26 CLR 508 FEDERATED MUNICIPAL AND SHIRE COUNCIL EMPLOYEES UNION OF AUSTRALIA v. MELBOURNE CORPORATION.

(1918) 26 CLR 508

HIGH COURT OF AUSTRALIA.

THE FEDERATED MUNICIPAL AND SHIRE COUNCIL EMPLOYEES' UNION OF AUSTRALIA

CLAIMANT;

AND

THE LORD MAYOR ALDERMEN COUNCILLORS AND CITIZENS OF THE CITY OF MELBOURNE AND OTHERS RESPONDENTS.

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

1918-1919: MELBOURNE, Sept. 23-26, 1918; May 19, 1919. Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ. May 20-23, 26-27, June 20, 1919.

26 CLR 508

Industrial Arbitration — Commonwealth Court of Conciliation and Arbitration — Jurisdiction — Powers of Commonwealth Parliament — "Industrial dispute" — Parties — Municipal corporation — Government instrumentality — Undertaking not carried on for profit — Organization — Association not composed of manual workers — Registration — The Constitution (63 & 64 Vict. c. 12), sec. 51 (XXXV.) — Commonwealth Conciliation and Arbitration Act 1904-1915 (No. 13 of 1904—No. 35 of 1915), secs. 4, 18, 19, 55.

Held, by Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ. (Griffith C.J. and Barton J. dissenting), that municipal corporations established under State laws are not, with regard to the making, maintenance, control or lighting of public streets, instrumentalities of State government, and, therefore, are not, in respect of such operations, exempt from Commonwealth legislation under sec. 51 (XXXV.) of the Constitution.

Per Isaacs and Rich JJ.: A municipality is not exempted except so far as it represents the Crown by reason that it (1) is legally empowered to perform and does perform some function for the Crown, or (2) is lawfully empowered to perform and does perform some function which constitutionally is inherently a Crown function.

Per Higgins J.: Even if the Crown and its agents are immune from the Act—which is doubtful—municipalities are not agents of the Crown so as to share in the immunity.

Held, also, by Isaacs, Higgins, Powers and Rich JJ. (Borton and Gavan Duffy JJ. dissenting), that, in order to constitute an "industrial dispute" within

the meaning of sec. 51 (XXXV.) of the Constitution and of the Commonwealth Conciliation and Arbitration Act 1904-1915, it is not necessary that the undertaking in which the parties to the dispute are engaged should be an industry, a trade, or a business, carried on for profit.

Per Isaacs and Rich JJ.: The position of industrialists has been gradually changing from one of pure contract to one of status.

Held, therefore, by Isaacs, Higgins, Powers and Rich JJ. (Griffith C.J., Barton and Gavan Duffy JJ. dissenting), that the Commonwealth Court of Conciliation and Arbitration had authority to determine by award a dispute between an organization of employees registered in connection with "municipal and shire councils, municipal trusts and similar industries," and municipal corporations constituted under State laws, such dispute relating to the operations of those municipal corporations which consisted of the making, maintenance, control and lighting of public streets.

Meaning of the expression "industrial disputes" in sec. 51 (XXXV.) of the Constitution discussed.

Per Barton, Isaacs, Higgins, Gavan Duffy and Rich JJ.: Circumstances might arise in which employees would be parties to an industrial dispute notwithstanding that they are not manual workers.

CASE STATED.

On the hearing of a dispute in the Commonwealth Court of Conciliation and Arbitration in which the Federated Municipal and Shire Council Employees' Union of Australia was claimant and the Lord Mayor, Aldermen, Councillors and Citizens of the City of Melbourne and others were respondents, the Deputy President stated, for the opinion of the High Court, a case which, so far as is material, was as follows:—

1. The Commonwealth Court of Conciliation and Arbitration has cognizance of the industrial dispute above referred to under sec. 19 (d) of the Commonwealth Conciliation and Arbitration Act 1904-1915, the dispute having been referred into Court on 17th May 1918.

3. The claimant is an association of employees registered as an organization under the Act on 30th August 1910 "in connection with the municipal industry." Later on, the constitution of the organization was altered to read "in connection with municipal and shire councils, municipal trusts and similar industries."

4. The respondents include the Lord Mayor, Councillors and Citizens of the City of Melbourne, and one hundred and ninety

other municipal, city, town, borough and shire councils in Victoria; the Lord Mayor and Aldermen of the City Council of Sydney, and three hundred and eighteen other municipalities and shire councils in New South Wales; the Mayor, Aldermen and Citizens of the City of Hobart, and two other municipal corporations in Tasmania; one hundred and thirty-seven contractors to municipal, borough and shire councils in the three States; five trustees and commissioners of other public bodies; and two electric supply companies.

5. The city councils, municipal and town councils, borough and shire councils and municipal corporations above mentioned are hereinafter referred to as "municipal corporations."

6. Objection has been taken that the municipal corporations referred to are not subject to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration, on the ground that they are State instrumentalities.

7. All the respondent corporations are constituted under State Acts, and the parties are at liberty to refer to all relevant Acts in argument.

8. The State Acts under which most of the municipal corporations were originally constituted have been repealed, and the municipal corporations respondents in this case with few exceptions (if any) are now constituted corporations, under or subject to the provisions of the following State Acts: In Victoria, Local Government Act 1915 (No. 2686); in New South Wales, Local Government Act 1906 (No. 56 of 1906); in Tasmania, Local Government Act 1906 (6 Edw. VII. No. 31).

9. Generally speaking, the claims are made by the organization in respect of work done by its members employed by the municipal corporations on municipal works not being works carried on for municipal trading purposes.

The following is a question arising in the proceedings, and is, in my opinion, a question of law, and I submit it for the opinion of the High Court: Has the Commonwealth Court of Conciliation and Arbitration power or jurisdiction to determine by an award the dispute between the organization and the municipal corporations, constituted under or subject to the provisions of the three Acts mentioned in par. 8 of this case, so far as the dispute relates to such

operations of the said municipal corporations as do not consist of municipal trading?

During argument the question was amended by substituting, for the words "as do not consist of municipal trading," the words "as consist of the making, maintenance, control and lighting of public streets or any of them."

The nature of the arguments sufficiently appear in the judgments hereunder.

The case was first argued on 23rd, 24th, 25th, and 26th September 1918, before Griffith C.J. and Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ., when arguments were confined to the question whether municipal corporations established under State laws were, with regard to the making, maintenance, control and lighting of streets, instrumentalities of State government so as to be immune from Commonwealth legislation under sec. 51 (XXXV.) of the Constitution.

Bryant and Owen Dixon, for the claimant organization.

Starke and Stanley Lewis, for the City of Melbourne and certain Victorian municipalities.

Mann and Eager, for the Commonwealth, intervening.

Stanley Lewis, for the Municipal Council of Sydney.

Sir Edward Mitchell K.C. and Davis, for the State of Victoria, intervening.

J. A. Browne, for the State of New South Wales, intervening, and for the Sydney Harbour Trust, intervening.

Cussen, for the State of Tasmania, intervening.

During argument reference was made to Federated Amalgamated Government Railway and Tramway Service Association v.

New South Wales Railway Traffic Employees' Association 1 4 C.L.R., 488, at pp. 534, 536, 539; Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1] 2 12 C.L.R., 398, at pp. 414, 427, 452; Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 2] 3 16 C.L.R., 245, at p. 262; Collector v. Day 4 11 Wall., 113; Perry v. Eames 5 (1891) 1 Ch., 658, at p. 668; Veazie Bank v. Fenno 6 3 Wall., 533, at p. 555; United States v. Railroad Co. 7 17 Wall., 322, at p. 329; McCulloch v. Maryland 8 4 Wheat., 316; D'Emden v. Pedder 9 1 C.L.R., 91; Mersey Docks v. Cameron 10 11 H.L.C., 443; Coomber v. Justices of Berks 11 9 App. Cas., 61, at p. 74; Tyne Improvement Commissioners v. Chirton Overseers 12 1 E. & E., 516, at p. 524; Gilbert v. Corporation of Trinity House 13 17 Q.B.D., 795; Jumbunna Coal Mine, No Liability, v. Victorian Coal Miners' Association 14 6 C.L.R., 309, at pp. 332, 366, 370; R. v. Sutton 15 5 C.L.R., 789; Attorney-General of New South Wales v. Collector of Customs for New South Wales 16 5 C.L.R., 818; Attorney-General of Manitoba v. Manitoba Licence Holders' Association 17 (1902) A.C., 73; The Commonwealth v. New South Wales 18 25 C.L.R., 325; R. v. Oakleigh Shire; Ex parte Wilson 19 10 V.L.R. (L.), 67; 5 A.L.T., 195; Powell v. Apollo Candle Co. 20 10 App. Cas., 282; Willoughby on the Constitution, vol. II., p. 1317; Cooley's Constitutional Limitations, 7th ed., p. 265; Stoutenburgh v. Hennick 21 129 U.S., 141, at p. 147; Mayor v. Ray 22 19 Wall., 468, at p. 476; Fowles v. Eastern and Australian Steamship Co. 23 17 C.L.R., 149; Flint v. Stone Tracy Co. 24 220 U.S., 107; Pollock v. Farmers' Loan and Trust Co. 25 157 U.S., 429, at p. 584; Atkin v. Kansas 26 191 U.S., 207, at p. 220; Vilas v. Manila 27 220 U.S., 345, at p. 351; R. v. McCann 28 L.R. 3 Q.B., 677; Baxter v. Commissioners of Taxation (N.S.W.) 29 4 C.L.R., 1087, at p. 1157; Carslake v. Caulfield Shire 30 17 V.L.R., 560, at p. 588; 13 A.L.T., 72; R. v. Barger 31 6 C.L.R., 41, at pp. 82, 102; Meriwether v. Garrett 32 102 U.S., 472, at p. 511; Sydney Municipal Council v. The Commonwealth 33 1 C.L.R., 208, at pp. 230, 233; Van Brocklin v. Tennessee 34 117 U.S., 151; Purcell v. Sowler 35 2 C.P.D., 215; Heiner v. Scott 36 19 C.L.R., 381, at p. 400;

Middlesex County Council v. St. George's Union Assessment Committee 37 (1896) 2 Q.B., 143, at p. 146; Local Government Act 1915 (Vict.) (No. 2686), secs. 8, 345 et seqq., 595; Municipal Corporations Act 1835 (5 & 6 Will. IV. c. 76), secs. 76, 90, 98; Sydney Corporation Act 1842 (N.S.W.) (6 Vict. No. 3); Sydney Corporation Act 1902 (N.S.W.) (No. 35 of 1902), sec. 75; Sydney Corporation Act 1853 (N.S.W.) (17 Vict. No. 33); Local Government Act 1906 (N.S.W.) (No. 56 of 1906), secs. 23-47, 73-76, 78-83, 89-98, 109, 116-119, 130, 179-188; Rural Municipalities Act 1865 (Tas.) (29 Vict. No. 8); Local Government Act 1906 (Tas.) (6 Edw. VII. No. 31); Local Government Amendment Act 1911 (Tas.) (2 Geo. V. No. 65); Police Regulation Act 1865 (Tas.) (29 Vict. No. 9); Police Regulation Act 1898 (Tas.) (62 Vict. No. 48); Factories Act 1910 (Tas.) (1 Geo. V. No. 57), sec. 9; Roads Act 1884 (Tas.) (48 Vict. No. 28).

Cur. adv. vult.

May 19, 1919.

GRIFFITH C.J. read the following judgment:—This case raises the question of the existence and extent of the immunity of municipalities as instrumentalities of Government of the States. The matter came before the High Court in Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1] 38 12 C.L.R., 398 in 1911, when the Court intimated that, in its opinion, if a municipal corporation chooses to engage in what has lately been called "municipal trading," and joins the ranks of employers in industries, it is liable to the same Federal laws as other employers engaged in the same industries.

In that case various decisions of the Supreme Court of the United States of America were cited. This Court left undecided, without expressing any opinion upon it, the question whether, and how far, a municipality is subject to the jurisdiction or award of the Arbitration Court.

The principal American cases cited were the following:—The Mayor v. Ray 39 86 U.S., 468, at pp. 475-476, in which the Court said:—"A municipal corporation is a subordinate branch of the domestic government of the

State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. ... Our system of local and municipal government is copied, in its general features, from that of England. ... They are not trading corporations and ought not to become such." Meriwether v. Garrett, in which the Court said 40 102 U.S., at p. 511:—"Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer. ... This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text writers." Stoutenburgh v. Hennick, in which Fuller C.J., delivering the judgment of the Court, said 41 129 U.S., at p. 147:—"It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity." Pollock v. Farmers' Loan and Trust Co., in which Fuller C.J. said 42 157 U.S., at p. 584: "A municipal corporation is the representative of the State and one of the instrumentalities of the State government." And the important case of South Carolina v. United States 43 199 U.S., 437.

The present case was argued at the September sittings of the Court, when argument on the main point was concluded, and the Court reserved judgment on it, leaving for further argument after judgment the application to the different forms of municipal activity of any general rule which it might lay down.

The matter now comes for our determination, and I will give my opinion.

I regard these decisions of the Supreme Court of the United States as to the immunities of municipal corporations rather as historical expositions of the unwritten law which the thirteen colonies had brought with them from the Mother Country and carried with them into the Union than as interpretations of the Constitution of that Federation. As such, they are entitled to very great weight. In the view of those eminent men, who were after all only stating matters of common knowledge, it was part of the unwritten law and of the system of English government which the colonists brought with them to America, that the functions of government were divided between the central Government and the local or municipal bodies, and that certain powers were allocated to these latter, not as agents or servants of the central Government, but as independent authorities, created by the Legislature, and subject of course to it, but who were entitled as independent organs of the Government of the Colony to equal freedom in the performance of their functions. And they did not find anything in the Federal Constitution which authorized any interference with this freedom. The doctrines of the law of master and servant, and of principal and agent, deal with matters on a lower plane, and are wholly beside the question.

In my opinion, this exposition of the law is historically applicable to the Australian Colonies. And it follows, in my opinion, that a municipal authority, in the discharge of that portion of the general mass of State functions which had been entrusted to it at the date of Federation, is entitled to the same immunity from Commonwealth interference as the State itself would be in the discharge of similar functions.

BARTON J. read the following judgment:—My learned brother Powers, as Deputy President of the Commonwealth Court of Conciliation and Arbitration, asks the Bench to determine a question of great moment from the aspect of the relations between Commonwealth and State in the Australian Federation. A dispute between the parties is before him in that Court.

The claimant is a registered organization of employees. There are six hundred and fifty-eight respondents, consisting mainly of city,

municipal, borough and shire councils, which, for convenience, are in the case grouped under the name of municipal corporations. Each of them exists under the statutory law of one or other of the States of the Commonwealth. They are now constituted under one or other of the Local Government Acts of Victoria, New South Wales or Tasmania. The claims are in respect of work done by members of the organization employed by the municipal corporations in municipal works which are not carried on for "municipal trading" purposes. The organization contended that even in the case of such operations the Arbitration Court had jurisdiction. The respondents denied this contention, their ground being that the municipal corporations are instrumentalities of the States under which they are constituted.

The question originally submitted for the opinion of this Court was this: "Has the Commonwealth Court of Conciliation and Arbitration power or jurisdiction to determine by an award the dispute between the organization and the municipal corporations, constituted under or subject to the provisions of the three Acts mentioned, so far as the dispute relates to such operations of the said municipal corporations as do not consist of municipal trading?" During the argument, the learned Deputy President, who was one of the Court, altered this question, with the approbation of the rest of us, by striking out the final words, "as do not consist of municipal trading," and putting in their place these words: "as consist of the making, maintenance, control and lighting of public streets or any of them"—meaning, of course, the public streets of the municipality concerned. The arguments followed in the main the lines of the contentions described in the case stated. Besides the parties to the dispute, we had the advantage of hearing counsel for the Commonwealth and for each of the States concerned, who had all obtained leave to intervene.

Apparently the question as altered, in its inclusion of street lighting, refers to the ordinary lighting for public convenience, supported by municipal taxation, and not to the special lighting of places of business and residences, &c., undertaken by contract with individuals and for profit. I mean that the question includes only that lighting which it is contended is part of the governmental work

of the municipality, as distinct from that which is a mere commercial undertaking for pay or reward. Although the principle at issue was touched in a previous case, as I shall point out, it now comes before us for the first time as matter for decision. In the elaborate argument that we heard, many cases were cited and discussed, but I propose to refer only to a few, comparatively, which may help me in the process of elucidating the real question.

First, it is sufficient merely to mention such cases as D'Emden v. Pedder 44 1 C.L.R., 91; Baxter v. Commissioners of Taxation (N.S.W.) 45 4 C.L.R., 1087; The Railway Servants' Case 46 4 C.L.R., 488 (a decision which, as the Court intimated in the course of the present case, it would be a waste of time to attack). Taken together, these cases, and indeed others, completely establish, as a necessary implication from the whole scheme of the Constitution, the immunity of the Commonwealth or a State and the instrumentalities or agencies of its government from interference at the hands of the other authority, whether by way of taxation or otherwise; an immunity, as the last-mentioned case establishes, not in any wise affected in the case of the States by the terms of sub-sec. XXXV. of sec. 51 in the Constitution. I have no doubt that municipal corporations are such instrumentalities in respect of the governing functions committed to them, and I propose to make that clear presently.

But it would be going a good deal further to say that municipal corporations are entitled to this immunity from interference by the Commonwealth in respect of all of their operations. If they are not, then it must be ascertained whether the immunity extends to such operations as are the subject of the question raised by the case stated. The contention for the claimant is that municipal corporations stand altogether outside this immunity, which is confined, they urge, to the case of the directly governmental operations of the State itself; that municipal corporations are not in that sense instrumentalities or agencies of the State, but independent bodies created for certain purposes and not subject to the control of the State. Their position was likened to that which arose in Mersey Docks v. Cameron 47 11 H.L.C., 443; 11 Eng. Rep., 1405, Gilbert v. Corporation of Trinity House 48 17 Q.B.D., 795,

and similar cases, on which much reliance was placed. But these cases do not apply to such a position as the present one. They go to show the liability of certain corporations (not municipal), (1) to be taxed by the State to which they belong, (2) to be sued for negligence by subjects of that State—in each case on the ground that the corporation could not be held to share the immunity from liability of the Government of that State. The corporation in the first-named case claimed immunity from taxation on the ground that the Crown does not tax itself. The corporation in the Trinity House Case claimed immunity in an action for negligence on the ground that "The King can do no wrong," since legislation, where the Crown is not expressly mentioned, is held to apply to the subject and not to the Government. In both instances the claim was rejected. But these corporations were not defending themselves from the Government of any sphere extraneous to that of their own State on the ground that they were free from interference from that quarter. The question of liability as between State and State or between Commonwealth and State stands on wholly different grounds. It is not because the State may tax or the citizen of that State may sue that the Commonwealth may tax or its citizens outside the State may sue. The question has to be determined on different considerations. If, for instance, it were admitted that the State of Victoria could tax its own municipal corporations, it would not follow that the Commonwealth could for that reason tax the municipal corporations of Victoria. If the Commonwealth could impose such taxation, which I am far from saying, it could only be by reason of power given by the Constitution as in sec. 51 (II.). But power to interfere with municipal corporations is not given anywhere by the Constitution. Indeed by the direct implication of sec. 51 (XX.) such corporations are protected from the legislative power of the Commonwealth. There is, above all things, a prohibition underlying the whole of the Constitution, which, it is to be remembered, is sedulous in preserving the respective spheres of State and Commonwealth. It is a prohibition of action on the part of either tending to invade or impair, by means not distinctly authorized, the powers of the other in the sphere allotted to the

one or preserved to the other. And it is in each case to be determined in which sphere is included the matter over which power is claimed. Is, then, the control of municipal corporations within the sphere of the Commonwealth, or within that of the State which creates them, and under which they subsist in the sense that their granted powers can be increased, or diminished, or abolished at the will of the grantor, the Parliament of the State? That question can only be answered in the negative. The cited case of Powell v. Apollo Candle Co. 49 10 App. Cas., 282 has nothing to do with this question so far as the main point decided is concerned; though where the Judicial Committee held that duties levied by the Order in Council there in question were really levied by the authority of the Legislature, and not that of the Executive, they may have provided the present respondents with a useful analogy. These municipal bodies are independent only in the sense that they may exercise the powers allotted to them without interference save on the part of the State Legislature. They have power to pass subsidiary legislation such as by-laws (in the case of some shires ordinances), but they are distinctly subordinate to the powers of the State; they move entirely within the sphere of, and are subject to, its laws. But these matters are no doubt of concern to the State, and, in fact, within its ambit, equivalent to national matters. Such are, for instance, the making, maintenance, and control of communications. Of these the State attends to railways, telegraphs, and main roads; the municipalities, to roads not main ones, within their boundaries, and to streets. They are all part of one great concern. One may apply to the State the words of Cockburn J. in Purcell v. Sowler 50 2 C.P.D., at p. 218:—"The Court below seems to have distinguished between the general and the local administration of the poor law, holding that the general administration was a matter of national concern, while the administration in a particular district was not. But it seems to me that whatever is a matter of public concern when administered in one of the Government Departments, is matter of public concern when administered by the subordinate authorities of a particular district. It is one of the characteristic features of the government of this country that, instead of being centralized, many important branches

of it are committed to the conduct of local authorities. Thus the business of counties, and that of cities and boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighbourhood that it is not a matter of public concern." True, these words were used in deciding a libel case, but they are aptly descriptive of the relation of local authorities to the government of the country concerned. And anyone, more especially if he has compared the Federal Constitution with that of the State and considered the legislation of the latter, will admit that the country concerned is in this connection the State and not the Commonwealth.

I turn to some American cases in addition to those cited by the learned Chief Justice. I refer to them because the statements seem to me to be accurate and the reasoning cogent. In Ottawa v. Carey 51 108 U.S., 110, at p. 121, in 1883, Waite C.J. said:—"Municipal corporations are created to aid the State Government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. ... To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect." In other words, the State has granted to the corporation, during the pleasure of the Legislature, some of its powers, and it retains the rest.

In United States v. Railroad Co. 52 17 Wall., 322 it was held that a municipal corporation is a part of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues. Clifford and Miller JJ. dissented, not from this proposition, but from its application in the particular instance, because they were of opinion 53 17 Wall., at p. 334 that "private property held by a corporation in a proprietary right, and used merely in a commercial sense for the income, gains, and profits," which they thought the subject of

the litigation was in effect, might be taxable just the same as property used by an individual or by any other corporation. That is, I think, undeniable. But the principle laid down by the judgment of the Court stands unimpaired. In delivering it, Hunt J. said 54 17 Wall., at p. 329:—"A municipal corporation like the City of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its Legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation" (i.e., by the Federal power). And further, speaking of an issue of bonds by the corporation to aid in railway construction, under an Act of the State Legislature, the Court said 55 17 Wall., at p. 330:—"Was it exercised for the benefit of the municipality, that is, in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power?" If it were so acting, the bonds were not taxable by Congress.

In Atkin v. Kansas 56 191 U.S., 207, where the decision was that it was within the power of a State, notwithstanding the 14th amendment of the United States Constitution, to prescribe the conditions on which it would permit public work to be done on behalf of itself or its municipalities, the Statute impeached dealt with hours of labour, rates of wages, &c. The precise question decided is not in issue here, nevertheless the case is important on the present question by reason of some passages in the judgment of the Court, delivered by Harlan J., as to the relation existing between a State and its municipal corporations. "Such corporations," the Court said 57 191 U.S., at pp. 220-221, "are the creatures, mere political subdivisions, of the State for the

purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the Legislature; the authority of the Legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed."

The judgment cited a previous case of Williams v. Eggleston 58 170 U.S., 304, at p. 310, in which the Court had said: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the Legislature." They also quoted from a judgment of the Supreme Court of Iowa the following passage, which is remarkable, in my opinion, for its terse and vivid statement of the true position 59 191 U.S., at p. 221:— "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the Legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the Legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations of the State, and the corporations could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the Legislature." And, as they pointed out 60 191 U.S., at p. 222, "it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character." I fully adopt that proposition.

These strong passages harmonize in reason with the decision in Flint v. Stone Tracy Co. 61 220 U.S., 107, following South Carolina v. United States 62 199 U.S., 437, that the exemption from Federal taxation of the means and instrumentalities employed in carrying on the governmental operations of the States does not extend to State agencies and instrumentalities used for carrying on business of a private character. This limitation of an admitted principle, of course, covers the operations of municipal corporations which are conducted by municipal bodies for commercial or trading purposes: for those of gain or profit and not for those of government.

It has been pointed out more than once from this Bench that when it cites American decisions it is fully conscious that they are not authorities by which it is bound. But it is entitled to adopt the reasoning adduced in support of such decisions when it is convinced of the soundness of the reasons and when they are applicable to the facts of the case in hand. And in that conviction I apply to this case the quotations I have made.

My views, as well as those of the learned Chief Justice and the late O'Connor J., as to the limitations mentioned, are expressed, though extra-judicially, in Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1] 63 12 C.L.R., 398. I adhere as a matter of decision to what, with my colleagues, I then put as an opinion invoked by the parties.

So far, then, as its "municipal trading" or the carrying on of business commercially for purposes of gain and profit is concerned, a municipal corporation is, in my view, in no better position than a private trading corporation, or indeed an individual, would occupy, and cannot claim immunity from the exercise of Federal powers to any greater extent than such a company or person. But to the extent that its functions which are exercised under the statutory authority of the State are governmental, in the sense shown by the above observations and quotations, the municipal corporation shares the immunity of the State itself from Federal interference, just as the Commonwealth and its instrumentalities may not be undermined or impaired by the State.

The operations described in the question stated are, in my opinion,

clearly governmental, and I therefore hold that the Arbitration Court can no more interfere with the respondent municipal organizations in these respects than could its creator, the Parliament of the Commonwealth.

I must therefore answer the question stated in the negative. This answer applies to the first branch of the argument. As the majority of the Bench are of a different opinion, argument is to be taken on the second branch—whether there can be an industrial dispute extending &c. between the municipal corporations and their employees in respect of the operations mentioned, regard being had to par. XXXV. of sec. 51 of the Constitution and also to the Conciliation and Arbitration Act of the Commonwealth.

ISAACS AND RICH JJ. (read by ISAACS J.):—As the case stands amended, the question of law stated for the opinion of this Court is whether the Commonwealth Court of Conciliation and Arbitration has jurisdiction to settle a dispute as to wages and hours, and other conditions of employment, between municipal corporations and such of their employees as are employed in the construction and maintenance of the public streets of the municipalities.

The argument upon this question has been divided into two branches. The first branch is whether the words "industrial disputes" in pl. XXXV. of sec. 51 of the Constitution are limited to disputes in "an industry" in the sense of a specific business or avocation in which both employer and employees are engaged, or whether they extend to cover all disputes of an industrial nature—that is, for instance, where the employees are engaged in industry in the broad sense by working in the service of the employers and the dispute is as to the conditions of employment either as between employers and employees or as between different classes of employees, such as demarcation disputes. The second branch is whether, supposing the words "industrial disputes" have the wider connotation, municipalities are subject to the jurisdiction of the Commonwealth tribunal, having regard to their relation to the State system of government. The argument so far—though something was said as to the first branch—was ultimately limited to the second branch, leaving the first to be argued out in the event of

the opinion of the Court on the second branch making that course necessary.

If municipalities, on the true construction of the Constitution, are outside the sphere of Commonwealth jurisdiction, in relation to their construction and repair of roads, by reason of their position as an "instrumentality," as it is called, of State government, it matters not whether road construction or maintenance can or cannot be considered "an industry" in the narrower sense. The language of pl. XXXV., read as part of sec. 51, is as follows: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... (XXXV.) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." No express limitation is placed on the class of disputants in the placitum itself or elsewhere in the Constitution.

The laws, therefore, that may be made under that specific power, so far as any express limitation is concerned, extend to all industrial disputes in the Commonwealth extending beyond the limits of any one State. And covering section V. of the Constitution Act makes the Constitution itself, and all laws made under it "binding on the Courts, Judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State." Any constitutional exemption of municipalities from the operation of such laws must, therefore, rest upon some implication of law, which when applied to pl. XXXV. excludes their industrial disputes from the words "industrial disputes" there found.

It has already been decided by this Court (Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 2] 64 16 C.L.R., 245) that a municipal corporation in Victoria so far as it engages in trading occupation, is subject to the jurisdiction of the Arbitration Court. This shows that the mere fact that a corporation may be created or abolished by the State is no reason for exemption from Commonwealth jurisdiction. A distinction was drawn in that case between trading and non-trading operations, but, although trading operations were held to fall within the jurisdiction of the

Court, the decision did not lay down "trading" as the discrimen. It was not necessary to do so. The question of how far non-trading operations attracted the jurisdiction was left undetermined. In that case, "trading" and "governing" were contrasted; but there are municipal functions which are neither the one nor the other. The care of parks and the establishment of free libraries could not properly be brought under either head. We have now to consider the true line of demarcation, if there is one. The question, then, as to the implied exclusion of non-trading operations from the arbitral jurisdiction of the Commonwealth is this: Where do we find the restrictive implication of law? It is suggested, using American terminology, that municipalities are "State instrumentalities." Tested by British standards—which are the only legitimate standards—such a term, to have any meaning which would attract a legal implication restricting the meaning of the words "industrial disputes," must denote that municipalities are, in relation to the subject matter of disputes, true functionaries of the State Government, that is, the King's Government.

A clear distinction must be noted and preserved between the expression "the Government of the country" in the sense of the King's representatives or agents in the concrete sense, and the expression "the government of the country" in the abstract sense of the process of governing the country in whole or in part. The first denotes the persons who act, and the second denotes acts done. Again, the functions performed by "the Government" in the concrete sense, including in that term those who represent the Government pro hac vice, are the acts of the General Government, that is, theoretically, the Crown; but there may be functions coming under the second head which are not in any real sense acts of the General Government. For instance, as early as the reign of Queen Anne, the Court of King's Bench said, speaking of a case concerning the City of London, "a corporation is properly an investing the people of the place with the local government thereof, and therefore their law shall bind strangers" Cuddon v. Eastwick 65 1 Salk., 192). A "by-law" is a law Hopkins v. Swansea 66 4 M. & W., 621, at p. 640 and London Association of Shipowners

and Brokers v. London and India Docks Joint Committee 67 (1892) 3 Ch., 242, at p. 252). In Arnold on Municipal Corporations (1851), at p. 3, there is the following definition: "A municipal corporation, therefore, is a civil corporation aggregate, established for the purpose of investing the inhabitants of a particular borough or place with the power of self-government, and with certain other privileges and franchises." Royal Charters creating municipal corporations and investing them with powers were not imposed on the locality, but were offered and might be accepted or rejected; and, if accepted, it was taken that every person who chose to be or to come within the area of the powers granted subjected himself to the control conferred. Indeed, municipal corporations were the creation not merely of the Crown, but also of subjects who had jura regalia. (See fully on this subject, Grant on Corporations, particularly pp. 10 et seqq.) The Act of 1835 (5 & 6 Will. IV. c. 76), which was referred to in argument, did not destroy the old corporations; they remained, but under new governmental powers (Attorney-General v. Corporation of Leicester 68 9 Beav., 546). The charters creating new corporations were still issued under the royal prerogative, although, when once created, the new municipality is pro tanto invested with the statutory functions and powers (Grant, p. 16).

By various later English enactments, many municipal corporations were enabled to undertake works some of which may usefully be referred to here; as, for instance, the establishment of museums of art and science, the providing of baths and wash-houses, the removal of nuisances, the appointment of police constables, and the establishment of salaried police magistrates. They may, at common law, be liable to repair highways and bridges, and may make rates for the purpose; they could in some instances supply water, and impose water rates. All these instances and others, with the appropriate authorities and references, are to be found in Grant on Corporations, passim, and in the article "Municipal Corporations" by Mr. Manson in the Encyclopaedia of the Laws of England (2nd ed.), vol. IX., pp. 466 et seqq. The later English legislation does not affect the fundamental character of the system. To borrow Mr. Manson's quotation, the motto is "Spartam nactus es, hanc exorna." The

duties and functions of the corporation are, at least in the main, entirely local and for the benefit and advantage of the inhabitants of the locality or persons transiently coming there.

The distinction between the functions of such bodies and those of the General Government has been very clearly marked by the Courts. The fundamental case is Coomber v. Justices of Berks 69 9 App. Cas., 61. But, before quoting the ruling passage from that case, reference should be made to some other cases. In R. v. Mayor of Sheffield 70 L.R. 6 Q.B., 652, at p. 661 Blackburn J. refers to the reason why the Act of 1835 was passed, namely, to control the corporations, to cut down their ownership of the municipal property, and to check their expenditure by appropriating the fund to certain purposes such as debts, police expenses, prosecutions, payment of constables, &c., and any surplus "for the public benefit of the inhabitants and improvement of the borough"—deficiencies to be made good by rates. This view was adopted by Jessel M.R. in Attorney-General v. Mayor of Brecon 71 10 Ch. D., 204. The learned Master of the Rolls pointed out that since that Act municipalities were trustees of their property, and no longer simply owners of it. He proceeds to lay down the principle that the powers and privileges of such a corporation go to make up its existence; that if those powers and privileges are attacked, the corporation itself may defend them; that, in so defending them, there is no valid distinction between property strictly so called and a right of regulation involving the making of tolls, which is in the nature of property, and a power of regulation apart from tolls and consisting of mere government of the town. The right of regulating markets, said the Master of the Rolls 72 10 Ch. D., at p. 219, "is part of the municipal government of the town," and "is vested in the corporation for the benefit of the town as part of the government of the town; and he who seeks to interfere with the privileges and duties connected with the regulations must be resisted, and, of course, resisted at the expense of the corporation."

This all tends to show, both by its affirmative propositions and negatively by the absence of any reference to the Crown or the Attorney-General, that the municipality was regarded in relation

to its rights and powers as independent of the General Government acting for the whole country. Then the Courts have also had to consider the position of municipalities from the standpoint of their obligation to contribute to rates. Prior to the Act of 1835, municipalities were liable to the poor rate R. v. Mayor of York 73 6 A. & E., 419). In 1839 and 1840 the Court of Queen's Bench held them no longer liable, having regard to the provisions of the Act of 1835, sec. 92, and the public nature of their functions R. v. Mayor of Liverpool 74 9 A. & E., 435 and R. v. Inhabitants of Exminster 75 12 A. & E., 2). Lord Denman C.J., in the Liverpool Case 76 9 A. & E., at p. 442, spoke of the "public" purposes as in "extent and approximation to something like national benefit." Parliament, however, in 1841, by Act 4 & 5 Vict. c. 48 promptly rejected the notion of any such intention on its part in passing the Act of 1835. After reciting the decisions, it declared the expediency of the municipal corporations being rateable, and enacted that they should be rated.

There was, of course, always the Crown exemption, because the Crown was not included expressly or by necessary implication. In County Council of Middlesex v. St. George's Union 77 (1896) 2 Q.B., 143 it was expressly argued for the County Council, whose property was sought to be assessed, that it was exempt because "the government of each county is none the less administered by the Sovereign according to the theory of the Constitution because it is administered through local agencies." On the other hand, it was contended for the Assessment Committee that "it is not enough that it should be used for purposes of government; it must be used for the purposes of that part of the government of the country which is theoretically administered by the Crown." In delivering judgment Cave J. said 78 (1896) 1 Q.B., at p. 146 that in the authorities "a distinction has been drawn between Crown or Imperial purposes, such as the administration of justice, and purposes of local government." The learned Judge also observed: "whether a municipal authority be created by charter or by Statute, its purposes must equally be local." Wills J. agreed. In the Court of Appeal 79 (1897) 1 Q.B., 64 the arguments were repeated and the

judgment affirmed. There is, however, one passage in the judgment of Lopes L.J. 80 (1897) 1 Q.B., at pp. 70-71 which deserves special notice. The Lord Justice first refers to Lord Westbury's judgment in Mersey Docks v. Cameron 81 11 H.L.C., at p. 505, where that learned Lord uses the phrase "the Government of the country" in the concrete sense of the King's Government. Then Lopes L.J. states the inclination of his opinion that prior to 1888 the whole of the building would have been exempt "because at that time the administrative business of the county was done by the justices in Quarter Sessions assembled as such, and by virtue of the authority which they derived from the Crown." "But," proceeds the learned Judge, "in 1888 a great change took place. The judicial business of the county continued to be performed by the justices in Quarter Sessions, but the administrative business was transferred to the County Council, who in performing their functions do not act by virtue of any judicial office, or as being servants of the Crown." And so he held that so much of the building as was occupied for Crown purposes was not rateable; but so much as was occupied by the County Council for administrative or municipal purposes was rateable.

These decisions applied the principle of Coomber's Case 82 9 App. Cas., 61, which is stated most clearly by Lord Watson at p. 74. The learned Lord adopted Lord Chancellor Westbury's view that the exemption of the Crown extends "not only to the immediate and actual servants of the Crown but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country." Then Lord Watson proceeded to say: "Seeing that, in my opinion, the administration of justice, the maintenance of order, and the repression of crime, are among the primary and inalienable functions of a constitutional Government, I have no hesitation in holding that Assize Courts and police stations have been erected for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities." Here we have the discrimen of Crown exemption. If a municipality either (1) is legally empowered to perform and does

perform any function whatever for the Crown, or (2) is lawfully empowered to perform and does perform any function which constitutionally is inalienably a Crown function—as, for instance, the administration of justice—the municipality is in law presumed to represent the Crown, and the exemption applies. Otherwise, it is outside that exemption, and, if impliedly exempted at all, some other principle must be resorted to. The making and maintenance of streets in the municipality is not within either proposition.

It is true, as observed by the Privy Council in Farnell v. Bowman 83 12 App. Cas., 643, at p. 649, that "the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works." In New South Wales and Victoria, as in other Australian States, the railways are governmental undertakings, and the Commissioners, for such a purpose as the present, represent the Crown. But the undertaking of railways is not what Lord Watson calls "an inalienable function of a constitutional government." The Deniliquin and Moama Railway is a private enterprise; the Hobson's Bay Railway in Victoria was a private enterprise; the Mount Lyell Railway in Tasmania is a private railway. Government tramways are assumed as governmental functions; while municipal tramways are not, notwithstanding rules and regulations which govern the traffic upon them. In Australia, when settlement began, the Government was obliged to construct roads in the new country; but when municipal institutions arose that function was for local purposes handed over to the municipalities, and where they did not exist the Government retained the function. Where the transfer, however, took place, the municipality, as a matter of principle, stood in relation to that function exactly as a municipality stood in England to the same function—namely, it was simply local government as distinguished from general or Crown government, and the rights, powers and privileges of the municipality depended on Statute. The passage above quoted from the judgment of Lopes L.J. in the County Council of Middlesex Case 84 (1897) 1 Q.B., at p. 71 has close application.

What doctrine of construction, then, can by implication exclude

municipalities in relation to such a function from the constitutional purview of pl. XXXV. of sec. 51? Apart from the doctrine that the Crown is not bound by Statute unless included by express words or clear intendment (Attorney-General for New South Wales v. Curator of Intestate Estates 85 (1907) A.C., 519, at p. 523), ordinary British law offers no canon of construction which would have that effect. This is a doctrine as well recognized in America in both Federal and State Courts as it is in our own jurisprudence. For instance, in Jones v. Tatham 86 20 Pa. St. Rep., 398, at p. 411 Lewis J. says: "The general business of the legislative power is to establish laws for individuals, not for the Sovereign; and when the rights of the Commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied." The Supreme Court of the United States affirmed the principle in Guarantee Co. v. Title Guaranty Co. 87 224 U.S., 152. This constitutional doctrine effectively guards the State Governments, and, under that denomination, guards their agents and representatives within the terms of Lord Watson's judgment from coercion by Federal law except where the State Government is expressly named in the Constitution or where its subject matter indicates that the State Government also must be bound. But apart from that, the question is one of conflict between two laws—Federal and State—both assumedly within respective powers, and both in terms operating on the same persons or other subject matter. If power is wanting cadit quaestio. But if the power exists in general terms and the law is passed in general terms, then, apart from implied exclusion from the general term, it comes to a question of supremacy.

The constitutional doctrine of the actual decision in D'Emden v. Pedder 88 1 C.L.R., 91 is founded on the principle of supremacy, and on nothing else (see pp. 110-111). It applied sec. 109 of the Constitution; it assumed the power in each Parliament, so far as its own Constitution was concerned, to pass the respective laws; it further assumed, as is the truth, that all executive power of a selfgoverning Colony is ultimately referable for its authority to some legislative provision: it then placed the true ultimate legislative authorities in juxtaposition, and declared in case of conflict the

supremacy of the Federal Constitution or Federal Act. That is precisely what Marshall C.J. said, in McCulloch v. Maryland 89 4 Wheat., at p. 431, in these words: "There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control." The same point was very distinctly put, with respect to Federal officers' freedom from State control, in Ohio v. Thomas 90 173 U.S., 276, at p. 284.

Stress, it is observed, is here laid on the fact that D'Emden v. Pedder 91 1 C.L.R., 91 is an application of the constitutional declaration of supremacy in sec. 109 of the Constitution, which itself rests for its binding force on covering section V. of the Act—that section being, after all, the controlling provision of the Imperial Parliament. And the reason stress is laid on that fact is that, although the case itself declared the inability of the State to fetter Commonwealth agencies, it was argued that the principle of the decision in that case must be reciprocal. As soon as it is perceived that the principle of the decision is "supremacy," it is manifest that there can be no reciprocity. D'Emden v. Pedder, therefore, can be laid aside so far as this case is concerned. Any application of the doctrine of reciprocity must depend on some decision other than D'Emden v. Pedder, applying rightly or wrongly the actual decision in that case. The only possible ground for excluding municipalities from arbitral jurisdiction in any given case, is utter want of Federal power, apart from any opposing State enactment. If the power exists, D'Emden v. Pedder annihilates the opposing enactment; if the power does not exist, the case is inapplicable. The position is simply stated. The Constitution connotes the continued existence unimpaired of both the Commonwealth and the States as governing bodies in their respective spheres of jurisdiction. The King is the same King throughout Australia Williams v. Howarth 92 (1905) A.C., 551). But his powers are not the same in every sphere of jurisdiction; and they are exercised by different agents, differently constituted and authorized, according to the sphere of jurisdiction in which they are to operate. The Constitution preserves the most

absolute freedom of action—legislative, executive and judicial—in every sphere, but subject to this qualification: that, wherever there would otherwise be a conflict if the two agencies met on the same field, there shall be no conflict, because, to the extent of interference with the operation of Commonwealth action, State law shall be invalid—which also invalidates everything dependent upon it. Municipal powers, which are the creation of State law, are not, as such, within the sphere of Commonwealth jurisdiction, and therefore, in the main, conflict is not possible. But the lines of municipal powers and action may at some points intersect Commonwealth powers, and, where they do, Commonwealth law must prevail. This does not interfere with State legislative power, except to the extent expressly stated by the Constitution; it does not interfere with State action at all, because the municipal council is not a part of the State General Government, any more than an individual would be if he were authorized by State law to make roads and charge tolls. On the basis of British precedent, therefore, the jurisdiction is given by general words, which no other part of the Constitution, on ordinary principles of construction, restricts, and which, therefore, according to R. v. Burah 93 3 App. Cas., 889, at p. 905, no Court is entitled to limit.

Reliance, however, is placed on American authorities to the effect that municipalities are State "instrumentalities." Those authorities cannot prevail here, if opposed to the principles underlying our own jurisprudence. But a short reference to them may be desirable. The general principle of State action is well established by the decisions in America. Perhaps, for the present purpose, it is as well stated as anywhere in Ex parte Virginia 94 100 U.S., 339, at p. 347, where it is said:—"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." It is also a basic principle in American jurisprudence that the power of the various State organs cannot be delegated. This principle, however, as pointed out in Willoughby on the Constitution (vol. II., sec. 774, p. 1317), is subject to one exception. "The exception," says the learned author, "is with reference to the delegation of powers to local governments." He says the exception is based on the antiquity of the Anglo-Saxon practice of local government antedating the adoption of the Constitution.

This view may receive support from the judgment of Gray C.J. in Hill v. Boston 95 122 Mass., 344. Cooley on Constitutional Limitations, 6th ed., chap. VIII., pp. 226-227, expresses the matter somewhat differently. There we find expressions which modify the notion that the municipality can be regarded in the same light as the State. It is said, "The Legislature ... is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood as to belong properly to the State."

Undoubtedly we find various expressions to the effect that "public corporations are but parts of the machinery employed in carrying on the affairs of the State" (Cooley, p. 229, note 2, quoting from the judgment of a State Court). But the judicial opinions we meet with are varied in form. Some are very close to the English view already cited. For instance, in Walla Walla City v. Walla Walla Water Co. 96 172 U.S., 1, at p. 8 Brown J., in delivering the unanimous opinion of the Court (which included the present Chief Justice, the late Chief Justice Fuller and other eminent Judges) said:—"It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as the agent of the State for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business." At p. 10 the learned Justice refers to a case, where it was held that "a contract to put electric wires under ground was ... for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the State at large, and that with reference to such contracts the city must be regarded as a private corporation." Another case is referred to as to waterworks. No mention is made of trading in electricity or water. Indeed, the observations on p. 11 show that trading is immaterial, because the Court says, with reference to the case in hand, that the city might furnish the water free of charge to its citizens and raise the necessary funds by a general tax. When other cases which were referred to during the argument such as Vilas v. Manila 97 220 U.S., at p. 356 are considered in conjunction with the Walla

Walla Case 98 172 U.S., 1, they are not insusceptible of reduction to the same view as is taken in England. Government control of the conduct of individuals is undoubtedly of a different nature from trading functions, and both are distinct from power to contract for road making.

Sufficient has been said to indicate that American opinion cannot be said to be clearly and decidedly opposed to the English rule: it always professes to follow the English notion of municipal status, and nowhere is it based on any difference of result owing to the Federal system. Perhaps one of the clearest cases illustrating the distinction between the State and the local public is Barree v. City of Cape Girardeau 99 114 Am. St. Rep., 763, at p. 767, citing Bullmaster v. City of Joseph 100 70 Mo. App., 60. But that case expressly treats the making and care of streets as private municipal matters, and not as governmental.

In this situation the law as appearing from considerations of British law, as here understood, should prevail, and the question should be so answered as to affirm the jurisdiction of the Court of Conciliation and Arbitration over municipalities in respect of street construction and maintenance, subject to the other branch of the respondents' argument with reference to the meaning of "industrial dispute."

HIGGINS J. read the following judgment:—The question as amended relates only to persons employed by the municipalities in "the making, maintenance, control and lighting of public streets": Can there be an award as between the Union and the municipalities?

It has been decided in the Railway Servants' Case 101 4 C.L.R., 488 that the Court of Conciliation and Arbitration has no powers either of conciliation or of arbitration as to disputes between State railway commissioners and their employees—that a railway servants' union cannot even be registered. Counsel for the Union attempted to impugn the decision in this case; but, as the majority of my learned colleagues intimated that the attempt would be futile, counsel refrained from further argument on the subject. In this judgment I treat the decision as binding.

The American cases cited as to interference with State "instrumentalities" (the term is not familiar in English law) relate, in most cases, to taxation; and taxation is, in very nature, a burden on the person taxed. For my part, I am not satisfied that the essential nature of the power conferred by sec. 51 (XXXV.) of the Constitution, and exercised by the Act made thereunder, has been sufficiently considered. Conciliation is not necessarily a burden; arbitration, even if it end in a compulsory award, is not necessarily a burden. These processes are primarily meant to aid both parties to the dispute—meant as an aid to industrial peace, to the peaceful prosecution of the industries needed by the public. Under the Act, the first duty of the Court, as to an industrial dispute of which it gets cognizance, is to try to reconcile the parties, to get an agreement. It has no right to make an award except to the extent that it cannot get an agreement (secs. 23, 24). It is found, indeed, that as the principles of the Court become known the number of agreements is increasing, the number of awards decreasing. Such an Act as our Australian Act is not, I think, dealt with in any American cases. Under English law, Acts of Parliament do not bind the Crown unless by express words or by necessary implication; but there is an exception when the Act is made for the public good, the advancement of religion and justice, and to prevent injury and wrong (Bacon's Abridgment, 7th ed., vol. VI., p. 462; per Jessel M.R., Ex parte Postmaster-General 102 10 Ch. D., 595, at p. 601).

But I shall assume that the Act is a burden in the same way that a tax is a burden. Who is exempt from the burden? I shall first consider the matter on the lines of the English law. Does the Act bind the Crown; and, if it does not bind the Crown, are municipalities agents of the Crown within the rule exempting agents of the Crown as well as the Crown itself? The Crown is not bound by a Statute unless by express words or necessary implication. This is a mere rule of construction—a rule which yields to the clearly expressed intention of Parliament. In the case of this Act there is no doubt as to the intention of Parliament to bind the Crown's undertakings; for, by sec. 4, an "industrial dispute" of which the Court may take cognizance includes "any dispute in

relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State." There is no doubt, therefore, that, if there be a two-State dispute in relation to employment in an industry carried on by or under the control of a State or any public authority constituted under the State, the State—or the Crown in right of the State—was not meant to be exempt from the provisions of the Act. But even if the Crown and its agents were immune from the Act, municipalities are not agents of the Crown so as to share in the immunity. The fact that municipalities exist for public purposes does not make them immune. In England they have always been held liable to church rates, to sewers rates, to poor rates, to income tax, to land tax (see Rawlinson, Municipal Corporation Act 1883, 8th ed., p. 220). The same principle is applied to municipal corporations as to the trustees of the Mersey docks Mersey Docks v. Cameron 103 11 H.L.C., 443), to the University of Edinburgh (Greig v. University of Edinburgh 104 L.R. 1 H.L. (Sc.), 348), to Trinity House (Gilbert v. Trinity House 105 17 Q.B.D., 795). The distinction between governmental purposes and purposes of local government is emphatically shown in the case of the County Council of Middlesex v. Assessment Committee of St. George's Union 106 (1896) 2 Q.B., 143; affd. on app., (1897) 1 Q.B., 64. In that case, the guild-hall of a county council was used for a double purpose—the administration of justice (quarter sessions), and municipal purposes; and it was held that the guild-hall was rateable so far as it was occupied for municipal purposes, not rateable so far as it was occupied for the administration of justice—a strictly governmental purpose, a function of the Crown. Therefore, so far as the English authorities are concerned, there seems to be no possible ground for the contention that municipalities are not subject to this Act.

But certain American authorities are invoked which treat municipal corporations as being "agencies" or "instrumentalities" of the State, and as being, therefore, immune from the operation of Federal laws. The immunity of the State itself from the operation of Federal laws does not rest on mere construction; it is an immunity

which no Act of the Federal Congress can take away. There is nothing express in our Constitution in favour of the immunity. On the other hand, there is an express provision that the Commonwealth shall not "impose any tax on property of any kind belonging to a State" (sec. 114). At first sight, this express immunity ought to be treated as excluding any implication of immunity from laws as to conciliation and arbitration. Under the covering section V., "all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State ... notwithstanding anything in the laws of any State"; and under sec. 109 of the Constitution, when a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail. Under sec. 106, the whole Constitution of the State is subject to the Federal Constitution—subject to the powers conferred by the latter Constitution on the Federal Parliament with regard to the subjects specified. But I must treat the Railway Servants' Case 107 4 C.L.R., 488 as binding, and as involving the immunity of the State Ministers and the managers of State railways from laws as to conciliation and arbitration. The question remains: Does the immunity extend to municipalities?

Now, the Supreme Court of the United States speaks of such a corporation as being "a political division of the State" (Van Brocklin v. State of Tennesses 108 117 U.S., at p. 178). "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government" (Atkin v. Kansas 109 191 U.S., at p. 221). "A municipal corporation is the representative of the State and one of the instrumentalities of the State Government"; and therefore the property and revenues of the municipality have been held to be not subject to Federal taxation (Pollock v. Farmers' Loan and Trust Co. 110 157 U.S., at p. 584). Expressions of this sort are very numerous; but I cannot find that they have any basis in our law, or that they are consistent with the history of English municipal corporations. I have not had the time to satisfy myself as to the origin of this doctrine; but it would seem to have found ready acceptance in a country in which, as de Tocqueville points out, municipal officials

collect the State taxes and carry out most of the State Statutes (Democracy in America (1862), vol. I., p. 68). According to Ashley (Federal State, chap. XXI.), almost all the laws of the State are carried out by local officials—Judges, sheriffs, health officers. But whatever may be the history of the doctrine, it appears that the tendency of recent decisions is to draw a sharp line between the ordinary activities of a municipality and the activities of a strictly governmental character—such as the judiciary, the administration, the Legislature of the State. In the case of the United States v. Railroad Co. 111 17 Wall., at p. 327 the Court said:—"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this Court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agents and instruments from the taxing power of the Federal Government." In the case of South Carolina v. United States 112 199 U.S., at p. 461, a State having taken up the business of selling intoxicating liquors, and the question being whether its agents were liable to the Federal licence tax, the Court summed up the position by saying that "the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character." In the case of Flint v. Stone Tracy Co. 113 220 U.S., at pp. 157-158 the Court, after reviewing the cases, said:—"The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the State. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws and similar governmental functions, cannot be taxed by the Federal Government." It also said 114 220 U.S., at p. 172:—"It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. ... The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character." In Vilas v. Manila 115 220 U.S., at p. 356 the Court

spoke of "the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred." I know of no American case which lays it down that municipalities are exempt, as agents of the State or otherwise, from a Federal Statute which purports to bind them—I mean, of course, a Federal Statute made within the scope of the Federal powers—in matters outside the State's essential functions of legislation, administration and the judiciary. No ground whatever has been adduced for treating the immunity of State agencies as being wider in Australia than in the United States, as extending to the making, maintenance, control and lighting of the public streets. These are not matters of the "strictly governmental character" referred to in the American cases.

I very much doubt, also, whether it is proper, under our law, to call a municipality an agent of the State at all. The municipality is created by the State, no doubt; but not everything created by the State, even for the benefit of the people of a locality, is an agent of the State. There is an oak-tree—a forbidden tree; it must not be touched—its fruit, or its leaves, or its wood. But the tree drops an acorn which takes root. The young tree is not within the prohibition. To be a product is not to be an agent. In the United States I find that State universities are called "agencies" of the State; but under our law they would not be "agents" of the State in any relevant legal sense. The axiom Qui facit per alium facit per se is inapplicable; the acts of such agencies are not the acts of the State as principal. Are we prepared to follow the Courts of the United States in the corollaries of their doctrine that municipalities are "political subdivisions" or "agencies" of the State? An employee who is injured by the negligence of county asylum authorities (in regard to a steam mangle) has no remedy (Hughes

v. Co. of Munroe 116 147 U.S., 49). A citizen is injured by the negligence of a municipality in blasting; he has no cause of action (Howard v. Worcester 117 153 Mass., 426). A child is injured by the neglect of the city to keep a sound staircase for its school; an action will not lie (Hill v. Boston 118 122 Mass., 344). Under our law, municipalities are liable in damages for causing nuisances to a highway, or for neglect to repair a sewer grating (Borough of Bathurst v. Macpherson 119 4 App. Cas., 256; and see Municipal Council of Sydney v. Bourke 120 (1895) A.C., 433; Municipal Council of Willoughby v. Halstead 121 22 C.L.R., 352). If the King is the principal, and the municipality is his agent, how comes it that no attempts are made to treat municipal debentures as Government debentures, to treat the Government as liable for the wages of street cleaners, or to treat the Government as liable for the torts of municipalities? Under the Statutes of most of the Australian States, and of the Commonwealth (Judiciary Act, secs. 56, &c.) the King is liable in action of tort as well as of contract. In my opinion, there is nothing in the decided cases, either American or English, to justify the proposition that municipalities are exempt from the operation of Federal laws, or, in particular, from the operation of laws made under sec. 51 (XXXV.) of the Constitution.

GAVAN DUFFY J. I agree in the opinion of the majority of the Court, but I do not propose to deliver any reasoned judgment until we have dealt with the whole matter.

POWERS J. I agree with my learned brothers who hold that municipal corporations established under State laws are not, with regard to the making, maintenance, control or lighting of public streets, instrumentalities of State Government, and, therefore, are not, in respect of such operations, exempt from Commonwealth legislation under sec. 51 (XXXV.) of the Constitution.

The case was further argued on 20th, 21st, 22nd, 23rd, 26th and 27th May before Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ., when reference was made to Jumbunna Coal Mine,

No Liability, v. Victorian Coal Miners' Association 122 6 C.L.R., 309, at pp. 332, 336, 352, 358, 364-367; Fatal Accidents Inquiry (Scotland) Act 1895 (58 & 59 Vict. c. 36), sec. 7; Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1] 123 12 C.L.R., 398, at pp. 413, 420, 435, 446; R. v. Deputy Industrial Registrar; Ex parte J.C. Williamson Ltd. 124 15 C.L.R., 576, at p. 578; R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Allen Taylor & Co. 125 15 C.L.R., 586, at p. 607; Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co. [No. 2] 126 16 C.L.R., 705; Australian Tramway Employees' Association v. Prahran and Malvern Tramway Trust 127 17 C.L.R., 680, at pp. 696, 700, 701; Collecting Societies and Industrial Assurance Companies Act 1896 (59 & 60 Vict. c. 26); Conciliation Act 1894 (S.A.) (No. 598); Industrial Conciliation and Arbitration Act 1894 (N.Z.) (No. 14 of 1894); Federated Saw Mill &c. Employees' Association of Australasia v. James Moore & Sons Proprietary Ltd. 128 8 C.L.R., 465, at pp. 488, 490, 502, 514; Industrial Schools Act 1866 (29 & 30 Vict. c. 118), sec. 5; Industrial Conciliation and Arbitration Act Amendment Act 1898 (N.Z.) (No. 40 of 1898); Industrial Conciliation and Arbitration Act 1900 (N.Z.) (No. 51 of 1900); Industrial Conciliation and Arbitration Amendment Act 1901 (N.Z.) (No. 37 of 1901); In re Professional Officers' Association 129 15 Arb. Rep. (N.S.W.), 401; Commonwealth Conciliation and Arbitration Act 1904-1915, secs. 18, 19, 55; Australian Workers' Union v. Pastoralists' Federal Council 130 23 C.L.R., 22; Combination of Workmen Act 1825 (6 Geo. IV. c. 129); Conspiracy and Protection of Protection Act 1875 (38 & 39 Vict. c. 86), sec. 3; Trade Union Act 1871 (34 & 35 Vict. c. 31), sec. 23; Trade Union Act Amendment Act 1876 (39 & 40 Vict. c. 22), sec. 16; Trade Disputes Act 1906 (6 Edw. VII. c. 47); Quinn v. Leathem 131 (1901) A.C., 495; Conway v. Wade 132 (1909) A.C., 506; Larkin v. Long 133 (1915) A.C., 814; Clancy v. Butchers' Shop Employees' Union 134 1 C.L.R., 181; Industrial Conciliation and Arbitration Act 1900 (W.A.) (64 Vict. No. 20); Christchurch United Tramway &c. Union of Workers v. Christchurch Tramway Co. 135 2 N.Z. Gaz. L.R., 104; Auckland Carters' Industrial Union v. Lovett 136 3 N.Z. Gaz. L.R., 31; Tramways Case [No. 2] 137 19 C.L.R., 43, at p. 122;

Hairdressers' &c. Union v. Eslick Bros. 138 3 N.Z. Gaz. L.R., 267; Cope v. Crossing-ham 139 25 T.L.R., 593; Rickards v. Bartram 140 25 T.L.R., 181; Dallimore v. Williams 141 29 T.L.R., 67; Rolls v. Miller 142 27 Ch. D., 71.

Cur. adv. vult.

June 20, 1919.

The following judgments were read:—

BARTON J. This case has been stated by my learned brother Powers as Deputy President of the Arbitration Court.

The claimant Union is an association of employees registered as an organization under the Act "in connection with the municipal industry." Since its registration the constitution of the organization has been altered to read thus: "In connection with municipal and shire councils, municipal trusts and similar industries." The respondents include a large number of municipal authorities in Victoria, New South Wales and Tasmania.

The questions argued relate to a dispute between the organization and the municipal corporations now constituted under the Local Government Acts of Victoria, New South Wales and Tasmania, respectively.

The claims are made by the organization in respect of work done by its members employed by the corporations on municipal works not being works carried on for municipal trading purposes.

The question submitted by the learned Deputy President for the decision of this Court is as follows: "Has the Commonwealth Court of Conciliation and Arbitration power or jurisdiction to determine by an award the dispute between the organization and the municipal corporations (constituted under or subject to the provisions of the three Acts mentioned in par. 8 of this case) so far as the dispute relates to such operations of the said municipal corporations as consist of the making, maintenance, control and lighting of public streets or any of them."

In argument, this question has divided itself into two branches. The first is whether the corporations are State instrumentalities so as to be exempt from the jurisdiction of the Commonwealth Arbitration Court. That branch of the question has already been answered

in the negative. The second branch, since argued, is whether the employees of municipalities can be engaged in an industrial dispute extending beyond the limits of one State, within the meaning of sec. 51, sub-sec. XXXV., of the Constitution.

The argument has turned upon the meaning of the words "industrial dispute" in the sub-section.

The Constitution does not define what is meant by the two words in question. They are not a term of art, nor have they any technical signification. They must, therefore, be read in their popular sense, and the argument has been practically confined to an endeavour to ascertain that sense, for the purpose of seeing whether the work done for municipal corporations by members of the organization employed on municipal works, not being works carried on for "municipal trading" purposes, brings them within sub-sec. XXXV. in case of dispute (see case stated, par. 9). This amounts to the question whether such a dispute is an "industrial dispute."

Many treatises, reports, and Acts of Parliament were quoted to sustain the interpretations put upon the words by the respective parties.

What the framers of the Constitution meant by the words is entirely a question of fact. It is the question what the ordinary average citizen meant by the words in 1900. What they meant then, they mean now.

Brewer J., delivering the judgment of the Supreme Court in the oft-quoted case of South Carolina v. The United States 143 199 U.S., 437, at p. 448, said:—"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a Government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. ... Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded." He quoted some words of Taney C.J. in Dred Scott v. Sandford 144 19 How., 393, at p. 426. Speaking of the same rule, the Chief Justice said:

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"Any other rule of construction would abrogate the judicial character of this Court, and make it the mere reflex of the popular opinion or passion of the day." Brewer J. further quoted a passage from the judgment of Marshall C.J. in Gibbons v. Ogden 145 9 Wheat., 1, at p. 188, in which he said that the framers of the American Constitution and the people who adopted it "must be understood to have employed words in their natural sense, and to have intended what they have said."

No one will contend that such views, opinions, &c., as were cited at the Bar, are to be disregarded. Their weight does not consist, however, in giving a new meaning to a popular expression, but in the extent to which they elucidate, if at all, the meaning of such an expression. An opinion, or even a statement of fact, expressed by an author, however intellectual, must always be considered in relation to the known opinions, tendencies and aspirations of the writer, however honest the expression may be. On the other hand, terms and definitions in Acts of Parliament must be weighed as having been used in connection with the immediate objects which were being legislated for, since Parliament naturally restricts its view to those objects. So, in weighing the reports of commissions it must not be forgotten that their words have very largely, perhaps primarily, relation to the changes in the law which the commissioners have determined to recommend.

All these matters, while not depriving these many citations of relevancy, largely qualify their value as throwing light upon the meaning of popular terms employed in the written Constitution. There will always be contention, on such a question as this, as to the value of the respective terms employed. A term or definition taken by itself may mean a great deal, but when it occurs as one of a very large number of such utterances, employed by those who look upon their subject from many differing view points and with many different objects in view, it is apt to lose much or even most of its significance when sought to be applied to the interpretation of a legislative instrument. These are not very safe guides when contrasted with the pronouncements of authorities distinguished not only by depth of research but also by perfect impartiality.

A great lexicographer has no end in view save the meaning of the

word or phrase with which he is dealing. So far as any lexicographer can be deemed pre-eminent, the author or editor of the Oxford Dictionary is, by common consent, awarded the palm.

An "industrial dispute" is a dispute in an industry, and, for the meaning of the term "an industry" as applied to the present question, I think we must look to the great Oxford Dictionary. Its authority may not be final, but it is the safest guide accessible on such a question. I quote from vol. v., pp. 236-237, of that work. Under the word "industry," heads 4 and 5, I find the following:—"(4) Systematic work or labour; habitual employment in some useful work, now esp. in the productive arts or manufactures. (This, with 5, is the prevalent sense.) ... (5) A particular form or branch of productive labour; a trade or manufacture."

Now, head 4 does not speak with reference to an industry as does head 5. I mean that when looking for the meaning of a dispute in an industry one does not turn to head 4, because "industry" as referred to in head 4 is not "an industry" as referred to in head 5. In other words, a person who is not the employer may come within head 4 as being "his own master," but he cannot come within head 5 without being an employee. It is a particular "form or branch of productive labour" that is an industry in the sense involved in an industrial dispute. The concept of "industry" does not involve the particular form or branch, but the concept of "an industry" does.

It seems to me that an industry, as involved in the term "industrial dispute," connotes something carried on within the last definition, and I am forced in interpreting it as a popular term to adopt the prevalent, which is the popular, sense; the employment must be in a particular form or branch of productive labour; as a trade or manufacture. Each form or branch of productive labour is "an industry," and therefore each trade or manufacture is an industry. All are conducted for profit, without which they cannot live.

The way in which the public look at the matter is seen in the fact that the term "industrial dispute" and the term "trade dispute" are used interchangeably to denote the same thing. Industries and trades are branches of productive activity. Where I have spoken of profit I mean that these activities are carried on by means of

the employment of labour by capital, and capital is not adventured except with the prospect of making profit. It is not material to the present question whether the whole of the labour employed must be manual. Some of it may not be manual. In trading and manufacturing concerns there are inevitably many employed who work otherwise than merely manually, some, for instance, as scientists, some merely as clerks, some as messengers and the like, but they do not adventure any part of the capital used. Clerks, e.g., may be engaged in an industrial dispute as part of the employees in an industry. But that is not to say that of itself clerkship is an industry.

It is too often forgotten that a dispute in an industry must have some relation to that industry. It must, therefore, in some way affect the course of the work, that is, the performance of their duties by the employees. It would be idle to pretend that the dispute may be about things not related to those duties; because it is plain that if there is no such relation the dispute is not industrial.

I think I have described the sense in which in 1900 the average person employed the term "industrial dispute" or "trade dispute," and it must be conceded that the framers of the Constitution employed the contested term in that sense which was, and still is, the prevalent one; and it cannot be contended that the sense has changed, and that the meaning of the Constitution is thereby also changed. "That which it meant when adopted it means now."

I am unable to say that such operations of municipal corporations as consist of the making, maintenance, control, and lighting of the public streets are included within that meaning.

I therefore answer the question in the negative.

ISAACS AND RICH JJ. The first branch of this case has already been disposed of. Before dealing with the second branch, however, reference may usefully be made to some cases decided in England and Scotland, under the Income Tax Act, in which municipalities claimed exemptions which were denied, as to certain matters, on the principle that the municipalities were not, qua these matters, exercising Crown functions. They are Attorney-General v. Scott 146 1 Tax Cas., 55,

Adam v. Maughan 147 2 Tax Cas., 541 and Brown v. Smith 148 4 Tax Cas., 435. The second branch raises the question whether the dispute referred to in the case stated is an "industrial dispute" within the Act and the Constitution.

Recent amendments of the Act have so widened it as to make any contention that the matter is not, within its provisions, practically unarguable. It cannot be denied that from the standpoint of the municipalities the works in question are "undertakings," nor can it be contended that the employees are not carrying on an industry within the meaning of the Act. The argument ultimately rested on the construction of pl. XXXV. of sec. 51 of the Constitution. The matter is certainly extremely important not only to the municipalities as corporations, and to the large and ever-increasing body of workers in their employ, but to the whole community. The special responsibility of this Court, under sec. 74 of the Constitution, interpreted by the case of Jones v. Commonwealth Court of Conciliation and Arbitration 149 (1917) A.C., 528; 24 C.L.R., 396, in delimiting Commonwealth authority over State corporations demands a close examination of the matter.

The respondents' contentions may be thus stated: (a) they say that in 1900, when the Constitution was passed, the phrase "industrial dispute" meant "trade dispute," and that "trade dispute" meant a dispute in "trade" carried on by the employer for profit; (b) they also say that "trade disputes" as then known were limited to disputes between employers and workmen, or workmen and workmen, meaning by "workmen" manual labourers only; (c) they further say that an organization of workmen disputing with the employer, must, in order to create "a trade dispute," be one composed exclusively of workmen of that particular trade. For these reasons, it is said, the Act, assuming it to include by its terms the present dispute, goes beyond the Constitution.

It must be evident that, with the industrial progress of this Commonwealth, the respondents' argument would lead to the result that recognized later industrial disputes within every State, if they in fact extended over the continent so as to become one Australian dispute and therefore assumed a unity of character beyond the

control of each and every State, would also be beyond Commonwealth control (see Builders' Labourers' Case 150 18 C.L.R., at pp. 243, 255, 263). To place such a limitation on the unqualified expression of the Constitution, "industrial disputes," would lead to serious public loss and, indeed, to anarchy. What is it that should drive the Court to that construction? It would be pedantic to quote the many observations we find in American cases—approved by this Court—as to the breadth of construction to be given to constitutional powers by reason of the nature and object of a Constitution. The words of O'Connor J. on this subject in the Jumbunna Case 151 6 C.L.R., at pp. 367-368 and the Saw-millers' Case 152 8 C.L.R., at pp. 510-511, approved in Australian Tramway Employees' Association v. Prahran and Malvern Tramway Trust 153 17 C.L.R., at p. 701, should, however, be specially borne in mind. Reference may also be made to "the commanding principle" of construction stated so clearly by Lord Shaw in Butler v. Fife Coal Co. 154 (1912) A.C., 149, at p. 178-179. His Lordship's words were quoted in the Builders' Labourers' Case 155 18 C.L.R., at p. 244, and need not here be repeated.

One case, however, of great authority, and not yet cited, deserves special mention. In Keates v. Lewis Merthyr Consolidated Collieries 156 (1911) A.C., 641 the House of Lords had to consider the construction of the Employers and Workmen Act 1875 (38 & 39 Vict. c. 90) under which the County Court has power to adjust claims on the part of either employer or workmen arising out of or incidental to the relation between them. With the particular facts we are unconcerned; but the principles of construction laid down for such a case are of great importance. Lord Atkinson observed 157 (1911) A.C., at p. 642: "In the construction of a Statute it is, of course, at all times, and under all circumstances, permissible to have regard to the state of things existing at the time the Statute was passed, and to the evils which, as appears from its provisions, it was designed to remedy." The question was how far the Court could exercise its powers as to certain matters in the absence of a claim as to those matters. Lord Atkinson added 158 (1911) A.C., at p. 643: "It is obvious that this peculiar quasi-parental jurisdiction was

conferred in the interest of industrial peace, and should not be hampered by rules of pleading." Then, with great appositeness to an argument we have heard, that industrial disputes as they exist now, under the influence of later legislation, are wider than those known in 1900, the learned Lord observes 159 (1911) A.C., at p. 642: "And I think nothing could be more unsafe or more misleading than to allow oneself to be deterred from putting upon a Statute the particular construction which the consideration of these things would lead one to adopt, by the apprehension of the prejudicial effect it might have on rights and privileges conferred by subsequent legislation, unthought of at the time the particular Statute was passed." In other words, the fact that incidents unthought of at the time the legislation is passed are not, for that reason, to be excluded if within the natural meaning of the Act construed with reference to its purpose. The same learned Lord, by way of construing the Act in the light of its purpose, says 160 (1911) A.C., at p. 644: "I think that the object of the Statute being, as in my opinion it obviously is, to promote industrial peace, and, with that end, in the case of any dispute between employer and workman coming before the County Court to secure the adjustment of all claims for debt or damages, wages, or other liability subsisting between them, whether connected with this dispute or not, one's attention ought to be directed to see whether there is any provision of the Statute so clear and imperative as to prohibit the exercise of the benevolent jurisdiction conferred by it in such a case as the present." Lord Robson says 161 (1911) A.C., at p. 645: "It is a Statute dealing with industrial disputes, and it seeks to provide certain Courts with a means of checking or composing such disputes so far as they are concerned with small pecuniary claims." Lord Robson continues 162 (1911) A.C., at p. 646:—"The first sub-section aims at settling disputes by the adjustment of all subsisting claims, and the second aims at the same object by summary termination of contracts which it may have become irksome and dangerous to enforce. The scope of the Statute being thus wide, there seems to be no ground on which the first sub-section can properly be read in a more restricted sense than its literal wording imports." And as to the effect of subsequent

changes by legislation, Lord Robson proceeds 163 (1911) A.C., at p. 647:—"It has been pointed out that if the magistrates acted up to the full extent of the jurisdiction given to them by this Statute we might have the most inconvenient consequences. When the Statute was passed the claims between employer and workman were, for the most part, simple in character and small in amount. Since then they have become numerous, complicated, and substantial, and are no longer such as can be conveniently or properly disposed of by a magistrate acting under this sub-section, but most of them are confined to special tribunals, and I doubt if the mischief suggested would be serious in extent. The jurisdiction of the magistrate, however, is discretionary, and it is difficult to think that he would be so unreasonable as to exercise it in some of the extreme and inappropriate cases that have been suggested. In any event we have no power to construe this Statute otherwise than according to its plain intent, and I think this appeal fails." Lord Loreburn L.C. agreed with both judgments.

Now, if, in the interests of industrial peace, so wide a construction can be given to a limited Statute of that character, and with reference to inferior tribunals, how can we, conformably to recognized rules of legal construction, attempt to limit, in an instrument of self-government for this Continent, the simple and comprehensive words "industrial disputes" by any apprehension of what we might imagine would be the effect of a full literal construction, or by conjecturing what was in the minds of the framers of the Constitution, or by the forms industrial disputes have more recently assumed? By the light of history, not only Old World history but also Australian history up to 1900—much of which can be found in the Badge Case 164 17 C.L.R., 680 and the second Tramways Case 165 19 C.L.R., 43—the subject matter is seen to be one which it is essential to the very existence of the nation to control. "Industrial warfare" is no mere figure of speech. It is not the mere phrase of theorists. It is recognized by the law as the correct description of internal conflicts in industrial matters. It was adopted by Lord Loreburn L.C. in Conway v. Wade 166 (1909) A.C., at p. 511. Strikes and lock-outs are by him correctly described

as "weapons"; and it must be borne steadily in mind that, just to the extent that the term "industrial disputes" in the Constitution should be held to fall short of the actual "industrial disputes" which take place to-day, and will in all human probability take place in the future, to that extent, since neither State nor Commonwealth can have authority to intervene, force—not national force, but private force—must prevail. To that extent, the strike and the lock-out would be what Lord Loreburn calls "weapons allowed by the law," and, to that extent, the Australian people would be without the means of authoritatively intervening for their own protection by composing the disastrous differences that disorganize their industrial life and carry their injurious consequences into every quarter of the social structure. These are strong and, indeed, irresistible reasons why this Court in discharging its great responsibility of construing pl. XXXV. should not weaken in the smallest degree what Lord Atkinson terms the quasi-parental jurisdiction conferred by the comprehensive literal force of the two simple words "industrial disputes" as they have come down to us in history.

Approaching the construction of that placitum with these considerations, what is the material upon which the mind of the Court should operate in order to mark out the ambit of the expression "industrial disputes"? We apprehend that mere etymology is misleading. The claimant says that "industrial" means simply relating to "industry" in the abstract, whether it be in the exercise of trade, commerce, science or learned professions. Nor can the matter be determined by any theory of convenience or balanced considerations framed by a judicial tribunal either on its own views of fairness and appropriateness or on the speculations of economic or social thinkers. Judges have no personal opinions on those matters; or, what is the same thing, they have no right to express them, or act on them. They must take facts and law as they find them. "Industrial disputes" were, in 1900, matters of fact known to and recognized by the community. They in fact possessed certain essential characteristics. The particular manifestation of such a dispute, while possessing those essentials, might vary from every predecessor in almost every outward respect; but individual differences are consistent with identity of species.

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Where, then, are we to look for the criteria of industrial disputes? No better source, we apprehend, exists than what may be called the historians of industrial movements. Among these, the contemporary historians are to be preferred; and of their works, original documents and particularly official documents are par excellence the governing sources. In Australia in 1900 the language of industrialism was precisely that of England: some advance, it is true, had been made here in remedial legislation beyond that of the Imperial Parliament; but the industrial structure, its terminology and its conflicts were similar, and the evils to be guarded against or cured were identical. The very expression "industrial disputes" was in use in both countries, and meant the same thing, in protean forms. From a careful examination of English official records from 1894 to 1914, and a perusal of works of economic and municipal history, as well as the common knowledge of Australian history, the conclusion is reached that the respondents' contentions are not well founded.

One thing is very clear: that the phrase "industrial disputes" had the same inherent signification in 1894 as it had in 1900, and as it has to-day. Environment does not alter the essential nature of an "industrial dispute," but it necessarily alters its growth, its methods, its circumstances, its proximate causes, its participants and its area of operations, and, if allowed to go unchecked, its remedies. "Industrial disputes" as introduced into the Federal Constitution was a concept applicable to all forms of future industrial conflict that assumed national character and was not an institution in a state of arrested development.

The concept may be thus formulated:—Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation. This formula excludes the two extreme contentions of the claimant and the respondents respectively. It excludes, for instance, the legal and the medical professions, because they are not carried on in any intelligible sense by the co-operation of capital and labour and do

not come within the sphere of industrialism. It includes, where the necessary co-operation exists, disputes between employers and employees, employees and employees, and employers and employers. It implies that "industry," to lead to an industrial dispute, is not, as the claimant contends, merely industry in the abstract sense, as if it alone effected the result, but it must be acting and be considered in association with its co-operator "capital" in some form so that the result is, in a sense, the outcome of their combined efforts. It also implies that "an industry," in the relevant sense, is not confined to a single enterprise, but means a class of operations in which all persons, employers and employees, are engaged on the same field of industry—not necessarily of commerce—provided by the society in which they exist.

It will be convenient to apply in order to each of the contentions advanced by the respondents, the test of recorded precedent, observing only that the references given are, of course, not exhaustive. The fact that the time at our disposal has not been unlimited is in itself a sufficient reason for that.

1. Whether Industrial Disputes are limited to Operations carried on for Profit.—It is needless to trace the course of the industrial development by which the worker in a trade ceased to carry on a handicraft in which he naturally passed from apprentice to journeyman, and then to master, and became, by force of the application of various inventions, a mere animated cog in the capitalist's machinery. What is called the "industrial revolution" of the latter part of the eighteenth century and particularly of the nineteenth century so transformed his position as to drive him into combination. The details of the struggles which led to the Acts of 1825, 1871, 1875, 1896 and 1906 in England would be tedious. But the broad fact that emerges is that the position of industrialists, by a singular reversal of what has been thought to be the general current of history, has been gradually changing from one of pure contract to one of status. This, which is the irresistible conclusion from a broad survey of the stream of industrial effort (see Badge Case 167 17 C.L.R., at p. 703), is emphasized by the views of Mr. Sidney Webb in a recent work (The Works Manager To-day, at pp. 103 et seqq.). The

"industrial revolution" for a long time (see Kidd's Social Evolution pp. 6 et seqq., and Professor Macgregor on The Evolution of Industry, pp. 43-62) made the workman's labour a mere marketable commodity to be bought at the lowest price that individual competition between workers would permit. The degradation and suffering that ensued, the revolt against the system, the repression of illegal acts, the amelioration of the law, the organization of labour, the gradual recognition of collective bargaining, the introduction of private conciliation and arbitration as well as of industrial laws securing better conditions for workers, are all well-known historical facts.

From about 1882 to 1896 industrial conditions in Australia, by reason of sweating and strikes, received great public and parliamentary attention. Previous judgments have covered portion of the ground. The rest can be read in the report of Mr. Aves to the Imperial Government in the House of Commons Papers for 1908, vol. LXXI. It is sufficient to say here that about 1890 and onwards industrial disputes assumed such importance and magnitude both in England and in Australia and New Zealand as to demand special public attention. In 1890 a Royal Commission was appointed in England, which, after four interim reports, made in 1894 its fifth and final report. (See House of Commons Papers 1894, vol. XXXV., pp. 9 et seqq.) This report has been referred to several times in previous cases, and has formed the basis of much argument here. It is extremely valuable for the present purpose. It shows that "trade disputes," as they were originally called and almost exclusively called, have a larger signification than disputes respecting the "trade" of the employer. They are also called "industrial disputes." For instance, on p. 16 (we shall in all cases, except where otherwise expressed, refer to the continuous ink pagination), there are the expressions "conditions of industry" as the causes of dispute; "industrial disputes," and "industrial interests." So, also, on p. 46, "causes of industrial disputes."

The questions for consideration, as the Commission states them, are these:—(1) What are the leading causes of modern disputes between employers and employed; out of what conditions of

industry do they arise; and what is the effect upon them of organizations on either side? (2) By what means or institutions can they be prevented from arising, or, if they do arise, can they be most pacifically settled, without actual conflict in the shape of strikes and lock-outs? (3) Can any of these causes of dispute be wholly or partly removed by practicable legislation, due regard being had to the general interests of the country? What is extremely important is this:—The report deals with those questions on the basis that the disputes are "labour disputes," that the fundamental consideration is the relation of labour to capital, and that the disputes they are investigating are "trade conflicts" in the sense that they are generally conflicts between those engaged in industry on opposite though co-operating sides. For instance, on p. 17, in the General Review of the Evidence, the first division is "conditions of labour." At p. 46 is par. 100, which has in a previous case been partly quoted, but which throws so much light on the matter as we have to deal with it now that it should be fully quoted. It is as follows:—"The essence of most of the disputes between employers and employed is, of course, the shares in which the receipts of their common undertaking shall be divided. By far the largest proportion of disputes, strikes and lock-outs, have direct reference to the increase or diminution of the standard of wages, or the introduction of fixed price lists. Many other disputes relate to the standard of hours, a question which in many cases forms part of a conflict with regard to wages. Other conflicts are undertaken by trade societies with a view to compel employers to recognize them, to strengthen and enlarge their organization, to limit the number of youths entering the trade, to prevent the employment of non-unionists, or sometimes that of women and children, to defend unionist colleagues, or assert unionist rules and customs, and, generally speaking, to protect the monopoly of workmen already in the organization. As has already been indicated, the ultimate object of all this policy is by increasing their strength and securing as far as possible a monopoly of employment to obtain as large a share as possible of the receipts of the industry, and to exercise a voice as to the general conditions under which it is carried on. Many disputes are connected with special customs or circumstances in particular works, with attempts

to alter or prevent the alteration of various working arrangements, with questions of piece-work, overtime, holidays, meal-times, and the introduction or abolition of systems of fines, deductions and so forth. Some are of a merely personal nature, being connected, for instance, with the unpopularity of particular officials. `Sympathy' or `on principle' strikes, of which much has lately been heard in connection with the less skilled industries, are those in which men engaged in one occupation strike, without alleging any special grievance of their own, expressly in order to support men engaged in some other occupation who are involved in a conflict with their employers. A common instance of this kind of strike, in recent times, has been the refusal of dock labourers to discharge or to coal ships manned by non-unionist crews. There are also instances of a number of employers closing their works for a time in order to support a particular employer against whom a strike is being directed. Finally, there are the `demarcation disputes' in which organized bodies of workmen employed in some complex trade like ship-building, as, for instance, shipwrights and joiners, are at issue with regard to the province of work belonging to each section. In this last case employers, although not directly concerned in the disputes, yet have to bear the inconvenience and expense of the strikes or stoppages of work to which they lead." On p. 49 (par. 105) this is said:—"The essential point of discord between employers and workmen being the mode and proportions in which the net receipts from the sale of produce shall be divided, the machinery by which this is settled has great influence upon the character of the relations between them. Other causes of dispute are, usually, only secondary, and in more or less near connection with the main issue. If workmen consider that they are being treated with openness and justice, and if they find the employers disposed to look upon them rather in the light of industrial partners than as servants, it seems from the evidence that contentment and friendliness on the whole exist."

It is evident that the Commission regarded the question of "industrial disputes" or "trade disputes" or "labour disputes" (see p. 65, par. 159) as involving the struggle of labour to attain recognition as a co-operator with capital, in other words, of its "status." And the immediately succeeding pages after p. 49 of the report

refer to the "machinery," as it is called, for settling or avoiding the disputes—such as sliding scales, wages boards, co-operative trading, conciliation, arbitration, both voluntary and compulsory, and industrial agreements: so that at bottom the comprehensive nomenclature reached by, at all events, 1894, is "labour dispute." In their concluding observations at p. 120, the majority, who include the Duke of Devonshire, Sir Michael Hicks-Beach, Lord Courtney, Jesse Collings, Sir Frederick Pollock, Professor Marshall, Mr. Gerald Balfour, Mr. Burt, Mr. Plimsoll and others, say as follows:—"We desire to say in conclusion that, in our opinion, many of the evils to which our attention has been called are such as cannot be remedied by any legislation, but we may look with confidence to their gradual amendment by natural forces now in operation which tend to substitute a state of industrial peace for one of industrial division and conflict. The growth and development of large industrial establishments during the present century has necessarily resulted in the creation of considerable bodies of workmen more or less separated in their lives and pursuits from those under whom they work. In those manufactures, which in modern times have been carried on upon a great scale with costly machinery, there cannot exist the intimate relation between the employer and workman and between the workman and his work which is to be found in some small industries where the workman owns, or may hope some day to own, after serving as apprentice and journeyman, his tools, workshop, and material. The mutual ignorance arising from this separation is, we believe, a main reason why so many conflicts take place, turning upon the division of the receipts of the common undertaking between the owners of the machinery and material, and the workmen who supply the labour. ... It is, however, precisely in these industries where the separation of classes and, therefore, the causes of conflicts are most marked, that we observe the fullest developments of that organization of the respective parties which appears to us to be the most remarkable and important feature of the present industrial situation. Powerful trades unions on the one side and powerful associations of employers on the other have been the means of bringing together in conference the representatives of both classes enabling each to appreciate the position of the other, and to

understand the conditions subject to which their joint undertaking must be conducted. The mutual education hence arising has been carried so far that, as we have seen, it has been found possible to devise articles of agreement regulating wages which have been loyally and peacefully maintained for long periods. We see reason to believe that in this way the course of events is tending towards a more settled and pacific period in which, in such industries, there will be, if not a greater identification of interest, at least a clearer perception of the principles which must regulate the division of the proceeds of each industry, consistently with its permanence and prosperity, between those who supply labour and those who supply managing ability and capital. We cannot deny the possibility of organizations of employers and of workmen combining together to control an industry injuriously to the public interest; but it may be hoped that such combinations would in the end either fail from within or be defeated by competition arising from unexpected quarters, or be destroyed by changes in methods of production. ... The various agencies on which we have been dwelling are, in their various degrees, especially noteworthy in dispelling the jealousies and antipathies which formerly characterized industrial disputes, and in producing a frank and open treatment of the circumstances provoking a struggle. A more cordial understanding, and one based on a better knowledge of the relations between employers and employed, is growing up. This better knowledge is passing outside the ranks of the combatants themselves, and is tending to spread throughout the nation; and the public opinion thus developed reacts upon special industrial disputes and operates to bring about a pacific solution of them. We may, indeed, say that all the causes tending to industrial peace which we have reviewed unite in producing this common spirit running through all classes of the kingdom, which is the best promise and assurance of the realization of peace in the future." In later official reports, for instance in 1895 and 1900, the expressions "trade disputes" and "labour disputes," and with increasing frequency the latter, are used as synonymous.

The inevitable conclusion, as it seems to us, from this is that in 1894 it was well understood that "trade disputes," which at one time had a limited scope of action, had, without altering their inherent and

essential nature, so developed as to be recognized better under the name of "industrial disputes" or "labour disputes," and to be more and more founded on the practical view that human labour was not a mere asset of capital but was a co-operating agency of equal dignity—a working partner—and entitled to consideration as such. It is at the same time, as is perceived, contended on the part of labour, that matters even indirectly prejudicially affecting the workers are within the sphere of dispute. For instance, at p. 70 (par. 175 (4) (a)) one of the competing contentions is thus stated:—"Long hours proceed from the competition of employer with employer in the same trade. Employers ought to be prevented from competing in this way at the expense of their workmen." As a fact in a later year, Lord James of Hereford, in an award, held that one employer in a certain trade must conform to the practice of others. What must be borne steadily in mind, as evidenced by the nature of the claims made, is that the object of obtaining a large share of the product of the industry and of exercising a voice as to the general conditions under which it shall be carried on (par. 100) covers all means direct and incidental without which the main object cannot be fully or effectively attained. Some of these will be particularized, but in the meantime it should be said that they will show in themselves, and from the character of the disputants this will be confirmed, that so long as the operations are of capital and labour in co-operation for the satisfaction of material human needs, the objects and demands of labour are the same whether the result of the operations be money or money's worth. It is immaterial to the worker whether the capitalist employs him to make a profit or to carry out a scheme on the basis of not making a loss: whether it is a public or a private employer, whether, if public, the working capital is recouped by individual payments or by compulsory rates, the worker is still a co-operator, he is still a human being, with needs and desires of his own; and (as we took pains to express in the Badge Case 168 17 C.L.R., at p. 703) his disputes are for his personal welfare, be it health or leisure or a larger share of combined production. That is always the central idea. And neither on principle nor on precedent can we find any jurisdiction for excluding him in any of the cases mentioned, on

the ground of legal distinction (for that is all we have to consider here) from the operation of the constitutional provision. At p. 85 (par. 227) of the report of 1894, the majority of the Commission, speaking of preventive remedies suggested by witnesses for the evils under consideration, mention "the extension of State and municipal employment in the sphere of productive industry; and the substitution, more or less gradual, of public authorities in the place of private employers competing with one another for profit." That substitution, of course, might or might not be accompanied with profit-making; probably profit-making was mainly in contemplation of the witnesses who testified. At the same time the absence of profit-making was also in view. This appears at p. 93 (par. 249 (1)) of the report of 1894. One of the opposing arguments proceeded thus: "The more just and impartial view of the claims of labour, expected to be taken by employers who are under no necessity of making a profit, might too often come to mean, in practice, the taxing of the community for the benefit of the particular classes of workmen who happened to be in the public service." Again, in par. 249 (2), this passage occurs: "No doubt too, any disputes that did arise between employers and employed would take a different form under Government management." See also the summary at p. 739 (end of par. 691 in Appendix 2, "State and Municipal Employment of Labour"). See further, the minority report of Mr. Abraham, Mr. Mann and others, at p. 137. In subsequent years the terminology is the same. For instance, in 1895 House of Commons Papers, vol. XCII., p. 352, under heading "General List of Labour Disputes" we find a sub-heading "Municipal Employment," and then, under that, items 780 and 781 are respectively disputes of lamplighters and ashpit cleaners with the municipalities employing them.

In House of Commons Papers 1896, vol. LXXX., part 2, p. 140, the heading of the page is "Average rate of wages in various Industries. On p. 141 there is a sub-heading, "Employees of Local Authorities, Gas and Water Companies"; and then under that we find this table: Police, 27s. 5d.; Roads, pavements, and sewers, 20s. 9d.; Gasworks, 27s. 2d.; Waterworks, 24s. 9d. In House of Commons

Papers 1898, vol. LXXXVIII., p. 620, under appellations indiscriminately "Labour Disputes" and "Trade Disputes," are included lamplighters and nightmen in dispute with municipalities. In the same volume, at p. 697, are found "Trade Unions grouped by Industries." Table 2, "Number and Membership of Trade Unions," includes under the sub-heading "Groups of Trades" thus: "Employees of Public Authorities." In House of Commons Papers 1900, vol. LXXXIII., p. 425, under the heading of "Miscellaneous Trades and Employees of Local Authorities" are found eleven disputes of employees of local authorities. In House of Commons Papers 1901, vol. LXXIII., p. 606 (Appendix, p. XVI.), under "Groups of Trades" are included "Employees of Public Authorities" Disputes in 1896, 1897, 1898, 1899 and 1900. In House of Commons Papers 1902, vol. XCVII. (Cd. 1124, printed page 57), there is a list of "Changes in Hours of Labour Classified by Industries," 1897 to 1901. Under that are included "Public Authorities." That is the general and official view in England of municipal undertakings from 1894 to 1902, and it continues.

When we remember that labour disputes are only one phase of social evolution, and part of that social evolution is the gradually increasing assumption by municipalities of enterprises formerly carried on entirely by private capital, and when it is once admitted, as it must be, that if municipalities carry on their enterprises for profit "industrial disputes" can occur, the burden lies on those who assert that the profit making is the discrimen, to establish it. Neither reason nor precedent can be found to support that distinction. Reference was made to a work by Mr. Knoop, called Principles and Methods of Municipal Trading, in support of that distinction. But an inspection of that work tells the other way. For instance, at p. 46, sec. 8, the author speaks of cases of trading enterprises, apart from water, gas, electricity, tramways and markets. He groups them into five classes. In the first class (sec. 9), which he says consists of "subsidiary trades or industries," he includes (p. 47) paving streets, laying sewers and erecting any buildings required for municipal purposes. The function of road making and maintenance is, in its inherent nature, one in direct aid of commerce. It is as clearly within the true meaning of

"industrial enterprise" as a railway or a tramway. Mr. Knoop is clearly accurate in describing it as a subsidiary industry to others, such as agriculture, or coal mining, or manufacturing or transport. When tolls were charged by persons who undertook to keep roads in order, no one could doubt it came within the sphere of private enterprise. Any work of public utility can be so undertaken. As Mr. Gomme in his Principles of Local Government (1897), at p. 153, says: "Any municipal service can be made to pay dividends on private capital, if only the means of levying a revenue are granted to private owners." Cemeteries, as he points out, are, in England, sometimes in the hands of the State, sometimes in the hands of municipalities and sometimes in the hands of private owners. Taxation is not profit-making, and if the service is recouped by taxation it is not profit earning. But it may be an industry. And because in the case of cemeteries private capital is repaid out of the proceeds of taxation—that is, a specialized tax—he holds it is not "trading" because not profit making in the strict sense. But that does not alter the nature of the enterprise as an "industrial enterprise." In Professor Macgregor's recent work The Evolution of Industry, chap. VIII., beginning at p. 210, it will be seen that "industries" are still called "industries" by whomsoever or howsoever they are carried on. For instance, he says: "The Post Office and the Coinage are as yet our only nationalized industries." Again he says: "Although labour disputes in public services cannot be entirely avoided, municipal ownership helps to prevent their arising or being discussed simply from the standpoint of immediate material gain."

The question of profit-making may be important from an income tax point of view, as in many municipal cases in England; but, from an industrial dispute point of view, it cannot matter whether the expenditure is met by fares from passengers or from rates. In each case the municipality is performing a function; and in the one case it performs it with a variation in contrast with the other. If trade unions as recognized under the English Act are to be taken as a test—as was urged for the respondents—the position is greatly strengthened. For instance, in the House of Commons Papers 1902, vol. XCVII. (Cd. 1348, p. 116 (printed page)), we find that in 1894

there was a recognized trade union called "Municipal Employees' Association," showing a recognition of such employees as a distinct trade within the meaning of the English Act. At the end of 1901 it had 40 branches. It is item 1480. It also there appears that in 1896 there was another trade union registered, the Glasgow Corporation Tramways Employees (item 1481); and that in 1899 the Liverpool Corporation Workmen (item 1485) and in 1900 the Westminster Municipal Labour Union (item 1488) were registered. Further, in the House of Commons Papers 1900, vol. LXXXIII., p. 912, we find several Government employees' trade unions: "1895, 4,885 persons; 1896, 7,980 persons; 1897, 15,200 persons; 1898, 8,250 persons; 1899, 7,900 persons." These include Ship Constructive Association, Southampton Government Workers, Army Clothing Department Employees, Waltham Abbey Gunpowder Employees and Portsmouth Dockyard Trades Council. Others of the same kind are there mentioned. Further, in the House of Commons Papers 1912-1913, vol. XLVIL, at pp. 828 and 832, we find other Government employees' trade unions: for instance, under heading of Admiralty Employees, "Item 1280, Government Labourers, Chatham, 1889; Devonport 1890; Portsmouth 1894."

In the face of these considerations it is quite impossible to draw an imaginary line at profit undertakings and say that the power of making laws under pl. XXXV. of sec. 51 for the peace, order, and good government of the Commonwealth was intended to be limited by that, and that, on the other side of that imaginary line, in inter-State disputes private force alone was left to act.

2. Are Trade Unions confined to Manual Workers?—It was contended that they are. Sir Edward Mitchell urged very strongly that in Webb's monumental work on trade unionism it so appeared. In the first place, the same work, as was pointed out during the argument itself, makes some and sufficient reference to the contrary. But, further, there is overwhelming evidence that both before and after 1900 the construction given by the responsible authorities, and everyone else concerned, to the Trade Union Act of 1871 includes more than manual workers. More than that, under the Trade Disputes Act of 1896 disputes between trade unions not manual workers' were recognized as such by the Board

of Trade, both in their official reports and by their official action. Some recorded instances will prove this.

In House of Commons Papers 1912-1913, vol. XLVII., at pp. 824 and 826, these appear:—Agents (Life Assurance, &c.): item 1211, National Life Assurance Agents, registered Union 1884; item 1213, Prudential Assurance Agents, registered Union 1893; item 1214, British Federation of Assurance Agents, registered Union 1900. Musicians, Theatrical &c. Employees: item 1229, National Theatrical Employees, registered Union 1890; item 1230, Amalgamated Musicians, registered Union 1893; item 1232, Variety Artistes' Federation, registered Union, 1906; item 1235, Actors, registered Union 1907. Journalists: item 1228, National Journalists, registered Union 1907, with 67 branches at end of 1910—having 1,925 members. In connection with insurance agents it may be noticed that in House of Commons Papers 1895, vol. XCII., Appendix 1, headed "General List of Labour Disputes," we find (at p. 309) this entry:—"Insurance Agents, Walsall District. Against new conditions of employment. One establishment and 17 persons affected for 9 days." The result was a compromise. It does not appear that the men were in a trade union. In House of Commons Papers 1897, vol. LXXXIV., p. 446, under heading of "Disputes" and sub-heading "Other Trades" we find: "Item 1005, Musicians," the cause being "refusal of men to leave their Union." In House of Commons Papers 1907, vol. LXXX., pp. 268 and 355, reference under the head of "Trade Unions" is made to one by musicians. In House of Commons Papers 1907, vol. LXXX., p. 57, a dispute is referred to which took place at certain London music halls affecting artistes, musicians and stage-hands. Mr. (now Sir George) Askwith arbitrated and his award is given. In House of Commons Papers 1914, vol. LXXIX., pp. 176 and 177, in the 11th report of the Board of Trade under the Conciliation Act of 1896, reference is made to a dispute of the variety artistes to have the 1907 award revised. The artistes applied to the Department for arbitration, the manager concurred, and the Chief Industrial Commissioner acted as arbitrator. This was a statutory function, and the Act means the same now as it did in 1896. In the case of Rickards v. Bartram 169 25 T.L.R., 181 the Variety Artists' Federation or Trade Union was made liable for defamation.

The reason of the matter rejects the contention. Even as far back as 1868 the House of Lords, in Wilson v. Merry 170 L.R. 1 H.L. (Sc.), 326, acted on the principle that all fellow servants were collaborateurs whatever their grade. Lord Colonsay said 171 L.R. 1 H.L. (Sc.), at p. 343:—"The constantly-increasing scale on which mining and manufacturing establishments are conducted, by reason of new combinations and applications of capital and industry, has necessarily called into existence extended organizations for management—more gradations of servants, more separation or distribution of duties, more delegation of authority, and less of personal presence or interference of the master. The same personal superintendence and supervision by owners or masters, common and beneficial in some minor establishments, is in many cases unattainable, and, even if attainable, would not be beneficial. The principles of the law, however, have sufficient elasticity to enable them to be applied, notwithstanding such progressive changes in the manner of conducting business." An observation to be noted. In 1891, in Johnson v. Lindsay 172 (1891) A.C., 371, the House of Lords confirmed the principle.

Now, once we remember that industry becomes every day more diverse and complex and interrelated, that every day brings, even to the most radical and elementary industries of production and extraction, the application of inventive science and skill, it is evident that such a rule as is contended for would, day by day, tend to withdraw more and more from the operation of the constitutional power industries that were at its enactment admittedly within it. The true rule is that stated in the observation made by Lord Colonsay. And in Mr. Sidney Webb's later work, The Works Manager To-day (1917), we find some observations very pertinent to more than one branch of this case. He points out that the works manager has a distinct function, different from the craftsman, from the inventor, from the clerical staff. It is the function of direction—the management of human nature. He says (p. 4): "This function of management, which is needed as soon as two or three are gathered together in a common task, is recognized as indispensable when we come to enterprises in which numbers are engaged." At p. 5 he says:—"Nor

is it only for the sake of the profit-making proprietors, who still so often control our factories and our industries, and still so often intervene personally in their administration, that management is indispensable. The co-ordination of energies that the manager secures, that efficiency in production which is his object, is as necessary when the proceeds of the enterprise are shared exclusively among the producers, as in the so-called self-governing workshop, or (as in the rapidly increasing development of State or municipal or co-operative production) are appropriated for the common benefit of the community, as they are when they enrich the private capitalist. Management is involved in the avoidance of any waste of human effort." At p. 6 he observes:—"Whether the factories are owned by individual proprietors or by joint-stock companies, by gigantic Trusts or by the Government of the State; whether industry is conducted by private employers, or by State Departments, or by municipalities, or by co-operative societies, or even, as some of the younger thinkers now propose, by the trade unions developed into national guilds; finally, whether the net product is made for the capitalists or is in one or other way shared among any particular group of producers or among the whole community, that expert direction and co-ordination of the wills and energies of all the producers which we call management will always be necessary. The manager, superintendent, and foreman may have what designations we please; they may be selected and appointed in this way or that; their authority may be enlarged or diminished as their duties may be varied; they may become to a lesser or a greater extent `profiteers,' or be exclusively salaried functionaries; but they will, we may be quite sure—like the conductor of an orchestra—henceforth always exist, and always have their function in industrial enterprise." But there is no suggestion that the manager is other than the highest, the commanding officer, so to speak, in the army serving the employer, whoever he may be. And as to all below the manager, it is clear that whether they are brain workers or muscle workers, they are in the ranks of labour, they are among "the producers." It is very clearly expressed by Marshall on Economics, at p. 179, sec. 2, where he thus expresses it:—"The head of a large business can reserve all his strength for the broadest and most

fundamental problems of his trade: he must indeed assure himself that his managers, clerks and foremen are the right men for their work, and are doing their work well; but beyond this he need not trouble himself much about details. He can keep his mind fresh and clear for thinking out the most difficult and vital problems of his business; for studying the broader movements of the markets, the yet undeveloped results of current events at home and abroad; and for contriving how to improve the organization of the internal and external relations of his business."

In the result, the words "industrial disputes" in the Constitution are shown to have had inherently in 1900 a signification large enough to embrace every form of dispute coming within the formula above stated.

3. The Validity of the Organization.—It follows also from the facts and considerations above stated that, whether we treat the organization as registered under sec. 55 (1) (b) or (c), Parliament has full power to permit industrial employees to group themselves in any way it thinks convenient to carry out arbitration and conciliation for the prevention or settlement of industrial disputes extending beyond the limits of any one State. Some misapprehension appears to exist as to the meaning of collective bargaining. It was argued as if collective bargaining was simply a bargaining by all an employer's workpeople en masse as to their several terms and conditions of employment, instead of leaving each one to bargain for himself separately. That is a mistake; and, unless it is corrected, a wrong notion will exist as to the real meaning of collective bargaining, or, bringing it closer to us, as to what is meant by an industrial agreement. This is essential, because, once that is understood, the argument as to the invalidity of sec. 55 (1) (c) disappears.

In 1912 the English Industrial Council, under the presidency of Sir George Askwith, the Chief Industrial Commissioner, were asked by the Government to report on industrial agreements. The report is found in House of Commons Papers for 1913, vol. XXVIII, pp. 1 et seqq., along with the evidence on which it is based. The report is most valuable as indicating the true nature of a collective industrial agreement. We quote its language at p. 4:—Par. 6.—"It may be of advantage at the outset to consider what might be regarded as

a working definition of an industrial agreement. (It is understood that there is no legal definition of the term.) An industrial agreement may be described as an arrangement arrived at by employers and workpeople with a view to formulating the general conditions of employment in a particular trade and district. It is essentially different from (though to a large extent it forms the basis of) the contract of service entered into between an individual employer and an individual workman. It is, in most cases, arrived at because the employers and workpeople think that a collective agreement is a desirable method of formulating what they have agreed shall be (for the time being, or for some period mentioned in the agreement) the principal terms governing the contracts of service between individual employers and individual workmen. As a matter of practice, agreements are usually made between Associations of Employers and Associations of Workpeople, and the extent to which these Associations in the various cases cover the whole of the trade concerned differs in almost every instance." Par. 7.—"It is to be noted that industrial agreements, considered as contracts between employers and employed, cannot fairly be compared with the ordinary commercial contracts made between individuals or corporate bodies. In the case of ordinary commercial contracts the persons who enter into the contracts are the principals directly concerned, or at least persons acting under well-defined authority from principals. Industrial agreements, on the other hand, are frequently made—especially on behalf of the workpeople—by representatives who, by reason of the numbers involved, and the circumstances which surround trade movements, find it difficult to obtain well-defined authority to enter into a settlement, or even to ascertain, beforehand, the exact wishes of those whom they represent. This fact is necessary to keep clearly in mind in the consideration of the questions now under review."

The essence of the matter is that collective bargaining by making an industrial agreement is not confined to bargaining between employer A and his own actual employees for the time being, it extends to bargaining with them as to future conditions of employment of any employee in the future, and to bargaining with any recognized body representative of their class in the industry,

and whether that representative body has or has not obtained formal authority from the individuals affected, so long as it—much as in chancery proceedings—can be considered in the circumstances fairly to represent their interests. (Taff Vale Railway Co. v. Amalgamated Society of Railway Servants 173 (1901) A.C., 426, at p. 438; Parr v. Lancashire and Cheshire Miners' Federation 174 (1913) 1 Ch., 336, at p. 375.) If they have a "common interest" they may fairly be so considered. O'Connor J., in Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1] 175 12 C.L.R., at p. 435, held that "industry" in sec. 55 (1) (a) meant a class of industrial enterprise, and said "the common interest" of employers arose from "their employing labour in carrying on the same class of industrial enterprise." But even that broad aspect was limited to the Act, that is, to "industry" as intended by the Act. It does not follow that the common interest of either employers or employees is restricted by the Constitution now, or for all time, to their own specific class of enterprise. Specialization of function proceeds rapidly, and industrial community of interest exists wherever by interrelation of industries any of them may be mutually affected. The words of the learned Chief Justice in R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Broken Hill Proprietary Co. 176 8 C.L.R., 419, at p. 431, are noteworthy. His Honor said:—"The first objection taken formally is that there was no dispute in an industry extending beyond the limits of any one State. I only remark upon that that those are not the words of the Constitution, and that a priori I do not see why there may not be one dispute embracing or extending over several industries, just as much as there may be several disputes within the limits of one industry. It is not however necessary to express any decided opinion upon the point." The view expressed is clearly right. Each day's experience more and more confirms it; and, collective bargaining once admitted as a principle, the basis being that organization of labour strengthens it in its demands on capital, and organization of capital, and organization of capital strengthens it in maintenance of its own demands, it is as impossible to lay down a fixed line beyond which community of interest is unlawful to pass,

as it was for King Canute to set bounds to the waves of the sea. Their "industry" in its broadest practical aspect is the "nexus" both for employers and employees. As long as that "nexus" can be shown, the body is representative of all workers of the class. And Parliament, having full discretion over incidentals, is not bound to segregate them from other persons who are representatives of other classes, and who join them in order to obtain a more effective organization. The doctrine of misjoinder is not applicable.

There is no reason, therefore, for limiting the Constitution in the way suggested, and, if not, the statutory provision is necessarily valid.

We answer the question submitted in the affirmative.

HIGGINS J. It is now urged that the dispute, if it exists, is not an "industrial dispute," within the meaning of sec. 51 (XXXV.) of the Constitution. It is said that a municipality does not, in making, maintaining, controlling and lighting the streets, carry on an "industry"—that it is not engaged in any manufacture, any business of production, transport, &c. The argument is that pl. XXXV. in using the words "industrial dispute" means a dispute in some specific industry of that nature. There is no doubt that the Act, as amended in 1911, includes under the word "industry," not only the undertaking of an employer, but also any calling, service, employment or industrial occupation of employees. The Act, however, is not conclusive as to the meaning of the Constitution; and it is said that the Act is pro tanto invalid if it includes more than the Constitution meant to be included. But the interpretation which Parliament has given by the Act is entitled to some weight on a question as to popular meaning; even if the definition itself is not to be regarded as a bona fide exercise of the power of Parliament to make laws "with respect to" conciliation and arbitration for the prevention and settlement of industrial disputes extending &c. (see Attorney-General for New South Wales v. Brewery Employees' Union of New South Wales 177 6 C.L.R., 469, at p. 610). A power to make laws with regard to "aliens" conveys power to say who

shall be aliens (see Harvard Law Review, vol. XXII., p. 360; and see p. 547).

The words are "industrial disputes"—not "disputes in an industry." The phrase is not technical; and we are to give it the popular meaning to find what it would include in the mind of the man in the street. This is not really a question of law, but of fact. What a legal expression includes is a true question of law. Our duty is to find what Dr. Lushington called "the common understanding and acceptation of the term"—uti loquitur vulgus (The Fusilier 178 34 L.J.P.M. & A., 27).

Now, if labourers who break stones for the roads demand higher wages or shorter hours from their employers, would the man in the street be likely to call the dispute an "industrial dispute" if the employer is a contractor, and to refuse to call it an "industrial dispute" if the employer is the municipality? For this question we must ignore the theories of the sophisticated, and consider merely common usage. At first sight, the answer is obvious. But we are at liberty to have recourse to the dictionary; and in Webster's International Dictionary we find "industrial" defined as "concerning those employed in labour, especially in manual labour, and their wages, duties, and rights." This dictionary meaning obviously fits the case of a dispute of street labourers with their employer, a municipality, as to their conditions of employment; just as the expression "industrial remuneration" in the transactions of the British Conference of 1885 covered the remuneration of municipal labourers; and the provision for fatal accidents "in any industrial employment or occupation" would cover accidents to such labourers (Act 58 & 59 Vict. c. 36). The word "industrial" cannot mean merely in a specific industry—or even specific industries—of production or transport in such expressions as "industrial gazette," "industrial situation," "industrial peace," "industrial Court," "industrial insurance," "industrial upheaval," "industrial crisis," "industrial world," "industrial parliament," If there be a commission to report as to "industrial unemployment," must it close its eyes to municipal operations? I find in a newspaper that an "industrial league" has been formed in England for the purpose of promoting

good relations between employers and employed: is the word improperly used? Mill speaks of the "industrial capacities of human beings" (Pol. Econ., bk. I., chap. III., sec. 3). This cannot mean capacities in an industry—some specific industry of manufacture or transport. The purpose of profit-making can hardly be the criterion. If it were, the labourers who excavated the underground passage for the Duke of Portland's whim, or the labourers who build (for pay) a tower of Babel or a pyramid, could not be parties to an "industrial dispute."

It is urged that unless the meaning of the words be restricted as suggested, the Court of Conciliation would have jurisdiction over a dispute between doctors and lodges, between lawyers and their clients, between clergymen and their congregations, &c., &c. It is not necessary—or, as I think, desirable—that we should, in answering the specific question asked of us, commit ourselves to a final, exhaustive definition of a popular phrase such as that in question. It is not necessary for us, in order to determine whether this dispute (a dispute between street cleaners, street lighters, &c., and their employer, the municipality) is an industrial dispute, to define fully "industrial dispute"—to enumerate even all the characteristics, the full connotation of an industrial dispute; any more than it is necessary for us to define what is a dog when we determine that a certain animal is a dog. To my mind, a great deal of time is wasted and harm done by the premature efforts of Courts to define exhaustively expressions of common speech. We have to consider here, not technical language, but the language of common speech, with all its vague and indeterminate connotations and denotations. As in the case of natural classes, the subject of the learned discussion between Whewell and Stuart Mill, it is sufficient—at least for our purpose—to determine the class to which the dispute belongs, not by a boundary line without, but by a central point within, each of several classes of dispute. It is sufficient for our purpose to find that the dispute in question has the characteristics of some admitted type. The definition in Webster fully covers the present dispute; and it leaves open for further examination, when necessary, the question whether others than manual labourers can

be said to be parties to an industrial dispute. The question put to us relates to manual labourers only.

But if it be necessary to define further the expression "industrial dispute," then, looking at the current use of the phrase and leaving out of sight disputes such as demarcation disputes, I should say that the expression includes, at all events, a dispute between employer and employee as to their reciprocal rights and duties. Under "employer" in this definition I include an association of employers; and under "employee" I include an association of employees. This definition, of course, covers non-manual employees as well as manual employees. For the purpose of the Constitution, at all events, the words in pl. XXXV. cannot be treated as excluding from the power of Parliament any class of such disputes. It is true that up to the present most of the disputes are disputes with manual workers; but we are discussing a remedial power conferred on Parliament for all time; and we have no right to limit the meaning of the words to manual disputes, even if it were true that when the Constitution became law there had been no disputes with non-manual workers as to their conditions of labour. The recent strike of clerks in Western Australia, the formation of musicians' unions, of actors' unions, of foremen's unions, of unions of professional officers in the public service, of teachers, colliery officials, health inspectors, journalists, of shipmasters and officers—all these things show that in essentials the problems to be faced in regard to non-manual employees are the same as with regard to manual employees. When the American Constitution was framed and came into force (about 1788) there were certainly no telegraphs or telephones; and when they were invented it could as reasonably have been contended that commerce between the States could not include communication between the States by these unknown devices. Yet the Courts of the United States have held that Congress can make laws with regard to inter-State telegraphs and telephones by virtue of the power "to regulate commerce among the several States" (see Pensacola Telegraph Co. v. Western Union Co. 179 96 U.S., 1). The telegraphs and telephones were treated as having the essential connotation of inter-State commerce, and, in

my opinion, any dispute between employers and employees as to their reciprocal rights and duties in that relation has the essential connotation of an industrial dispute. Sir Edward Mitchell asserted that no single instance can be found before 1900 of a trade union formed by non-manual workers with a view to better conditions. Yet in Webb's History of Trade Unions—even in the original edition of 1894—there are several such unions mentioned (and distinguished from mere benefit societies)—such as the national union of teachers, established 1870; the telegraph clerks, life assurance agents, shop assistants, two unions of postmen; and certain others not so large or well defined (p. 427n). The truth seems to be that our task of interpreting the Constitution is not to stereotype the facts of the world and of social life as at that date. We have, of course, to find the meaning of the words as then used, and to find the end to be secured by the exercise of the power; and if as the result we find that the new facts actually fit these words of the power and come within the end desired in the Constitution, even though the words could not, in 1900, include the new facts in their denotation, we should decide in favour of the Act which is impeached. In the case of the shipmasters and officers—not manual workers—the branches of the union a few years ago actually instructed the members to withdraw their services from certain ships; and there would undoubtedly have been a strike but for the interference of this Court at the instance of the Minister of Labour of New South Wales (Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co. 180 7 C.A.R., 25, at p. 92).

So far as the Constitution is concerned, the question should, in my opinion, be answered in the affirmative.

It is urged, however, that even if the dispute is within the words of the Constitution, it is not within the words of the Act—that the Court has no jurisdiction to determine the dispute because the registration of the Union is a nullity under the Act. The argument is that in order to be registered a union or association must be registered in or in connection with some specific industry (sec. 55). Now, in the first place, this question as to the propriety of the registration is not open to us for our decision on the case stated.

The case assumes that the registration is valid. Par. 3 states: "The claimant is an association of employees registered as an organization under the Act on 30th August 1910 in connection with the municipal industry"; and the only question asked for our opinion is: "Has the Court power or jurisdiction to determine the dispute between the organization and the municipal corporations?" This High Court has jurisdiction to hear and determine the question of law asked, and no other question (sec. 31). The Deputy President may have been wrong in his assumption that the registration was valid (I do not suggest that he was wrong); but it was for him, and not for us, to determine that question.

In the second place, the argument is based on the mistaken assumption that the Court of Conciliation has no "power or jurisdiction" to determine a dispute unless the association making the claims be a registered association—an "organization" under sec. 55. It is true that no plaint can be submitted to the Court except by an association so registered (sec. 19 (b)); but there are three other methods by which the Court can get cognizance of a dispute (sec. 19 (a), (c), (d)), and in none of these three methods is a registered association, an organization, made necessary. Under sec. 18 the Court is given jurisdiction to prevent and settle pursuant to the Act "all industrial disputes"; and this particular dispute came in fact under the cognizance of the Court, not by virtue of any plaint, but by virtue of an order made after a compulsory conference under sec. 19 (d). A copy of the order referring the dispute into Court is annexed to the case. An instance in which the Court got cognizance of a dispute where employees belonged, as well as employers, to unregistered associations will be found in Rural Workers' Union v. Mildura Branch of Australian Dried Fruits Association 181 6 C.A.R., 61. It follows that even if the question as to the validity of the registration were open in this case to discussion, the "power and jurisdiction of the Court of Conciliation to determine the dispute" is unquestionable.

But there is a view put by Mr. Starke as to the Act which deserves separate notice, for it comes fairly within the question as to power and jurisdiction. It is shortly that, whatever the Constitution

means, the Act does not give power to the Court to deal with industrial disputes other than trade disputes; and that the meaning of "trade disputes" is to be limited so as to exclude disputes between municipalities and their employees. It seems that in England the name usually given to industrial disputes in the Acts has been "trade" disputes; but it is also, to my mind, clear that the British Parliament has treated disputes between municipalities and their employees as being "trade" disputes: see the Conspiracy and Protection of Property Act 1875 (38 & 39 Vict. c. 86). In that Act, under the heading "Conspiracy, and Protection of Property," the law was amended so as to make combinations of persons in furtherance of a trade dispute between employers and workmen no longer a criminal conspiracy (sec. 3); but it was at the same time provided that persons employed by a municipal authority or by contractors to supply the municipality with gas or water and wilfully breaking a contract of service, knowing that the inhabitants would probably be deprived of gas or water, should be liable to fine or imprisonment (sec. 4). Then, in the Act of 1906 (6 Edw. VII. c. 47), "trade dispute" is expressly defined as "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person"; and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises. It is clear that what is called a "trade dispute" in England in these Acts would include a dispute between municipalities and their employees—whether municipalities carry on what is usually called "trade" or not. The expression "industrial dispute" must have a meaning at least as wide. There is a great difference between being engaged "in an industry" and "in industry"; and to show an industrial dispute it is sufficient, in my opinion, to show a dispute relating to industry in its collective sense—there is no need to show that it is a dispute in any operations of production, or transport, or for any purposes of business or of gain, or of trade in the commercial sense.

GAVAN DUFFY J. This special case asks the following question:

(1918) 26 CLR 508 at 579

"Has the Commonwealth Court of Conciliation and Arbitration power or jurisdiction to determine by an award the dispute between the organization and the municipal corporations, constituted under or subject to the provisions of the three Acts mentioned in par. 8 of this case, so far as the dispute relates to such operations of the said municipal corporations as consist of the making, maintenance, control and lighting of public streets or any of them?"

We were asked to answer this question in the negative on two grounds: (1) because the various municipal corporations who had been made respondents were State agencies or instrumentalities, and as such were not subject to the operation of Commonwealth legislation; (2) because an industrial dispute within the meaning of sec. 51 (XXXV.) of the Constitution was not possible between municipal corporations and their employees engaged in the making, maintenance, control or lighting of public streets. I have already expressed an opinion that the respondents cannot succeed on the first ground, and I now proceed to consider the second ground. The term "industrial dispute" is one which may have many meanings and there is much room for a difference of opinion as to the meaning which should be given to it here. Members of this Court have from time to time proposed definitions, but with hardly more success in obtaining unanimity than has been attained by counsel in the present case.

Mr. Mann says that "an industrial dispute" within the meaning of sec. 51 (XXXV.) is a dispute between employers and employees, whatever may be the nature of the work in which such employees are engaged, or of the question on which the parties are disputing. Mr. Dixon says that it is a dispute arising in and in relation to the systematic performance of work done in satisfying human requirements by the supply of services and commodities, and that such a dispute has no necessary relation to the existence of employers or employees. Sir Edward Mitchell says that it is a dispute between manual wage earners and their employer, or among manual wage earners, in an industry, that is to say, in some trade, business, or other similar operation carried on for gain. Mr. Starke says that it is neither more nor less than a trade dispute. Mr. Lewis says that

it is a dispute between employers and workmen, or between workmen and workmen, in or in connection with manufacturing, transport, or other trading or commercial operations carried on by the employers.

Counsel arrived at these discrepant results by considering the meaning of the word "industrial" in such expressions as "industrial peace," "industrial turmoil," "industrial unrest," by citing instances of the use of the word "industrial" by publicists and economic writers, and by a copious reference to the demands which from time to time have been made by or on behalf of the working classes in Great Britain and elsewhere; but we were not furnished with a relevant example of the use of the phrase "industrial dispute" except in certain legislative enactments in Australia and New Zealand. On 31st March 1892 there came into operation in New South Wales an Act called "An Act to provide for the establishment of Councils of Conciliation and of Arbitration for the settlement of Industrial Disputes." The preamble is as follows: "Whereas it is believed that the establishment of Councils of Conciliation and of Arbitration for the settlement of disputes between employers and employees would conduce to the cultivation and maintenance of better relations, and more active sympathies, between employers and their employees, and would be of great benefit, in the public interest, by providing simple methods for the prevention of strikes, and other disputes, from the effects of which industrial operations may suffer serious and lasting injury, and the welfare and peaceful government of the country be imperilled." Sec. 23 provides that a claim or dispute under this Act shall include any matter as to which there is a disagreement between any employer and his employees respecting certain relations set out in the section. These relations cannot be said to arise exclusively in the case of employees doing manual labour, though it is probable that the Legislature had only manual labourers in view. Sec. 28 declares that the Act may be cited for all purposes as the Trade Disputes Conciliation and Arbitration Act 1892. I think that the industrial disputes sought to be settled by conciliation under this Act are disputes between employers and employees (or perhaps only such of these as perform manual labour) which if not settled would, by means of strikes or otherwise, be

likely to produce serious and lasting injury to the industrial operations carried on in the community.

The next in point of date is the New Zealand Act, No. 14 of 1894, intituled "An Act to encourage the Formation of Industrial Unions and Associations, and to facilitate the Settlement of Industrial Disputes by Conciliation and Arbitration." Its short title is the Industrial Conciliation and Arbitration Act 1894. The term "industrial dispute" is thus defined in sec. 2: "`Industrial dispute' means any dispute arising between one or more employers or industrial unions, trade unions, or associations of employers and one or more industrial unions, trade unions, or associations of workmen in relation to industrial matters as herein defined," and "industrial matters" are defined as meaning "all matters or things affecting or relating to work done or to be done, or the privileges, rights, or duties of employers or workmen in any industry, and not involving questions which are or may be the subject of proceedings for an indictable offence." "Industry" means any business, trade, manufacture, undertaking, calling, or employment of an industrial character.

The next use of the term "industrial dispute" is to be found in the South Australian Conciliation Act 1894, which came into force on 1st January 1895, it is intituled "An Act to facilitate the Settlement of Industrial Disputes." The expression "industrial disputes" is defined in sec. 3 as including all disputes relating to industrial matters, and the expression "industrial matters" is defined as including all matters relating to pay, wages, hours, privileges, rights, or duties of employers or employees in any industry, and "industry" means any avocation, business, trade, undertaking, calling, or employment. The machinery of the Act seems to be based on the assumption that industrial disputes can arise only between employers and employees.

On 1st May 1899 an Act came into force in New South Wales intituled "An Act to make provision for the prevention and settlement of Trade Disputes." It is founded on the British Act 59 & 60 Vict. c. 30. It does not contain any reference to industrial disputes, and I need say no more about it.

On 5th December 1900 an Act of Parliament was passed in

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Western Australia which is intituled "An Act to facilitate the Settlement of Industrial Disputes by Conciliation and Arbitration." It is founded on the New Zealand Act of 1894, but in the definition of the word "industry" it uses the words "Any business, trade, manufacture, undertaking, calling, or employment in which workers are employed," instead of the words "any business, trade, manufacture, undertaking, calling, or employment of an industrial character."

The Constitution Act (63 & 64 Vict. c. 12) received the Royal Assent on 9th July 1900.

In my opinion "an industrial dispute" then meant a dispute existing in an industry or industries, and the term "an industry," which had once signified the labour and capital employed in the production of a class of marketable commodities, had gradually expanded so as to include the labour and capital employed in any branch of trade or business carried on for the purpose of profit and wholly or mainly by means of manual labour, and finally, by an easy metonymy, to apply to the aggregate of those who contributed such labour and capital and to the aggregate of the business undertakings in which such labour and capital are used. This was a natural evolution. The earliest manufacturer or maker conceivably collected his own materials, made his own tools, and distributed the work of his hands. Then came economic co-ordination and as time went on producers specialized and what had been one industry became many, but within the connotation of the term "industry" there always remained the presence of manual labour. We speak of the mining industry, of the smelting industry, of the metal grinding industry and the transport industry, but not of the insurance industry, the broking industry or the banking industry. But, though there cannot be an industry without manual labour, many and perhaps all industries require labour of another kind, and their operations may be impeded or prevented by the withdrawal of such labour. A dispute arising in any industry would be no less an industrial dispute because some or even all of the employees involved in that dispute were not manual labourers. If an industrial dispute is a dispute arising in an industry, and an industry is what I have indicated, the question in this case must be answered in the negative, but, as in other cases other questions have arisen

which depend for their solution on the meaning of the term "industrial dispute," I propose to further consider the meaning of this term. It has been strongly urged on us that any persons engaged in an industry may dispute with any other persons so engaged and thus constitute an industrial dispute, but in my opinion the disputants must be employers on one side and employees banded or united together on the other. It is true that employers have always competed and disputed with one another in their endeavours to buy cheap and to sell dear, and employees have struggled individual against individual and class against class, but in the year 1900 these rivalries and contentions were not known as industrial disputes. They may be so called at the present day; if they are so called it is mainly because the Commonwealth Parliament has adopted a new nomenclature when exercising what it considered to be the powers conferred on it by sec. 51 (XXXV.) of the Constitution. It was also urged that an industrial dispute is a dispute about industrial matters, and that a disputant may insist on the fulfilment of any condition as a condition precedent to his entering into or continuing in the relation that exists between master and servant, or at all events on the concession of anything which has been demanded by or on behalf of the industrial classes in England and elsewhere during the economic evolution which has been proceeding for some generations. Long before the year 1900 the industrial classes, and more especially those employed in large industries, were seeking for the amelioration of their lot in matters which did not directly affect the performance of their duties—for better education, better housing, the recognition of collective bargaining, and so on. Some of these concessions were asked from the State, some from employers; and whatever the employer could concede might, of course, be demanded from him as a condition precedent to the establishment or continuance of the relation of master and servant. But such conditions precedent are not the conditions referred to in the familiar phrase which I have just quoted. The phrase means merely that an industrial dispute is a dispute about the conditions under which work is done, that is to say, the circumstances directly affecting the employee in the performance of his duties. When we look at the language of sec. 51 (XXXV.) of the

Constitution and recall the evils which it was designed to remedy, the intention of the Legislature becomes abundantly clear. Disputes between employers and employees with respect to wages and conditions directly affecting the performance of the duties of employees, which began in combinations by means of trade unions and ended in strikes and disorder and sometimes in violence, had paralyzed some of the great Australian industries. In the interest of the community it was necessary to put an end to such disputes, and it was impossible for the Legislature of any State to deal effectually with them by separate action. It was necessary to have one central control, and that control was entrusted to the Commonwealth Legislature by sec. 51 (XXXV.) of the Constitution. We have already held that the effect of this provision is to enable the Commonwealth Court of Conciliation and Arbitration to settle, not merely disputes which arise in the natural order of events, but those which are created for the express purpose of invoking its jurisdiction and so establishing standard industrial conditions throughout Australia. We so held because, whatever may have been the intention of the Legislature, the words of the sub-section are fairly capable of that meaning. I do not think that they are fairly capable of such a meaning as will enable the Court not only to establish standard conditions of labour throughout Australia, but also to impose on all employers and employees in Australian industries such further collateral conditions as it thinks fit, and so take possession of the whole of the industrial energy throughout the Commonwealth. In my opinion an "industrial dispute" within the meaning of sec. 51 (XXXV.) of the Constitution is one in which a number of employees organized or united together are in contest with their employer or employers with respect to the remuneration of the employees, or with respect to any matter directly affecting them in the performance of their duties, in an undertaking or undertakings carried on for the purpose of gain and wholly or mainly by means of manual labour.

For the reasons I have stated I think the question submitted to us should be answered in the negative.

POWERS J. The Court in this case is asked for its opinion on a

question of law submitted to it by the Deputy President of the Commonwealth Court of Conciliation and Arbitration. During the hearing of the arguments in the case the question was limited by consent of the parties and the Court. The question now reads: "Has the Commonwealth Court of Conciliation and Arbitration power or jurisdiction to determine by an award the dispute between the organization and the municipal corporations, constituted under or subject to the provisions of the three Acts mentioned in par. 8 of this case, so far as the dispute relates to such operations of the said municipal corporations as consist of the making, maintenance, control and lighting of public streets or any of them?"

The only objection to the jurisdiction of the Court raised in the facts stated in the case is that referred to in par. 6, namely, that "the municipal corporations referred to are not subject to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration, on the ground that they are State instrumentalities." This Court on 19th May last decided by a majority that municipal corporations, so far as their operations consist of the making, maintenance, control and lighting of public streets, are not State instrumentalities in the sense that they are exempt from the provisions of the Commonwealth Conciliation and Arbitration Act 1904-1915. Municipal corporations, in view of the decision of the Court referred to, must, in considering the question put, be regarded as ordinary corporate bodies employing labour.

Counsel for the respondents then contended that, as the question was whether the Court had jurisdiction to determine by an award the dispute between the organization and the municipal corporations without limiting it to the ground stated in the case, they were entitled to show that the Court had no jurisdiction to make an award on the further ground that, assuming the municipal corporations were not State instrumentalities, the Court could not make an award in respect of the operations referred to, for three reasons:—(1) That the operations referred to were not matters about which an "industrial dispute" within the meaning of the Commonwealth Conciliation and Arbitration Act, or the Constitution , could arise, on the ground that "industrial" disputes—cognizable by the Court—could only arise in respect of "trade disputes in, or in

connection with, an industry," or trade, or business, carried on for profit. (2) That the term "industrial disputes" at the time the Constitution was passed, both in England and Australia, was generally used in reference to "trade disputes" with manual labourers only, and never to disputes between employers and employees not engaged in manufacture or production, or in the transportation of goods for profit. That disputes as to wages, or conditions of employment, between employers and employees not engaged in manufacture, trade, or business, in the ordinary sense of the terms, would not, at the date of the Constitution, be considered "industrial disputes"; and, therefore, persons so employed could not now be held to be parties to any industrial dispute within the meaning of the words "industrial dispute" in pl. XXXV. of sec. 51. (3) That, as there is no "industry" properly called the municipal and shire council industry, the organization could not be a party to an "industrial dispute" within the meaning of those words in the Act.

It was also contended that the organization was not legally registered as "an organization," and could not, therefore, be a party to an industrial dispute. It was decided by the Court that, as the last question was not raised in the case, it would not, in answering the question submitted, consider the objection to the registration of the organization. I may, however, say that I agree with my brother Higgins, and for the reasons given by him, that the Court has jurisdiction to make an award on a dispute referred to the Court under a reference, where the claimant is an association of persons whether duly registered as an organization or not. The special case refers to the dispute in question as one referred to the Court—not submitted by plaint. It was also pointed out during the argument that the association registered was one of "employees connected with the construction, maintenance or cleaning of any road, street, footpath or channel or other undertaking carried out by any municipal council in Australia." The certificate of registration issued was for an association of employees engaged in connection with the "municipal industry." Sec. 4 of the Commonwealth Conciliation and Arbitration Act 1904-1915 includes as "industrial matters": "All matters relating to work, pay, wages, reward, hours, privileges, rights, or duties of employers or employees,

or the mode, terms, and conditions of employment or non-employment; and in particular, but without limiting the general scope of this definition, includes all matters pertaining to the relations of employers and employees, and the employment, preferential employment, dismissal, or non-employment of any particular persons, or of persons of any particular sex or age, or being or not being members of any organization, association, or body, and any claim arising under an industrial agreement, and includes all questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole." "Industry" includes: "(b) any calling, service, employment, handicraft, or industrial occupation or avocation of employees, on land or water." In my judgment, undertakings and operations of municipal corporations—such as street making—are "industrial matters" within the meaning of the words used in sec. 4.

The only question left on this point, in my opinion, is whether the words "industrial dispute" in the Constitution can be properly held to include all that the Commonwealth Conciliation and Arbitration Act includes as "industrial matters." The question has been before the Court in other cases, to which I propose to refer; and the majority of the members of the Court (if not all of them) have, I think, held that the definition of "industrial matters" in the Act is not wider than the meaning Parliament was authorized—by pl. XXXV. of sec. 51 of the Constitution—to put on them. The first case in which the question was fully dealt with was the Jumbunna Case 182 6 C.L.R., 309. In that case the learned Chief Justice of this Court said 183 6 C.L.R., at p. 332: "It must, of course, be a dispute relating to an `industry,' and, in my judgment, the term `industry' should be construed as including all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life." The late Mr. Justice O'Connor said 184 6 C.L.R., at p. 365:—"The words are free from ambiguity, and must be construed with their ordinary grammatical meaning. So construed, the definition includes within the term `industry' every kind of employment for pay, hire, advantage, or

reward except agricultural, viticultural, horticultural, or dairying pursuits" (which were excepted by the Act). "It meant just what the two English words in their ordinary meaning conveyed to ordinary persons, and the meaning of these words seems to be now much what it was then" (at date of Constitution). After referring to the meaning of the word "industrial" in several dictionaries, the learned Judge pointed out that "the dictionaries apparently agree in recognizing both uses of the words `industry' and `industrial' as referring to labour in the production and manufacture of goods, and as referring to labour of any kind," and that Acts of Parliament referred to during the argument extended the use of the word in the Constitution, O'Connor J. said 185 6 C.L.R., at p. 366: "And it is certainly fair to assume that the expression `industrial disputes' was at the time of the passing of the Acts commonly used in Australia" (at the time the Constitution was established) "to cover every kind of dispute between master and workman in relation to any kind of labour." He further said 186 6 C.L.R., at p. 367:—"After an examination of all these sources of information as to the sense in which the word `industrial' in connection with labour disputes was used at the time of the passing of the Constitution, I have come to the conclusion that it was used in two senses—in the narrower sense contended for by the appellants, and in the broader sense contended for by the respondents. There is nothing in the Constitution to show that the word was intended to be used in the narrower sense. On the contrary, the scope and purpose of sub-sec. XXXV. would lead to an opposite conclusion." Isaacs J. said 187 6 C.L.R., at p. 371: "I do not rest my judgment on the narrower view, as in my opinion the constitutional power is broad enough to include even the larger sense of industry."

My brothers Isaacs, Higgins and Rich have dealt so fully with the use of the words "industry," "industrial matters," "industrial disputes," "trade disputes" and the word "industrial"—and the meanings given to the words mentioned before 1900—that I do not see my way to add anything useful to what they have said on that matter.

The only question left to be decided, on the special case submitted, is whether the work of making, maintaining, controlling and lighting public streets by employees employed by municipal corporations is an industrial matter about which an industrial dispute within the meaning of the Commonwealth Conciliation and Arbitration Act and of the Constitution (pl. XXXV. of sec. 51) can arise. Assuming, although not admitting, that the work must be done by "manual labourers," as the respondents contend it must, there can be an industrial dispute between the corporations and the employees, for the claims are made on behalf of manual labourers. The dispute here is one between employers and employees. Assuming that it must, as contended by the respondents, be a dispute by trade unionists recognized as such in England in 1900, there can be an industrial dispute in this case, because, as my brothers Isaacs, Higgins and Rich have shown, municipal employees employed in ordinary municipal works were registered and recognized as trade unionists before 1900. In the case of Cope v. Crossingham 188 25 T.L.R., 593, in the Court of Appeal, the Master of the Rolls in delivering his judgment said: "The Municipal Employees' Association is a registered trade union ... with branches," &c. It appears from the report of the case that the Association was a trade union constituted with branches, and was a society registered under the Trade Union Acts of 1871 and 1876. In 1901 a branch of the society called the Woolwich Branch was constituted. It is clear, from what has been referred to, that in 1900 municipal employees were recognized as engaged in industrial work and as trade unionists. Trade unionists who are employed by the municipal corporations in connection with the making, maintenance and lighting of streets, and who are shown in the special case as members for whom the association is claiming wages and conditions of labour, include labourers, quarrymen, stone-masons, engine-drivers, carpenters, bridge carpenters, plumbers, carters. It was not seriously contended that the work of making streets (including necessary bridges, culverts, quarrying, &c.) would not be "industrial" if carried on by private contractors for profit, or that contractors carrying out contracts for making streets, bridges, &c., were not

carrying on a trade or business in the ordinary sense of the term. In the special case it is stated that there were at the date of the reference of the dispute into Court one hundred and thirty-seven contractors carrying out works by contract for municipal, borough and shire councils, and that many of the municipal employees—members of the association—were employed by the contractors—respondents in the dispute—on works for the Councils referred to. It was admitted that "quarrying" (a necessary work in connection with street making) by a private employer would be "industrial," and that an industrial dispute could arise between him and his employees engaged at work in a quarry; but it was asserted that if a municipal corporation acquired the quarry and employed the same men no industrial dispute could arise, because the Council was not carrying on "an industry" or a trade or business for profit. So far as the question in this case is concerned, as the argument proceeded the ground mostly relied upon (after the Councils were held not to be exempt as State instrumentalities) was that the work was not carried on by the municipal corporations for profit in the ordinary sense of the term, although it would generally speaking be carried on by the Councils themselves to save contractors' profits. If that argument were sufficient, then a philanthropist who acquired a clothing factory and employed the same employees as the previous owner had employed would not be engaged in an occupation about which an industrial dispute could arise, if he distributed the clothes made to the poor free of charge or even if he distributed them to the poor at the bare cost of production. If the contention of the respondents is correct, a private company carrying on a ferry would be engaged in an industrial occupation. If a municipal corporation carried it on, it would not be industrial. The same argument would apply to baths, bridge-building, quarries, sanitary contracts, gas-making for lighting streets and public halls, municipal building of houses or halls, and many other similar industrial undertakings. Even coal-mining for use on municipal railways or tramways would not be industrial work if the contention of the respondents is correct. If the works in question are carried out by contractors or by private individuals it is said to be industrial, but not

industrial within the meaning of the Arbitration Act or Constitution if carried out by municipal corporations. I cannot accept that view.

I agree with those of my learned brothers who hold that the Commonwealth Court of Conciliation and Arbitration has jurisdiction to determine by an award a dispute between an organization or association of employees and municipal corporations so far as the dispute relates to such of the operations of municipal corporations as consist of the making, maintenance, control and lighting of public streets or any of them, and that the answer to the question should be in the affirmative.

Question answered in the affirmative.

Solicitors for the claimant organization, Farlow & Barker.

Solicitors for the respondents, Malleson, Stewart, Stawell & Nankivell; Maddock, Jamieson & Lonie; T.W.K. Waldron; E.J.D. Guinness, Crown Solicitor for Victoria; J.V. Tillett, Crown Solicitor for New South Wales; A. Banks-Smith, Crown Solicitor for Tasmania.

B. L.

1 4 C.L.R., 488

2 12 C.L.R., 398

3 16 C.L.R., 245

4 11 Wall., 113

5 (1891) 1 Ch., 658

6 3 Wall., 533

7 17 Wall., 322

8 4 Wheat., 316

9 1 C.L.R., 91

10 11 H.L.C., 443

11 9 App. Cas., 61

12 1 E. & E., 516

13 17 Q.B.D., 795

14 6 C.L.R., 309

15 5 C.L.R., 789

16 5 C.L.R., 818

17 (1902) A.C., 73

18 25 C.L.R., 325

19 10 V.L.R. (L.), 67; 5 A.L.T., 195

20 10 App. Cas., 282

21 129 U.S., 141

22 19 Wall., 468

23 17 C.L.R., 149

24 220 U.S., 107

25 157 U.S., 429

26 191 U.S., 207

27 220 U.S., 345

28 L.R. 3 Q.B., 677

29 4 C.L.R., 1087

30 17 V.L.R., 560, at p. 588; 13 A.L.T., 72

31 6 C.L.R., 41

32 102 U.S., 472

33 1 C.L.R., 208

34 117 U.S., 151

35 2 C.P.D., 215

36 19 C.L.R., 381

37 (1896) 2 Q.B., 143

38 12 C.L.R., 398

39 86 U.S., 468

40 102 U.S., at p. 511

41 129 U.S., at p. 147

42 157 U.S., at p. 584

43 199 U.S., 437

44 1 C.L.R., 91

45 4 C.L.R., 1087

46 4 C.L.R., 488

47 11 H.L.C., 443; 11 Eng. Rep., 1405

48 17 Q.B.D., 795

49 10 App. Cas., 282

50 2 C.P.D., at p. 218

51 108 U.S., 110

52 17 Wall., 322

53 17 Wall., at p. 334

54 17 Wall., at p. 329

55 17 Wall., at p. 330

56 191 U.S., 207

57 191 U.S., at pp. 220-221

58 170 U.S., 304

59 191 U.S., at p. 221

60 191 U.S., at p. 222

61 220 U.S., 107

62 199 U.S., 437

63 12 C.L.R., 398

64 16 C.L.R., 245

65 1 Salk., 192

66 4 M. & W., 621

67 (1892) 3 Ch., 242

68 9 Beav., 546

69 9 App. Cas., 61

70 L.R. 6 Q.B., 652

71 10 Ch. D., 204

72 10 Ch. D., at p. 219

73 6 A. & E., 419

74 9 A. & E., 435

75 12 A. & E., 2

76 9 A. & E., at p. 442

77 (1896) 2 Q.B., 143

78 (1896) 1 Q.B., at p. 146

79 (1897) 1 Q.B., 64

80 (1897) 1 Q.B., at pp. 70-71

81 11 H.L.C., at p. 505

82 9 App. Cas., 61

83 12 App. Cas., 643

84 (1897) 1 Q.B., at p. 71

85 (1907) A.C., 519

86 20 Pa. St. Rep., 398

87 224 U.S., 152

88 1 C.L.R., 91

89 4 Wheat., at p. 431

90 173 U.S., 276

91 1 C.L.R., 91

92 (1905) A.C., 551

93 3 App. Cas., 889

94 100 U.S., 339

95 122 Mass., 344

96 172 U.S., 1

97 220 U.S., at p. 356

98 172 U.S., 1

99 114 Am. St. Rep., 763

100 70 Mo. App., 60

101 4 C.L.R., 488

102 10 Ch. D., 595

103 11 H.L.C., 443

104 L.R. 1 H.L. (Sc.), 348

105 17 Q.B.D., 795

106 (1896) 2 Q.B., 143; affd. on app., (1897) 1 Q.B., 64

107 4 C.L.R., 488

108 117 U.S., at p. 178

109 191 U.S., at p. 221

110 157 U.S., at p. 584

111 17 Wall., at p. 327

112 199 U.S., at p. 461

113 220 U.S., at pp. 157-158

114 220 U.S., at p. 172

115 220 U.S., at p. 356

116 147 U.S., 49

117 153 Mass., 426

118 122 Mass., 344

119 4 App. Cas., 256

120 (1895) A.C., 433

121 22 C.L.R., 352

122 6 C.L.R., 309

123 12 C.L.R., 398

124 15 C.L.R., 576

125 15 C.L.R., 586

126 16 C.L.R., 705

127 17 C.L.R., 680

128 8 C.L.R., 465

129 15 Arb. Rep. (N.S.W.), 401

130 23 C.L.R., 22

131 (1901) A.C., 495

132 (1909) A.C., 506

133 (1915) A.C., 814

134 1 C.L.R., 181

135 2 N.Z. Gaz. L.R., 104

136 3 N.Z. Gaz. L.R., 31

137 19 C.L.R., 43

138 3 N.Z. Gaz. L.R., 267

139 25 T.L.R., 593

140 25 T.L.R., 181

141 29 T.L.R., 67

142 27 Ch. D., 71

143 199 U.S., 437

144 19 How., 393

145 9 Wheat., 1

146 1 Tax Cas., 55

147 2 Tax Cas., 541

148 4 Tax Cas., 435

149 (1917) A.C., 528; 24 C.L.R., 396

150 18 C.L.R., at pp. 243, 255, 263

151 6 C.L.R., at pp. 367-368

152 8 C.L.R., at pp. 510-511

153 17 C.L.R., at p. 701

154 (1912) A.C., 149

155 18 C.L.R., at p. 244

156 (1911) A.C., 641

157 (1911) A.C., at p. 642

158 (1911) A.C., at p. 643

159 (1911) A.C., at p. 642

160 (1911) A.C., at p. 644

161 (1911) A.C., at p. 645

162 (1911) A.C., at p. 646

163 (1911) A.C., at p. 647

164 17 C.L.R., 680

165 19 C.L.R., 43

166 (1909) A.C., at p. 511

167 17 C.L.R., at p. 703

168 17 C.L.R., at p. 703

169 25 T.L.R., 181

170 L.R. 1 H.L. (Sc.), 326

171 L.R. 1 H.L. (Sc.), at p. 343

172 (1891) A.C., 371

173 (1901) A.C., 426

174 (1913) 1 Ch., 336

175 12 C.L.R., at p. 435

176 8 C.L.R., 419

177 6 C.L.R., 469

178 34 L.J.P.M. & A., 27

179 96 U.S., 1

180 7 C.A.R., 25

181 6 C.A.R., 61

182 6 C.L.R., 309

183 6 C.L.R., at p. 332

184 6 C.L.R., at p. 365

185 6 C.L.R., at p. 366

186 6 C.L.R., at p. 367

187 6 C.L.R., at p. 371

188 25 T.L.R., 593

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