiffs were dismissed as a result of the fact that operations could not then proceed.

Apart from this incident, during 1957 the plaintiffs worked on the waterfront without disturbance, though they were to a large degree isolated. There was, however, considerable activity at Branch meetings. There were sundry conferences between Branch officials and the plaintiffs at which feelers were put out that the levy payable by plaintiffs be paid to charity or to some other political party. These proposals were rejected by Hursey Senior on the ground that they still involved payment of a compulsory political levy. At a later stage Hursey Senior indeed refused to accept a proposal that both Hurseys pay their contributions and 'death levies.' It is doubtful whether this could be regarded as a formal Branch offer, but it was certainly carried as a resolution of the Branch executive. It was shortly after this happening that Hursey Senior issued the writ in the first action (22nd October, 1957).

In January, 1958, the Federal general secretary, Mr. J. Healy, after an abortive interview with Hursey Senior, announced to a meeting of the Hobart Branch that the plaintiffs' membership would cease on 31st January unless they paid the levy before that date. After that date the plaintiffs (not having paid the levy) were treated as having ceased to be members and a course of direct action directed at preventing them from working on the waterfront commenced. The Federation requested the Stevedoring Industry Authority to cease to put the plaintiffs to work and quoted Port Order No. 38 of 1948, but the Authority took the view that while the plaintiffs remained registered waterside workers it was bound to continue to roster them for duties.

The direct action divides into three periods. In the first period there were some general 'walk-offs' of labour when the Hurseys were put to work. This short period was succeeded by the period of the so-called 'picket lines' tactics (which would probably be called mass picketing in the United States). The concept of this technique appears to have been suggested to certain Branch officials by the result of an incident occurring on the 7th February, 1958. On this day there was a noisy and abusive mob scene apparently initiated by seamen and waterside workers without union direction, in the course of which the plaintiffs were assaulted and as a result of the press of men could not answer their call to work in time

and so were replaced by the employer. The end result was eminently desirable and could easily be achieved by a technique of obstruction. What resulted was the formation, on each occasion on which the plaintiffs were allotted to work, of a human barricade which refused to let the plaintiffs through until such time as the employer's timekeeper had called their names and they had failed to answer. The pattern of behaviour at the barricades varied. Sometimes the Hurseys pushed against the line in an endeavour to get through and the pickets pushed back with the result that the Hurseys could not get through; at other times the Hurseys, after having made a request to be let through, fell back and contented themselves with taking names; sometimes they were advised by police not to try to force their way. There were other times, which, however, were not the normal pattern, where more aggressive tactics were favoured by individual watersiders, for instance kicking, throwing eggs, and on two occasions the plaintiffs were forced back by large and menacing throngs and threats were made to throw them into the harbour. The resort to 'mass picketing' had been preceded by certain acts of violence and threats of violence and trespass to the Hurseys' car, but these were not clearly a by-product of organized union activity. On most of the occasions when the plaintiffs attempted to proceed to work, there was considerable abuse and name-calling, some of it very offensive, but Branch officials of the union did repeatedly advise the men not to resort to violence.

The picket lines continued during most of February and March, but from 25th March to 8th June, 1958, the plaintiffs were given leave of absence by the Authority and shortly after their return, on meeting a continuance of such tactics, they obtained, on 13th June, an interlocutory injunction from the Supreme Court of Tasmania which was effective to restrain the picketing. Thereafter resort was made to what was called the 'Pinkenba tactics',[7] that is to say, there was no picket line and the plaintiffs were permitted to answer their names, but as soon as they were put to work the winchman, who was a key man in the gang, walked off, rendering the gang unworkable so that the plaintiffs had to be dismissed. This technique had previously been recommended by Healy as avoiding the mass suspensions of waterside workers which followed the first general 'walk-offs' in February.

The manning of the 'picket' line and the arrangement of other concerted tactics was handled by the Campaign Committee of the Hobart Branch, a body which had no official recognition in the Rules of the union or Branch. However, it included certain Branch officials, the records of meetings of the Branch indicated close liaison with it, and Branch resolutions were passed from time to time which recognised the 'picketing' activities.[8] So far as the Federal organization was concerned, there was the close touch maintained by Healy from the beginning with

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[7] So called because of their use on the Pinkenba wharf in Brisbane.

[8] e.g., the resolution of the Branch Committee on the 25th February, 1958, that 'job meetings be called on all night shifts to keep members current on recent dispute and to stress the need of maintaining picket lines'.

all developments of the dispute, the fact that though he had not conceived the idea of the 'picket' lines, he in his later evidence gave his full approval to their use, the fact that he had advocated use of the 'Pinkenba' tactics, and the fact that the Federal organiser participated in 'picket' lines. In broad effect the Federal organization had from the outset made the dispute their business.

THE LITIGATION

The first writ was issued by Hursey Senior alone on the 22nd October, 1957, before direct action had become a reality. The defendants named were the Federation, its Branch and the then President and Secretary thereof (Williams and Pelham respectively). The statement of claim sought a declaration that the political levy was *ultra vires,* an injunction restraining the Hobart Branch from excluding the plaintiff from union membership, and damages against the Hobart Branch and the President and Secretary thereof for conspiracy to exclude the plaintiff from membership and to prevent him from working and for procurement of breach of contract.

The second action, commenced by writ issued on 18th February, 1958, was instituted by both plaintiffs, and in addition to the Federation and Branch and the President of the latter they joined certain officials of the Hobart Branch, certain members of the Branch Executive and certain members of the Campaign Committee. The statement of claim alleged (a) a conspiracy upon three bases, *viz.,* a conspiracy with an unlawful object, a conspiracy by unlawful means, and a conspiracy to injure[9]; (b) breach of statutory duty; (c) assault; and (d) physical obstruction of the plaintiffs. The particulars of 'unlawful means' under the relevant head of the civil conspiracy count included, *inter alia,* striking, assault, violence, breaches of section 44 of the Stevedoring Industry Act, defamation, besetting within the meaning of the Conspiracy and Protection of Property Act 1889 (Tasmania), behaving in a riotous or offensive manner, committing a nuisance and taking part in an unlawful assembly. No charge of inducing breach of contract as a tort committed without combination appears to have been made in this action. By an amendment a claim respecting wrongful exclusion of the plaintiffs from membership of the Federation and Branch was added.

In considering the defences it is thought that the two actions can be treated together. In both actions the defendant Federation and Branch admitted that the plaintiffs were registered waterside workers, they supported the validity of the levy and pleaded that by reason of the plaintiffs ceasing to pay their annual contributions they ceased to be members of the union on 1st January, 1957 (or alternatively on 1st January, 1958), and they relied on Port Order No. 38 of 1948. In the first action the defendant Federation and Branch traversed the allegations of conspiracy and inducement of breach of contract and in the second the allegations

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[9] The last-mentioned within the formulations of Sorrell v. Smith [1925] A.C. 700 and Crofter Hand Woven Harris Tweed Co. v. Veitch [1942] A.C. 435 (hereinafter called 'The Crofter case').

of tortious and otherwise wrongful acts. In the alternative in the second action they pleaded that their sole purpose was to advance the policy of the union and to protect the interests of their members, denied intent to injure the plaintiff and pleaded that the acts were done with reasonable cause or excuse, *viz., (inter alia)* that the plaintiffs had ceased to be members of the Branch or a *bona fide* belief on the part of the defendants that they had so ceased, and the effect of the 1948 Port Order or a *bona fide* belief that the same had the force of law. They also both pleaded in both actions that neither was capable of being sued at law. The defences of the individual defendants were substantially similar save as to the allegation of non-suability.

In a third action certain members of the Federation claimed declarations that they were entitled to be offered employment in stevedoring operations in preference to the Hurseys. The contentions of the plaintiffs in this action were based upon the 1948 Port Order.

THE JUDGMENT

The course has been taken of considering first the main thread of the judgment and then in stating in detail the considerations relied on by the learned Chief Justice in relation to each of the four sections into which the judgment divides itself. With some hesitation it also has been decided to offer the writer's comments in relation thereto rather than to include the comment *en bloc* at the end.

(a) *Outline*

The learned Chief Justice held that the expenditure of the funds of an employee association registered under the provisions of the Federal Conciliation and Arbitration Act did not as a matter of law fall outside the permissible objects of such an association but that as a matter of construction the Federal and Branch Rules of the Union did not authorize such a levy as was in issue in the present proceedings. Hence the plaintiffs were not under any obligation to pay the levy, and they were not in default in payment of their ordinary contributions as the formalities of legal tender had been waived. The plaintiffs therefore had never ceased to be members of the Federation.

He went on to hold that clause 15 of the 1948 Port Order was of necessity superseded by the Stevedoring Industry Act of 1956. There was therefore no obligation on the part of the Stevedoring Industry Authority to give preference in employment to members of the union. This meant that the learned judge considered the rights of the plaintiffs simply on the basis that they were registered waterside workers.

He proceeded then to the analysis of their rights and the question of tort infringement. He found that, arising out of the structure of the statutory regulation of the industry, the plaintiffs had certain contractual and statutory rights and that the defendants were liable for interference with those rights on the basis of the principle of *Lumley v. Gye*; he also held that the defendants were guilty of a conspiracy both for an object

specifically unlawful and for a conspiracy by unlawful means. They were also liable in tort for breach of statutory duty and *(semble)* for intimidation as a specific tort but these represented minor keys in the main concerto. The main specific bases were *Lumley v. Gye* and conspiracy.

On the question of responsibility he held substantially that the Federation and its Branch were liable for the maintenance of 'picket' lines and for the 'walk-offs' as leading to an infraction of the plaintiffs' statutory and contractual rights; on the basis of conspiracy he found all the defendants in the second action liable in respect of certain specified assaults but also found that there were certain assaults and trespasses to property which either preceded the initiation of the conspiracy or were not sufficiently incidental to the main purposes thereof to make the defendants other than the actual tortfeasors liable. He assessed the damages against the defendants in respect of the matters in which they occupied the position of joint tortfeasors and reserved the question of damages against individual defendants in respect of acts for which there was no general liability on the basis of conspiracy. He declined to agree with the contention that the defendant organization and branch could not be held responsible in respect of tortious acts which were *ultra vires* such bodies.

The first action was dismissed save as to a declaration that the plaintiffs had not ceased to be union members as the Court did not find that any of the defendants to the first action had been responsible for the incident of 29th April, 1957, which was the only instance of direct action exerted against the defendants prior to the issue of the writ in this action. The third action was of necessity dismissed.

In view of His Honour's holding as to the effect of the Port Order of 1948, it is obvious that he regarded the plaintiffs as being entitled to succeed in tort apart from any question of their membership of the union so that even if the exclusion of the plaintiffs from membership had been valid, they would have succeeded (or at least would have made out a *prima facie* case). It appears then that the decision on the levy could be regarded as relevant to the final legal result only because cesser of union membership by the plaintiffs or a *bona fide* belief that such membership had ceased could be argued to go to the question of justification pleaded by way of defence by the union.

Attention is now directed to elucidating and commenting on the judgment in each of its four main parts.

(b) *The Political Levy*

The learned Chief Justice held that the principle of *Amalgamated Society of Railway Servants v. Osborne*[10] that the expenditure upon political objects by a trade union was *ultra vires* as falling outside the statutory objects listed in the Trade Union Act 1871 (English) did not apply to an organization registered under the Federal Conciliation and Arbitration Act, though it appears that he would regard it is applicable to a

[10] [1910] A.C. 87.

trade union which was not so registered and would therefore be operating under the law of a State and hence subject to the particular Trade Union Act of that State.[11]

Section 136 of the Federal Act has the effect of incorporating an organization upon being federally registered,[12] though the section does not use the words 'corporation' or 'corporate.' The organization becomes incorporated 'for the purposes of this Act' so that in terms it is a limited incorporation. The purposes *expressly* named in the Act include the purpose of encouraging the organization of representative bodies of employees and the registration of such associations.[13] His Honour, however, considered that the phrase 'for the purposes of this Act' was not to be narrowly interpreted as confining the scope of corporate capacity to the exercise of the specific powers conferred by the Act upon registered organizations. He referred to the fact that the Act itself defined 'association' as *inter alia* any association 'for furthering or protecting the interests of . . . employees'.[14] It is obvious that he inferred from this that such furtherance or protection was itself a purpose of *the Act*. He went further and held that the corporate capacity conferred by the Act on registered organizations extended to the exercise not only of objects envisaged by the Act as appropriate to an 'association' but of *all* powers conferred *by the registered rules themselves*. He regarded the latter as analogous to the memorandum of association of a company registered under the Companies Acts. He derived this conclusion very largely from the provisions of the Conciliation and Arbitration Act and more particularly from the Regulations made thereunder.[15] The latter prescribe the conditions to be complied with by an association applying for registration and provide *inter alia* that the affairs of the association are to be regulated by rules which must state the objects thereof and that the rules may 'also provide for any other matter not contrary to law.' The purposes of the organization are therefore defined by the rules at the point of registration and as a condition precedent to registration.

The judgment draws the conclusion that the corporate capacity derived from the Commonwealth Act extends to all its functions whether defined by the Act or by its rules and does not agree with the hint of Griffith C.J. in the *Jumbunna* case[16] that an organization registered under the Federal Act might be regarded as having a double legal life, partly flowing from

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[11] True v. Australian Coal and Shale Employees Union (1949) 51 W.A.L.R. 73. There appears to be little doubt that, so far as trade unions not registered under the Federal Act are concerned, the Osborne decision, if applicable at all, is applicable whether or not the trade union is registered under the particular State Trade Union Act—Lloyd: Law of Unincorporated Associations p. 148. The position may be further complicated if the union is also registered under a State Arbitration Act. In True's case it was held that this made no difference to the applicability of the Osborne decision.

[12] Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association (1908) 6 C.L.R. 309 at 336 (per Griffith C.J.).

[13] Conciliation and Arbitration Act 1904-1958 s. 2.

[14] Ibid., s. 4 (1) (interpretation).

[15] S.R. No. 60 of 1956, esp. Reg. 115.

[16] Supra (footnote No. 12) at 336.

the Commonwealth Act and partly *(semble)* flowing from a combination of the effect of agreement under the common law of contract with the provisions of the relevant State Trade Union Act. From this viewpoint he was able to distinguish the *Osborne* case as depending on a restrictive definition of 'trade union' contained in the English Trade Union Act. The Commonwealth Act, by way of contrast, contained the wide definition of 'association' above referred to.

The business of a union as shown by such definition was the protection and furtherance of the industrial interests of its members and in the absence of a limitation such as that which was in point in the *Osborne* decision, any object which could fairly be said to further those interests could be said to be legitimate. An incorporated trade union might therefore (if authorised by its rules) expend funds to support a particular political party for the purpose of achieving political action to further its business interests as an industrial union. He considered, however, that a rule for *permanent* financial support for any particular party would not fall within such a principle.

Then comes the further decision, however, that in the instant situation neither the Federal nor the Branch Rules did in fact expressly or impliedly give the power. There was no express power given so that the matter was one of construction. The conclusion that there was no implied power derives from a detailed analysis of the various Federation and Branch rules into which we will not enter save to say that His Honour did not consider that the object specified by Rule 3 of the Federal Rules to 'improve and foster the best interests of the members of the organization' would include action to raise a compulsory levy to be passed *directly*[17] to the Australian Labor Party for its benefit in a political campaign. It might be, he said, that to support such a levy it would be for the Federation to call positive evidence that return of the Labor Party would conduce to the best interests of members. If, however, the Court should make some presumption from the fact of affiliation of the Hobart Branch with the Australian Labor Party, then he was still unable to spell out any implication that the raising of the levy was authorised. He added that there were two specific considerations to the contrary. The second of these he relied on considerably, not only in relation to Rule 3, but also to the question of the implication of the power from any other rules of the union. This consideration is the existence of section 140 of the Conciliation and Arbitration Act. To hold that the compulsory levy was authorised—a holding which would involve the result that the plaintiffs could be expelled from membership for non-payment—would amount to a finding that the rule was contrary to that section inasmuch as it would amount to imposing 'an unreasonable condition of membership'. The judgment clearly handles this consideration on the basis of the maxim *ut res magis valeat quam pereat*, that is to say, the possibility of invalidity attending one construction is taken as a reason for preferring the other. We are still in the realm of construction.

[17] His Honour himself supplies the emphasis to this word.

We may add a few words here on what the judgment had to say as to the status of the Branch. This seems to have been sued under the provisions of Order 53, Rules 15 to 35, of Rules of Court made under the Supreme Court Civil Procedure Act 1932[18] which provide for actions against an unincorporated society and apply a procedure obviously intended to surmount some of the difficulties attending the ordinary representative suit. His Honour clearly regarded the Federation as a statutory corporation for all purposes envisaged by the Federal Act or contained in its Rules. He was inclined to view the Branch as a part of the Federation particularly in view of the fact that the Branch Rules appeared to be merely an integral part of the Federal Rules. However, in an interlocutory application in the present action, Gibson J. of the Supreme Court of Tasmania had held that the Branch was a subordinate voluntary association. The High Court refused leave to appeal, expressing a view that it was more likely than not that the Branch ought to be held to be a voluntary association but that the Court did not want the matter foreclosed at that stage. If the Branch was a separate voluntary association then Burbury C.J. was inclined to think that the *Osborne* case would apply to a levy purporting to be made by the Branch as such. He did not find it necessary, however, to decide the point.

Comment

It is difficult not to reach the conclusion that His Honour's decision that the union rules did not as a matter of interpretation warrant the levy is inconsistent with the view he had already reached in support of the power to make the levy. He had held that the objects contained in the union rules may for the purposes of the Act include all objects reasonably incidental to the protection of the industrial interests of members and that the expenditure of funds to support a particular political party is within the scope of such an object. The union rules in this case *did* include the objective of 'improving and fostering the best interests of the members of the organization' (which is the same type of formulation of object as that which is mentioned above) and it would seem to follow from his reasoning that this would cover the application of political funds to support a designated political party. He had already decided that such a union rule became not only an object of the union but also an object or purpose of the Act. If then in relation to *such a clause* the question of of its validity was settled it would appear that the question of its scope and what it covered would be clear.

It is submitted, however, that the view of the learned judge that the objects envisaged by the Act cover generally the motive of protecting 'industrial'[19] interests of the union and its members is much too wide. It is further thought that the notion of His Honour that the conferred corpo-

[18] See Tasmanian Consolidated Acts Vol. 2 pp. 454-459.

[19] What indeed is the denotation of the word 'industrial' here? Does it cover merely the material benefits in working conditions such as increased wages and amenities, or does it have reference also to the ideological concepts of class solidarity which might say sometimes, and often do say, that resort to direct action pressures is a 'good thing'?

rate capacity of the union necessarily extends to action under the rules is mistaken. It seems to involve the assumption that every purpose expressed in the rules is also a purpose of the Act provided, apparently, that it is not illegal. It is submitted that both conclusions are unwarranted. It is true that the Act specifies as one of its express purposes the encouragement of representative bodies of employees, but it is submitted that this means the encouragement of bodies of employees for the object of playing a particular part in connection with the processes of conciliation and arbitration, the system which the Act establishes and maintains. It must not be forgotten that the whole operation of the Act is conditioned by section 51 (xxxv) of the Commonwealth Constitution which has a significant and well-known phraseology. It must also not be forgotten that the other expressed purposes of the Act in section 2 thereof are all linked up with the settlement of industrial disputes by a certain method. The word 'representative' in the definition of 'association' itself is a key one. In the *Jumbunna* case the view was expressed that the object of the registration of organizations was to ensure the representation for the purposes of conciliation and arbitration of bodies of workmen who otherwise could not be brought before the Court.[20] Moreover, although the definition of 'association' certainly refers to an association for furthering or protecting the interests of employees, it seems that this is merely descriptive of the general nature of the body which is deemed appropriate for registration. It does not mean that the object of furthering or protecting the industrial interests of members *simpliciter* becomes one of the objects of the Act. Furthermore, if objects and purposes expressed in the rules become *ipso facto* the objects of the Act, then action taken by the union in furtherance of a strike, assuming it was not technically an illegal strike or one in breach of an award, would be action taken for the purposes of the Act provided that there was a union rule which empowered the union to act for the promotion of the interests of its members or to control the conditions of employment.

What seems a reasonable conclusion is that the union is acting for the purposes of the Act when it is acting in a manner reasonably calculated either to improve the technique of settling disputes through the processes of conciliation and arbitration or to strengthen its own position for efficiently functioning as a unit in such processes and securing benefits to members *through* such processes. Where the activity of the union is part of those processes or arises out of them as in *Waterside Workers Federation v. Stewart*[21] the position is abundantly clear. But no unduly narrow view needs to be taken. The union is not a bloodless creature; to carry on for the processes of the Act it must exist, it must do a number of mundane things. It cannot be said that appointing office bearers, hiring a hall or buying land and buildings to hold meetings, acquiring a certain amount of chattel property, buying a car for the use of the union organiser, are not actions for the purposes of the Act. Conducting a newspaper, as was

[20] See (1908) 6 C.L.R. at 350-1 (O'Connor J.), also p. 334 (Griffith C.J.).
[21] (1919) 27 C.L.R. 119.

the position in the two Victorian cases of *Australian Workers Union v. Coles*[22] and *Australian Tramways Employees Union v. Batten*,[23] seems much more equivocal. The activities of the union in those cases were investigated rather in the light of the particular activity in each case than in the light of a general union rule. If there was a general union rule permitting the publication of a newspaper or journal then it might well be that this would permit the conducting of a newspaper which advocated the abolition of the arbitration system or vilified the judges of its tribunals. It is, of course, not too late to review these two decisions. The actual decisions on the facts may be justifiable, but the principle therein asserted that everything is within the purposes of the Act which is not obviously *opposed* to those purposes seems objectionable. If the Act is merely not interested in what the union does[24] then surely to that extent it can hardly be said to be acting for the purposes of the Act. What should be said about the making of a loan to a member of the union to enable him to meet the legal costs of contesting a civil claim for damages arising out of a motor car collision, assuming that the rules authorized such an application of funds?

The view of the Tasmanian Chief Justice that the fetters of the *Osborne* decision do not apply to a registered Federal organization operating within the scope of the Federal Act and carrying out the purposes of that Act seems abundantly justified,[25] but can making a political levy for the purposes of the campaign of a political party be said to constitute acting within the scope or for purposes of tht Act unless one frames fairly rigid qualifications? The matter would seem to depend on the question whether such an activity could reasonably be regarded as contributing to the benefit and improvement of the governmental arbitral structure and procedure or its working or to making the organization itself more fit for and capable of sustaining its part in that structure. If one had a union rule permitting political levies or contributions framed within fairly precise limits one could probably form a conclusion. But a widely framed rule simply permitting levies to be made for political purposes could not be said to be capable of covering only Federal arbitration objectives; it would, for instance, permit contributions to a party, the policy of which was directed to the replacement of the curial arbitration structure by a pure system of collective bargaining. At the same time it cannot be gainsaid that such a rule *could* authorise the application of political funds in a way which could be regarded as contributing to the advancement of the conciliation and arbitration technique for settling industrial disputes.[26]

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22 [1917] V.L.R. 332.

23 [1930] V.L.R. 130.

24 See A.W.U. v. Coles, supra at 337.

25 It is reinforced by the fact, pointed out by Burbury C.J., that the original Commonwealth Conciliation and Arbitration Act contained a provision [s. 55 (1)] which clearly assumed that political levies could be made.

26 A concrete case would be when the contribution proposed was one to the funds of a political party which had stated that if returned it would conduct a royal commission into the question of improving the working of the compulsory arbitration system or of making it easier for registered employee organizations to enforce compliance with awards by their members.

The same could be said of a rule which simply authorised a union to act to foster the best interests of its members (assuming that this would within its terms permit a political levy). Such rules cannot simply be designated *ultra vires*. It is with respect submitted that such rules should be read down to include only levies which can be reasonably supposed to promote industrial arbitration interests as above explained and that in any given instance it is simply a question whether the type of levy involved conforms to this description.

It is also suggested that, whether the matter is being looked at from the viewpoint of power or the viewpoint of interpretation of the rules (assuming the particular rules in point are of the wide type), the question is not whether the purposes of the political party do *in fact* assist what may loosely be designated the arbitration objective, but whether they could reasonably be regarded as so assisting.

The views above tentatively advanced certainly involve the adoption of the standpoint that the registered Federal union enjoys a double legal life, a view which Burbury C.J. regarded as a schizophrenic phantasy. In so far as the association is not acting for the purposes of the Act, that is to say for arbitration objectives, it would seem to derive its being from the fact of agreement[27] reinforced by the provisions of the particular State Trade Union Act which is law in the area in which its challenged activities were carried on. The rules of the union from this aspect would usually be in restraint of trade at common law but would be saved from invalidity by virtue of the provisions of the Trade Union Act, whether the union was registered thereunder or not. If the union is registered under the State Trade Union Act then it can be sued in its registered name.[28] Probably the *Osborne* decision applies to it whether it is so registered or not. Such a view of dual existence lacks social convenience and neatness of result, but it seems to be an inevitable deduction from the impossibility of a truly industrially minded union always operating in all respects within the strict confines of a system devoted to settling disputes without direct action.

It is difficult to see in considering the issue of political contributions how the question of compulsion to pay or the fact that the contribution is specifically called a 'levy' and is openly avowed to be for political purposes affects the matter.[29] For one thing, if the payment was not compulsory then in a practical world the issue would probably very rarely

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[27] It is submitted that nothing in Edgar v. Meade (1916) 23 C.L.R. 29 or Barrett v. Opitz (1945) 70 C.L.R. 141 goes to the extent of denying all contractual effect to the Rules. See the guarded statements at pp. 151 and 169 of the report of the latter case. Both decisions of course assert (which cannot indeed be denied) that the Federal Act confers special qualities on the Rules which change very much the nature which would otherwise be possessed by them but not to the extent of obliterating that nature.

[28] Bonsor v. Musicians' Union [1956] A.C. 104 provided that the particular difficulty stemming from Cameron v. Hogan (1934) 51 C.L.R. 358 is overcome.

[29] The phraseology of Burbury C.J. (see p. 42 of his Reasons for Judgment) suggests that he was influenced by both. He emphasises, for instance, the word 'direct' in his judgment.

arise. And if in the second place the union, having collected its usual dues, proceeded then to resolve that out of these collected funds a contribution would be made to the Labor Party, precisely the same question would arise. And in so far as the question of compulsion tangles with this second issue, that element would merely arise at a different point of time.

The argument on the interpretation question involving reference to section 140 of the Arbitration Act has two weaknesses. The section at what is thought to be the relevant time to consider its possible application to the facts of this case (that is to say, before its amendment in 1958) did not render a rule coming within the description of one imposing *inter alia* an unreasonable condition of membership void but merely allowed the Industrial Court to disallow it.[30] The second weakness is that the section in its pre-1958 form was held to be invalid by the High Court as an attempt to confer non-judicial functions on a body constituted and adapted to exercise judicial functions.[31]. On the other hand, it seems that the learned Chief Justice could have drawn from Regulation 115 of the 1956 Regulations made under the Federal Act some deductions of assistance to his view, though this probably constitutes only a direction to the Registrar.

The fact that a rule on its proper construction would authorise the expulsion of a member for non-contribution to a political party of which he disapproved, an expulsion which might lead to a *de facto* interference with his liberty to earn a living, is certainly one going to unreasonableness. In the *Federated Ironworkers* case[32] a political contribution rule was held to amount to the imposition of unreasonable conditions of membership unless protection was provided for the right of minorities. On the other hand it cannot be said that the fact that the levy is made *specifically* as a political levy as distinct from being effected as a mere disbursement from union funds is a factor making for a greater degree of unreasonableness.[33]

(c) *The Question of Preference*

The decision of the learned Chief Justice on the Port Order of 1948 largely rests on the view that the continued operation of clause 15 thereof as to preference would be inconsistent with the discharge under the

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30 At the latest the exclusion (but for its alleged invalidity) would have operated as at the 31st January, 1958. If the correct date, however, is the registration of the union rule relied on (1933) then at that time, too, the corresponding section merely gave the Court power to disallow.

31 R. v. Spicer ex parte Australian Builders Labourers' Federation [1958] A.L.R. 1.

32 Re Federated Ironworkers Association of Australia (1948) 61 C.A.R. 726. It is of course not necessary to go further and say that it infringes basic human liberties as perhaps the rule in point in Little v. Flockhart (1951) 73 C.A.R. 18 did.

33 The Federated Ironworkers case (supra) rather suggests the contrary as here the majority of the Court was influenced by the fact that the union member was being asked to contribute to a fund which later could be applied to any political party.

Stevedoring Industry Act 1956 of one of the most important functions of the Authority under that Act, *viz.*, 'to make arrangements for allotting waterside workers to stevedoring operations so as to ensure . . . a fair distribution of work . . . *amongst registered waterside workers*'[34]. He relied in more general terms upon the view taken by Ashburner J. of the Commonwealth Arbitration Commission when refusing an application for an order for preference to members of the Federation,[35] that the legislation itself provides a scheme of preference and lays down the limits of that preference.[36]

Comment

The reasoning of the judgment here appears to give insufficient importance to the significance of section 6 (4) of the Stevedoring Industry Act which in reference to the orders therein mentioned (which would include the Port Order of 1948) states that such orders shall not cease to be in force 'by reason of the enactment of this Act.' In fact, a statutory intention seems to be evident both from the 1956 Act and its predecessor, the 1949 Act, that the miscellaneous orders emanating from the successive Authorities should continue to be in force until the Authority for the time being operating should see fit to remove them in terms of section 6 (7). Moreover, on the basis that the Order could be regarded as possibly superseded by the provisions, as distinct from the mere introduction, of the Act, the argument that the Act of 1956 provides its own complete code on the subject of preference does not seem to be convincing. By virtue of the complicated operation of the definitions of 'waterside worker' and 'stevedoring operations' in the 1956 Act, it seems that three categories of waterfront work might be involved and that, so far as the Act itself was concerned, special rights to the Waterside Workers Federation were granted only to members of the union engaged in the loading and unloading of ships (called by Ashburner J. 'category 1 work'). In 'category 2 work' members of other unions could be engaged, and men engaged in 'category 3 work' were not legally 'waterside workers' at all. It must be remembered, however, that the Act in effect speaks only to the enrolment of labour, it does not speak to the continued operation of work by the labour employed. To use American phraseology, it is more on the lines of a 'closed shop' than a 'union shop' provision. It says nothing, as to 'category 1 work,' regarding the position of a man who at point of engagement was a union member but who for some reason, for instance failure to pay his ordinary union dues, indisputably ceased to be a member. That might well be regarded as a gap which such an order as Port Order of 1948 was capable of filling.

The decision of Ashburner J. in 1958 above referred to is of direct relevance only to the question whether there was jurisdiction in the Arbitration Commission to award preference of employment in view of

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[34] Stevedoring Industry Act 1956 s. 17 (1) (f). Italics are mine.

[35] Reported in Industrial Information Bulletin (Commonwealth Department of Labour and National Service) Vol. 13 No. 3 p. 157 (19th March, 1958).

[36] He is referring, of course, to section 31 which gives to the Federation in relation to a certain category of work a qualified monopoly in the supply of labour.

the Stevedoring Industry Act. The decision that there was no jurisdiction may have been justified by the fact that to grant preference unqualifiedly would affect the scheme laid down for category 2 and category 3 workers, but, whether justified or not, the decision cannot be regarded as having direct relevance to the status of such an order as that of 1948 in relation to the statutory scheme of 1958. What of course is of significance is the view of Ashburner J. that the Act spoke its own code on the subject of preference. In regard to that general conclusion we have already made certain remarks. As to the more particular view expressed by the Tasmanian Chief Justice that the existence of clause 15 would be inconsistent with the discharge by the Authority under section 17 (1) (g) of the Act of its function to make arrangements for allotting waterside workers to stevedoring operations so as to ensure a fair distribution of work, there would seem to be nothing to prevent the Authority from exercising its function of spreading work amongst registered waterside workers within the framework of a provision for preference inherited from an earlier validly made order.[37] In fact, there would seem little in principle to exclude the operation of the Port Order, clause 15, to category 1 work save the obvious fact that it bears the appearance of being a forgotten legacy from a past era of things.

(d) *The Liability in Tort*

The conclusions of the judgment on liability in tort are largely dependent on the view taken of (i) the contractual rights of the plaintiffs arising out of the statutory framework governing employment on the waterfront, and (ii) the statutory rights of the plaintiffs and the statutory duties of the employers, of the Authority and of other waterside workers, arising out of such framework.

Very fundamental to the judgment is the assertion that in the absence of a contractual or statutory right to work as distinguished from the general liberty to work which is allowed to all members of the public, the plaintiffs could succeed in so far as the 'picket lines' (or other concerted activity) was concerned, only if they were able to prove (a) interference amounting to the tort of intimidation, (b) conspiracy by unlawful means, or *semble,* with an unlawful immediate purpose, (c) a conspiracy with the dominant object of injuring the plaintiffs. The first would be independent of combination; the second two would be dependent on combination.[38]

From an analysis of the provisions of the Stevedoring Industry Act and the Port Order of 1956 His Honour concluded that the plaintiffs had a statutory right to be set to work which crystallised at the time their engagement was announced through the press and radio system save in the case where they were merely directed to attend at the Authority's

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[37] The Act says 'fair' and not 'equal', and there is no presumption that the maxim 'Equality is equity' applies to the waterfront!

[38] See pp. 51-2 of Reasons for Judgment. We might add that it is probable that His Honour did not intend at this point to exclude independent liability for assault in the event of actual violence on the picket lines or an independent action for breach of statutory duty on the model of Groves v. Wimborne [1898] 2 Q.B. 402.

central pick-up point to serve as replacements. He thought that in legal analysis a waterside worker by virtue of being on the register made a standing offer to accept employment, and the press notification operated as an acceptance of that offer, the Authority acting as agent for the employer. On this view the picket lines interfered with the plaintiff's contractual rights by preventing the employer putting the plaintiffs to work in accord with his contractual obligations and the principle of *Lumley v. Gye*[39] was thereby brought into play.

The learned judge, however, placed additional and, in fact, more emphatic, reliance on the aspect of statutory rights. He mentioned that the contract of employment in the peculiar conditions of the waterfront was one almost entirely governed by statute though it was still a contract. He concluded that if no contractual relationship was created until the waterside worker answered his name at the pick-up area at the wharf, then nonetheless the employer was under a statutory duty to employ the waterside worker mentioned in the press and radio notification by virtue of the provisions of Port Order No. 16/1956 which had the force of law. From this it followed that the worker had a statutory right to be put to work and to work. He also concluded that as under section 17 (1) (f) of the Stevedoring Industry Act the authority was under a statutory duty to make arrangements for a fair distribution of work among registered waterside workers, the plaintiffs derived a statutory right to work from this source also. The picketing therefore prevented both employer and Authority from discharging their respective statutory duties under the Act.

His Honour thought that the principle commonly known as that of *Lumley v. Gye* was wide enough to include civil rights independent of contract and refers to the remarks of Dixon J. (as he then was) in *James v. The Commonwealth*[40] wherein the latter states a view to this effect and refers to the case of inducing a common carrier to refuse in breach of duty to accept goods tendered to him. He also relied on the formulation of Lord Watson in *Allen v. Flood*[41] where the learned law lord merely refers to inducing another person to commit 'an actionable wrong.'

His Honour of course was aware that in the instant case there was not *persuasion* to infringe either contractual or statutory rights.[42] But it is well recognised that the tort of interference with contract is not limited to the case of persuasion. It would extend to cases of intervention by physical constraint preventing either contracting party from performing his contract.[43] The principle may also extend to the act of an intervener who does not intervene directly in the contractual affairs of the head

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39 (1853) 2 E. & B. 216, 118 E.R. 749.

40 (1939) 62 C.L.R. 339 at 370.

41 [1898] A.C. 1 at 96.

42 At p. 230 of the Reasons for Judgment he does indeed tentatively suggest that the 'picket lines' should be regarded as persuasion through conduct but does not press it.

43 D. C. Thomson v. Deakin [1952] Ch. 646 at 678, 694-5.

contracting parties at all, but nonetheless seeks to render it impossible for such contracting parties or either of them to perform their contract, by pressure brought to bear on third parties. This principle was asserted by the Court of Appeal in *D. C. Thomson & Co. v. Deakin.*[44] Here Bowaters Ltd. were suppliers of paper to the plaintiffs under contract and the allegation was that the defendant trade union officials had procured the breach by Bowaters of their contract with the plaintiffs by wrongly inducing the employees of Bowaters to break *their* contracts of employment by refusing to handle paper destined for the plaintiffs. The action, however, failed, *inter alia,* because the Court of Appeal held that in order to found a cause of action in this particular factual situation, it had to be shown that the act of the intervener itself was *independently unlawful,* that is to say, unlawful apart from the inducement of breach of the main contract.[45] This was not so in the *Thomson* case because no breach of contract on the part of Bowaters' workmen was shown.

The Hursey situation was, unlike that of *Thomson v. Deakin,* a case of direct intervention in the relationships between the plaintiffs and the persons who were bound to them. Nevertheless Burbury C.J. was troubled by the fact that in the English case the formulation was that in *all* cases where the contract was ruptured by *means other than persuasion* the means used had to be wrongful in themselves.[46] He found it difficult to reconcile this view with the exposition of Dixon J. in the *James* case.[47] Nevertheless he refrained from deciding this point because in his opinion in the Hursey situation there were unlawful acts. The list of these unlawful acts is quite a formidable one but it is not quite clear in all cases whether His Honour is referring to illegality at common law or illegality under statute. In brief he held the unlawful acts to comprise:

(i) *Illegal acts at Common Law.* It seems that he did not regard the existence of the picket lines as in themselves constituting assault, but it is plain that there were other acts arising out of the picket lines which were clearly assaults and it is clear from what the judge said later as to conspiracy that he regarded all the defendants as liable for at least some of these. Further, though the picket lines in themselves did not involve assault, yet he regarded them as intimidatory at common law by reason of the threat to use unlawful force inherent in them. His Honour here was apparently referring to the so-called tort of intimidation, *viz.,* a threat to use unlawful means, which he preferred to view less as a nominate tort (as Salmond[48] regards it) but as 'innominate tortious conduct'.

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44 [1952] Ch. 646. See at p. 678, 681.

45 It is submitted that the wrongful act proof of which was regarded as necessary was not so much the breach of contract of Bowaters' workmen as the act of the defendants in inducing that breach—in other words, a Lumley v. Gye tort situation in itself. This is clearer in the formulations of Jenkins and Morris L.JJ. than in that of Evershed M.R.

46 Thomson v. Deakin, supra, at 681-2.

47 See footnote No. 40

48 Torts 12th Ed. Ch. 18 (pp. 669-71).

(ii) *Illegal acts under the Stevedoring Industry Act.* Here he relied on section 44 (1) of the Act which refers to violence to the person, threat, intimidation or incitement, boycott or threat of boycott or discriminatory action. He pointed out that the prototype of this section was section 3 of the Act 6 Geo. 4 c. 129 (Imp.), the statute which ultimately repealed the Combination Laws. He did not think that the view of the Court of Appeal in *Connor v. Kent*[49] that the word 'intimidate' in section 7 of the *Conspiracy and Protection of Property Act* of 1875 (Imp.) should be restricted to such acts as would justify a justice of the peace binding over the defendant to keep the peace could be applicable to section 44 (1), in view of the fact that such sub-section refers to threats, intimidation or incitement *of any kind.* He was inclined to rely more on some of the decisions on the English Act of 1825 (which incidentally was repealed in 1871). He rested his conclusion on 'intimidation' and 'threat' and did not decide whether the 'picket lines' constituted 'boycott' or 'discriminatory action.'

(iii) *Illegal acts under the (Tasmanian) Conspiracy and Protection of Property Act 1889, s. 6.* This is the analogue of what are often called in England the 'watching or besetting' provisions of the English Act of 1875. His Honour found that here the men in every 'picket' line contravened the provisions of the statute not only by intimidating the plaintiffs but also by besetting the approach to the place where they normally worked.

(iv) *Miscellaneous.* He found also unlawful assembly under the Tasmania Criminal Code on various occasions. He did not deal specifically with the allegations of nuisance and defamation or with those of behaving in an offensive manner and using threatening, abusive or indecent language or behaviour which would involve offences under Tasmanian statutory law.

This examination of the unlawful acts committed on behalf of the defendants is evoked, of course, in the consideration of the requirement of unlawful means to support an allegation of liability under the *Lumley v. Gye* principle in accord with the views of the Court of Appeal in *Thomson & Co. v. Deakin.*

So far the judgment had not touched the question of the 'Pinkenba tactics.' His Honour then turned to these. He held that the waterside workers who 'walked off' their jobs committed breaches of their contracts of service and breaches of section 31 of the Stevedoring Industry Act.[50] Striking in breach of contract moreover involved unlawful means at common law.[51] He related the use of these 'unlawful means' to the *Lumley v. Gye* principle in view of the fact that it was by reason of them that the plaintiffs were dismissed.

Leaving *Lumley v. Gye*, His Honour passed to conspiracy. He was of the view that he was not obliged to find whether there was an actionable

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[49] [1891] 2 Q.B. 545 at 559. The provisions of the previous statute of 1871 (repealed by the 1875 Act) did expressly include this limitation.

[50] This must be wrong. Probably it is an error for section 36.

[51] South Wales Miners' Federation v. Glamorgan Coal Co. [1905] A.C. 239. This decision, however, does not seem to support this proposition.

conspiracy 'to injure' within the meaning of the principles enunciated in the *Crofter* case[52] and *McKernan v. Fraser*.[53] He expressed certain views, however. Here the combination acted for the *immediate object* of preventing the plaintiffs from presenting themselves for work or of procuring their dismissal. On the whole, however, he was not satisfied that the predominating or main purpose, the ultimate motive, of the conspiracy was to injure the plaintiffs. He regarded the view undoubtedly held by the rank and file that they were defending the union principle that unionists would not work with non-unionists as somewhat naive and certainly did not think it was held by Healy. On the other hand he did not think it was true to say that the motive springs were dislike of the political associations of the plaintiffs; he thought that it was essentially an internecine struggle and the union action was motivated by a desire to uphold majority rule, to ward off what was regarded as a threat to solidarity in union affairs. Undoubtedly the struggle was made more bitter by the fact that some waterside union officials were members of the Communist Party, but he thought that the position was that direct action would be equally likely to have been used against anyone who had defied a majority decision. The fact that the union resorted to direct action at a time when the validity of the exclusion of the plaintiffs was clearly to be made the subject of Court proceedings was treated by His Honour as a matter relevant to the question of damages only.

The reason why the judge did not find it necessary to make a firm decision on the considerations moving from the *Crofter* case was that he found that the combination was otherwise vitiated. It was vitiated firstly because it was a combination for a specifically unlawful *immediate* objective, *viz.*, prevention of the plaintiffs from going to work or being put to work, and secondly because of being a combination to operate by *means* specifically unlawful. The first consideration rested on what he had previously decided on the plaintiffs' contractual and statutory rights to work. It followed that the combination was directed to an end specifically unlawful in terms of the *Lumley v. Gye* principle. As respects the second consideration he relied on the acts of specific unlawfulness which he had already dissected.

In so far as the defendants were joint tortfeasors liable for nominate torts, for instance assault, he emphasized that the allegation of conspiracy would be surplusage.[54] However, he thought that the concept of unlawfulness of means was not confined to tortious conduct. This conclusion was prompted by the consideration that in the instant case all the wrongful means were not necessarily tortious in character.

The learned Chief Justice also upheld the existence of a separate cause of action on the basis of breach of statutory duty. This is directly on the *Groves v. Wimborne*[55] model. He refers to section 44 of the Stevedoring

[52] [1942] A.C. 435.
[53] (1931) 46 C.L.R. 343.
[54] O'Brien v. Dawson (1942) 66 C.L.R. 18 at 27.
[55] [1898] 2 Q.B. 402.

Industry Act, but it is not clear whether he is referring to sub-section 1 which refers to threats, intimidation or boycott, or sub-section 2 which refers to refusal to work with another registered waterside worker and would be of relevance to the 'walk-off' tactics.

It appears that he also held intimidation established as a separate basis of tortious liability apart from its auxiliary aspect in relation to *Lumley v. Gye* or conspiracy.[56] He said nothing about any possible independent liability on the basis of public nuisance.

His Honour therefore associated the *Lumley v. Gye* cause of action with the specific *right* to work and the other torts, whether combination or individual-action torts, with the *liberty* to work. However, there is a certain interplay. Thus he uses the interference with the plaintiffs' contractual and statutory rights not only as the basis of the *Lumley v. Gye* liability but also as showing a conspiracy for an illegal purpose as distinct from one acting through illegal means. Secondly, the long list of illegal acts is regarded as relevant not only by reason of the formulation of the Court of Appeal in *Thomson & Co. v. Deakin* covering this particular type of *Lumley v. Gye* situation, but also to establish a conspiracy by illegal means.

Comment

It is thought that no serious quarrel can be picked with the Hohfeldian analysis of His Honour. In fact, the distinction between specific rights and liberties[57] is consistently and clearly maintained throughout the judgment. What we have to investigate is the soundness of the various links on which the chain of reasoning depends.

The weakest is undoubtedly the application of the principle in *Lumley v. Gye*. One objection, however, may be first disposed of. The principle of *Lumley v. Gye,* assuming it correctly covers both causing breach of contract and causing breach of some statutory right, is usually regarded as at least involving the bringing about of some condition of suability between the parties who are initially linked in the relationship, whether it be contractual or otherwise. For instance, B is bound to A by contract, C induces B to break his contract, A has not only rights of action in tort against C but also for breach of contract against B. Usually the existence of the latter is regarded as a pre-requisite for the former. In the instant case it could hardly be asserted that the employer who failed to employ the Hurseys or the Stevedoring Industry Authority who (so it was asserted) was under a duty to set them to work committed any actual breach. They were prevented by forces (presumably) beyond their control. This, however, seems to create no real difficulty. Maybe in cases where the intervener acted directly on the mind of, say, B in the example above given, either by persuasion or threat of action, it is necessary that B's action in not fulfilling the contract should constitute a breach for which he is suable, but this possibly is not always the case. The contract may contain, for instance, a 'strike' clause. This matter has been very

[56] Reasons for Judgment, pp. 243-4.
[57] See Stone: Province and Function of Law (1946) pp. 119, 121.

little explored.[58] In situations, however, where the intervener acts not by persuasion but by some direct physical constraint either of person or property upon B or acts through some form of pressure brought to bear on a third person (D), it does not seem necessary that there be some suable breach of the main contract upon which A is entitled to sue B. This seems obvious from the examples of direct constraint upon the contracting party given by Jenkins L.J. in *Thomson & Co. v. Deakin*.[59] It seems that it is enough that the contractual objects are frustrated or brought to naught.[60]

However, all formulations of the liability under *Lumley v. Gye* must pre-suppose the initial existence of some civil duty situation between the complaining party and another person followed either by the actual suable breach of duty or the rupture or frustration of the situation existing between them. Did this prior duty situation exist in this case? In other words, did the 'right to work' exist? His Honour initially relied on the *nexus* of contract. Now, as he commented himself, the contract between the waterside worker and his stevedoring employer is one largely upon statutory terms. In fact here, it seems, is a case where status has almost entirely superseded contract. If the contract has an offer and acceptance, then that offer and acceptance is regulated through a statutory mechanism. Yet there seems to remain an element of contract. There would seem at the very lowest to be an obligation on the part of an allotted waterside worker to obey the commands of the stevedoring employer. The employer can put the worker upon a 'red' discharge for misconduct or slackness in working. These obligations are not prescribed by the Act nor do they seem to derive entirely from the terms of the Waterside Workers Award. That award prescribes certain obligations but can hardly be said to completely cover the field. It seems that here is an element interpretable only in terms of common law. If the offer and acceptance mechanism is not only regulated by statute but is *forced* by statute, then probably the correct view is that the element of contract is compulsorily written in and that the common law incidents, such as they are, come in by pleasure of the statute only. But is the transaction which constitutes the engagement a forced one? Probably the worker, as the Chief Justice said, makes a standing offer by remaining on the register. This is voluntary on his part as presumably he can take himself off the register. Then, unless the writer has omitted to notice some relevant Port Order provision, it seems that there is no distinct legal obligation on the part of the employer to accept for work any particular waterside worker. All that the Act does is to prescribe that the employer shall

[58] It is mentioned very briefly by Payne in an article in 7 Current Legal Problems (1954) at 113.

[59] [1952] Ch. 646 at 696 (second para.). See also Payne op. cit. at 107-108.

[60] This admittedly leaves some puzzling questions. Thus, suppose an employer validly dismisses an employee by giving him seven days notice because the union causes the other employees to come out on illegal strike until the employee is dismissed. If the act of striking is unlawful here is the independently wrongful act, but is it a Lumley v. Gye situation? It is merely the position of Allen v. Flood [1898] A.C. 1 with the additional element of an illegal strike.

employ none other than registered waterside workers. Clause 1 of the 1956 Port Order certainly assumes that employers will accept the labour made available, but seems to supply a practical rather than a legal compulsion for accepting each individual component.[61] Failure to accept labour does not necessarily constitute a breach of section 33 of the Act though it would be evidence of it. Failure to accept, again, would be a reason for cancellation of the employer's registration, but only if there was a direction so to do made by the Authority. If then the employer might have some discretion in some circumstances in refusing to accept labour, then it appears that a little of the contractual flavour would enter the transaction. However, the point at which such discretion of the employer would enter would seem to be the point at which the allotted waterside worker answers his name at the wharf 'pick-up' area. This would be too late a point to serve as a basis for the conclusions which His Honour draws. His view that the contract is complete at the moment that the announcement is made through the press and radio, and that the announcement is an acceptance made by the Authority as agent for the employer seems far too mechanistic to accept.[62]

His Honour also relied on the question of statutory right. This of course pre-supposes a statutory duty, usually enforceable by penalty or some other criminal or quasi-criminal sanction, of such a nature that it also gives the plaintiff claiming the benefit of the statute a right to sue civilly for damages for breach. Here it seems exceedingy doubtful whether any specific statutory duty is imposed. The matter has been discussed above in connection with the alleged duty of the employer to engage. Section 33 does not seem specific enough and section 35 would not apply without the application of a Port Order direction and even then involves merely the sanction of withdrawal of registration. So far as a duty is alleged to rest on the Stevedoring Industry Authority, the matter seems even plainer. Section 17 (1) (f) dealing with the matter of allotting waterside workers so as to ensure a fair distribution of work in terms prescribes a function, not a duty. If it can be described as a duty, it is a duty to roster for engagement, not one to see that the employee gets to work. What was prevented here was the putting of the Hurseys to work, not the paper allocation of work to them.

Even assuming a general statutory obligation on the employer and the Authority to exist, it is suggested that before *Lumley v. Gye* can come into play there must be some civil *vinculum juris* between the Hurseys and the employer or Authority. Corresponding to the duty resting on the latter there must exist a civil right on the part of the Hurseys. It is true that the cause of action is not of the *Groves v. Wimborne*[63] type, that is, a direct

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61 Inquiries made by the writer of the Stevedoring Industry Authority elicited the information that the employer would be prosecuted under section 33 of the Act and not under the particular Port Order for failure to accept a particular worker allotted to him.

62 Supposing the employer makes a requisition by error for 100 instead of 90 waterside workers. 100 are allotted. With which particular 90 is the contract made? The view is also opposed to section 7 (2) of the Act.

63 [1898] 2 Q.B. 402.

action for breach of statutory duty. But a *Groves v. Wimborne* situation must be shown to exist before it can be said that the alleged wrongful intervener has caused the breakdown of an existing duty situation. It is not enough for criminal liability to exist for breach; civil liability as between the parties must exist, too. On the principles applied this is so only where the person alleging the existence of a civil obligation can show that he is a member of a special class for whose benefit the legislation was passed[64] or that it was otherwise clear that the legislature intended to confer on him a civil right to sue for damages as well as imposing some form of criminal liability.[65] It is true that one of the aims of the legislation is to ensure an equitable distribution of labour, but the dominant aim seems to be rather that of assisting the industry generally by removing the evils of casual employment, frequently adverted to in the various Reports of the successive controlling authorities, and ensuring a regular stream of labour. Equitable distribution of work seems rather a means to that end than an end in itself and, although the Act obviously contemplates benefits to accrue to employees from more regular employment, it seems designed to secure that end rather by administrative arrangements than by prescription of statutory duties.[66]

It is thought that if the necessary conditions of statutory duty giving rise to civil right existed, then the fact that neither the Authority nor the employer could be sued for damages by the Hurseys nor prosecuted for breach, because in fact there was not a breach committed, would not of itself be a bar to *Lumley v. Gye* liability. There must be a situation where A could sue B *if* B breaches the duty, but if B cannot fulfil because of C's wilful intervention and the arrangement is thereby frustrated, C cannot set up that in fact B committed no suable breach. The weaknesses in the formulation seem to come from other sources, *viz.*, whether there *is* a duty and whether, if there is, civil rights are attached to it.[67]

As regards the view of the Court of Appeal in *Thomson & Co. v. Deakin* that, apart from the situation where there was direct persuasion, the intervener must commit some independently wrongful act, a view which Burbury C.J. applied but with which he did not agree, there may be some doubts as to its correctness where the intervener acts directly on the contracting parties, but it certainly seems a reasonable limitation where the situation is that the intervener gets some other person to act. Without it the flood-gates would indeed be opened wide. So far as the catalogue of unlawful acts which the learned Chief Justice listed, it seems that there is quite an embarrassment of riches. The grounds seem fairly convincing, with the exception of the ground of 'watching or besetting' under the Tasmanian Conspiracy and Protection of Property Act. This provi-

64 As in Groves v. Wimborne itself.

65 As in Monk v. Warbey [1935] 1 K.B. 75.

66 Darling Island Stevedoring Co. v. Long (1957) 97 C.L.R. 36 where breach of statutory duty was held to create a civil right of action against the 'person in charge,' was a case of an entirely different type.

67 There may also be some difficulty in view of the fact that the plaintiffs were the constrainees, not the other party deprived of the constrainees' services.

sion is copied from the English Act of 1875 (section 7) whereunder the dominant line of reasoning is that in *Ward Lock & Co. v. Operative Society of Printers' Assistants*,[68] *viz.*, that the provision, by reason of the presence of the words 'wrongly and without lawful authority' operates only to convert into offences conduct which was previously at least tortious. The reasoning in *Lyons v. Wilkins*[69] that these words are a mere rhetorical flourish seems to have been discredited,[70] though the question whether the same can be applied to the separate offence of 'intimidation' which is contained in the same section has never been faced. Picketing therefore is 'besetting' but not of itself wrongful 'besetting.' Here, however, there was more than picketing in the normal sense and it seems that His Honour's opinion if incorrect is so only in so far as he attributed wrongfulness to the mere aspect of besetting as such.[71]

It is suggested that His Honour was unduly cautious on the question of assault. He found that the picket lines in themselves did not constitute an assault and limited his findings of assault to those instances when there was evidence that the pickets actually pushed the plaintiffs back when they tried to force their way through. Yet he found later that the picket lines were intimidatory in themselves, that they constituted a threat of force. It would seem that this threat of force would be enough to constitute an assault though not, of course, a battery.[72] There may be some doubt, too, whether the aspect of false imprisonment was sufficiently considered, but false imprisonment was not clearly pleaded.

It is submitted that the judgment is clearly correct in assuming that the unlawful acts themselves need not be torts. It seems that in *Thomson & Co. v. Deakin*, assuming that the other *Lumley v. Gye* conditions had existed, the defendants could not have pleaded that inducing breach of contract on the part of Bowaters' employees was not itself actionable because of section 3 of the Trade Disputes Act 1906 (English).[73]

It is also thought that His Honour was clearly justified in dismissing the defence of justification.[74]

As regards the 'walk-off' tactics employed after the 13th June, 1958, the judgment is far from clear. It appears to regard breach of section

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[68] (1906) 22 T.L.R. 327.

[69] [1899] 1 Ch. 255.

[70] See Fowler v. Kibble [1922] 1 Ch. 487; Re Van der Lubbe (1949) 49 S.R. (N.S.W.) 309. The last case, however, rather strangely, holds that peaceful picketing without any obstruction to the passage of persons along the streets or into premises is a public nuisance.

[71] It seems indeed that His Honour, in part at any rate, confused four concepts, viz., that of 'watching or besetting' under the English Act of 1875, 'intimidation' under the same Act, 'intimidation' under the English Act of 1825, and 'intimidation' under the English Act of 1871 (which was repealed by the 1875 Act).

[72] See Fleming: Law of Torts (1957) pp. 30-31. Innes v. Wylie (1844) 1 Car. & K. 257, 174 E.R. 800 is rather a special case.

[73] providing that an act done in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment. See Payne: op. cit. at 113.

[74] Mere bona fide desire to advance trade interests is clearly not legal justification in relation to this particular tort. In fact the only substantial basis for a plea of justification in the instant situation would appear to be the valid existence of the Port Order of 1948.

36 of the Stevedoring Industry Act as constituting the specifically unlawful act, but this section carries only the sanction of cancellation of registration. Section 44 (2) is a more likely source. The other suggested independently unlawful act is breach of contract by the watersiders and *Thomson & Co. v. Deakin* shows that this is a permissible way of looking at the matter. However, it raises the other difficulty as to whether the contract relationship has not been swallowed up by status. Again it is doubtful whence Burbury C.J. derives his main duty situation, that is to say between the Hurseys and the employers. Does he rely on the same sources as in connection with the 'picket line' infringements, or does he regard section 44 (2) of the Act as creating the initial *duty*?

The cause of action in conspiracy may be more shortly discussed. In so far as the conspiracy alleged was simply conspiracy to injure, the principle of the *Crofter* case places the emphasis on ultimate motive and the plaintiff must prove that the basic motive of the defendants was more than the desire to advance legitimate trade interests. Malevolent intent to injure on personal grounds need not be shown, but the fact of concerted action to advance trade or other legitimate interests is a sufficient exculpation. Here the view that, although certain animosity on political grounds did enter, the combination was in the main motivated by the desire to secure the carrying out of majority rule seems a reasonable deduction. The fact that considerable spleen and hot feeling was exhibited is not necessarily proof of malevolence, as is shown by the admirably clear judgment of Evatt J. in *McKernan v. Fraser*.[75]

The learned judge, however, held the conspiracy actionable on the basis of its possession of an immediate object which was expressly unlawful, *viz.*, the denial of the plaintiffs' contractual and statutory right to work. The fate of this conclusion depends on what was said previously concerning the *Lumley v. Gye* cause of action. The further finding of a conspiracy by unlawful means is probably that part of the judgment least open to attack. Specific torts seem to have here been committed and in such cases it seems unimportant to inquire whether the cause of action was on the basis of the conspiracy or on the basis of the other nominate torts, except perhaps in cases where the sufferer from the conspiracy was one person and the torts were committed against another. It therefore is unnecessary to inquire here whether the judge was holding the defendants liable for conspiracy or liable for jointly committed assaults.

However, in the instant situation not all the wrongful acts committed were torts, for instance the breaches of section 44 of the Stevedoring Industry Act. It is remarkable that actual cases do not seem to pose this particular position, but the general position can surely not be in doubt. It seems to have been assumed in some of the decisions that the employment of an unlawful act *simpliciter* as means would vitiate the combination[76] and the judgment of Evatt J. in *McKernan v. Fraser* is based on

[75] (1931) 46 C.L.R. 343 at 403-5.

[76] Crofter case [1942] A.C. at 445, 467; Sorrell v. Smith [1925] A.C. 700 at 714.

the notion that a wrongful though non-tortious act would be enough.[77] It is thought, however, that the means must be in some way essential to the purposes of the conspiracy.[78]

No comment need be made on the independent cause of action for breach of statutory duty. It is submitted that, assuming the various alleged statutory duties (or some of them) existed and were broken, that gave the plaintiffs no cause of action on this head alone.

It is not clear where His Honour places the so-called tort of intimidation. He appears to have relied on intimidation both as one of the unlawful means relevant to other torts and also as a substantive ground of liability. Intimidation, though regarded by him as comprising innominate tortious conduct, seems to be viewed in the main by text book writers as a nominate tort.[79] It seems to have been also so regarded in the joint judgment of Gavan Duffy C.J. and Starke J. in *McKernan v. Fraser*,[80] though not by Evatt J. or Dixon J. (as he then was). It seems to comprise a threat to perform an unlawful act and its horizon is bounded by the concept of 'threat.' How this tort fits in, if it fits in at all, with the extended application of the *Lumley v. Gye* principle applied in the *Thomson* case is matter of conjecture.[81]

(e) *Liability of the Federation and Branch*

The notion of vicarious liability here makes contact with the theory of corporate existence and the judgment takes refuge ultimately in finding the case to be one of *express* authorization.

The learned Chief Justice referred to the familiar principle of scope of duties and course of employment which had been applied to the case of trade unions in the *Taff Vale* case[82] and, in fact, in certain Australian decisions, to test the issue of vicarious liability.[83] He thought that the establishment of picket lines and the concerted refusal on the part of

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77 i.e., his view—see (1931) 46 C.L.R. at 371—that had the act threatened been that of an illegal strike under the South Australian Industrial Code there would have been no need to inquire into the question of 'conspiracy to injure.' The assumption is obviously that the existence of the criminal act would have been enough. See also Dixon J. (as he then was) in the same case at 359, and Citrine: Trade Union Law p. 420; Citrine's reference is to criminal conspiracy, but see Sorrell v. Smith [1925] A.C. 700 at 725 for Lord Dunedin's view as to the nexus between the two.

78 It probably could not be contended that a combination was actionable as conspiracy because completion of its purpose involved incidentally the commission of a parking offence even though that result was contemplated.

79 Salmond: Torts 12th Ed. Ch. 18; Fleming: Law of Torts (1957) p. 722. Street's view seems neutral—Law of Torts (1955) p. 370.

80 Supra at 350 (statement of plaintiffs' claims). See also James v. The Commonwealth (1939) 62 C.L.R. 339 at 363-5.

81 Thus in the example given in footnote 60 presumably the employee could sue on the basis of intimidation if his dismissal was procured through threat of an illegal strike though there was thereby not caused any actual breach of contract. Why, however, should the threat be regarded in a more serious light than the actuality? See Payne op. cit. p. 108.

82 Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426.

83 e.g., Nolan v. South Australian Labourers Union [1910] S.A.L.R. 85; Keogh v. Australian Workers' Union (1902) S.R. (N.S.W.) (Eq.) 265.

waterside workers to work with the plaintiffs were done in the course of the Federation's business of achieving a monopoly of labour for the benefit of its members and to enforce the principle of union solidarity. In his view there was sufficient evidence to associate the executive of the Branch and its officials with the activities of the Campaign Committee and the complicity of the Federation's officers was sufficiently established by the considerations previously referred to. There were certain assaults which bore insufficient relationship to the purposes of the combination to establish vicarious liability, but for assaults which grew out of the picket line he thought there was liability as some violence and active hostility were the inevitable results of this form of action and could not be treated as foreign to the purposes of the conspiracy. On the assumption that certain of the actual torts committed were not within the scope of the corporate powers of the Federation, he treated the case of *Poulton v. L. & S.W. Railway*[84] where the company was held not liable for the act of its stationmaster in arresting the plaintiff, an act beyond its powers, as resting on the basis that in the absence of *express* authority it would be presumed that the scope of *implied* authority of the stationmaster would not extend to the commission of an *ultra vires* tort.[85] He relied on *Campbell v. Paddington Corporation*[86] for the proposition that a corporation would be liable for wrongful acts which happened to be *ultra vires* if such acts were *expressly authorised*. In the present case he thought the *Campbell* principle was applicable as both the 'picket' lines and the 'walk-off' tactics were *expressly* authorised both by the Federation and the Branch, if not by prior authorization then by later ratification.

If the Branch was to be regarded as a separate voluntary association, then he said that it must be treated as an agent of the Federation and, as it expressly authorized the unlawful acts, was jointly liable with the Federation. It its capacity as a voluntary association it was suable under the Tasmanian Rules of Court.

Comment

It is to be noted that the judgment of Burbury C.J. does not consider the *juristic status* of the union in its aspect of suability as any different from its status in relation to the question of powers. Nevertheless, his discussion clearly proceeds on the basis that what was done in connection with the picketing was *ultra vires* the union, that is to say it was not for the purposes of the Arbitration Act. Nevertheless, he held the Federation *liable as a corporation* (not as a voluntary association on some such basis as that which was applied in *Bonsor v. Musicians' Union*,[87] save by Lords Morton and Porter). Here indeed he is in respectable company as the trend in company law is to treat the question of liability in a different way from that of power.

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[84] (1867) L.R. 2 Q.B. 534.

[85] This also is Salmond's explanation—Salmond: Torts 12th Ed. p. 67.

[86] [1911] 1 K.B. 869.

[87] [1956] A.C. 104.

Assuming for the moment that both the Federation and Branch could be regarded as one corporate entity and putting aside the question of *ultra vires* torts for the moment, then there is no reason why the acts of its officials should not be imputed to it on the ordinary vicarious liability principle resting on course of employment and course of duties. This, as previously mentioned, has been applied in cases involving trade union liability in England and in Australia. There is no doubt that key officials of both Federation and Branch approved of the direct action tactics and of incidents which were an inevitable result of them, and such officials had been placed by the union in a position where they could do such acts.[88] Apart therefore from the difficult question of *ultra vires* torts the position would seem to be clear.

Burbury C. J. solved the issue of *ultra vires* torts by invoking the principle of the *Campbell v. Paddington Borough Council*[89] decision and holding that the torts had been specifically authorised either at the time or by subsequent ratification. It is indeed difficult to know what is meant by express authorization here. Presumably on the analogy of the *Campbell* case one would need to have some resolution passed by the union's governing body. This would be satisfied in the case of the Branch but hardly in the case of the union as Healy could scarcely be regarded as the effective decision-making unit of the Federation,[90] though normally he could probably affect it with liability on the course of employment test. On the other hand, it may be enough to show that a majority of members of the governing committee approved of the actions taken. Need, however, we go to the difficult question of express authorization? The *Poulton* case seems to have been decided the way it was only because the company was engaged upon a perfectly regular scheme of *intra vires* activities. The act of the stationmaster then suddenly appeared on the scene as the isolated commission of an act which happened to be *ultra vires* the company and this was held not to be within the scope of his implied authority, that is to say within his course of employment. But suppose the company had been embarking on a regular course of *ultra vires* activity and the tort was committed as a regular incident thereof. Suppose it was formed to operate a steam railway system but commenced to operate an electric tramways system and the driver of a tram injured a pedestrian by negligent driving. Surely the company would be regarded as liable on the application of the ordinary course of employment test.

It is suggested that the result which it is submitted the law has arrived at is defensible only on the basis of expediency and justice, not logic. Logically no corporation could be liable for *ultra vires* torts committed

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88 See the classic formulation of Willes J. in Bayley v. Manchester Railway Co. L.R. 7 C.P. 415 at 420.

89 Supra.

90 The case cited by His Honour of Australian Commonwealth Shipping Board v. Federated Seamen's Union (1925) 35 C.L.R. 462, was certainly a case where the union was held liable but the judgment of Isaacs J. expressly proceeds on the basis that there was no resolution of the governing body (see at p. 476). It is not a case involving an ultra vires torts question at all.

by its servants for the simple reason that the contract to employ them would be void *qua* the *ultra vires* torts.[91] Logic, however, *must* be discarded in favour of social justice because a slight extension of the same principle would lead to the result that a corporation could not be liable for *any* tort or illegal act even though it could be regarded as a mere mode of doing an unauthorized act.[92] Corporations of necessity lack the power to sanction *any* unlawful act.

So far as regards the direct action tactics of the employee Federation, these could hardly be regarded as being performed 'for the purposes of' the Arbitration Act. This indeed would seem to be so even though nothing that had been done was distinctly unlawful; for instance, peaceful picketing carried out for purely informational purposes. The element of illegality therefore seems to add nothing distinctive to the problem. If, as has been above submitted, the trend of authority would be to hold a corporation liable for wrongful acts committed in the course of employment or expressly authorized, even though such acts were *ultra vires,* then the Federation would be liable in the same way as any other corporation unless the words 'for the purposes of this Act' make some significant difference. It might be argued that this is a limited corporation; that once it begins to act beyond the purposes of the Act is ceases to be a corporation. Nevertheless the ordinary trading corporation formed under the Companies Act is incorporated only for the purposes of its memorandum of association, yet if *ultra vires* torts are committed it holds its corporate capacity to the extent of shouldering legal liability. If considerations of strict logic are overturned in the one case, there is no reason why they should not be in the other. To the realist school the situation will merely serve as an example of the absurdity of applying purely 'concessional' theories.

On the trends it is submitted that the Federation would be held liable, if its agents, placed in a position where they could normally have performed acts of the type complained of, associate themselves in a sufficiently significant way with the acts which were done. Here there was obviously sufficient evidence of such association.

If the Branch was an integral part of the Federation organization,[93] then no more would seem to require to be added. On such assumption one clear result would seem to be that it was improperly added as a

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91 See Goodhart—2 Cambridge Law Journal (1926) 350, and Essays in Jurisprudence Ch. V.

92 It is not clear whether Burbury C.J. treated the acts of the union as being ultra vires merely because of their specifically wrongful character or because they followed out a course of conduct which was opposed to the settlement of disputes by arbitration (c.f. the frequent statements made by Australian arbitration court judges, 'You cannot have direct action and arbitration, too'). The two lines of thought are treated differently, e.g., Gower: Modern Company Law 2nd ed. pp. 91-2.

93 There are strong indications that this was so, viz., the relationship between the Federation and Branch Rules and the strong doubt whether the Branch in law possessed any separate property. See Barrett v. Opitz (1945) 70 C.L.R. 141, where it was held that the organization rules included the Branch Rules.

defendant. If it was a subordinate voluntary association and as such properly sued under the Tasmanian Rules of Court, then there are certainly difficulties. If it had been registered as a trade union on the *Taff Vale* principle it would be liable on the vicarious liability basis and no difficulty as to *ultra vires* torts would arise because it appears that the exertion of extra-legal pressures is within the usual scope of the statutory definition of a trade union within the Trade Union Acts. It was not, however, so registered and it is doubtful whether the Tasmanian Rules of Court relieve the plaintiffs entirely from the substantive difficulties that attend the representative action.[94]

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Many difficult questions arise on the assumption that certain conclusions of the learned Chief Justice are incorrect. Thus if he is wrong on the point of the validity of the levy and also wrong on the question of the 1948 Port Order, then the question whether the express repeal of that Order in 1958 was valid would affect some but not all of the direct action. Even if he be right on the question of the levy, then an argument that the plaintiffs ceased to be members by reason of failure to pay their normal union contributions is possible. This article is far too long already to attempt to go into such matters. Nor is the question of damages treated; nor the constitutional point involving jurisdiction which, it is understood, was raised in the High Court on appeal.

The learned Chief Justice did not grant additional damages by reason of the exclusion from union membership. He granted appropriate declarations and in respect of this relief purported to distinguish the decision in *Cameron v. Hogan*[95] in a somewhat unconvincing manner.

The above represents a respectful commentary on a very valiant judicial attempt to grapple with a very complex situation, a situation which in such aspects as the status of the union and Branch might well be regarded as verging towards the insoluble. The observations here given are given with due appreciation of the fact that the voice of the High Court is yet to be heard on the matter.

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[94] Without going into the matter to any depth, these Rules bear every indication of being merely procedural in character, not touching the difficulties of substantive liability, especially in tort, attending the ordinary representative suit—see Lloyd (1956) 19 M.L.R. at pp. 133-4 for a statement of some of these difficulties.

[95] (1934) 51 C.L.R. 358. This decision dealt with a voluntary association very different from the one in point here. Even if the principle can be taken as extending to trade unions generally, perhaps the High Court might review the whole decision in view of the more recent decisions in England such as Bonsor v. Musicians Union, supra, and Lee v. Showmen's Guild [1952] 2 Q.B. 329, which handle somewhat roughly some of the cases referred to in Cameron v. Hogan. In any event it would be the Branch only, considered as a separate voluntary association, which would be susceptible to Cameron v. Hogan treatment, not the registered Federal organization—Edgar v. Meade (1916) 23 C.L.R. 29.