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Isaacs J.

legislature has excluded all idea of acting upon any power but that of enacting a land tax—we are, I think, restricted to the single enquiry whether sec. 36 is really incidental to such a tax. In my opinion it is not, because the fiction it creates, namely, that the given person is to be deemed owner of certain land not in his name, is accompanied by an acknowledgment on the very face of the section itself, that the person in question has no interest whatever in the land.

The provision therefore shows *ex facie* that it is not and cannot possibly be incidental to a land tax, because the idea of a person admittedly unconnected with the land in any way whatever being required personally to pay a tax upon it already imposed upon the owner, is *ex vi termini* foreign to the very idea of a land tax.

For this reason I am of opinion that the section is invalid, but that its invalidity does not infect any other enactment, and does not violate sec. 55 of the Constitution.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. Sec. 36 (2) of the *Land Tax Assessment Act* 1910, when read with the other sections of that Act and with the incorporating *Land Tax Act* 1910, was, in our opinion, designed to impose a tax on persons having no interest in the land in respect of which the tax is assessed. How should such an enactment be described? Is it an attempt to impose a tax dealing with land, or is it an attempt to impose a tax other than a land tax so as to bring the *Land Tax Act* within the mischief of the second part of sec. 55 of the Constitution as dealing with more than one subject of taxation? The answer to this question may be found in a case already decided by this Court. All the Judges who took part in the decision in *Osborne* v. *The Commonwealth* (1) expressed the opinion that the *Land Tax Act* 1910 incorporating the *Land Tax Assessment Act* 1910 does not deal with any subject of taxation other than land. It cannot, therefore, be said that those Acts are, or any section of them is, bad under the second part of sec. 55 of the Constitution as dealing with more than one subject of taxation. The result is that the

(1) 12 C.L.R., 321.

legislature must be taken to have made an attempt to levy a land tax in respect of persons having no interest in the land, and the question is whether such an attempted exercise of power is valid. It seems to have been assumed by all the Judges who took part in the decision in *Morgan* v. *Deputy Federal Commissioner of Land Tax, N.S.W.* (1) that such an enactment would be unlawful, because not warranted by the gift of legislative power in the Constitution. Both the arguments and judgments in *Morgan's Case* (1) are based on the hypothesis that the Commonwealth Parliament has no power to tax a person in respect of land in which he has no beneficial interest. Indeed, in view of the prior decision in *Osborne's Case* (2) no argument could have arisen except on that hypothesis.

We think, accordingly, that the provisions of sec. 36 (2) of the *Land Tax Assessment Act* 1910 are not obnoxious to the provisions of sec. 55 of the Constitution, but are invalid as being beyond the powers conferred by the Constitution on the Commonwealth Parliament, for any Commonwealth power must be based on a provision of the Constitution, and the onus of proving the existence of such a power lies on those who seek to rely on it.

Our answer to the first question must be in the affirmative. It is unnecessary to answer the other questions.

First question answered in the affirmative.

Solicitors, for the appellants, *Bakewell, Stow & Piper*, Adelaide, by *Madden & Butler.*

Solicitor, for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

(1) 15 C.L.R., 661.

(2) 12 C.L.R., 321.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN TRAMWAY EMPLOYES ASSOCIATION . . . } CLAIMANTS;

AND

THE PRAHRAN AND MALVERN TRAMWAY TRUST AND OTHERS . . } RESPONDENTS.

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MELBOURNE, *Oct.* 7, 8, 9, 10, 20.

Barton A.C.J., Isaacs, Higgins, Powers and Rich JJ.

Industrial arbitration—"*Industrial dispute*"—"*Industrial matter*"—*Badge of membership of association*—*Right of employés to wear badge*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *sec.* 4.

The question of permitting employés to wear and display when on duty a badge indicating that they are members of a trade association is an "industrial matter" within the definition of that term in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911; and there may be an "industrial dispute" in respect of such a question within the definition, and within sec. 51 (xxxv.) of the Constitution.

So held by *Isaacs*, *Higgins*, *Powers* and *Rich* JJ. (*Barton* A.C.J. dissenting).

CASE stated by the President of the Commonwealth Court of Conciliation and Arbitration.

On a plaint in the Commonwealth Court of Conciliation and Arbitration by the Australian Tramway Employés Association against a number of employers including the Prahran and Malvern Tramway Trust, the Melbourne Tramway and Omnibus Co. Ltd., the Municipal Tramways Trust, Adelaide, and the Brisbane Tramways Co. Ltd., the President stated the following case for the opinion of the High Court :—

"1. There is a plaint before this Court in process of hearing in which one part of the relief claimed is as follows :—

'39 (B). All employés shall be permitted to wear and display a badge of membership of the Association.'

"A copy of the plaint is annexed hereto and marked A.

"2. The claimant was registered as an organization on 5th January 1911 and it has branches in all the States.

"3. By a resolution of the Federal Council passed on 11th February 1911 the Executive was empowered to take steps to secure a union badge of membership.

"4. On 25th April 1911 the Executive resolved that a union badge be obtained bearing the Australian Coat of Arms and the name of the claimant organization, and that it be issued to all financial members of the Association to be worn by them.

"5. In pursuance of the resolutions, badges were made and issued, but certain of the respondents or their principal officers purporting to act for them objected to and forbade the wearing of the badges by the employés when in uniform or on duty, and there is a dispute on the subject.

"6. Annexed hereto and marked respectively B and C are copies of the forms of agreement which have to be signed by employés in (*a*) the Brisbane Tramways Co. Ltd. and (*b*) the Municipal Tramways Trust, Adelaide. The Melbourne Tramway and Omnibus Co. Ltd. has by an agreement made since the plaint agreed to the wearing of the badges.

"7. The relevant Acts are the (Queensland) *Tramways Act* of 1882 and the (South Australia) *Municipal Tramways Trust Act* of 1906.

"8. The uniforms worn by the employés belong to the Company, and the badges are worn on the watch chains worn by and belonging to the employés.

"9. The employers contend that it is a breach of the agreement for an employé to wear the badge when in uniform or on duty, as he is forbidden to do so by the rules or regulations, or by-laws or orders of the employer. The employés contend that the question of wearing the badge as aforesaid is a matter relating to the work, privileges, rights, or duties of the employés and to the terms and conditions of employment, and a matter pertaining to the relations of employers and employés and the employment of particular persons

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being or not being members of the organization and a question of what is fair and right in relation to an industrial matter.

"10. The wearing of the badges tends to consolidate and strengthen the organization in its endeavours to obtain for the employés better industrial conditions from the employers, and it facilitates organization for the purpose.

"11. The employers object to the badge for the reason (amongst others) that it is an encouragement of unionism.

"I submit to the High Court the following questions which, in my opinion, are questions of law :—

"1. Is the dispute a dispute 'as to industrial matters' within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 ?

"2. Is the dispute capable of being a dispute as to 'industrial matters' within the meaning of the said Act under any circumstances ?

"3. Is the dispute an industrial dispute or part of an industrial dispute within the meaning of sec. 51 (xxxv.) of the Constitution, or is it capable of being so ? "

The only material part of the plaint is clause 39 (B), which is set out in the case.

The only material part of the form of agreement marked B is the following :—" The employé will faithfully fulfil all his duties . . . and especially will observe and be bound by, as well, all the clauses of the rules and regulations which relate to employés, and in force or published from time to time."

The only material part of the form of agreement marked C is the fifth condition of the agreement which is as follows :—" That in whatever capacity the employé may serve the Trust he shall faithfully perform all the duties of his position . . . and he shall observe conform and be subject to . . . the by-laws rules and regulations and orders of the Trust that now are or may hereafter be promulgated . . . "

The Commonwealth obtained leave to intervene on the hearing of the case.

Arthur, for the claimants. The wearing of a badge by employés

is an " industrial matter " within the definition of that term in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911; and, if it is, a dispute as to the wearing of a badge is an " industrial dispute " within the definition in that section and within sec. 51 (xxxv.) of the Constitution. The wearing of a badge is an industrial matter because it is regarded by the employers as a breach of the agreement of employment. It is a " term of employment " and also a " privilege " within the definition of " industrial matters " in sec. 4. It is an industrial matter because it has been made so by the persons engaged in the industry, and it has a particular industrial purpose of keeping the employés together and assisting them in their endeavours. The object of sec. 51 (xxxv.) of the Constitution is to bring about industrial peace, and therefore it should be given the widest possible meaning. Anything which relates to industry and which tends to bring about a dislocation of trade is a matter as to which there may be an industrial dispute. As to the meaning of " industrial dispute," see Mr. *Geoffrey Drage's* definition of " trade dispute " quoted by *Isaacs* J. in *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1).

Feez K.C. and *Henchman*, for the Brisbane Tramways Co. Ltd. A dispute as to the right to wear a badge is not an " industrial dispute " within the meaning either of the Act or of the Constitution. To constitute an industrial dispute the matter in dispute must be something affecting the mutual relationship of employer and employé in the industry, affecting the industry itself and affecting the surroundings in which it is carried on. The object of sec. 51 (xxxv.) of the Constitution was to enable the Commonwealth Parliament to deal with disputes which are really industrial disputes, and not disputes as to any matter, however absurd, which might be the subject of a claim by employers or employés. There must be some limitation of the term " industrial dispute." The subject of an industrial dispute must be connected with the particular industry, and must affect what the employés give and the employers receive in the work of the industry. The wearing of a badge is no more

(1) 8 C.L.R., 465, at p. 514.

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than an advertisement of the fact that the wearer is a member of a particular trade union. [They referred to *Australian Workers' Union* v. *Pastoralists' Federal Council of Australia* (1)]. The subject of an industrial dispute must affect the actual contract between employer and employé, and it must affect the parties mutually. It is not sufficient that it should be something which may be beneficial to the one without affecting the other. See *Clancy* v. *Butchers' Shop Employés Union* (2); *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Sons Proprietary Ltd.* (3). The words of the definition of "industrial matters" in sec. 4 cannot extend the meaning beyond something in the employment which mutually and directly affects the industrial conditions with regard to both employers and employés, and they do not cover a condition which affects merely the one or the other. Taking the words of the definition of "industrial matters," "privilege" means something not contracted for—some business advantage which has not yet come to be a right; "rights" and "duties" are correlative and relate to something which is directly part of the contract; "the mode, terms, and conditions of employment" mean the surrounding physical conditions under which the work is to be performed, and include stipulations as to the proportion in which employer and employé are to share the profits. It is not sufficient to constitute a dispute within the meaning of the Constitution that it is between industrials, or that it is in a specific industry or that it interferes with the harmonious working of the industry, but it must be in regard to a matter which forms, or is desired by one of the parties to form, a term or condition of employment. [They referred to *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (4)]. The first question and the first part of the third question should be answered in the negative, and the second question and the second part of the third question should not be answered, as they do not arise in the proceeding.

O'Halloran and *Angas Parsons*, for the Municipal Tramway Trust, Adelaide. The case does not state who are the parties to the alleged

(1) 1 C.A.R., 62, at p. 95.
(2) 1 C.L.R., 181, at pp. 189, 205.
(3) 8 C.L.R., 465, at pp. 488, 502.
(4) 6 C.L.R., 469, at p. 503.

industrial dispute. The facts set out show that the claim as to wearing a badge was made by the organization and not by the employés. There must be some limitation on the words "industrial dispute" as used in sec. 51 (xxxv.) of the Constitution. In order to constitute such a dispute it must be in or in relation to the particular industry in which the disputants are engaged, the disputants must be employer and employé, and the dispute must have relation to the actual operations of the industry. The words "industrial dispute" should be construed so that nothing can be treated as an industrial dispute which does not mutually and directly affect the employer and the employé in relation to the work of the particular industry. The right to wear a badge does not come within the definition of "industrial matters" in the *Commonwealth Conciliation and Arbitration Act* 1904-1911. Even if that right might be the subject of an industrial dispute, there is not sufficient evidence here to determine whether or not such a dispute exists. The object of sec. 51 (xxxv.) of the Constitution is to secure industrial peace, and not to assist or strengthen unions of either employers or employés. It appears here that the whole object of the claim to the right to wear a badge is in order to strengthen the claimant organization. That is an object altogether ulterior to the prevention and settlement of industrial disputes, so that the controversy in regard to that claim is not a real industrial dispute. [They referred to *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1); *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (2)].

Schutt and *Starke*, for the Commonwealth. The definition of "industrial matters" in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 does not go beyond the power conferred by sec. 51 (xxxv.) of the Constitution. The words of the definition are words which must have been used in defining that term at the time the Constitution was enacted.

Arthur, in reply. At the time the Constitution was enacted an attempt by employés to strengthen the trade association of

(1) 8 C.L.R., 465, at p. 510. (2) 6 C.L.R., 309, at p. 334.

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which they were members was recognized as a common subject matter of industrial disputes. See *per Isaacs* J. in *Federated Saw Mill &c. Employés of Australasia* v. *James Moore & Sons Proprietary Ltd.* (1).

Cur adv. vult.

The following judgments were read :—

BARTON A.C.J. The interest in this special case has become somewhat academic. There were originally eleven respondents, each representing a system of tramways. Of these apparently nine have disappeared from the case, having, with the exception of one, as against which the claim was dismissed, agreed to accept claim 39 (B) of the plaint, which runs as follows :—" All employés shall be permitted to wear and display a badge of membership of the Association." Of the remaining two respondents, we were told at the Bar that the Brisbane Tramways Co. has no longer any members of the claimant Association in its service, nor any employés claiming to wear the Association badge ; though Mr. *Arthur*, for the Association, says that a number of its members, not considerable, remain in the Company's service. The Municipal Tramways Trust of Adelaide allows all its employés to wear the badge without objection.

The real points for decision are involved in question 1 and the first part of question 3. Question 2 and the second part of question 3 do not seem to me to be " questions arising in the proceeding " within the meaning of section 31 (2) of the *Commonwealth Conciliation and Arbitration Act* : See the two recently decided cases of the *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [No. 1 and No. 2] (2), and the authorities cited in the judgments. But I apprehend that the answers to the remaining questions will serve the purpose for which the learned President has stated the case.

I propose to deal first with the question which arises under the Constitution, namely, whether the dispute is an industrial dispute, or part of one, within the meaning of sec. 51 (xxxv.). The dispute arises out of the desire of the employés, members of the Association, to " wear and display " a union badge when in uniform or on duty,

(1) 8 C.L.R., 465, at p. 515. (2) 16 C.L.R., 591 ; 705.

and the objection of the employers, who forbade it. That at any rate is the matter in dispute as to the Brisbane Company so far as that Company has members of the Association as employés, and it was the matter in dispute as to the Adelaide Trust so long as the Trust continued to forbid the wearing of the badge. An industrial dispute within the meaning of sub-sec. xxxv. may be taken to be a dispute as to industrial matters in the common acceptation of that term. Industrial matters in their ordinary meaning are matters relating in themselves to any particular industry. To limit them to matters relating to industries in general would be a needlessly narrow interpretation. The arguments used before us, if pushed to their logical extreme, would, as I understand them, justify the classing of anything demanded by the employés and not granted by their employer as an industrial matter, and it was broadly asserted that at any rate, where there is an agreement between employés and their employer that the former shall obey the lawful orders of the latter, anything thus lawfully forbidden by the employer under the terms of the contract of service becomes an industrial matter. But such assertions need not be seriously discussed.

Notwithstanding sub-sec. xxxv. the States have exclusive regulative power over the conduct of industrial concerns within their territorial limits; and this fact must be considered in conjunction with the further fact, repeatedly pointed out by this Court, that the common law rights of citizens are to be regarded as unhampered except so far as a Statute diminishes them expressly or by necessary implication. See, for instance, *Clancy's Case* (1).

Certain rights then remain to an employer. He may, for instance, carry on his business in such lawful manner as seems best to him, and may decline to give employment except on such conditions as he thinks conducive to the success of his enterprise, subject only to the restrictions of the law. Except so far as the complete exercise of a power granted to the federal legislature may impinge upon the reservation in the Constitution, the power to limit the rights of the employer belongs to the States; and so this Court has repeatedly declared. Granted that the Commonwealth has full power to provide for the settlement of industrial disputes extending, &c., by

(1) 1 C.L.R., 181.

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conciliation or arbitration, its exhaustive exercise is still limited to settlement by those means. It does not carry with it a right so far to encroach on the powers of the States as to place the general control of industrial enterprises in the hands of employés in place of the owners because the Court is satisfied that otherwise the employés will not rest in that contentment without which it is feared that industrial peace will not continue.

I think further that an owner of a business has still the right, subject to the law of his State, to decline to contract for the services of any man unless he wants him, just as the man need not come to the owner unless he wants the work. It follows that the employer need only accept a man's services on such terms as in the employer's judgment are not calculated to injure his business, just as the workman need not grant them except on terms consonant with his own interests. Strange as it may seem to some, the employer may decline to give the man the right to have wages from him unless the man will agree to obey any lawful orders he may receive, even as to matters which are not part of the employment itself. If the employer thinks that to allow a request or claim to which he has not yet agreed will lead to a position offensive to those who deal with him, or to other employés, or will jeopardize the success of his enterprise, he may not only refuse to concede that request or claim, but he may certainly provide in his service agreement for power to refuse to allow the thing to be done. No one is obliged to serve if he does not like the terms of the agreement, provided only that he has not agreed to serve on those terms. Take some illustrations: If the employer chooses for instance to forbid his employés to smoke on his tramcars when on duty, or to work on the cars wearing Orange emblems on St. Patrick's Day, he may lawfully do so if he has not contracted his right away. If it seems to him that it would be most dangerous and unjust to compel his non-unionist employés to wear a distinguishing badge, who is to force him to compel them? His freedom to contract in such matters remains to him, and as to them he is the judge, not this Court, nor the President, nor the employés. That the display of a badge by employés tends to strengthen their organization seems to me to be irrelevant to the constitutional question whether a dispute about it is a dispute

about an industrial matter. If it is an industrial matter, the tendency to strengthen the organization does not make it more so. If it is not an industrial matter, it will not become one by reason of such a tendency.

I think these views are in full accord with the intention of the framers of the Constitution. I do not think the framers contemplated turning the settled relations of employers and employed topsy-turvy. It was the removal, and not the multiplication of causes of friction, that they had in view. They could not have supposed that they were authorizing the setting up of a tribunal for the consideration of matters quite extraneous to the work to be done, the manner and time of doing it or the reward, and quite unconnected with the relations of employers and employed. The regulation of an infinitude of such extraneous matters is not the composing of disputes in the true sense. It amounts to legislation, and legislation on a subject not committed to the federal power. I think the Tramway Company has a power to dictate within the limits of decency and positive law what is to be worn by its employés on duty. So far as the uniform is concerned this does not seem to be disputed. And a power to say what is to be worn seems to me to include a power to say what must not be worn. In both directions the employer and not the employed must prevail in matters not covered by express agreement, but affecting the successful conduct of the business; since one or the other must prevail, and the decision what to do with his own property and therefore the conduct of it, belongs to the employer, who takes the risks of the enterprise.

But it is argued that every matter which affects or may affect the successful conduct of the business is an industrial matter. That is certainly not the meaning of the Constitution. Businesses are every day affected by matters quite extraneous to them, and it would be absurd to say that such matters become for that reason industrial. I admit, as everyone must admit, the difficulty of arriving at an exact definition of an industrial matter, as the term is ordinarily understood, that is, as it is used in sub-sec. xxxv. But it is not so difficult in a particular instance to say whether a matter is industrial or not. A matter may be industrial in one concern and not in another. Because the shaping of a pipe is an industrial

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matter inherent in pipe making, it does not become an industrial matter in a millinery establishment. Because the trimming of a bonnet is an industrial matter inherent in the millinery business, it does not become an industrial matter in a cheese factory. But, conceding all this, in what industry is the wearing and displaying of a badge an industrial matter *in se*? And in what concern, not being primarily an industrial matter, does it become so in any ordinary course of events? Why is it that a matter industrial in one enterprise is not industrial in another? Obviously, because it has to do with the ordinary operations of the one and not with the ordinary operations of the other. What, then, has the union badge to do with the ordinary running of a service of trams, or with the ordinary work of a tram-driver or conductor, or a fitter or cleaner in a tramway yard? I confess my utter inability to answer such a question except by the word "Nothing."

Now, as already pointed out, the federal Parliament has nothing to do with the contract of service between master and man in a State, except so far as the contract relates to an industrial matter in a dispute extending beyond one State, and then only for the purpose of conciliation or arbitration. Such contracts relate, no doubt, principally to industrial matters, but they do not make industrial matters of things which were not such before the contract, unless, being capable of importation into the working operations of the industry as an actual part of the work, they have been so imported by the contract of service. But you cannot make a union badge part of the working operations of an industry by permitting or forbidding the wearing and displaying of it during working hours. It remains what it was before—an emblem of something which, however beneficent it may be, is not in itself any part of the control on the one hand and the service on the other out of which the industrial relationship arises.

I wish to add that it is an erroneous assumption to suppose that this paragraph xxxv. gives power to either party to a contract of service to set at nought and destroy any agreement which he finds irksome. It does not seem that the assumption is popularly applied to employers so commonly as it is to employés. The former seem to be held pretty tightly to their bargains. But, whichever party

be considered, it would be deplorable if this impression were to gain ground. I hope we shall not reach the day when deliberate contracts entered into in a State are to be regarded as mere nullities because there are persons in another State who agree to unite with the original contractors to do away with their bargains.

I am of opinion that the dispute as to the wearing and displaying of the badge is not an industrial dispute or part of an industrial dispute within the meaning of sec. 51 (xxxv.) of the Constitution.

That is my answer to question 3; and as to question 1, if the dispute about the badge is not an industrial matter within the Constitution, it cannot be such within the definition in the Act, except upon the supposition that the Act as well as the matter is outside the Constitution in that respect. That is a construction not to be adopted if it can be avoided. Assuming, therefore, that the Act is within the Constitution, the conclusion that the dispute is outside the Constitution involves a negative answer to question 1. Independently of this, I think the question is not an industrial matter within the definition in sec. 4, because I adopt the principle laid down by *O'Connor* J. in the case of *Australian Workers' Union* v. *Pastoralists' Federal Council of Australia* (1), as the operation of that principle is not affected by any subsequent amendment of the definition.

My answer, therefore, to the questions so far as they are admissible is in the negative.

The judgment of Isaacs J. and Rich J. was read by

Isaacs J. The question in this case when stripped of all non-essentials is this: Does a claim by the tramway employés to wear visibly while on duty, and without liability to dismissal for so doing, a badge denoting their membership of the claimant Association constitute, according to law, a claim of an industrial nature?

The case states there is a dispute, and raises no question as to the competency of the disputants. We therefore have to assume that the disputants are the proper parties, and that their differences have reached the situation which, according to the decisions governing that branch of the question, establishes the existence of a real dis-

(1) 1 C.A.R., 62, at p. 95.

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pute. All that being conceded for the purposes of this special case, though of course not otherwise binding, we have only to consider whether the subject matter, as we have stated it, falls within what the law recognizes as an industrial matter.

The grave importance of the question in itself, and from the events that have led to it, demands the most careful consideration of the subject. The law as it stands cannot be wider than the combined effect of the Constitution and the Act, and that may be narrower, but not wider than the Constitution itself. Parliament may prefer to exercise a portion only of the powers open to it, and the jurisdiction of the tribunal it creates cannot extend further than that which Parliament has in fact committed to it. So that the first consideration for us is whether the claim is an "industrial matter" within the meaning of the Act. A great wealth of argument was expended to show it was not, but notwithstanding the ingenuity and force with which the contention was pressed, we are unable to perceive any room for doubt. The statutory definition (sec. 4) of "industrial matters" includes, *inter alia*, all "privileges" and "rights of employés," and the "terms and conditions of employment." and "all matters pertaining to the relations of employers and employés."

These words are sufficient for the present purpose. No question can arise as to what is a "right" of an employé. Whatever he, as employé, is entitled to at a given moment, as between himself and his employer as such, whether with or without taking into consideration the circumstances of any third person, is a right. The rate of wages, the times of payment, the mode of payment, the number of days per week, the particular days, the number and identity of working hours, the quantity of work to be done, and so on, are rights. An ordinary legal tribunal, looking at the contract, express or implied, between them, or looking at any law regulating their relative rights, and without reference to the claims, status or position of any other person, except as affected by the legal inter-relations of the parties themselves, could say at once what each was entitled to as against the other.

But the word "privileges" is also there. We were invited to say it was something not a right, but something undefined; something which when tested by examination faded into some nebulous

conception, affording no assistance whatever in understanding why Parliament inserted the word, or why, as will appear, many Parliaments have over many years adopted it. It must have a reality beyond that suggested. It is plain that once a "privilege" is a subject of dispute and made the subject of arbitration and award, then, if allowed by the award, it becomes a right.

What, then, is that claim which before arbitration may be a "privilege" only, and after arbitration, if awarded, becomes a right and yet answers the description of a privilege?

In our opinion, the word signifies some right which carries with it an advantage relatively to others, who would, but for that privilege be on an equal footing with the person having it. "Privilege" is defined, *inter alia*, in the Oxford Dictionary thus:—"A right, advantage, or immunity granted to or enjoyed by a person, or a body or class of persons, beyond the common advantages of others." Again, as "A privileged position; the possession of an advantage over others or another." And a quotation is given from *Mill's Utilitarianism* (iii. 48):—"Inequalities of legal privilege between individuals or classes." An illustration is taken from the *Westminster Gazette* of 15th February 1897 as follows:—"The privilege ticket system, by which the employés of every railway company were enabled to travel over all parts of the Kingdom, or at any rate over the leading lines, at . . . one-half of a single third-class fare for the double journey."

Then, as to the phrase "terms and conditions of employment or non-employment." Read *secundum subjectam materiam*, as words in every document must be, the word "employment" in relation to industrial disputes has a large meaning. It certainly includes in this place, the state of employment, the acts of service rendered by an employé during his engagement, the performance of his part in the industry. The "terms" of employment are the stipulations agreed to or otherwise existing on both sides upon which the service is performed. The "conditions" of employment include all the elements that constitute the necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment.

And the words "employers" and "employés" are used in the

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Act not with reference to any given contract between specific individuals, but as indicating two distinct classes of persons co-operating in industry, proceeding harmoniously in time of peace, and contending with each other in time of dispute. As the statutory definition of "employé" includes "any person whose *usual* occupation is that of employé in any industry," what we have said is manifest.

In addition, the Act not only makes provision for organizations, but is almost entirely dependent for its working upon organizations at least of employés, who do not cease to be employés simply because for a time they are out of active employment. This is no mere accidental circumstance.

The whole industry, and particularly the later history of industrial conciliation and arbitration, demonstrates that trade disputes are dealt with by unions, not by units. Experience as well as common sense convinces the mind that isolated workers can seldom or never succeed in inducing their employers or prospective employers to introduce changes involving general schemes of alteration, and sometimes considerable expense, as, for instance, new methods of sanitation, or a minimum wage or shorter hours, or non-employment of persons of tender years, and so on. Nor, indeed, in many cases could isolated employers, however personally disposed to admit the justice or desirability of their employés' claims, afford to overlook the fact of competition of other employers, whose views ran on different lines.

Collective bargaining is therefore, as is well known, necessary to the prevention of such disputes, and if, unfortunately, they arise, collective action is absolutely essential to their successful termination. But there can be no collective bargaining or other action without organization. Consequently the Commonwealth Act, when it provides for organizations, supplies a necessary link in the chain of effective settlement of the claims of individuals. This is a clear and sufficient answer to the suggestion by the respondents that the badge is merely an adjunct to the organization, and not relevant to the industrial claims of the employés themselves.

Everyone knows, and this very contest indicates, that the use of the badge by the employés is a substantial means of strengthen-

ing their industrial position relatively to their employers—and thereby both of protecting their existing rights, and of obtaining larger rights. Whether in any particular case the result be fair or unfair, just or unjust, we of course express no opinion whatever; that is for another tribunal; but the nature of the right claimed—one which advances the employés' interests in respect of their employment—indicates, beyond real doubt, that it proximately affects the industrial relations of employers and employed, and so falls within the words of the statutory definition which we have quoted.

If that be so, say the respondents, the Act is so far invalid, as exceeding the true limits of sub-sec. xxxv. of sec. 51 of the Constitution.

That depends upon how the expression "industrial dispute" was generally understood in 1900, when the *Constitution Act* was passed. It was not then a technical term; it expressed in popular language a situation with respect to industry that had often happened, and was happening with increasing frequency and ever-broadening application; and though the causes of such a situation differed in particular cases, the situation itself as a concept was recognized in the community as "an industrial dispute."

Not being measurable by any standard devised by law, for the Constitution refers to no such standard, and not being the subject of any prior judicial decision, which that instrument might be assumed to adopt, but being ascertainable, like any other natural or social product bearing a name, from its actual characteristics as recognized by the community, it follows that the question of what elements an "industrial" dispute is composed is pre-eminently a question of fact. Though ultimately determinable by this Court—subject to whatever appeal may exist—yet we have to determine it by our notion of what in fact in 1900 was the general sense of the community as to the essential characteristics of such a dispute. We may, and indeed should in accordance with universal practice, aid our general knowledge on this point by reference to dictionaries, histories, Statutes, reports and other trustworthy guides to the contemporary use of the term.

On questions of that nature, the import of terms of daily life—which are at root jury questions—Parliament is so constituted

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as to be very likely to understand correctly the meaning of popular language as applied to current events, and unless the meaning of the expression "industrial dispute" has acquired any additional significance since 1900—which is not and cannot be suggested—the interpretation which Parliament has placed upon the word "industrial" must carry great weight as evidence of its meaning. No doubt, for us that is only evidence; but it is evidence of a character that cannot be lightly overridden.

It is wholly different from the cases where Parliament in an Act places some assumed construction of law upon a section of the Constitution, or where it puts a special interpretation on some technical expression already stamped by law with a specific meaning. In such cases the opinion of Parliament carries no authority when it is disputed before this Court.

The respondents, however, ask us to say that the connotation as understood by Parliament of an English untechnical expression used by business men and trade employés apart from all legal definitions, and in what Lord *Westbury* L.C. calls "the vocabulary of ordinary life" (*Young* v. *Robertson* (1)), is wrong—that is to say, is wrong if the words used in the Statute and quoted by us are to have their full primary and natural meaning. In support of their objection, learned counsel for the respondents have not referred us to any single instance where at any time approximate to 1900, or indeed at any time whatever, a more limited signification has been attached to the expression "industrial dispute," or its substantial equivalent "trade dispute." The absence of any such reference is, of course, due entirely to the dearth of material.

On the other hand, there is a large and convincing body of testimony demonstrating the accuracy of the Parliamentary view.

First of all, there is the passage in the report of the 1894 English Royal Commission set out in the *Saw Millers' Case* (2) From that it is clear that industrial disputes were well known in 1894 to include those which were entered upon by the employés "to prevent the employment of non-unionists, or sometimes that of women and children, to defend unionist colleagues, or assert unionist rules and

(1) 4 Macq. H.L. Cas., 314, at p. 325. (2) 8 C.L.R., 465, at p. 515.

customs, and, generally speaking, to protect the monopoly of workmen already in the organization."

With the desirability or undesirability of these or any of these causes of dispute, this Court has, of course, no concern. But it is bound to take notice of them as actually existing facts, and that they were enumerated by a body so representative of all classes of the community, as the English Labour Commission, as recognized subjects of trade disputes only three years before the Convention was elected and six years before the Constitution was enacted.

If we turn to the authoritative sources of information in Australia up to and about 1900, we find even more precise corroboration of the Parliamentary definition.

As far back as 1892 the legislature of New South Wales passed an Act (No. 29) called the *Trade Disputes Conciliation and Arbitration Act* 1892, of which the preamble indicates the extensive purview of the Statute and the evils to be met, and sec. 23 defines what matters are included in "claims and disputes." Sub-sec. VIII. of sec. 23 is as follows :—"The dismissal or employment under agreement of any employés or number of employés."

The Act did not have any appreciable effect upon trade disputes; but it was a step in purpose and definition.

It is well known, however, that the public of Australia were, long before 1900, familiar with the New Zealand *Industrial Conciliation and Arbitration Act* 1894 (No. 14) passed in August of that year; and that Act was passed by a colony of British subjects whose speech was and is identical with our own; whose experience of industrial disputes differed in no respect from ours, and whose legislation was to remedy those disputes as they existed in fact, and not for the purpose of setting up an artificial definition of something else.

"Industrial dispute" was there defined as "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."

"Industrial matters" were 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,

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and not involving questions which are or may be the subject of proceedings for an indictable offence." Without limiting the general nature of that definition it included all matters relating to various specified subjects—among which were (1) "qualification or status of workmen, and the mode, terms, and conditions of employment," (2) "the employment of children or young persons," and (3) the employment "of any person or persons or class of persons in any industry, or the dismissal of or refusal to employ any particular person or persons or class of persons therein."

In December 1894, the legislature of South Australia passed the *Conciliation Act* (No. 598) in which "industrial disputes" were defined as including "all disputes relating to industrial matters"; and "industrial matters" were stated to include "all matters relating to pay, wages, hours, privileges, rights, or duties of employers or employés in any industry." Under the Act, by sec. 52 and following sections, provision is made for binding organizations and persons, and by sec. 63 organizations are penalized for lockouts and strikes. Apparently the generality of the words of the definition of industrial matters was thought to be sufficiently inclusive without specifying particulars as in the New Zealand Act.

In December 1900, just after the enactment of the Constitution, the legislature of Western Australia passed the *Industrial Conciliation and Arbitration Act* (No. 20) in which the definition of "industrial dispute" was practically identical with the New Zealand Act, and the definition of "industrial matters" included what we have marked as (1) and (2) in the New Zealand definition, omitting express mention of the third, but not excluding it from the general words at the beginning.

In 1901, by the New South Wales *Industrial Arbitration Act* (No. 59) the terms "industrial dispute" and "industrial matters" are defined substantially as in the New Zealand Act of 1894. The meaning had not changed in 1901.

There is, consequently, a strong and clear body of evidence that in Australia the term "industrial matters" comprised within its meaning that which is conveyed by the words above quoted from the statutory definition in the Commonwealth Act. Not only so, but the universality, so to speak, of this wide import of the expression is

confirmed by its recognition in 1907 by the Canadian Dominion Parliament Act, chap. 20 of that year, which is shortly called the *Industrial Disputes Investigation Act* 1907, its full title being "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities." The range of industries covered by it is stated in sec. 2 (*c*). The definition of "dispute" and "industrial dispute" *inter alia* follows very closely the words already quoted from the New Zealand Act, the variations being, at all events for present purposes, immaterial. How, then, is this Court able to say—in opposition to the mass of English, Australian, New Zealand and Canadian exposition of the words, expressive of a condition of life common to all—that the signification attributed to them by the legislative branch of the Commonwealth is incorrect? The argument for the respondents, ably expounded and vigorously pressed, invited us to narrow the meaning of the constitutional provision so as to exclude the present claim. But, in doing so, it altogether failed to recognize the amplitude of the grant of power with which we are concerned. It treated the power in the first place as if it were designed for the exclusive personal concerns of the parties to the dispute, like a sub-clause of a section in a procedure Statute relating to industrial litigation. That method of regarding this great constitutional provision is certain to end in misunderstanding it.

This aspect of the Constitutional provision was referred to by *Isaacs* J. in the *Saw Millers' Case* (1) and in *Whybrow's Case* [No. 1] (2). In the latter case this was said (3) :—"The animating spirit, as well as the natural signification of the words of sub-sec. xxxv., is the preservation or restoration of industrial peace, and the subsection authorizes federal intervention, not simply to determine private differences between an employer and his employés and make a scale of rights and liabilities to operate merely for their exclusive benefit, but in the interest of the whole general population to avert or end disastrous industrial disorganization. From the standpoint of the Constitution the immediate combatants, numerous as they may be, are not necessarily even the chief objects of regard.

(1) 8 C.L.R., 465, at p. 530. (2) 10 C.L.R., 266, at p. 326.
(3) 10 C.L.R., 266, at pp. 325-326.

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Except to protect the general public dependent upon the peaceful and orderly continuance of industries which have an Australian operation and an effect upon that inter-State commerce placed directly under federal control, there could have been no moral, and there would have been no legal, warrant for federal control of any industrial quarrel. A coal strike in one State, for instance, entails severe loss to employers and employés while it lasts; yet each side sees or thinks it sees for itself eventual and compensating advantages. It is the non-combatants, the rest of the community, who after all suffer most."

And whether we regard our national industries as the means of satisfying the local needs of our population, or as the instruments of Australian competition in the markets of the world, their orderly and peaceful development is in the highest degree essential to the public welfare. It is a settled principle of the legal interpretation of legislative enactments that the evils they are designed to meet are a guide to their construction; and consequently the public danger of industrial crises arising from inter-State trade disputes is a prime element that a Court must take into its judicial consideration in construing the constitutional power.

We are indebted to an address in 1900 of Mr. W. O. Reed, the President of the Massachusetts State Board of Mediation and Arbitration, for an apposite reference to the eminent Chief Justice *Glanvill*, the first author of any treatise upon English jurisprudence, dated about 1180, who wrote in praise of the jury system then displacing the duel as a means of determining private rights. *Glanvill* observes with reference to the Grand Assize, in other words, the jury system:—"So effectually does this proceeding preserve the lives and civil condition of men that everyone may now possess his right in safety, at the same time that he avoids the doubtful event of the duel. Nor is this all; the severe punishment of an unexpected and premature death is avoided. . . . This legal institution flows from the most profound equity. For that justice, which after many and long delays is scarcely if ever elicited by the duel, is more advantageously and expeditiously attained through the benefit of this institution. . . . And by this course of proceeding both the labour of men and the expenses of the poor are saved."

After many days, the bedrock principle of English law by which public tribunals are substituted for private force, has found a place and falls to be applied in the legal system of our Constitution in the wider application to the duel of modern industry, which involves in its disastrous consequences, not merely the parties immediately engaged, but still more the larger body of non-participants who suffer, whichever side is victorious. The community in its turn—helpless as individuals—now protects itself by organization, in other words by its public tribunal.

Sub-sec. xxxv. ought, in our opinion, therefore to receive the fullest interpretation that the natural meaning of its language will allow. We would quote some valuable words of *O'Connor* J. in this connection, lest they should be overlooked. In the *Jumbunna Case* (1) that learned Judge, in dealing with the word "industrial," said :—"Where it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose. There is no such indication in any part of the Constitution : on the contrary, I do not see how its objects in this respect can be effectually attained unless the broader interpretation is adopted."

And in giving the Constitution this wider power, the same learned Judge pointed out in the *Saw Millers' Case* (2) that the contractual rights of the parties, and the State common law and Statute law as to contracts, must yield to the federal law, on the simple ground of necessity. He observes (3) :—"For, as the federal power cannot be effectually exercised unless in these respects, State control over State industries is invaded, the power of the

(1) 6 C.L.R., 309, at pp. 367, 368. (2) 8 C.L.R., 465, at pp. 510, 511.
(3) 8 C.L.R., 465, at p. 511.

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Commonwealth Parliament to clothe its tribunal with authority for that invasion is, therefore, necessarily included in the terms of sub-sec. XXXV."

The conditions of industrial life and the mutual relations of employer and employed have undergone many and vital changes in recent years; they are perceptibly altering before our eyes to-day, and each stage of development brings with it its own problems and with them its own new subjects of dispute. The words of the Constitution "industrial disputes" stand unabridged by any specified subject matter of dispute; they fit themselves to every phase of industrial growth, and look only to the single fact of an industrial dispute. Parliament, shaping the national policy in accordance with the predominant political ideas for the time being, may or may not restrict the causes upon which public intervention shall proceed; but unless it does so, we are unable to see how the Court can impose any limitation on the matters which, at any given moment in the life of the Commonwealth, do in fact, and by their practical operation, affect at some stage the inter-relations of employers and employed so as to give rise to what would then be regarded as an industrial dispute. The cases of *Taylor* v. *Goodwin* (1) and *Cannan* v. *Earl of Abingdon* (2) are instances, on a smaller theatre of operations, of the principle adverted to. It is, if we may say so, well indicated by Lord *Shaw* in *Conway* v. *Wade* (3) that even a dispute founded originally on personal animosity may develop into a situation of a general aspect having the characteristics of a trade dispute. A suggestion was made that only that which directly affects the work done ought to be regarded as the cause of an industrial dispute. No doubt most alterations in the conditions of service affect directly or indirectly the results of labour. As a test it is fallacious. For instance, it would exclude the remuneration. But on principle it overlooks the paramount object of every industrial dispute, that is to say, *every disagreement respecting a demanded alteration of industrial relations.* The object is to maintain or to improve the condition of the persons making the demands in opposition to the resistance of the opposite party. That may directly

(1) 4 Q.B.D., 228.
(2) (1900) 2 Q.B., 66.
(3) (1909) A.C., 506, at p. 521.

affect the work—as where a particular method or ingredient of manufacture is required or objected to. On the other hand it may not—as where it is desired to change from a weekly payment to a daily or monthly payment. And when the central idea is kept steadily in sight, that workmen's disputes are for personal welfare, be it health, or leisure, or a larger share of combined production, or the incidental consolidation of their forces so as to stand collectively instead of singly, it is manifest that any test which looks only to the amount or quality of the work done as the standard of inclusion in the constitutional provision is altogether too narrow. That contention, which has been the one note sounded in many keys in the ears of the Court from first to last of the respondents' arguments, does in truth—though doubtless far from the personal feelings of those presenting it—regard the man himself as a mere instrument, a living but mechanical contrivance recognized by this clause of the Constitution simply as an adjunct of the work he does. It acknowledges the relevance of better conditions for the workers, but only so far as they are enabled thereby to provide employers with better service or more of it, and entirely obliterates all considerations which make for an improved status of the men themselves. If that is not so, how reject this claim as industrial? Now, whether or not employés are entitled to improved conditions is a matter, we repeat, beyond the sphere of this discussion; but we should be blind to everyday facts and events, if we failed to observe that the aim of industrial struggles is to raise the personal status and condition of the workers. To this end, right or wrong, their organization is a real and accepted instrument incidental to the whole process. Indeed, this view is materially assisted by the reasons given by the members of the Court in the *Jumbunna Case* (1), notably at p. 313 (*Higgins* J.), pp. 336, 337 (the Chief Justice), p. 342 (*Barton* J.), p. 350 (*O'Connor* J.), and p. 373 (*Isaacs* J.). There it is acknowledged that an association may be a party to a dispute. If so, and if, as there held, the creation and maintenance of organizations are incidental to this power, it seems to follow inevitably that a claim by a member of such an organization, created and recognized by law for the very purpose of upholding his rights, to evince his

(1) 6 C.L.R., 309.

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membership by wearing a badge of that membership, cannot be foreign to the same power. The suggested test, therefore, cannot be accepted.

The true test as between employer and employed is whether the given matter touches the "employment," that is, whether it affects the mutual business relation connecting the respective parties concerned. Any effect on the work itself is secondary to the direct object, and even where that effect is direct, it is only a means to an end, and not the end itself. The direct object of the claim to wear a badge as a mark of unionism is to place the workers in a stronger position relatively to their employers with respect to the conditions of their employment; that it has considerable force in that connection is admitted, and it is therefore naturally a term of employment in the true sense if agreed upon; and if it be so when agreed upon, it is so when demanded or refused, and when exclusion from the employment is insisted on as a consequence of persistence.

Parties may, if they choose, by consent make any stipulation a "term" of employment, and any condition, a "condition" of employment. If, without prior consent upon the subject, employers insist on dismissing men because they will or will not wear a hat of a particular shape, or boots of a particular colour, or a special appendage or symbol on their watch-chains, we are unable to see how they can at the same time consistently aver that the matter in issue has no reference to the employment, or how a quarrel over the matter does not constitute an industrial dispute.

A refusal, for instance, to wear prison-made uniforms supplied by the employers, if the employers insist on dismissal for that refusal, appears to us to be an instance of undoubted subject matter for an industrial dispute, and yet it does not affect the quantity or quality or value of the work done by the employés.

On the whole, therefore, we disclaim not only the desirability but even the power to restrict the simple and unqualified word "industrial" as it stands in the Constitution by any cast-iron definition which the framers of that instrument omitted.

It is sufficient to say that the words of the Statute comprehending this particular dispute fall easily within it.

In our opinion, therefore, question 1 and the first part of question 3 should be answered in the affirmative.

This renders it unnecessary to consider question 2 and the second part of question 3, which, in reality, are included in the questions answered.

HIGGINS J. I concur in the opinion that the dispute as to the wearing of the badge is an industrial dispute within the meaning of the Act and of the Constitution.

I stated the case before awarding on the subject under the plaint, because I understood that in dealing with the case which was referred by me, as President, to the Court of Conciliation—the case arising out of the acute position in Brisbane in January 1912—certain members of the High Court had expressed doubts on the subject; and I did not wish to anticipate the view of the High Court. But I have never felt, personally, any doubt.

I agree with my learned brother *Isaacs* that it is not for us in the present case to attempt to put a definitive boundary to the meaning of "industrial dispute" in sec. 51 (xxxv.) of the Constitution. The phrase is not technical; and to say that it means any dispute on an industrial matter would seem to be a mere expansion of the words used. No doubt, the words would not cover a mere academic or political controversy or discussion. But the words, *taken by themselves*, might well cover the disputes raised by the Luddites with regard to the use of machinery; or the dispute involved in what is called the "general strike"—the strike which affects many unions and many industries—such a strike as is advocated in many quarters of late years. Many people may engage in certain disputes on industrial matters who are neither employers nor employés in any definite undertaking; and it would be absurd to deny that such disputes are not, in ordinary parlance, industrial disputes. It might be difficult, perhaps impossible, to apply the processes of conciliation or arbitration to such disputes—especially the process of arbitration; but this difficulty, or impossibility, should not be treated as limiting the meaning of the words "industrial disputes."

The Act, however, by its definition of "industrial dispute" and

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"industrial matters," seems to be confined to disputes between employers and employés. But "industrial matters," under the definition, include "*all* matters pertaining to the relations of employers and employés." To be more specific, the dispute whether the employés here should be forbidden by their employers to wear the badge when on duty on the tramcars is a matter "relating to privileges" of the employés, as well as to the "rights or duties of employers or employés," and to the "terms, and conditions of employment," within the definition. The abundance of words in this definition, words which are not mutually exclusive or capable of rigid demarcation, would appear to be intended to prevent any such argument as is used in this case in favour of a narrow interpretation of the ruling expression—"all matters pertaining to the relations of employers and employés."

POWERS J. The questions of law submitted by the learned President of the Arbitration Court for the opinion of this Court in this case are :—

"(1) Is the dispute a dispute 'as to industrial matters' within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1911 ?

"(2) Is the dispute capable of being a dispute as to 'industrial matters' within the meaning of the said Act under any circumstances ?

"(3) Is the dispute an industrial dispute or part of an industrial dispute within the meaning of sec. 51 (xxxv.) of the Constitution, or is it capable of being so ?"

I do not think that question 2 ought to be answered so far as it refers to circumstances not stated in the case : See *Newcastle and Hunter River Case* [No. 1] (1). Questions 1 and 3 are to be considered by this Court on the facts set out in the special case, and those admitted on argument ; and it is the duty of this Court, for the purposes of answering questions submitted by the learned President under sec. 31 of the Act, to accept as facts whatever is stated in the case submitted by him as statements of facts. This Court, when it considers the evidence in the prohibition case, may

(1) 16 C.L.R., 591.

come to different conclusions on any or on all the matters now accepted as facts only for the purpose of answering these questions. The question, therefore, whether this is a dispute, and, if so, whether it is an "inter-State dispute," need not be considered, for the President states in the case (par. 5) that "there is a dispute" (meaning an inter-State dispute). I hold also that the questions are questions of law arising in the proceeding.

The only questions, therefore, to consider are: (1) Is this dispute an industrial dispute within the meaning of the *Commonwealth Conciliation and Arbitration Act*? and (2) Is it an industrial dispute within the meaning of sec. 51 (xxxv.) of the Constitution?

The "dispute" arose in connection with the wearing of a "union badge" (the property of the employés) (par. 8 of the case). The badge was worn by the employés of the tramway companies on their watch-chains, under the circumstances and for the reasons set out in the case stated. This badge was treated by respondents' counsel during the argument, for the most part, as if it was simply an ornament or an advertisement, and therefore they contended that it was not in any way an "industrial" matter.

On the facts stated in this case, and admitted in the argument, I hold that the claim is placed higher than that, and must be so considered. The employés first claimed the right to wear and display a badge of membership of their association (or union) in April 1911. It was one of the claims in a plaint filed in the Commonwealth Court of Conciliation and Arbitration in Brisbane. That plaint was subsequently withdrawn. The employers followed that up by making a by-law or regulation of the Company, prohibiting the wearing of the badge by the employés. The agreements between the Brisbane Tramways Co. and their employés then in existence contained a provision (clause 4) under which the employés covenanted to "observe and be bound by, as well, all the clauses of the rules and regulations which relate to employés, now in force or published from time to time."

The plaint on which this case is based was filed on 26th October 1911, and included in its claims the right to wear and display a badge of membership of the Association. The questions raised in this case are raised on the plaint of 26th October 1911. Looking

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at the agreement between the Brisbane Tramways Co. and their employés referred to in par. 6 of the case stated, I find par. 1 reads :—" The employé will serve the Company, and the Company will hire him to serve them in the capacity of a ——— on the tramway cars or other vehicles of the Company, and the conditions in the other clauses of this agreement expressed are the conditions of such service and hiring." By clause 4 of the agreement one of the conditions of such service and hiring (that is, employment) is the observance of the regulations of the Company. The condition requiring the employés not to wear the badge, when the regulation was passed, became at once a condition of employment; and a condition of employment, imposed by the employer, on the employés then in the Company's service. For the purpose of this case we have also to consider the badge in question—because it is so stated in the case—as one which " tends to consolidate and strengthen the organization " (or union) " in its endeavours to obtain for the employés better industrial conditions from the employers and it facilitates organization for the purpose " (see par. 10 of the case stated), and that the employers object to the badge for the reason (amongst others) that it is an *encouragement to unionism* (par. 11). This to my mind distinguishes it from a claim to wear an ordinary badge for adornment, or for advertisement, or for political, social or religious purposes.

I find from pars. 3, 4 and 5 that a union badge was obtained by the organization and issued to the employés; but officers of the tramway companies objected to, and forbade the wearing of the union badges by the employés when in uniform or on duty. It was admitted that the badge did not in itself interfere in any way with the work of the employés, or disfigure the uniform, as it is only a small badge worn on the employé's watch-chain.

Par. 9 of the case stated reads :—" The employers contend that it is a breach of the agreement for an employé to wear the badge when in uniform or on duty, as he is forbidden to do so by the rules or regulations, or by-laws or orders of the employer. The employés contend that the question of wearing the badge as aforesaid is a matter relating to the work, privileges, rights, or duties of the employés and to the terms and conditions of employment, and a

matter pertaining to the relations of employers and employés and the employment of particular persons being or not being members of the organization and a question of what is fair and right in relation to an industrial matter."

The plaint was filed by an organization—the Australian Tramway Employés Association—a registered organization. The organization obtained the badges, but those used by the employés were their own property (par. 8). In par. 6 of the case stated it is mentioned that the Melbourne Tramway and Omnibus Co. Ltd., one of the respondents originally, has, by an agreement entered into since the plaint, agreed to the employés wearing the badges. It was also stated during the argument on the preliminary point, and admitted, that in January 1912 the employés of the Brisbane Tramways Co. did as a fact wear the union badge in question while at work on the tramways in Brisbane, and when they declined after notice to go to work without wearing the badges, their employer—the Brisbane Tramways Co.—declined to continue to employ any employé who wore the union badge. A strike or lockout of the tramway employés followed, causing a serious industrial "disturbance"; whether it amounted to a dispute or not, or, if so, whether it was an inter-State dispute, has yet to be decided. That disturbance was accentuated by many other unions joining in a sympathetic strike in support of their fellow unionists' claim to wear the badge. The alleged dispute in that case, therefore, did cause industrial disturbance. It was also stated that the Brisbane Tramways Co., since January 1912, have only employed men who would work without wearing a union badge. The Melbourne Tramway Co. have agreed to the demand of the men, and the union badge is worn by the employés.

The Municipal Tramways Trust, Adelaide, are allowing unionists to wear the union badge while at work on the trams, under an award by the President in the new dispute of January 1912, and no trouble has arisen through the wearing of the union badge on the Adelaide trams.

The question whether the dispute is an industrial dispute within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, is to be determined by considering whether the facts in the case stated bring it within the definition of "industrial

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matters." See sec. 4 of the Act. That section has already been quoted. I need not say anything more on the question as to whether the dispute is an industrial dispute within the meaning of the *Commonwealth Conciliation and Arbitration Act*, than to say at once that I hold that it is, and for the reasons mentioned in the judgment of my brothers *Isaacs* and *Rich*.

The more important question is whether it is an "industrial dispute" within the meaning of the Constitution, sec. 51 (xxxv.).

It is a serious thing to decide whether the power has, or has not, been given to the legislature by the Constitution, because of the difficulty attendant on any attempt to amend the Constitution. The words "industrial disputes" in the Constitution are admittedly very wide, and the power to prevent and settle industrial disputes by conciliation and arbitration was given to enable the Commonwealth to avoid, as far as possible, losses to the employers, employés and to the public through industrial "disturbances" caused by disputes between employers and employés, amounting to "industrial disputes" in the ordinary meaning of the words at the time the Constitution was passed.

In this case on the facts stated there is a dispute. So the only question is whether it is an "industrial" dispute.

The most important duty imposed on this Court is that of interpreting the Constitution; and I think some very important rules of interpretation have been laid down or accepted by members of this Court, which ought to guide us in considering whether the portion of the Act in question, the organization, and the subject matter are within the Constitution.

The learned Chief Justice of this Court, in *D'Emden* v. *Pedder* (1), said:—"It is, however, in our opinion, a sound principle of construction that Acts of a sovereign legislature, and indeed of subordinate legislatures, such as a municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative."

My brother *Barton*, in the *Jumbunna Case* (2), read with approval the rule for the interpretation of a Constitution laid down by *Marshall* C.J. in *M'Culloch* v. *Maryland* (3), and acted upon by the Supreme

(1) 1 C.L.R., 91, at p. 119. (2) 6 C.L.R., 309, at p. 344.
(3) 4 Wheat., 316, at p. 421.

Court of the United States ever since. That learned Judge said :— "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The late Mr. Justice *O'Connor*, in the *Jumbunna Case* (1), said :— "There seems to be nothing in the Constitution itself to indicate that the power conferred was intended to cover part only of the evils aimed at. The words used are large enough to cover all of them, and where it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve."

It would be hard to improve on the above rule.

Coming to the words themselves, I cannot find any decision of this Court which, if followed, would decide the question on the facts stated in this case. It is true that two cases were referred to as applicable, namely, *Clancy's Case* (2), by the Full Court, and *Australian Workers' Union* v. *Pastoralists' Federal Council of Australia* (3), decided by *O'Connor* J.

In *Clancy's Case* (2) the Court only decided what an "industrial dispute" was within the definition given to those words in a New South Wales Act. That definition differs from the one given in the *Commonwealth Conciliation and Arbitration Act*, and does not, in my opinion, apply. My brother *Barton*, in his judgment in *Clancy's Case* (4), said :—"In its essence the question hinges upon the interpretation of the definition of 'industrial matters' in sec. 2 of

(1) 6 C.L.R., 309, at pp. 367-368.
(2) 1 C.L.R., 181.
(3) 1 C.A.R., 62, at p. 95.
(4) 1 C.L.R., 181, at p. 204.

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the Act, and I do not think that this was a matter affecting the 'work done or to be done' within the meaning of that definition. I think that the words in the section refer only to actual work done or to be done by the employé."

In the second case referred to, the late Mr. Justice *O'Connor* only decided that a privilege asked for by unionists to be conferred on a third party not an employé was not on the facts of that case an industrial matter.

We do, however, get assistance from interpretations placed on the words " industrial dispute " by members of this Court.

My learned brothers *Barton*, *Isaacs* and *Rich* have, in their judgments to-day, expressed their opinions as to whether this particular dispute is, or is not, an industrial dispute within the meaning of the Constitution. I think it only right to point out the meaning the learned Chief Justice of this Court and the late Mr. Justice *O'Connor* gave to the words in question in the *Jumbunna Case* (1).

The learned Chief Justice said (2) :—" An industrial dispute exists where a considerable number of employés engaged in some branch of industry make common cause in demanding from or refusing to their employers (whether one or more) some change in the conditions of employment which is denied to them or asked of them." I entirely agree with that definition, and I think it applies where " terms " as well as " conditions of employment," or " rights or privileges," are denied to them, or asked of them.

The late Mr. Justice *O'Connor*, in the same case (3), said :—" If all the workmen of an employer in a particular trade take concerted action in demanding and endeavouring to enforce from him some alteration in their conditions of employment, there is an industrial dispute." The learned Judge then proceeded to describe what amounts to an inter-State industrial dispute ; and then added (4) : —" Such being the nature of the disputes covered by the Constitution, it was open to the legislature to adopt any method which they deemed effective for prevention and settlement by conciliation and arbitration." I agree with that definition.

My brother *Barton*, in the same case, said (5) :—" An industrial

(1) 6 C.L.R., 309.
(2) 6 C.L.R., 309, at p. 332.
(3) 6 C.L.R., 309, at p. 352.
(4) 6 C.L.R., 309, at p. 353.
(5) 6 C.L.R., 309, at p. 341.

dispute in the everyday meaning of the term does not take place unless a number of employés in an industry unite on their part to enter into controversy with the person or persons employing them so as to secure what they consider an improvement, or to prevent or remove what they view as a wrong or a hardship, in relation to the terms of their employment."

The late Mr. Justice *O'Connor*, in the same case (1), said :— "The appellants contend that the word 'industrial' in the Constitution does not cover so wide a field, that it is restricted to work connected directly or indirectly with production and manufacture. 'Industrial dispute' was not, when the Constitution was framed, a technical or legal expression. It had not then, nor has it now, any acquired meaning. 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." Further on (2), he said :—"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 to cover every kind of dispute between master and workman in relation to any kind of labour." And again (3) :—"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."

Was the prevention or settlement of "industrial disturbances" caused by disputes of this sort, contemplated by the framers of the Constitution, and by the British Parliament when the Constitution was passed? There is a dispute (see the case stated). The only question, therefore, is whether the "subject matter" of the dispute can be the subject matter of an "industrial" dispute under the Constitution.

The wearing of the union badge, on the facts stated in the case,

(1) 6 C.L.R., 309, at p. 365. (2) 6 C.L.R., 309, at p. 366.
(3) 6 C.L.R., 309, at p. 367.

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tends to consolidate and strengthen the organization in its endeavours to obtain for the employés better industrial conditions from the employers. The wearing of the badge is objected to by the employers (amongst other grounds) because it is an encouragement to "unionism." This statement in the case places the claim, in my opinion, on the same plane as a unionist claim not to work with non-unionists or with coloured labour. They are all based on unionists' claims to further unionism and its aims to maintain existing industrial conditions obtained through unionism.

That industrial disturbances caused by claims for recognition of trade unions and of unionists' rights were in 1900 recognized as industrial disputes, cannot, I think, be doubted. Acts of Parliament had been passed in England and in Australia long before 1900 recognizing "trade unions" and "trade union rights," and conferring on the members of trade unions special powers and freedom from liability for acts done in the interests of members of the trade unions for which persons not in trade unions are liable to be prosecuted. The rights of trade unions to combine for the purposes of improving the industrial conditions of unionists generally, and their right to act on behalf of the workers in demanding privileges and claims for the employés, have long been recognized.

My brother *Isaacs* in the *Saw Millers' Case* (1) referred to the majority report of the English Royal Commission on Labour (Fifth and Final Report)—*Commons Papers* 1894, vol. 35, p. 38. The following words are in paragraph 100 of the report (1):—"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 lockouts, 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

(1) 8 C.L.R., 465, at p. 515.

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."

The report referred directly to "industrial disputes" before 1894 between employers and employés where the cause of dispute was the claim of unionists to strengthen and enlarge the association, to compel employers to recognize the association, and to prevent the employment of non-unionists, &c.

The claim to prevent the employment of non-unionists with unionists, it is well known, has for many years past been the cause of industrial disputes or "disturbances." Such a claim by unionists is not based on an objection to the man. If he joins the union the objection ends. It is clearly based on the ground that employment of non-unionists tends, in the opinion of unionists, to weaken unionism and to endanger the continuance of fair wages and proper industrial conditions. In Australia one would hardly contend that a dispute in an industry caused by the employment of coloured labour would not be an industrial dispute, if the other essentials of a dispute were present, but neither that nor a dispute because of the employment of non-unionists would be an "industrial" dispute within any of the definitions given by counsel for the respondents on the argument.

To hold that a "dispute" causing serious industrial disturbance and public loss could not be dealt with by the Arbitration Court unless the claim refused directly affected both the employés and the employers would, in my opinion, seriously curtail a very beneficial power intentionally given to the Commonwealth Parliament, and I personally cannot concur in such a view. The effect of such a decision would, in my opinion, be disastrous to the peace, order and good government of the Commonwealth in relation to industrial disputes, and encourage strikes.

For example, assume that the whole of the miners of Australia made some such claim as I have referred to, and the coal proprietors decided not to concede the claim made, with the result that the whole of the coal mines of Australia were closed through a dispute that the parties could settle themselves. Can it be conceived that the framers of the Constitution, when giving the Commonwealth Parlia-

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ment power to prevent and settle industrial disputes by conciliation and arbitration, intended to prevent the Commonwealth from taking any steps whatever to prevent or settle by conciliation or arbitration a dispute so disastrous to the employers, employés and the people of Australia generally? I do not think so in the light of the knowledge they had in 1900 as to the causes of industrial disputes.

Would the Commonwealth Conciliation and Arbitration Court be unable to take any steps to prevent industrial disturbance and public loss continuing if the mine owners of Australia attempted to insist on all miners wearing, as part of their uniform, a badge—"Free labour approved: Unionism a curse"?

At common law, of course, the employers would be at liberty to make such a condition, and many other conditions that would in these days cause "industrial disputes" such as I am satisfied the Constitution intentionally conferred on the Commonwealth Parliament the power to settle—even if the award would interfere with the old common law right of employers to require the employees to conform to any conditions they think fit to impose.

It has been contended that the power given by the Constitution did not include a power to interfere with the common law rights of employers as to the way that they are to carry on their businesses, or with existing contracts entered into in accordance with State laws. On this point I do not think I need add anything to what my brothers *Isaacs* and *Rich* have said, in the judgment just delivered, why it must necessarily interfere with both to be effective; for I agree with the reasons given by them in the judgment, and with the reasons given by the late Mr. Justice *O'Connor* in the *Saw Millers' Case* (1):—"The meaning, scope and purpose of arbitration are well known. An ordinary arbitrator's duty extends only to determining and giving effect to the rights of the parties, in accordance with his view of the facts and the laws. The duty of arbitrator in an industrial dispute is also confined to the judicial determination of the matters in dispute. But the scope of his jurisdiction is necessarily larger in one respect. Industrial arbitration may involve the abrogation of the existing contractual rights of either

(1) 8 C.L.R., 465, at pp. 510-511.

of the parties where the abrogation is necessary for the effective settlement of the industrial dispute. That proposition was questioned in the course of the argument. But it is to my mind one of the fundamental conditions on which the jurisdiction of Industrial Courts is exercised. The federal tribunal must therefore necessarily have authority when it deems fit to make an award in disregard of contract between employers and employés and of the State law which makes them binding. Again: it may happen that the award of a State Industrial Court settling a State dispute stands in the way of fair and effective adjudication by the federal industrial tribunal. In such a case, where the industrial relations of the same parties become the subject of inquiry in the wider area of the inter-State dispute, the federal tribunal must, if its settlement is to be effective, have the power to disregard, as far as those parties are concerned, the award of the State tribunal, which has determined their future relations for a certain period. And although the State law makes the award binding on the parties, and makes its directions enforceable by penalties, that law must yield, as the State law as to contracts must yield, to the supremacy of the federal award, and for the same reason—necessity. For, as the federal power cannot be effectually exercised unless in these respects, State control over State industries is invaded, the power of the Commonwealth Parliament to clothe its tribunal with authority for that invasion is, therefore, necessarily included in the terms of sub-sec. xxxv."

This must necessarily be the correct view, I think, because although the rights of employers generally to carry on their own businesses in their own way, subject to the laws of the State to fix conditions under which State industries are to be carried on in the State, remain unaltered so long as there is no inter-State dispute, once a dispute develops into an inter-State industrial dispute the power of the Commonwealth to deal with it commences—a power the State never had (and therefore it could not be included in its reserved powers). The Commonwealth Court of Conciliation and Arbitration can then arbitrate, and make a binding award as to all matters in dispute between the employers and employés which they can but will not settle amicably; and an award can be made even if it interferes with the old common law rights of employers to