[HIGH COURT OF AUSTRALIA.]

THE AMALGAMATED SOCIETY OF ENGINEERS . . . . . } CLAIMANT;

AND

THE ADELAIDE STEAMSHIP COMPANY LIMITED AND OTHERS . . . } RESPONDENTS.

H. C. OF A. 1920.

SYDNEY, *July* 26, 27, 28, 29, 30; *Aug.* 2.

MELBOURNE, *Aug.* 31.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Constitutional Law—The Constitution—Rules of interpretation—Exemption of Crown in right of State—Implied prohibition—Rule in D'Emden v. Pedder—Reciprocal application of rule—State instrumentalities—Conciliation and arbitration—Power of Parliament of Commonwealth—Industrial operations carried on by State—Industrial dispute—Jurisdiction of President of Commonwealth Court of Conciliation and Arbitration—Commonwealth of Australia Constitution Act (63 & 64 *Vict. c.* 12), *sec. V.—The Constitution, secs.* 51, 106-109—*Commonwealth Conciliation and Arbitration Act* 1904-1918 (*No.* 13 *of* 1904—*No.* 39 *of* 1918), *sec.* 4—*State Trading Concerns Act* 1916 (*W.A.*) (*No.* 12 *of* 1917).

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ. (*Gavan Duffy* J. dissenting), (1) that the Parliament of the Commonwealth has power, under sec. 51 (xxxv.) of the Constitution, to make laws binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State; (2) that a dispute between an organization of employees and a Minister of the Crown for a State acting under the authority of a statute of that State as an employer, which, if it existed between the organization and a private employer would be an "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution, is such an "industrial dispute."

The rules of construction to be applied in construing the Constitution are those applied by the Privy Council in *Webb* v. *Outrim*, (1907) A.C., 81; 4 C.L.R., 356, and *Attorney-General for Australia* v. *Colonial Sugar Refining Co.*, (1914) A.C., 237; 17 C.L.R., 644.

It having once been ascertained in accordance with those rules of construction that a power has been conferred on the Commonwealth Parliament by the

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Constitution, no implication of a prohibition against the exercise of that power can arise, nor can a possible abuse of the power narrow its limits.

The *Commonwealth of Australia Constitution Act*, being passed by the Imperial Parliament for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia, is by its own inherent force binding on the Crown to the extent of its operation.

The Constitution, as it exists for the time being, dealing expressly with sovereign functions of the Crown in its relation to the Commonwealth and the States, necessarily so far binds the Crown; and laws validly made under the authority of the Constitution bind, so far as they purport to do so, both the Crown in right of the States and subjects.

Where the affirmative terms of a power stated in the Constitution would justify an Act of the Parliament of the Commonwealth, it rests upon those who rely on some limitation or restriction of the power, to indicate it in the Constitution.

Sec. 107 of the Constitution continues the previously existing powers of the Parliaments of the States to legislate with respect to State exclusive powers and State powers which are concurrent with Commonwealth powers; but does not reserve any power from the Commonwealth which falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated.

Sec. 109 of the Constitution gives supremacy to every Commonwealth Act over every State Act, whether the latter be passed under a concurrent power or under an exclusive power, if any provisions in the two conflict.

Whether the operations of a State Government in the exercise of the prerogative of the Crown, that is, the power of the Crown apart from statutory authority, are subject to any of the powers conferred upon the Commonwealth Parliament by sec. 51 of the Constitution not considered.

The rule laid down in *D'Emden* v. *Pedder*, 1 C.L.R., 91, at p. 111, that "when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative," on the basis of the supremacy of Commonwealth legislation created by sec. 109 of the Constitution, is sound.

Deakin v. *Webb*, 1 C.L.R., 585, and *Baxter* v. *Commissioners of Taxation (N.S.W.)*, 4 C.L.R., 1087, so far as they decide that the taxation by a State of money received by a Federal officer as salary from the Commonwealth is invalid as being an interference with a Federal instrumentality, overruled.

Federated Amalgamated Government Railway and Tramway Service Association v. *New South Wales Railway Traffic Employees' Association*, 4 C.L.R., 488, overruled.

CASE STATED.

On the hearing before *Higgins* J. of an application by the Amalgamated Society of Engineers under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, the learned Judge stated, for the consideration of the Full Court of the High Court, a case which was substantially as follows :—

1. An alleged industrial dispute has been submitted to the Commonwealth Court of Conciliation and Arbitration by plaint.

2. The industrial dispute is alleged to exist between the Amalgamated Society of Engineers as claimant and the Adelaide Steamship Co. Ltd. and eight hundred and forty-three others in all parts of Australia, including the Minister for Trading Concerns, Western Australia, the State Implement and Engineering Works, North Fremantle, and the State Sawmills, D. Humphries, Perth.

3. An application has been made to me as a Justice of the High Court sitting in Chambers for a decision on the question whether the dispute or any part thereof exists, or is threatened, impending or probable, as an industrial dispute extending beyond the limits of any one State between the said parties.

4. The said Minister for Trading Concerns, the State Implement and Engineering Works and the State Sawmills object that there can be no industrial dispute found to exist as between the claimant and themselves as governmental concerns.

5. The evidence has closed, and I have found that an industrial dispute exists as alleged as to most of the other respondents, but I have reserved my decision as to the respondents mentioned in par. 4.

6. Subject to the objection aforesaid, I am prepared to find on the evidence that there is in fact an industrial dispute existing within the meaning of the Act as between the claimant and the said respondents as well as the other respondents on the subjects of the plaint.

7. The State Implement and Engineering Works and the State Sawmills were established by the Government of Western Australia, and are regulated by the Western Australian Acts, the *Government Trading Concerns Act* 1912 and the *State Trading Concerns Act* 1916.

8. The State Implement and Engineering Works undertake for the public as well as for the various State Departments the work of

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making and repairing agricultural implements and engines, troughs, windmills, &c. They also undertake for private steamship owners, as well as for steamers owned by the State, repairs to ships and to shipping machinery. They advertise their operations in competition with private undertakings in newspapers and by circulars, have showrooms in Perth and have selling agents throughout the State.

9. The State Sawmills cut and mill timber, and sell the product in competition with other mill-owners to the public, and carry out sawmills work for the public as well as for the State Departments.

10. The clerical staff of the State Implement and Engineering Works and of the State Sawmills are appointed and hold office under the Western Australian *Public Service Act*, but the other employees (including members of the claimant union) have no statutory public service rights by reason of their engagement. The manager and superintendent of the State Sawmills hold office under a special agreement.

The questions for the consideration of the Full Court, as amended at the hearing, were as follows :—

(1) Has the Parliament of the Commonwealth power to make laws binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State?

(2) As to each of the respondents named in the special case—Is the dispute which has been found to exist in fact between the claimant and the Minister for Trading Concerns (W.A.) an industrial dispute within the meaning of sec. 51 (xxxv.) ?

Robert Menzies, for the claimant. The Constitution, as part of an Imperial Act of Parliament, should be interpreted as a statute ordinarily is. Its meaning is to be deduced from express provision and necessarily implied intention (*Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (1) ; *Inland Revenue Commissioners* v. *Herbert* (2) ; *Attorney-General for Australia* v. *Colonial Sugar Refining Co.* (3)). It is distinct from the American Constitution by reason of its statutory character, the existence

(1) 20 C.L.R., 148, at p. 171. (2) (1913) A.C., 326, at p. 332.
(3) (1914) A.C., 237, at p. 257 ; 17 C.L.R., 644, at p. 655.

of the royal veto, and the power of easy amendment, and by reason of express provisions such as sec. 51 (XIII.) and (XIV.) and sec. 114. The real *ratio decidendi* of *D'Emden* v. *Pedder* (1) is the doctrine of the supremacy of Commonwealth powers. This is so whether the decision rests on sec. V. of the Act and sec. 109 of the Constitution or on the reasoning of *Marshall* C.J. in *McCulloch* v. *Maryland* (2). The same notion of the supremacy or paramount character of Federal powers is shown in *Veazie Bank* v. *Fenno* (3); in the dissenting judgment of *Bradley* J. in *Collector* v. *Day* (4); in *Cohens* v. *Virginia* (5), and in *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation*, per *Isaacs* and *Rich* JJ. (6). Once it appears that the doctrine of *D'Emden* v. *Pedder* depends on supremacy, it manifestly can have no reciprocal operation. *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (7) was therefore wrongly decided. In America the immunity of States has probably arisen by reason of the historic position of the States at the foundation of the United States, and the subsequent fight for Federation (see *In re Income Tax Acts* [*No.* 4]; *Wollaston's Case* (8)). In any case, the operation of the American doctrine is limited to the control of the taxation power. The taxing power is, by its nature, indefinite and capable of effecting general control. Some limit to it may, therefore, be necessary. Looking at the power conferred by sec. 51 (XXXV.), several considerations arise. There is a presumption in favour of a wide operation; for the settlement of two-State disputes requires national treatment, and there should be no anomalies due to the accidental character of the employer. The power should be construed fully, and without regard to the alleged "reserved" powers of the States. The specific grant of power must be defined before the residue can be defined. The express grant is only to be cut down by express limitations (*R.* v. *Burah* (9)). The maxim *Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa valere non potest* can only apply to a

(1) 1 C.L.R., 91.
(2) 4 Wheat., 316.
(3) 8 Wall., 533.
(4) 11 Wall., 113.
(5) 6 Wheat., 264.
(6) 26 C.L.R., 508, at p. 532.
(7) 4 C.L.R., 488.
(8) 28 V.L.R., 357, at pp. 387-388; 24 A.L.T., 63, at p. 70.
(9) 3 App. Cas., 889, at p. 904.

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grant of power, and has no application to the powers of the States remaining after the Federal powers have been taken out. For the purposes of this case the word "industrial" in pl. xxxv. provides the only limitation. What is industrial if done by a private employer is industrial if done by a State. The existence of sec. 51 (xiii.), sec. 51 (xiv.) and sec. 114 gives special force to the maxim *Expressio unius exclusio alterius*. The Constitution gives power to bind the Crown, and the Crown in right of a State is bound by the *Commonwealth Conciliation and Arbitration Act* (see sec. 4). This view is consistent with *R.* v. *Sutton* (1) and *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (2); see also *Australian Workers' Union* v. *Adelaide Milling Co.* (3). In finding the area of operation of a Commonwealth power, the Crown in right of a State is irrelevant, for it does not enter the field as a governing body. It is, *pro hac*, a subject, and comes under the powers granted to the Commonwealth Government throughout the geographical area known as "the Commonwealth." (See the introductory words of sec. 51.) Should the Court resolve to follow the *Railway Servants' Case* (4), the respondents here are carrying on trading and not governmental operations, and fall within the distinction laid down in *South Carolina* v. *United States* (5); *Flint* v. *Stone Tracy Co.* (6); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (7); *Australian Workers' Union* v. *Adelaide Milling Co.* (8). For what are primary functions of Government, see *Coomber* v. *Justices of Berks* (9). [Counsel also referred to *Government Trading Concerns Act* 1912 (W.A.) and *State Trading Concerns Act* 1916 (W.A.).]

Sir Edward Mitchell K.C. and *Latham*, for the States of Victoria, South Australia and Tasmania, intervening. The first question should be answered in the negative. Where the question of the validity of Commonwealth legislation is raised, the onus is upon the party who supports it to point out in the Constitution some power to

(1) 5 C.L.R., 789, at pp. 796-797, 802, 811-814, 816.
(2) 5 C.L.R., 818.
(3) 26 C.L.R., 460, at p. 473.
(4) 4 C.L.R., 488.
(5) 199 U.S., 437.
(6) 220 U.S., 107.
(7) 12 C.L.R., 398, at pp. 426, 442.
(8) 26 C.L.R., at pp. 466, 471.
(9) 9 App. Cas., 61.

legislate on the particular subject matter. When he has done that, the onus is then upon the opposing party to show that the particular legislation on that subject matter is forbidden by some term in the Constitution either express or necessarily implied. So, when the validity of a State law is attacked, the first inquiry is where is the power to enact it. If the answer is that the State had it before Federation, then the next question is whether the Commonwealth Constitution has taken the power away. With regard to powers reserved to the States by the Constitution, the States have powers of legislation as exclusive as are the powers granted exclusively to the Commonwealth. As regards the concurrent powers, sec. 109 determines that the Commonwealth legislation overrides that of the States. The rule laid down in *D'Emden* v. *Pedder* (1) is not based on sec. 109, but is an implication based on necessity. That doctrine must have been in the minds of the framers of the Constitution; otherwise there was no necessity to enact sec. 51 (xxxii.) in view of sec. 51 (vi.) or sec. 98 in view of sec. 51 (i.). Having regard to the decisions in *Farey* v. *Burvett* (2) and *R.* v. *Sutton* (3), it cannot be said that the Constitution is to be construed in the same way as any other written document. The rule laid down in *D'Emden* v. *Pedder* as reaffirmed in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (4), and declared in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (5) to be reciprocal, is correct, and is necessary for the effective working of the Constitution in accordance with the intention as disclosed by its terms. The relation between the Crown and the States remains the same as between the Crown and the several colonies before Federation, and as to the powers reserved to the States they are free from the control of the Commonwealth and as supreme as before Federation (*Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (6)). The maxim *Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa valere non potest* applies to the reservation of powers for the States as well as to the grant of powers to the Commonwealth. It was

(1) 1 C.L.R., 91.
(2) 21 C.L.R., 433.
(3) 5 C.L.R., 789.
(4) 4 C.L.R., 1087.
(5) 4 C.L.R., 488.
(6) (1892) A.C., 437, at p. 442.

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mainly upon the application of that maxim to the Constitution that the rule in *D'Emden* v. *Pedder* (1) was laid down. That rule was affirmed in *Deakin* v. *Webb* (2) and in *The Commonwealth* v. *New South Wales* (3), was declared to be reciprocal in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (4) and *Baxter* v. *Commissioners of Taxation (N.S.W.)* (5), and was assumed to be a valid rule in *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (6), *Australian Workers' Union* v. *Adelaide Milling Co.* (7) and *Federated Municipal and Shire Council Employees' Union* v. *Melbourne Corporation* (8). The doctrine of non-interference was present in the minds of the Supreme Court of the United States in *McCulloch* v. *Maryland* (9) and *Veazie Bank* v. *Fenno* (10), although it was not applied until *Collector* v. *Day* (11). In *South Carolina* v. *United States* (12) the reciprocal nature of the doctrine was recognized as being based on necessity, which is the basis upon which it was put by this Court. The reciprocal doctrine has now come to be regarded by the Commonwealth and the States and their legal advisers as axiomatic, and has been acted upon by both Commonwealth and States, and should now be adhered to in accordance with the established principles relative to the refusal to overrule decided cases (*Baxter* v. *Commissioners of Taxation (N.S.W.)* (13); *Australian Agricultural Co.* v. *Federated Engine-Drivers' and Firemen's Association of Australasia* (14); *Tramways Case* [*No.* 1] (15)). The case of *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (4) was rightly decided, applying to the construction of the Constitution the principle *Expressio unius exclusio alterius*, and, as the States have incurred vast expenditure in consequence of that decision, it should not now be overruled. Upon its proper construction, pl. xxxv. of sec. 51 does not apply to State employees who are servants of the

(1) 1 C.L.R., 91.
(2) 1 C.L.R., 585, at p. 602.
(3) 3 C.L.R., 807.
(4) 4 C.L.R., 488.
(5) 4 C.L.R., 1087.
(6) 12 C.L.R., at p. 414.
(7) 26 C.L.R., 460.
(8) 26 C.L.R., 508.
(9) 4 Wheat., at p. 435.
(10) 8 Wall., at pp. 547, 556.
(11) 11 Wall., at p. 127.
(12) 199 U.S., 437.
(13) 4 C.L.R., at p. 1156.
(14) 17 C.L.R., 261, at pp. 274-277.
(15) 18 C.L.R., 54, at pp. 58, 69.

Crown, because it could not have been intended by general words to make so startling a change in the general relationship of the Crown to its servants as would be involved, and because it could not have been intended to subject a sovereign State, without its consent, to a compulsory arbitration Court appointed by another sovereign Power.

Flannery K.C. (with him *Evatt*), for the State of New South Wales, intervening. A consideration of the Constitution as a whole, and particularly of sec. 106, shows that the continued existence of the States as they were constituted before Federation is postulated. Their status as States must be determined by the position in which they are put by the *Constitution Act*. The fact that a State is thereafter found to be engaging in industrial operations will not in any way affect the question whether pl. xxxv. binds the State. Pl. xxxv. does not enable the Commonwealth Parliament to bind the Executive of the State unless clear words are to be found in sec. 51. The power given by the opening words of sec. 51 is to make laws for the peace, order and good government of the Commonwealth, that is, of the Commonwealth as set up by the Act. It does not include the States as entities, and the power is not to make laws for the peace, order and good government of the Commonwealth and of the States. The Parliament of a State has power to bind the Crown in right of the State, and when the Commonwealth was set up it was given power to bind the Crown in right of the Commonwealth. There is no general power given by sec. 51 to bind the Crown in right of the State or the State Executive. If there is no such general power it must be sought in each placitum of sec. 51. Without express or necessarily implied power to restrict the executive power of the States that power remains as it is under sec. 106 (*Lefroy's Legislative Power in Canada*, p. 582; *Attorney-General of Ontario* v. *Mercer* (1); *St. Katherine's Milling and Lumber Co.* v. *The Queen* (2); *Lefroy on Canada's Federal System*, pp. 150, 197).

[KNOX C.J. referred to *Valin* v. *Langlois* (3).

[ISAACS J. referred to *Virginia* v. *West Virginia* (4).]

(1) 8 App. Cas., 767.
(2) 14 App. Cas., 46, at p. 59.
(3) 5 App. Cas., 115.
(4) 246 U.S., 565, at p. 596.

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Sec. 106 preserves an independent Executive of the States dealing with matters restricted in area by the grant of powers to the Commonwealth. The State Executive retains its powers unless they are taken away by express words or by necessary implication. Among the placita of sec. 51, only in pl. VI., the defence power, can an implication of power to interfere with a State Executive be implied.

[STARKE J. referred to *Cushing* v. *Dupuy* (1); *R.* v. *Governor of South Australia* (2); *Horwitz* v. *Connor* (3).]

Ham, for the Minister for Trading Concerns of Western Australia. The State Engineering Works and the State Sawmills are not legal entities. The Minister for Trading Concerns is made a corporation, not for the purpose of appearing in the Commonwealth Court of Conciliation and Arbitration, but only for the purposes of being sued in contract or in tort and of holding property. It must be taken that it is the State Government which is carrying on those concerns. All the acts of a State Government acting through the State Executive are acts of the King (*Anson's Law and Custom of the Constitution*, 3rd ed., vol. II., p. 168), and are not subject to the power conferred by pl. XXXV. In *Young* v. *s.s. Scotia* (4) it was held that a Government ferry-boat had the exemption of the Crown although it was employed for what was in substance trading. The supply of timber is as much a governmental function as the supply of water. This Court has laid it down in the *Municipalities' Case* (5) that, if acts are done by a State Government for the common benefit of the people of the State, they are truly governmental. Whether the operations amount to trading is not then a discrimen in determining whether they are subject to the Commonwealth power. The principle that the Crown is not bound by a statute unless by express words or necessary implication applies with special force to the Constitution. The express exemption of the States in some of the placita in sec. 51 is only introduced *ex majori cautelâ*, and no argument can be drawn from it in regard to the other placita. The word "industrial" in pl. XXXV. should not be

(1) 5 App. Cas., 409, at p. 415.
(2) 4 C.L.R., 1497, at p. 1512.
(3) 6 C.L.R., 38.
(4) (1903) A.C., 501.
(5) 26 C.L.R., 508.

construed so as to include operations of the Government of a State through the Executive.

Leverrier K.C. (with him *H. E. Manning*), for the Commonwealth. The first question should be answered in the affirmative. The rule in *D'Emden* v. *Pedder* (1), which is merely a branch of the doctrine of supremacy, is a valid rule of law based on the Constitution itself. The reciprocal rule laid down in the *Railway Servants' Case* (2) is one which cannot be derived from the Constitution, but which is inconsistent with it. The powers of the Commonwealth must be ascertained purely by applying to the Constitution the ordinary rules of construction applicable to a statute. That connotes the taking into consideration not only the words of the Constitution but also all the relevant surrounding circumstances, for instance, the fact that it is a constitution and the fact that it was based on a prior compact between the individual States and the people of those States. The doctrine of supremacy is derived from the express words of the Constitution and the Act of which it is a part, namely, from sec. V. of the Act and secs. 106 to 109 of the Constitution. Sec. 106 by itself would be sufficient to support the doctrine, for by express words it makes the Constitution and all that it connotes supreme. In other words, it makes the Constitutions of the States, that is, their legislative, executive and judicial powers, subject to the Constitution of the Commonwealth. In sec. V. of the Act the word "people" means the people in every capacity, individually, collectively and as represented by the Governments of the States. The rule that the Crown is not bound by a statute unless expressly named or included by necessary implication does not apply to the Constitution. That rule only applies to the Crown which is legislating, that is, in respect of the Constitution, the Imperial Crown (*R.* v. *Sutton* (3)). It is plain in the language of the Constitution that it was intended to bind the Crown in right of the States. The Constitution deals with various powers of the States, and invests in a new body, the Commonwealth, some of those powers. This was done at the invitation of the States. That being so, an essential

(1) 1 C.L.R., 91. (2) 4 C.L.R., 488.
(3) 5 C.L.R., at pp. 795, 805.

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object was to bind the States. If, then, the words of the Constitution are capable of including the State Crown, the State Crown cannot be excluded unless there is some exception by express words or by necessary implication. The word " Commonwealth " in the opening words of sec. 51 means the geographical area comprised in the Commonwealth and everything within it. Those very wide limits are restricted by the various placita of sec. 51, but as to subject matter only, and not as to the objects of the power. Contrasting pl. XXXII. with pl. XXXIII., it is obvious that by pl. XXXII. the States are bound although not expressly named. As to pl. XXXV., the States collectively could legislate as to all disputes in all the States, including disputes to which the States themselves were parties, and it is to be presumed that, when power was vested in the Commonwealth Parliament to deal with industrial disputes extending beyond the limits of any one State, it was intended to give to the Commonwealth power at least as great as that which the States collectively had, including a power to bind the States. The nature of industrial operations cannot depend on the character of the persons who carry on those operations, and any dispute in respect of the industrials engaged in those operations is an industrial dispute within pl. XXXV. no matter who are the parties to the dispute. The term " arbitration " including compulsory arbitration, sec. 78 authorizes the Parliament to compel the attendance of any persons whose presence may be necessary for determining an industrial dispute.

Sir Edward Mitchell K.C., in reply.

Robert Menzies, in reply.

Cur. adv. vult.

Aug. 31. The following written judgments were delivered :—

KNOX C.J., ISAACS, RICH AND STARKE JJ. (delivered by ISAACS J.). This is a case stated under the *Judiciary Act*, sec. 18, for the consideration of the Full Court, on the hearing of a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*.

The Amalgamated Society of Engineers is claimant in a plaint

under the last mentioned Act. There are eight hundred and forty-four respondents in various parts of Australia. Among the respondents are the Minister for Trading Concerns, Western Australia; the State Implement and Engineering Works, North Fremantle, and the State Sawmills, D. Humphries, Perth. The Western Australian Trading Concerns Acts of 1912 and 1916, as was conceded in argument, leave no doubt of two facts: (1) that the respondents carry on trading operations which in point of fact could give rise to "industrial disputes" within the meaning of pl. xxxv. of sec. 51 of the Constitution, if the respondents were private employers, and (2) that the respondents are not private employers, but represent the State of Western Australia. The case in effect states that in fact, and within the meaning of the *Conciliation and Arbitration Act*, an industrial dispute exists to which these respondents are parties, unless upon the true interpretation of the Constitution no such dispute can be found to exist between Government trading concerns and their employees in such concerns. The questions for the determination of this Court are as follow:—(1) Has the Parliament of the Commonwealth power to make laws binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State? (2) As to each of the respondents named in the special case—Is the dispute which has been found to exist in fact between the claimant and the Minister for Trading Concerns (W.A.) an industrial dispute within the meaning of sec. 51 (xxxv.)?

The Commonwealth and the States of New South Wales, South Australia, Tasmania and Victoria have, by leave, intervened; so that all possible interests are fully represented. Queensland was given leave to intervene, but has not thought it necessary to do so. The question presented is of the highest importance to the people of Australia, grouped nationally or sectionally, and it has necessitated a survey, not merely of the Constitution itself, but also of many of the decisions of this Court on various points more or less closely related to the question we have directly to determine. The more the decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance

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with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognized principle of the common law underlying the expressed terms of the Constitution, but on implication drawn from what is called the principle of "necessity," that being itself referable to no more definite standard than the personal opinion of the Judge who declares it. The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the text of the Constitution and with distinct and clear declarations of law by the Privy Council.

It is therefore, in the circumstances, the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed. In doing this, we follow, not merely previous instances in this Court and other Courts in Australia, but also the precedent of the Privy Council in *Read* v. *Bishop of Lincoln* (1), where the Lord Chancellor, speaking for the Judicial Committee in relation to reviewing its own prior decisions, said: "Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law." The grounds upon which the Privy Council came to that conclusion we refer to, but need not repeat, adding, however, that as the Commonwealth and State Parliaments and Executives are themselves bound by the declarations of this Court as to their powers *inter se*, our responsibility is so much the greater to give the true effect to the relevant constitutional provisions. In doing this, to use the language of Lord *Macnaghten* in *Vacher & Sons Ltd.* v. *London Society of Compositors* (2), "a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the

(1) (1892) A.C., 644, at p. 655. (2) (1913) A.C., 107, at p. 118.

Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction."

It is proper, at the outset, to observe that this case does not involve any prerogative "in the sense of the word," to use the phrase employed by the Privy Council in *Theodore* v. *Duncan* (1), "in which it signifies the power of the Crown apart from statutory authority." Though much of the argument addressed to us on behalf of the States rested on the prerogative, this distinction was not observed, but it exists, and, so far as concerns prerogative in the sense indicated, it is unnecessary to consider it. In several recent cases the Judicial Committee has had the broader question under consideration, as in *Canadian Pacific Railway Co.* v. *Toronto Corporation* (2) and *Bonanza Creek Gold Mining Co.* v. *The King* (3), but in none of these was it found necessary to determine it. It is manifest that when such a question is involved in a decision, the nature of the prerogative, its relation to the Government concerned, and its connection with the power under which it is sought to be affected, may all have to be considered. In the *Bonanza Creek Case* (4) Lord *Haldane*, speaking for the Privy Council, after favouring an interpretation of the *British North America Act* by which certain rights and privileges of the Crown would be reserved from Canadian legislative power, proceeded to say :—"It is quite consistent with it" (that interpretation) "to hold that executive power is in many situations which arise under the statutory Constitution of Canada *conferred by implication* in the grant of legislative power, so that *where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected.*" In this case we have to consider the effect of certain statutory authority of the States, but in relation to pl. xxxv. only, and it is necessary to insert a word of caution. If in any future case concerning the prerogative in the broader sense, or arising under some other Commonwealth power—for instance, taxation,—the extent of that power should come under consideration so as to involve the effect of the principle stated in

(1) (1919) A.C., 696, at p. 706; 26 C.L.R., 276, at p. 282.
(2) (1911) A.C., 461.
(3) (1916) 1 A.C., 566.
(4) (1916) 1 A.C., at p. 587.

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the passage just quoted from the *Bonanza Creek Case*, and its application to the prerogative or to the legislative or executive power of the States in relation to the specific Commonwealth power concerned, the special nature of the power may have to be taken into account. That this must be so is patent from the circumstance that the legislative powers given to the Commonwealth Parliament are all prefaced with one general *express* limitation, namely, "subject to this Constitution," and consequently those words, which have to be applied *seriatim* to each placitum, require the Court to consider with respect to each separate placitum, over and beyond the general fundamental considerations applying to all the placita, whether there is anything in the Constitution which falls within the express limitation referred to in the governing words of sec. 51. That inquiry, however, must proceed consistently with the principles upon which we determine this case, for they apply generally to all powers contained in that section.

The chief contention on the part of the States is that what has been called the rule of *D'Emden* v. *Pedder* (1) justifies their immunity from Commonwealth control in respect of State trading. The rule referred to is in these terms (2): "When a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative." So far from that rule supporting the position taken up on behalf of the States, its language, strictly applied, is destructive of it. An authority has been set up by a State which is claimed to be an executive authority and which, if exempt from Commonwealth legislation, does fetter or interfere with free exercise of the legislative power of the Commonwealth under pl. xxxv. of sec. 51, unless that placitum is not as complete as its words in their natural meaning indicate, or, since sec. 107 applies to State concurrent powers equally with its exclusive powers, unless every Commonwealth legislative power, however complete in itself, is subject to the unrestricted operation of *every* State Act. It is said that the rule above stated

(1) 1 C.L.R., 91.

(2) 1 C.L.R., at p. 111.

must be read as reciprocal, because some of the reasoning in *D'Emden* v. *Pedder* (1) indicates a reciprocal invalidity of Commonwealth law where the State is concerned. It is somewhat difficult to extract such a statement from the judgment; it would be *obiter* if found. It is said, however, that the later cases regard *D'Emden* v. *Pedder* as supporting that view, and ultimately the doctrine of mutual non-interference finds its most distinct formulation in *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (2). There *Griffith* C.J., assuming the implication of non-interference to arise *primâ facie* from necessity *in all cases*, and then to be subject to *exclusion* where the necessity ended, proceeded to say: "It is manifest that, since the rule is founded upon the necessity of the implication, the implication is excluded if it appears upon consideration of the whole Constitution that the Commonwealth, or, conversely, the State, was intended to have power to do the act the validity of which is impeached." Then, how is that *intention* to be ascertained? The learned Chief Justice proceeds to ascertain it by reference to outside circumstances, not of law or constitutional practice, but of fact, such as the expectations and hopes of persons undefined that Crown lands then leased would become private property. It is an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution, and which, when started, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions. This method of interpretation cannot, we think, provide any secure foundation for Commonwealth or State action, and must inevitably lead—and in fact has already led—to divergencies and inconsistencies more and more pronounced as the decisions accumulate. Those who rely on American authorities for limiting pl. xxxv. in the way suggested, would find in the celebrated judgment of *Marshall* C.J. in *Gibbons*

(1) 1 C.L.R., 91.

(2) 20 C.L.R., at p. 163.

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v. *Ogden* (1) two passages militating strongly against their contention. One is at p. 189 in these words: "We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred." The other is at p. 196, where, speaking of the commerce power, the learned Chief Justice says: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." In *Keller* v. *The United States* (2) it is said of the State police power: "That power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation." Passing to one of the latest American decisions, *Virginia* v. *West Virginia* (3), the pre-eminence of federal authority within the ambit of the text of the Constitution is maintained with equal clearness and vigour.

But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution. While in secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot, for reasons we are about to state, be recognized as standards whereby to measure the respective rights of the Commonwealth and States under the Australian Constitution. For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of the residual powers, radically distinguish it from the American Constitution. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government. The combined effect of these features is that the expression "State" and the expression "Commonwealth" comprehend both the strictly legal conception of the King in right of a designated territory, and the

(1) 9 Wheat., 1.
(2) 213 U.S., 138, at p. 146.
(3) 246 U.S., 565, and particularly at pp. 596, 603.

people of that territory considered as a political organism. The indivisibility of the Crown will be presently considered in its bearing on the specific argument in this case. The general influence of the principle of responsible government in the Constitution may be more appropriately referred to now.

In the words of a distinguished lawyer and statesman, Lord *Haldane*, when a member of the House of Commons, delivered on the motion for leave to introduce the bill for the Act which we are considering:—"The difference between the Constitution which this bill proposes to set up and the Constitution of the United States is enormous and fundamental. This bill is permeated through and through with the spirit of the greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire—I mean the institution of responsible government, a government under which the Executive is directly responsible to—nay, is almost the creature of—the Legislature. This is not so in America, but it is so with all the Constitutions we have granted to our self-governing colonies. On this occasion we establish a Constitution modelled on our own model, pregnant with the same spirit, and permeated with the principle of responsible government. Therefore, what you have here is nothing akin to the Constitution of the United States except in its most superficial features." With these expressions we entirely agree. The recent case of *Commercial Cable Co.* v. *Government of Newfoundland* (1) is a landmark in the legal development of the Constitution. There the principle of responsible government was held by the Privy Council to control the question of the Crown's liability on an agreement made by the Government of Newfoundland. The elective Chamber having made a rule—*not a law*, be it observed—for regulating its own proceedings, requiring certain contracts to be approved by a resolution of the House, it was held that, in view of the constitutional practice of the Executive conforming, under the principle of responsible government, to the requirement of the elective Chamber, the rule was a restriction on the Governor's power under his commission to represent the Crown, and consequently on his power on behalf of the Crown to contract, which everyone transacting public business with him must

(1) (1916) 2 A.C., 610.

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be taken to know. The rule was in terms held to have become part of the Constitution of Newfoundland. How far that principle affects the question of executive power, necessarily correlative to legislative power, is indefinite, and does not now fall to be considered. But it is plain that, in view of the two features of common and indivisible sovereignty and responsible government, no more profound error could be made than to endeavour to find our way through our own Constitution by the borrowed light of the decisions, and sometimes the dicta, that American institutions and circumstances have drawn from the distinguished tribunals of that country. See also the observations of Sir *Henry Jenkyns* in *British Rule and Jurisdiction Beyond the Seas*, at p. 90. We therefore look to the judicial authorities which are part of our own development, which have grown up beside our political system, have guided it, have been influenced by it and are consistent with it, and which, so far as they existed in 1900, we must regard as in the contemplation of those who, whether in the Convention or in the Imperial Parliament, brought our Constitution into being, and which, so far as they are of later date, we are bound to look to as authoritative for us.

The settled rules of construction which we have to apply have been very distinctly enunciated by the highest tribunals of the Empire. To those we must conform ourselves; for, whatever finality the law gives to our decisions on questions like the present, it is as incumbent upon this Court in arriving at its conclusions to adhere to principles so established as it is admittedly incumbent upon the House of Lords or Privy Council in cases arising before those ultimately final tribunals.

What, then, are the settled rules of construction? The first, and "golden rule" or "universal rule" as it has been variously termed, has been settled in *Grey* v. *Pearson* (1) and the *Sussex Peerage Case* (2), in well-known passages which are quoted by Lord *Macnaghten* in *Vacher's Case* (3). Lord *Haldane* L.C., in the same case (4), made some observations very pertinent to the present occasion. His Lordship, after stating that speculation on the motives of the Legislature was a topic which Judges cannot profitably or properly

(1) 6 H.L.C., 61, at p. 106.
(2) 11 Cl. & Fin., 85, at p. 143.
(3) (1913) A.C., at pp. 117-118.
(4) (1913) A.C., at p. 113.

enter upon, said :—"Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions, and if they undertake the other province which belongs to those who, in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide. In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose, therefore, to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense." In the case of *Inland Revenue Commissioners* v. *Herbert* (1) Lord *Haldane* reaffirms the principle, with special reference to legislation of a novel kind. Other cases, of equal authority, could be cited, but it is not necessary.

With respect to the interpretation of a written Constitution, the Privy Council has in several cases laid down principles which should be observed by Courts of law, and these principles have been stated in the clearest terms. In *R.* v. *Burah* (2) Lord *Selborne*, in speaking of the case where a question arises as to whether any given legislation exceeds the power granted, says :—"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions." In *Attorney-General for Ontario* v.

(1) (1913) A.C., at p. 332.

(2) 3 A.C., at pp. 904-905.

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Attorney-General for Canada (1) Lord *Loreburn* L.C., for the Judicial Committee, said:—"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the *British North America Act*, *if the text is explicit the text is conclusive, alike in what it directs and what it forbids.* When the text is *ambiguous*, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act."

In two decisions the Judicial Committee has applied these principles to the interpretation of this Constitution, namely, *Webb* v. *Outrim* (2) and the *Colonial Sugar Refining Co.'s Case* (3). In the first mentioned case, quite independently of any observations as to the meaning of the word "unconstitutional," it is clear that their Lordships proceeded on the ordinary lines of statutory construction. In the second case the Judicial Committee considered the nature of the instrument itself in order to determine the more satisfactorily the depository of residual powers, and having arrived at the conclusion, as to which this Court has never faltered, that the Commonwealth is a government of enumerated or selected legislative powers, their Lordships examined the language of sec. 51 to ascertain from its words whether the suggested power could be deduced. The method of arriving at the conclusion is all that is relevant here. We therefore are bound to follow the course of judicial investigation which those two august tribunals of the Empire have marked out as required by law.

Before approaching, for this purpose, the consideration of the provisions of the Constitution itself, we should state explicitly that the doctrine of "implied prohibition" against the exercise of a power once ascertained in accordance with ordinary rules of construction, was definitely rejected by the Privy Council in *Webb* v. *Outrim* (2). Though subsequently reaffirmed by three members of this Court, it has as often been rejected by two other members of the Court, and has never been unreservedly accepted and applied. From its nature, it is incapable of consistent application, because

(1) (1912) A.C., 571, at p. 583. (2) (1907) A.C., 81; 4 C.L.R., 356.
(3) (1914) A.C., 237; 17 C.L.R., 644.

"necessity" in the sense employed—a political sense—must vary in relation to various powers and various States, and, indeed, various periods and circumstances. Not only is the judicial branch of the Government inappropriate to determine political necessities, but experience, both in Australia and America, evidenced by discordant decisions, has proved both the elusiveness and the inaccuracy of the doctrine as a legal standard. Its inaccuracy is perhaps the more thoroughly perceived when it is considered what the doctrine of "necessity" in a political sense means. It means the necessity of protection against the aggression of some outside and possibly hostile body. It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them. It may be taken into account by the parties when creating the powers, and they, by omission of suggested powers or by safeguards introduced by them into the compact, may delimit the powers created. But, once the parties have by the terms they employ defined the permitted limits, no Court has any right to narrow those limits by reason of any fear that the powers as actually circumscribed by the language naturally understood may be abused. This has been pointed out by the Privy Council on several occasions, including the case of the *Bank of Toronto* v. *Lambe* (1). The ordinary meaning of the terms employed in one place may be restricted by terms used elsewhere: that is pure legal construction. But, once their true meaning is so ascertained, they cannot be further limited by the fear of abuse. The non-granting of powers, the expressed qualifications of powers granted, the expressed retention of powers, are all to be taken into account by a Court. But the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts. When the people of Australia, to use the words of the Constitution itself, "united in a Federal Commonwealth," they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed

(1) 12 App. Cas., 575, at pp. 586-587.

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to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper. Therefore, the doctrine of political necessity, as means of interpretation, is indefensible on any ground. The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then *lucet ipsa per se*.

The Constitution was established by the Imperial Act 63 & 64 Vict. c. 12. The Act recited the agreement of the people of the various colonies, as they then were, "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established." "The Crown," as that recital recognizes, is one and indivisible throughout the Empire. Elementary as that statement appears, it is essential to recall it, because its truth and its force have been overlooked, not merely during the argument of this case, but also on previous occasions. Distinctions have been relied on between the "Imperial King," the "Commonwealth King" and the "State King." It has been said that the Commonwealth King has no power to bind the first and the last, and, reciprocally, the last cannot bind either of the others. The first step in the examination of the Constitution is to emphasize the primary legal axiom that the Crown is ubiquitous and indivisible in the King's dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law, or the statute law there binding the Crown (*Williams* v. *Howarth* (1); *Municipalities' Case* (2); *Theodore* v. *Duncan* (3), and *The Commonwealth* v. *Zachariassen and Blom* (4)). The Act 63 & 64 Vict. c. 12, establishing the Federal Constitution of Australia, being passed by the Imperial Parliament for the express purpose of regulating

(1) (1905) A.C., 551.
(2) 26 C.L.R., at 533.
(3) (1919) A.C., at p. 706; 26 C.L.R., at p. 282.
(4) 27 C.L.R., 552.

the royal exercise of legislative, executive and judicial power throughout Australia, is by its own inherent force binding on the Crown to the extent of its operation. It may be that even if sec. V. of the Act 63 & 64 Vict. c. 12 had not been enacted, the force of sec. 51 of the Constitution itself would have bound the Crown in right of a State so far as any law validly made under it purported to affect the Crown in that right; but, however that may be, it is clear to us that in presence of both sec. V. of the Act and sec. 51 of the Constitution that result must follow. The Commonwealth Constitution as it exists for the time being, dealing expressly with sovereign functions of the Crown in its relation to Commonwealth and to States, necessarily so far binds the Crown, and laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States—in other words, bind both Crown and subjects.

The grant of legislative power to the Commonwealth is, under the doctrine of *Hodge* v. *The Queen* (1) and within the prescribed limits of area and subject matter, the grant of an "authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow," a doctrine affirmed and applied in a remarkable degree in *Attorney-General for Canada* v. *Cain and Gilhula* (2). "The nature and principles of legislation" (to employ the words of Lord *Selborne* in *Burah's Case* (3)), the nature of dominion self-government and the decisions just cited entirely preclude, in our opinion, an *à priori* contention that the grant of legislative power to the Commonwealth Parliament as representing the will of the whole of the people of all the States of Australia should not bind within the geographical area of the Commonwealth and within the limits of the enumerated powers, ascertained by the ordinary process of construction, the States and their agencies as representing separate sections of the territory. These considerations establish that the extent to which the Crown, considered in relation to the Empire or to the Commonwealth or to the States, is bound by any law within the granted

(1) 9 App. Cas., 117, at p. 132. (2) (1906) A.C., 542, at p. 547.
(3) 3 A.C., at p. 904.

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authority of the Parliament, depends on the indication which the law gives of intention to bind the Crown. It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution.

Applying these principles to the present case, the matter stands thus:—Sec. 51 (xxxv.) is in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State, no exception being expressed as to industrial disputes in which States are concerned; but subject to any special provision to the contrary elsewhere in the Constitution. The respondents suggest only section 107 as containing by implication a provision to the contrary. The answer is that sec. 107 contains nothing which in any way either cuts down the meaning of the expression "industrial disputes" in sec. 51 (xxxv.) or exempts the Crown in right of a State, when party to an industrial dispute in fact, from the operation of Commonwealth legislation under sec. 51 (xxxv.). Sec. 107 continues the previously existing powers of every State Parliament to legislate with respect to (1) State exclusive powers and (2) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated. The effect of State legislation, though fully within the powers preserved by sec. 107, may in a given case depend on sec. 109. However valid and binding on the people of the State where no relevant Commonwealth legislation exists, the moment it encounters repugnant Commonwealth legislation operating on the same field the State legislation must give way. This is the true foundation of the doctrine stated in *D'Emden* v. *Pedder* (1) in the so-called rule quoted, which is after all only a paraphrase of sec. 109 of the Constitution. The supremacy thus established by express

(1) 1 C.L.R., 91.

words of the Constitution has been recognized by the Privy Council without express provision in the case of the Canadian Constitution (see, *e.g.*, *La Compagnie Hydraulique* v. *Continental Heat and Light Co.* (1)). The doctrine of "implied prohibition" finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning. The principle we apply to the Commonwealth we apply also to the States, leaving their respective acts of legislation full operation within their respective areas and subject matters, but, in case of conflict, giving to valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of sec. 109. That section, which says "When *a law* of a State is inconsistent with *a law* of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid," gives supremacy, not to any particular class of Commonwealth Acts but to *every* Commonwealth Act, over not merely State Acts passed under concurrent powers but *all* State Acts, though passed under an exclusive power, if any provisions of the two conflict; as they may—if they do not, then *cadit quæstio*.

We therefore hold that States, and persons natural or artificial representing States, when parties to industrial disputes in fact, are subject to Commonwealth legislation under pl. xxxv. of sec. 51 of the Constitution, if such legislation on its true construction applies to them.

That answers the first of the questions for our determination, which we have categorically set out.

2. *The Minister for Trading Concerns.*—The second question arises as to each respondent. Of the three State respondents mentioned, the only real one is the Minister for Trading Concerns; the other two may turn out to be mere names. The dispute to which the Minister is party, being manifestly and admittedly one which no one would deny was an "industrial dispute" if a private person were the employer, it follows from what has been said that it is, as regards the Minister, an industrial dispute within the meaning of sec. 51 (xxxv.).

(1) (1909) A.C., 194, at p. 198.

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3. *Previous Cases.*—It is proper that, in view of our revision of prior decisions, we should, for the guidance of Commonwealth and States and the better to evidence the meaning of this judgment, indicate the future authority or otherwise of some of the principal cases involved in our consideration of this matter.

D'Emden v. *Pedder* (1) was a case of conflict between Commonwealth law and State law. The Commonwealth law (*Audit Act* 1901) made provision as to how public moneys of the Commonwealth were to be paid out: written vouchers were required for all accounts paid (secs. 34 (6) and 46). The irresistible construction of the Act is that these vouchers, which the law requires for the protection of the Commonwealth Consolidated Revenue Fund, are to be under the sole control of the Commonwealth authorities. A State Act making it an offence to give such a voucher except on a condition imposed by the State Parliament, namely, a tax in aid of the State revenue, was, so far, manifestly inconsistent with the Commonwealth law. Sec. 109 of the Constitution applies to such a case, and establishes the invalidity to that extent of the State law. The decision rests on the supremacy created by sec. 109, and is sound. So far as any observation in that case can be regarded as favouring a reciprocal doctrine creating invalidity of Commonwealth legislation by reason of State Constitution or legislation, that observation must be considered as unwarranted by the Constitution, and overruled.

Deakin v. *Webb* and *Lyne* v. *Webb* (2) were cases in which it was held that the State *Income Tax Act* of Victoria did not validly extend to tax moneys which had been received as Commonwealth salary. The decision was rested on two grounds, both found in the American case of *Dobbins* v. *Erie County* (3). The first ground is that taxation of a person who is a Federal officer necessarily, *per se*, so far as it reaches money he received as salary, and although it so reaches that money by reason of provisions which apply generally to the whole community without discrimination, is an interference with the means employed by the Commonwealth for the performance of its constitutional functions. The second ground is that the State *Income Tax Act* was in conflict with the Commonwealth law fixing the

(1) 1 C.L.R., 91. (2) 1 C.L.R., 585.
(3) 16 Peters, 435.

officer's salary. The law, as laid down in those cases, was dissented from by the Privy Council in *Webb* v. *Outrim* (1), and was disapproved by two Justices as against three in the subsequent case of *Baxter* v. *Commissioners of Taxation (N.S.W.)* (2). Having regard to the principles we have stated, the first ground is erroneous. An act of the State Legislature discriminating against Commonwealth officers might well be held to have the necessary effect of conflicting with the provision made by the Commonwealth law for its officers relatively to the rest of the community. The second ground depends on the construction of the Commonwealth Act with which the State Act is alleged to conflict. If, on a proper construction of both Acts, they conflict, the State Act is, to that extent, invalid. But that is so by force of the express words of sec. 109, and not by reason of any implied prohibition. The final result is to be reached, not by a Commonwealth Act permitting the State Legislature to exercise a power it does not possess—except where the Constitution itself so provides, as in sec. 91 and sec. 114—but by valid Commonwealth legislation expressly or impliedly by marking limits conflicting with State legislation which is valid except for the operation of sec. 109. It is on this ground that the actual decision in *Chaplin* v. *Commissioner of Taxes (S.A.)* (3) is to be upheld as correct. *Baxter's Case* (2), of course, is in the same position as *Deakin* v. *Webb* (4).

In the *Railway Servants' Case* (5) the decision in *D'Emden* v. *Pedder* (6) was applied *e converso*. To reach that result the Court, relying upon a great number of American cases, held (1) that the rule as quoted from the earlier case could and should be applied conversely, and (2) that State railways were specially recognized by the Constitution as "State instrumentalities" for "governmental functions" and beyond the ambit of Commonwealth legislative power. It is apparent that if, as we have stated, the true basis of *D'Emden* v. *Pedder* (6) is the supremacy of Commonwealth law over State law where they meet on any field, there can be no possible reciprocity. Mutual supremacy is a contradiction of terms. Commonwealth legislation on an exclusive field, such as the Post Office, might

(1) (1907) A.C., 81; 4 C.L.R., 356.
(2) 4 C.L.R., 1087.
(3) 12 C.L.R., 375.
(4) 1 C.L.R., 585.
(5) 4 C.L.R., 488.
(6) 1 C.L.R., 91.

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conflict in incidental provisions with State legislation on a main exclusive field or as to incidental provisions; for instance, offences might be inconsistently dealt with, or, as recent examples, the prohibition of State referenda, and the closing of hotels on Commonwealth election day. The first ground is not legally sustainable. With respect to the second ground, the general proprietary right of the States in respect of their railways is undoubtedly recognized and specially protected; but the Constitution just as clearly confers upon the Commonwealth Parliament the express power stated in pl. xxxv., and does not proceed to except therefrom the States, as it does (subject to a qualification) in relation to banking (pl. xiii.) and insurance (pl. xiv.). But, as Lord *Dunedin* said for the Privy Council in *Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.* (1): "It has often been pointed out that the domain of legislation is quite a different matter from proprietary rights." It was so pointed out, for instance, in *Attorney-General for Canada* v. *Attorney-General for Ontario* (the Fisheries Case) (2) and in *Ontario Mining Co.* v. *Seybold* (3). Railways not only can be, but have been, and are at the present time, privately owned and operated. They do not stand in any different position, so far as regards the legislative authority of the Commonwealth under pl. xxxv., from that occupied by the trading concerns of Western Australia. "The text is explicit," to repeat Lord *Loreburn's* phrase. So the matter stands with respect to the *Railway Servants' Case* (4) in principle. But further, it is hopelessly opposed to the decision in the following volume of the *Commonwealth Law Reports—Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (the Steel Rails Case) (5). In that case it was unanimously decided by five Justices that, apart from sec. 114 of the Constitution, there was nothing to prevent the Commonwealth *Customs Act* operating so as to prevent the States importing steel rails for their railways free of duty. If the *Customs Act* applied at all, it could apply to prohibit the importation of steel rails or any other article required for State railways. A more drastic interference than that case sanctions can hardly

(1) (1919) A.C., 999, at p. 1005.
(2) (1898) A.C., 700.
(3) (1903) A.C., 73, at p. 82.
(4) 4 C.L.R., 488.
(5) 5 C.L.R., 818.

be imagined. It was an insistence on money being applied from the State Treasury for purposes of the Commonwealth Treasury as a condition of the State being allowed to import steel rails from abroad for use on its railways. Some difference of opinion occurred as to the nature of the duty, but none as to the primary validity of the interference. Difference of opinion also arose as to the reasons for permitting the primary interference. *Griffith* C.J. relied on (1) the doctrine of "necessity" and (2) that the State function protected must be exercised within the State. The first ground we have dealt with, and as to the second it is to be observed that the function sought to be protected was the function not of importing goods but of operating State railways. *Barton* J. thought that as the legislative power of the Commonwealth was exclusive, the State could not complain. But no distinction is made in the Constitution as to Commonwealth authority between its exclusive and its concurrent powers. That distinction affects the legislative power of the States, but not the effect of Commonwealth Acts once made. *O'Connor* J. rested on the necessity of maintaining the effective exercise of the Commonwealth power. But that applies to every power. *Isaacs* J. rested on his views in *R.* v. *Sutton* (the Wire Netting Case) (1). In that case *Isaacs* J. and *Higgins* J. held primarily that the Commonwealth commerce power as to foreign trade was complete, that the Crown was indivisible, but that its power varies in different localities, even in the same locality, and therefore the Crown, in right of New South Wales, was bound by what the Crown, in right of the Commonwealth, had enacted.

It is plain, therefore, that the utmost confusion and uncertainty exist as the decisions now stand. The *Railway Servants' Case* (2) is wholly irreconcilable with the *Steel Rails Case* (3). The latter is sustainable on the principles we have enunciated; the former is not. The *Railway Servants' Case*, consequently, cannot any longer be regarded as law. There are other cases in which the doctrine of implied prohibition is more or less called in aid to limit the otherwise plain import of legislative grants to the Commonwealth: it is sometimes difficult to say how far the decision is dependent upon

(1) 5 C.L.R., 789.

(2) 4 C.L.R., 488.

(3) 5 C.L.R., 818.

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such a doctrine, and therefore we hesitate to pronounce upon those cases, and leave them for further consideration, subject to the law as settled by this decision; but it is beyond any doubt that the doctrine of "implied prohibition" can no longer be permitted to sustain a contention, and, so far as any recorded decision rests upon it, that decision must be regarded as unsound.

We have anxiously endeavoured to remove the inconsistencies fast accumulating and obscuring the comparatively clear terms of the national compact of the Australian people; we have striven to fulfil the duty the Constitution places upon this Court of loyally permitting that great instrument of government to speak with its own voice, clear of any qualifications which the people of the Commonwealth or, at their request, the Imperial Parliament have not thought fit to express, and clear of any questions of expediency or political exigency which this Court is neither intended to consider nor equipped with the means of determining.

We therefore answer the two questions in the terms to be stated by the Chief Justice.

HIGGINS J. The Minister for Trading Concerns of Western Australia, and the State Implement and Engineering Works and the State Sawmills (both under his control), are three out of eight hundred and forty-four respondents to a plaint. They carry on operations in which members of the claimant organization are employed; and for profit, in competition with outside employers. The question is, substantially, are they amenable to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration, and should they be included in the finding of the High Court under sec. 21AA as being parties to the dispute. They in fact dispute—oppose—the claims in the plaint.

There stands at present a decision of the Full High Court, the unanimous decision of the three original Justices of the Court, to the effect that the railway servants of a State (New South Wales) are outside the jurisdiction of the Conciliation Court (*Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (1)). But the

(1) 4 C.L.R., at p. 538.

decision is now directly impugned by the claimant; and it is our duty to reconsider the subject, and to obey the Constitution and the Act rather than any decision of this Court, if the decision be shown to have been mistaken.

So far as the Act is concerned, there can be no doubt that the Federal Parliament intended State undertakings to be subject to the Court's powers of conciliation and arbitration. For, under sec. 4 of the Act, the words "industrial dispute" include "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." The position which this Court took in the *Railway Servants' Case* (1) was that the Parliament had by these words exceeded its powers under the Constitution.

Looking now at the Constitution, and interpreting it simply as if we were not under the constraint of any authority, the words used in sec. 51 are general and unrestricted as to pl. xxxv., and there is not the slightest indication that the power conferred on the Federal Parliament as to legislation on the subject of the placitum was to stop short at State industries or activities. The Parliament is there given power "subject to this Constitution . . . 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." Putting on one side any difficulty as to the precise force of the expression "industrial disputes" (for we have here definite industries carried on for profit and in competition), it is clear that the expression means the same thing whoever is the employer—person or firm or company or State. Fitters pass from an engineering firm to the Government railway shops; they do the same kind of work in both places; they claim the same rates in both places; the dispute is the same in both places; the union acts as to both places. It is quite as much to the interests of the community to preserve the continuity of operations in the railway shops as in the works of the firm. The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be

(1) 4 C.L.R., 488.

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expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable. Words limiting the power are not to be read into the statute if it can be construed without a limitation (per *Bowen* L.J. in *R.* v. *Liverpool Justices* (1); and see *King* v. *Burrell* (2)). The Parliament is given a power here to make any law which, as it thinks, may conduce to the peace, order and good government of Australia on the subject of pl. xxxv., "subject to this Constitution." There is no limitation to the power in the words of the placitum; and unless the limitation can be found elsewhere in the Constitution, it does not exist at all.

But there is even more reason in this case than usual for not treating this power as limited. For it is embedded in a series of other powers, as to some of which there is an express limitation with regard to State functions. In pl. xiii. the subject is "*Banking other than State banking.*" In pl. xiv. the subject is "*Insurance other than State insurance.*" Yet even in these cases any Commonwealth legislation may, by the following words of the placita, apply to State banking and State insurance if "extending beyond the limits of the State concerned." These latter words correspond with the words in pl. xxxv., and show the intention of the Constitution to be that the Federal Parliament may regulate banking or insurance or industrial disputes which extend beyond one State, even if the State is banker, or insurer or employer. Moreover, pl. ii. gives a power of "taxation" to the Commonwealth; but there is an express exception in sec. 114 of "taxation" on property of any kind belonging to a State. These exceptions would not be necessary if the power to legislate on the subjects stated did not include, but for the exception, a power to make legislation binding on the States. The express exception in one case prevents the implication of the exception in the other case: *Expressio unius exclusio alterius.* The British Parliament, in conferring the Constitution, has said that the Parliament of the Commonwealth may not apply its legislation to State

(1) 11 Q.B.D., 638, at p. 649. (2) 12 Ad. & El., 460, at p. 468.

banking or State insurance or (in taxation) to State property; but it has not said that the Parliament may not apply its legislation to industrial disputes between the State and its employees, provided that the dispute extends beyond the limits of any one State. It is only where the meaning is not clear that we are entitled to weigh probabilities or expediency. But even if the meaning were not clear, probabilities and expediency are in favour of the view that the Constitution, in its legislation with the object of securing continuity of operations in industries, would not forbid the extension of the same benefit to the States. Indeed, in a country such as Australia, where the State activities are more numerous than in most countries, and where such a large proportion of the population is in State Government employment, it is extremely unlikely that such a power as that contained in pl. xxxv. would be withheld in its operation from employment in the service of the State. Moreover, unless those employed in the State service are to be subject to regulation under pl. xxxv., as well as outside employees, the object of the placitum must often be defeated. I mentioned in the *Wheat Lumpers' Case* (1) the difficulty which arose as to the Victorian coal mines. The State had the principal coal mine undertaking, and the private employers, in competition with the State, could not give to their employees terms which they would have otherwise been willing to give, unless the State were bound to give similar terms. In the *Wheat Case* itself, some men, employed by the State, were carrying or moving bags of wheat to a stack; and other men, employed by shipowners and others, were carrying or moving the same bags to the ships. Under the doctrine hitherto adopted, the Court of Conciliation was able to conciliate or arbitrate as to one set of men, and unable to do so as to the other set. Contrasts as to the conditions of the respective sets of men were sure to arise, and did arise; but the Court could not prevent the unrest which the contrasts caused. If, as in Western Australia, the State carry on the butchering business, how can a dispute be effectively settled if the State enterprise be not bound? Counsel for the respondents here, and for the States intervening, say, however, that as to some of the subjects mentioned in sec. 51, other than banking and insurance,

(1) 26 C.L.R., 460.

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there is an exception implied that State activities are not to be touched; but they have failed to show any discrimen whereby this Court can distinguish the subjects as to which Parliament can apply its legislation to the States, and the subjects as to which it cannot. Certainly, if there were to be a discrimen between the subjects, as to the power to apply Commonwealth laws to State activities, it would be most extraordinary to find industrial disputes in the class of subjects as to which the States are not to have the benefit of the machinery devised by Parliament in aid of continuity in industrial operations.

On ordinary principles of interpretation, therefore, it would seem clear that it is for Parliament to say whether it would include the State industries or activities in its legislation under pl. xxxv. or not. Parliament consists of the King, Senate and House of Representatives (sec. 1 of Constitution); and if the King object to be bound by a bill he can refuse his assent thereto, or disallow the Act (sec. 59); and there is express provision for reserving a bill for his assent (sec. 60). I have already stated that the Federal Parliament has actually expressed its will that State industries should be subject to the powers of the Court of Conciliation.

But it has been urged that because the Constitution does not itself say that the Acts passed under sec. 51 (xxxv.) shall bind the Crown, there is no power for Parliament to bind the Crown. The same reasoning would apply, of course, to Acts passed under sec. 51 as to immigration and emigration (xxvii.); to bills of exchange and promissory notes (xvi.); to currency, coinage and legal tender (xii.); to patents and copyrights (xviii); to aliens (xix.); to bankruptcy and insolvency (xvii.), &c. Suppose that under the common law—or under express State legislation—the Crown has priority over all other creditors, it is argued that a Federal law as to bankruptcy, enacting that Crown debts are to be paid *pari passu* with other debts, would not bind the State! The true position I take to be that the rule as to the Crown's rights not being affected by an Act unless by express words or by necessary implication applies, not to a Constitution, but to the Acts made by the Parliament under the powers of the Constitution. The opening words of sec. 51 give to the Parliament power to make laws for the peace,

order and good government of the Commonwealth on the subjects mentioned in that section; the power is to be construed as co-extensive with the terms used, to their full purport (*Story on the Constitution*, secs. 424, 426); and if Parliament think that to apply its laws to the States would conduce to that object, the peace, order and good government of the Commonwealth, it can say so. Parliament has actually said so, as to the Commonwealth Court of Conciliation, by sec. 4 of the *Commonwealth Conciliation and Arbitration Act*. If the Parliament cannot bind the Crown by its Act—the "State Crown," so called—unless the Constitution say that it may bind it, then it would follow that no Act of the Victorian Parliament (for example) can bind the Crown, and the numerous Acts passed by the State Parliament which purport to bind the Crown are invalid. For the words of the Imperial Act conferring on the Victorian Parliament the power to legislate do not mention the Crown: "There shall be established in Victoria . . . one Legislative Council and one Legislative Assembly . . . and Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws in and for Victoria in all cases whatsoever" (18 & 19 Vict. c. 55, Schedule I., sec. 1.). According to *O'Connor* J. in *R.* v. *Sutton* (1), the doctrine that the King is not to be treated as bound unless named does not apply to a Constitution at all. The rule rests on the presumption that the King, the legislator, is making laws for his subjects and not for himself. It applies to a State Act as between the State Government and the people subject to the State laws; as to a Federal Act as between the Federal Government and the people subject to the Federal laws; it does not apply to a British law (the Constitution) as between the British Crown and the Crown in right of the State. By the Federal Constitution, the King in Parliament (the British Parliament) is, as it were, creating a new agent; and the principle of the rule is inapplicable in such a case, or in determining the powers of one agent in relation to another agent. In *Sutton's Case* wire-netting belonging to a State was removed from control of the Customs by executive order of a State Minister, and this Court held the removal to be illegal, although the

(1) 5 C.L.R., at pp. 805-807.

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Crown was not named in the *Customs Act*. So, too, in the very next case reported (*Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (1)) it was held that the State was bound to pay customs duty on steel rails which it owned and was importing for the purposes of the State railways.

Moreover, it is evident, as I have stated, from the form of the placita in sec. 51 of the Federal Constitution, that the Federal Parliament was to have power to bind the State Crown except so far as the power to bind it is expressly negatived, as in pl. XIII. and pl. XIV. The power to legislate is plenary, for the peace, order and good government of the Commonwealth, within the limits of the subjects mentioned in sec. 51. The Federal Parliament, "when acting within those limits . . . is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament" (*i.e.*, the Imperial Parliament) "itself." This was said by Lord *Selborne* and the Judicial Committee of the Privy Council as to an Act of the Council of the Governor-General of India (2); and—to say the least—no ground has been suggested for denying power of the same nature to the Parliament of Australia. The same principle was applied by the Judicial Committee to legislation of the Province of Ontario under the *British North America Act* 1867 (*Hodge* v. *The Queen* (3); and see *Powell* v. *Apollo Candle Co.* (4)) and other cases; it has not yet been suggested that the Imperial Parliament cannot bind the Crown: and it follows from these cases that if the Imperial Parliament can bind the Crown, the Federal Parliament can bind it within the limits of its allotted subjects.

In connection with this subject, much argument has been addressed to sec. V. of the *Constitution Act*—what we call the "covering sections" of the Constitution. It provides that that Act and all laws made under the Constitution "shall be binding on *the Courts, Judges, and people of every State* . . . notwithstanding anything in the laws of any State." I take sec. 51 of the Constitution as defining subject matters for legislation, and covering sec. V. as defining the persons who are to obey the legislation. Once we

(1) 5 C.L.R., 818.
(2) 3 App. Cas., at p. 904.
(3) 9 App. Cas., at p. 132.
(4) 10 App. Cas., 282.

find a valid Federal law—say, a law as to trade and commerce with other countries—the Courts and Judges and people of every State must obey it, whatever the State laws may say to the contrary. Organized bodies of persons, such as incorporated companies or municipal corporations or States, are not mentioned: for they always act through "people"—human beings; and these human beings have to obey the valid Federal Act, whatever the State law says. The State law is to have no efficacy for them as against the valid Federal law; they must obey the Federal law as if the State law did not exist, and whether they act for State or for corporation or company. Here, the Minister for Trading Concerns is, by the *Trading Concerns Act* (W.A.), constituted a corporation. The successive Ministers have the rights and duties conferred by the Act, and must obey the Act except so far as it is inconsistent with a valid Federal Act; but to the extent of the inconsistency the Minister has to obey the Federal Act, not the State Act (sec. 109 of Constitution).

The position seems so clear that my only difficulty lies in certain decisions of this Court, particularly the decision in the *Railway Servants' Case* (1). It was there held by the original Justices of this Court, in 1906, that the Federal Parliament could not, through the Court of Conciliation which it created, "interfere with" the railways of New South Wales. I pass by the dyslogistic connotation of the words "interfere with," in reference to a Federal power and a Federal Act which were designed to aid employers and employees alike, and to secure the continuity of operations; for I have sufficiently referred to this matter in other cases. In a previous case (*D'Emden* v. *Pedder* (2)) this Court had held that a Federal officer was not liable to a penalty under a Stamps Act of Tasmania for giving to the paying officer an unstamped receipt for salary, the receipt being given in pursuance of a duty imposed by the Commonwealth *Audit Act* 1901. But that was a case in which it was said that the State law was interfering with the Commonwealth activities, over which the Commonwealth Parliament had exclusive power (see p. 111). For the Commonwealth officer was employed in the Post Office department, the control of that department had been transferred

(1) 4 C.L.R., 488. (2) 1 C.L.R., 91.

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to the executive government of the Commonwealth, and under sec. 52 the Federal Parliament had the exclusive power to make laws with respect to matters relating to the department. The supremacy of the Federal legislation (see sec. 109) would be a sufficient ground for the decision, although that was not the only ground stated; and the principle as enunciated by *Griffith* C.J. was (1): "When a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative."

But in the *Railway Servants' Case* (2) the Full High Court went further. It said that the doctrine laid down in *D'Emden* v. *Pedder* (3) was equally applicable to interference on the part of the Commonwealth authority with a State authority. For this ruling the Court relied on a decision of the Supreme Court of the United States in *Collector* v. *Day* (4). There it was said (5):—"It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means" are "employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." Whatever opinion we may hold as to the sufficiency of this reasoning, as applied to the United States Constitution, is really immaterial: for we have to construe the Australian Constitution; and, as the Australian Constitution actually excludes such implication (sec. 109) by giving supremacy to a valid Federal law over State laws otherwise valid, I am free to say, and bound in duty to say, that, in my opinion, it is wrong to apply the principle of *Collector* v. *Day* to the construction of sec. 51 (xxxv.).

This, my conclusion, is of course quite consistent with the famous

(1) 1 C.L.R., at p. 111.
(2) 4 C.L.R., 488.
(3) 1 C.L.R., 91.
(4) 11 Wall., 113.
(5) 11 Wall., at p. 127.

case of *McCulloch* v. *Maryland* (1), where it was held that a State tax on a Federal bank was unconstitutional and invalid. There is no need for me to comment on that case here (see *Baxter* v. *Commissioners of Taxation (N.S.W.)* (2)).

Counsel for the respondents have properly pointed out to us the grave responsibility of overruling a decision of the Full High Court which has stood for thirteen years. No argument has been hitherto entertained by this Court against the *Railway Servants' Case* (3). There was an attempt to impugn it in the *Municipalities' Case* (4) last year, but the majority of the Court intimated that in the existing state of their minds it would be useless to attack the case, and counsel therefore refrained from argument. In the case of the *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (5) I find that I expressed doubts as to the doctrines adopted and the expressions used in *D'Emden* v. *Pedder* (6) and the subsequent cases, and as to the doctrine "that the railways are a State governmental function . . . in the same sense as the legislature, the executive and the judiciary are governmental functions." I said also (7): "I regard the doctrine as to the King not being bound save by express words, as being inapplicable as between the States and the Commonwealth, at all events in the exercise of an exclusive power of the Commonwealth; and I regard State laws and State powers in respect of the railways as subordinated to the Commonwealth powers with regard to trade and commerce, and with regard to customs taxation." In the recent *Wheat Lumpers' Case* (8) I treated the *Railway Servants' Case* as not binding on me for the purpose of my judgment, because that case had been based on a ground which was not applicable to the wheat lumping operations—the ground that at the time of the Constitution the construction and maintenance of railways were to be regarded as governmental functions (see also *Federated Engine-Drivers' Case* (9)). It cannot be said, therefore, that the doctrines of *D'Emden* v. *Pedder* and the *Railway Servants' Case*

(1) 4 Wheat., 316.
(2) 4 C.L.R., at p. 1164.
(3) 4 C.L.R., 488.
(4) 26 C.L.R., 508.
(5) 5 C.L.R., at p. 852.
(6) 1 C.L.R., 91.
(7) 5 C.L.R., at p. 853.
(8) 26 C.L.R., 460.
(9) 12 C.L.R., at pp. 459-460.

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have been accepted without protest. But still, respect for our late colleagues necessarily makes us hesitate; and I fully accept the view that it is fitting *stare decisis* unless the decision, to our minds, is manifestly wrong.

The crux of the *Railway Servants' Case* (1) is to be found, I think, at pp. 538-539. It had been held in *South Carolina* v. *United States* (2) that the State, having made the liquor trade an absolute monopoly, could not rely on the doctrine of *Collector* v. *Day* (3) as a defence against an action for excise duty on its liquor. The reason given was that the doctrine must be confined to "strictly governmental functions" of the State. The High Court said (*a*) that "the execution or administration of the laws of the State is in the strictest sense a governmental function"; (*b*) that "the construction and maintenance of roads and means of communication is one of the most important . . . functions of government"; and (*c*) that "in the year 1900 . . . the construction and maintenance of railways was in fact generally regarded as a governmental function in all the Australian colonies, and that they are expressly recognized as such" in the Constitution. But although where a State undertakes to lay and work railways, the construction and maintenance of railways become, of course, a governmental function in one sense, that function is not "strictly governmental" in the sense of being a function essential to all government, a function like the legislative, executive and judicial functions, without which a civilized State cannot be conceived, a function with which the State cannot part. Since the *South Carolina Case* the limit of the exemption has been even more clearly defined in *Flint* v. *Stone Tracy Co.* (4) and see *Vilas* v. *Manila* (5) —cases which had not occurred and, necessarily, were not before our learned colleagues in the *Railway Servants' Case*. In *Flint* v. *Stone Tracy Co.*—a case of an excise tax on corporations and joint stock companies with respect to the carrying on business—the *South Carolina Case* was followed, and was treated as deciding that "the exemption of State agencies and instrumentalities from

(1) 4 C.L.R., 488.
(2) 199 U.S., 437.
(3) 11 Wall., 113.
(4) 220 U.S., at pp. 157-158.
(5) 220 U.S., 345.

national taxation was limited to those of a strictly governmental character, and did not extend to those used by the State in carrying on business of a private character. . . . 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 right 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."

The position, therefore, is that even in the country of its origin, the United States, the doctrine of the exemption of State activities from Commonwealth legislation is held not to apply to commercial undertakings of the State or created by the State, but to apply to strictly governmental functions only, of the kind which had been stated. Nor can the reasons (*b*) and (*c*) of the High Court be applied to the engineering or the sawmilling business or to the business of running railways. But, personally, I desire not to be understood as regarding the case of *Collector* v. *Day* (1) as applying to our Constitution, even with the limitations which have been given to it by the subsequent cases. My view is that, on the true construction of sec. 51, the State activities which are not distinctly excluded from the Federal powers by the Constitution are subject to the Federal laws, to the full extent of their meaning; and that there is no exemption from Federal Acts unless and until they pass beyond the limits of the Federal powers on their true construction.

I am of opinion that the *Railway Servants' Case* (2) should be overruled, and that the question should be answered as proposed by the Chief Justice.

GAVAN DUFFY J. As I have the misfortune to differ from my brother Judges in this case, my opinion can have no effect on the ultimate decision of the Court, but I think it respectful to them that I should briefly state the reasons for my dissent.

The Government of Western Australia, through its agents, is carrying on certain industrial enterprises in which it employs members of the Amalgamated Society of Engineers. The Society,

(1) 11 Wall., 113. (2) 4 C.L.R., 488.

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by plaint No. 52 of 1919, sought the intervention of the Commonwealth Court of Conciliation and Arbitration in respect of an industrial dispute alleged to exist between it and a number of respondents, including the said agents. The Society assumed that the Government of Western Australia would not be willing to submit to the jurisdiction of the Court, and for the purpose of determining whether the State of Western Australia, in these circumstances, was amenable to the jurisdiction of the Court, made application to my brother *Higgins*, as a Justice of the High Court sitting in Chambers, for a decision on the question whether a dispute or any part thereof existed, or was threatened, impending or probable, as an industrial dispute extending beyond the limits of any one State, between the Society and each of the respondents. When the application came on for hearing, my brother *Higgins*, acting under the provisions of sec. 18 of the *Judiciary Act*, stated a case for the opinion of the Full Court in which he asked the following questions :—" (1) Is the Court of Conciliation and Arbitration competent to entertain for the purpose of conciliation, and (if necessary) arbitration, the claims in the plaint, or any and which of them, as between the claimant and the respondents mentioned in par. 4 or any or which of them ? (2) What is the proper decision for me as a Justice of the High Court to give under sec. 21AA as to the said respondents ? "

By sec. 4 of the *Commonwealth Conciliation and Arbitration Act* an industrial dispute extending beyond the limits of any one State includes a 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 by the Commonwealth or a State, and, as the only reason suggested in this case for holding that an industrial dispute extending beyond the limits of any one State does not exist between the Society and the agents of the Government of Western Australia is that the industry was carried on by or under the control of the State, the answer to question 2 must, of course, be that the alleged dispute did exist. My brother *Higgins* should have so answered it, and we should so answer it now, and refuse to answer question 1, which, in the circumstances, could not arise in determining the subject matter of the application. An application under sec. 21AA might perhaps have been made to determine question 1 as a

question of law arising in relation "to the dispute or to the proceeding," but no such application was in fact made to my brother *Higgins*. The substantial question which the parties were anxious to argue, and in fact did argue, before us was whether the Federal Parliament had jurisdiction under sec. 51 (xxxv.) to legislate with respect to disputes between a State carrying on industrial operations and its employees. The other members of the Court are unanimously of opinion that we ought to take the opportunity of deciding that question without too nicely considering the means by which it has been brought before us, and, in deference to their opinion, I shall proceed to consider it. We have been asked to approach the question as if it were free of authority, and, if necessary, to overrule any cases already decided by this Court. I shall therefore not rely on such cases as authorities, and, since my opinion on the constitutional question does not commend itself to the majority of the Court, it is unnecessary for me to indicate how far it is inconsistent with any decided case. The relevant portions of sec. 51 are 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."

For the Society it is said that the opening words of the section are so large that they enable Parliament to impose upon all persons, whether natural or artificial, and whether sovereign or subject, obedience to any laws with respect to a subject matter committed to Parliament by any of the succeeding sub-sections, or placita, as they have sometimes been called, so far as such laws are for the peace, order and good government of the Commonwealth, and that sub-section xxxv. includes every industrial dispute extending beyond the limits of any one State, and applies no less because one of the parties to the dispute happens to be a State, or, speaking more technically, the Crown operating in a State. Let us assume that the Crown operating in Western Australia is a party to a "dispute extending beyond the limits of any one State" within the meaning of the sub-section; we have still to consider whether the Federal Parliament can legislate with respect to the Crown so operating. It

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will be observed that the power conferred by sec. 51 is a power to legislate "subject to this Constitution," and if the section determines not only the subject matter of legislation, but also the persons who may be bound by it, it follows that no persons can be bound if to bind them would be inconsistent with any part of the Constitution. The existence of the State as a polity is as essential to the Constitution as the existence of the Commonwealth. The fundamental conception of the Federation as set out in the Constitution is that the people of Australia, who had theretofore existed in several distinct communities under distinct polities, should thenceforward unite for certain specific purposes in one Federal Commonwealth, but for all other purposes should remain precisely as they had been before Federation. In pursuance of that conception, secs. 106 and 107 preserve the Constitution of each State as it existed at the establishment of the Commonwealth, and every power of a State Parliament unless it is by the Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State. In this case it is not disputed that the industrial operations conducted by the Crown in Western Australia are within the Constitution of that State. They are authorized under its legislative power and conducted under its executive power, and therefore free from the authority conferred upon the Federal Parliament by sec. 51. But in my opinion sec. 51 does not determine the persons who may be bound by the legislation which it authorizes. The words "for the peace, order, and good government" have constantly been adopted in the Constitutions of self-governing British colonies where the power to legislate is general, and where they are used to describe the content of that power. It is not easy to give them a meaning in sec. 51, which deals with enumerated powers; it is enough to say that they seem to delimit the subject matter of legislation, not to enumerate the persons whom the legislation shall bind. It was argued for the respondents that if authority to bind the Crown operating in Western Australia was not conferred by sec. 51 it was to be found in sec. V. of the Constitution Act, which provides that the Act (and consequently the Constitution, which is part of the Act) and all laws made by the Parliament of the Commonwealth under the Constitution shall be 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. If this section is to be taken as enumerating those whom the Federal Parliament has power to bind, it is important to notice that it does not in terms include the Crown, though the Crown was a party to the agreement recited in the preamble of the Constitution Act, and when that Act was submitted in bill form for the consideration of the law officers of the Crown in London, it provided that the Act should bind the Crown, and we know as an historical fact that the provision was deleted at their instance. But in my opinion the section cannot be taken as an enumeration of those whom the Federal Parliament has power to bind; it cannot be pretended that the Parliament has not power to control the Crown exercising the ordinary executive power of the Commonwealth, nor that an alien, coming temporarily within the Commonwealth, would remain wholly unaffected by the Constitution or by any of the laws made under it, though the section is silent on these matters. It is beyond doubt that the Imperial Parliament had power to authorize Federal legislation with respect to any operation of the Crown within a State, and where it has done so in express words, no difficulty arises, but, where there are no such words, what is the test of Federal jurisdiction? In no case, so far as I am aware, does the Constitution of a British colony enumerate those who shall be subject to its legislative power, but it is a commonplace in constitutional law that underlying the grant of legislative power in the Commonwealth of Australia, as in every other self-governing British colony, is the hypostasis that such power binds only the Crown operating within that colony, British subjects who are citizens of the colony, and, to a modified extent, others with respect to their rights within the colony. In *Macleod* v. *Attorney-General for New South Wales* (1), a case which is commonly cited by writers on constitutional law as establishing the proposition that a colonial Legislature has no power to make laws having extra-territorial validity and operation, the Privy Council expressly recognized the limitation which I have just stated. In delivering the judgment of the Court, Lord *Halsbury* L.C. said (2):— "Their jurisdiction is confined within their own territories, and the

(1) (1891) A.C., 455. (2) (1891) A.C., at p. 458.

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maxim which has been more than once quoted, *Extra territorium jus dicenti impune non paretur*, would be applicable to such a case. Lord *Wensleydale*, when Baron *Parke*, advising the House of Lords in *Jefferys* v. *Boosey* (1), expresses the same proposition in very terse language. He says (2):—'The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.'"

Wherever representative government is established in a British colony the King legislates with the advice of the representatives of the people. His laws bind his subjects within the colony because they are his subjects, they bind himself as King under the Constitution of the colony so far as he chooses to make himself subject to them, and they bind strangers with respect to their rights within the colony because such persons must to that extent be deemed to have submitted themselves to his jurisdiction. It is recognized that it would be intolerable that a stranger should be at liberty to claim the hospitality and protection of a community without subjecting himself to such general regulations as may be necessary for the peace, order, and good government of the community. For the purposes of the present case it is unnecessary to consider what portion of the municipal law is binding on an alien, or how far the Crown, operating under the Constitution of one State, can be amenable to the laws of another State. I shall assume that the operations now conducted by the Crown in Western Australia would be subject to the laws of South Australia with respect to industrial undertakings if such operations extended into that State, because in such circumstances the Crown could not take with it its character of maker and administrator of the law, and must be deemed to have submitted itself to the laws of South Australia, as if it were a private person. Why should not these operations be subject to the laws of the Commonwealth within the Commonwealth territory? As we have

(1) 4 H.L.C., 815.

(2) 4 H.L.C., at p. 926.

seen, the legislative power of the Commonwealth under sec. 51, being subject to the Constitution, cannot affect the State in the performance of functions allotted to it by the Constitution. But apart from this limitation it is quite clear that though the territory of the State is the territory of the Commonwealth for the purpose of executing the functions committed to it by the Constitution, for every other purpose it is the territory of the State and of the State alone. In performing the functions allotted to it by the Constitution, the Crown operating in the State cannot in any way be said to abandon its legislative and administrative powers or to submit itself to the jurisdiction of the Commonwealth Parliament.

It follows from what I have said, that in my opinion the Federal Parliament has not jurisdiction under sec. 51 (xxxv.) to legislate with respect to disputes between a State carrying on industrial operations as in this case, and its employees.

Questions as amended answered: (1) *Yes*; (2) *Yes*.

Solicitor for the claimant, *H. H. Hoare*.

Solicitor for the Minister for Trading Concerns, Western Australia, *F. L. Stow*, Crown Solicitor for Western Australia.

Solicitors for the interveners, *Gordon H. Castle*, Crown Solicitor for the Commonwealth; *J. V. Tillett*, Crown Solicitor for New South Wales; *E. J. D. Guinness*, Crown Solicitor for Victoria; *F. W. Richards*, Crown Solicitor for South Australia; *A. Banks-Smith*, Crown Solicitor for Tasmania.

B. L.