[HIGH COURT OF AUSTRALIA.]

THE MERCHANT SERVICE GUILD OF AUSTRALASIA . . . . . } CLAIMANT;

AND

THE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS } RESPONDENTS.

[No. 2.]

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SYDNEY, *Aug.* 3, 4, 5, 6, 9.

MELBOURNE, *Aug.* 31.

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

Industrial Arbitration—Commonwealth Court of Conciliation and Arbitration—Jurisdiction—Powers of Commonwealth Parliament—"Industrial dispute"—Operations carried on by State Government—Statutory authority—Trading concern—Jurisdiction of President of Commonwealth Court of Conciliation and Arbitration—The Constitution (63 & 64 *Vict.* c. 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1918 (*No.* 13 *of* 1904—*No.* 39 *of* 1918), *sec.* 4—*Sydney Harbour Trust Act* 1900 (*N.S.W.*) (*No.* 1 *of* 1901)—*Navigation Act* 1901 (*N.S.W.*) (*No.* 60 *of* 1901)—*Melbourne Harbour Trust Act* 1915 (Vict.) (*No.* 2697).

Held, following *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation*, 26 C.L.R., 508, that in order to constitute an "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution and of the *Commonwealth Conciliation and Arbitration Act*, it is not necessary that the undertaking in which the parties to the dispute are engaged should be an industry, a trade, or a business, carried on for profit.

Per Higgins J.:—The definitions in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* of "industrial dispute" and "industry" are valid under sec. 51 (xxxv.) of the Constitution, and apply to any State activities in which there is a dispute between the State as employer and its employees as to their reciprocal rights and duties. If there be any restriction upon the power conferred by sec. 51 (xxxv.) in respect of State activities the restriction should

be limited to strictly governmental functions such as the legislative, executive and judicial functions.

Held, (1) that the Sydney Harbour Trust and the Melbourne Harbour Trust Commissioners, the operations of which bodies are carried on under statutes of New South Wales and Victoria respectively, are essentially industrial concerns, and are therefore justiciable under sec. 51 (xxxv.) of the Constitution and under the *Commonwealth Conciliation and Arbitration Act*; and (2) that, in respect of a dispute between an organization consisting of masters, officers and engineers of ships and their employers, the Colonial Treasurer, the Minister of Public Works and the Chief Secretary of New South Wales, whose Departments carry on, but not under the authority of any statute, operations which are industrial in their nature, and for the purposes of those operations own and use ships upon which members of the organization are employed, those employers are justiciable under sec. 51 (xxxv.) of the Constitution and under the *Commonwealth Conciliation and Arbitration Act*.

Amalgamated Society of Engineers v. *Adelaide Steamship Co. Ltd.*, *ante*, 129, applied.

CASE STATED.

On the hearing of an application by the Merchant Service Guild of Australasia under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, to which the Commonwealth Steamship Owners' Association and a large number of others were respondents, *Higgins* J. stated a case for the Full Court of the High Court which was substantially as follows :—

1. An alleged industrial dispute has been referred to the Commonwealth Court of Conciliation and Arbitration on 17th April 1920 under sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1918.

2. 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 alleged 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 claimant organization and the respondents as to certain matters (these matters were set out in a claim made by the organization and related to wages, hours and conditions of labour of members of the claimant organization).

3. Objection has been taken by the respondents hereinafter mentioned to being included in the decision as being parties to the dispute.

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4. I am prepared to find and decide on the evidence that the said respondents are parties to the dispute in fact subject to the answers to the questions hereinafter asked. There are members of the claimant organization on all the vessels referred to hereinafter.

5. The members of the claimant Guild are masters, officers and engineers employed by the several respondents on steam vessels.

6. The Sydney Harbour Trust, one of the respondents, is created and regulated by the *Sydney Harbour Trust Act* 1900 (N.S.W.).

7. The functions of the Sydney Harbour Trust and the mode of appointing the employees are as appearing in the said Act. The functions are not carried out for profit or in competition with private enterprise.

8. The Melbourne Harbour Trust Commissioners, another respondent, constitute a body corporate created and regulated by the *Melbourne Harbour Trust Act* 1915 (Vict.).

9. The functions of the Melbourne Harbour Trust Commissioners and the mode of appointing employees are as appearing in the said Act. Except in the case of a steam chain ferry crossing the river Yarra at Spencer Street and maintained in pursuance of sec. 48 of the said Act the functions are not carried out for profit or in competition with private enterprise. At the ferry a marine engine-driver is employed and a small charge is made, but there is no competition with other ferries.

10. The Colonial Treasurer for the State of New South Wales, another respondent, is a Minister of the Crown of the said State who controls and administers the Department of Navigation under the *Navigation Act* 1901 (N.S.W.). In the Department there are two pilot steamers, a pleasure-launch for Ministers, officials, &c., a launch used as a tender to one of the pilot steamers, two launches used for official business at Newcastle, a steam tug that sounds the Clarence River and assists shipping.

11. The pleasure-launch sometimes lands or loads mails from or into ships for payment under arrangement with the Commonwealth.

12. The steam tug at the Clarence River sometimes for hire tows vessels over the bar and up the river.

13. The employees of the Department of Navigation are under the *Public Service Act* 1902 (N.S.W.).

14. The Minister of Public Works for the State of New South Wales, another respondent, is a Minister of the Crown for the said State who controls and administers the Department of Public Works. In the Department there are many dredges dredging the harbours, bays, rivers, bars and anchorages, but not for hire or in any competition with others. Under the Department there is a ferry service between Newcastle and Stockton. The ferry is free. Under the Department there are vessels which convey workmen and material to and from the Government dockyard in Port Jackson. There is no payment made for the carriage but the dockyard is a trading concern. There is no competition with others as to conveyance. Under the same Department there are State metal quarries where business is carried on for profit in competition with other metal quarries. All the employees in the Public Works Department are under the *Public Service Act* 1902 (N.S.W.).

15. The Chief Secretary for the State of New South Wales, another respondent, is a Minister of the Crown for the said State. In his Department is a State trawling industry, established by the Government of the State for the purpose of discovering in waters adjacent any trawling grounds and of developing them, and of obtaining marketable fish, and of selling the fish to the public as well as to Government and public institutions. The employees are under the *Public Service Act* 1902 (N.S.W.). The only competition is in the retailing of the fish to the public.

I state this case for the consideration of the Full Court, submitting these questions on the facts hereinbefore appearing :—

(1) Is the Commonwealth Court of Conciliation and Arbitration competent to entertain for the purpose of conciliation and, if necessary, arbitration the claims as to the particular matters, or any and which of them, as between the claimant and the several respondents : (*a*) the Sydney Harbour Trust, (*b*) the Melbourne Harbour Trust Commissioners, (*c*) the Colonial Treasurer for New South Wales, (*d*) the Minister of Public Works for New South Wales, (*e*) the Chief Secretary for New South Wales ?

(2) Is it proper for me as a Justice of the High Court to include the said respondents respectively, or any and which of them,

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in my decision as being parties to the dispute as to any and which of the operations mentioned in this case?

At the hearing the first question was withdrawn.

This case was argued immediately after the conclusion of the arguments in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1).

Bavin and *Robert Menzies* (with them *Hooton*), for the claimant. Assuming all the bodies mentioned in the case to be carrying on functions which are strictly governmental, no exemption of them from the operations of sec. 51 (xxxv.) can be found in the Constitution. The relevant inquiry for the purposes of pl. xxxv. is not as to the relation of the employer to the outside world but as to his relation to his employees. Any work which, if done for a private employer, would be industrial is industrial if done for a State Government. If the exemption in this case is based on the alleged exemption of State instrumentalities, the answer is that given in *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (2), namely, that the power conferred by pl. xxxv. cannot be effectively exercised without controlling State instrumentalities. The only other basis for the exemption is that the State cannot be a party to an industrial dispute either because of something in the nature of the work or because of something in the character or position of the State itself. So far as the nature of the work is concerned, there is nothing in this case which differentiates it from work which, if done by a private employer, would undoubtedly be industrial. That is sufficient to bring a dispute in connection with that work between the Government and its employees within the term "industrial dispute" in pl. xxxv. The purpose or motive with which the work is undertaken is immaterial in determining whether a dispute is an "industrial dispute." The fact that the undertaking is governmental does not remove the dispute from that category, and it does not matter whether it is or is not carried on under the authority of an Act of Parliament. All that is to be looked at is what is it that the Government for the peace, order and good government of the State chooses to do. It is irrelevant whether

(1) *Ante*, 129.

(2) 5 C.L.R., 818, at p. 833.

what is done is done in pursuance of an Act, or for profit or under circumstances which amount to trading. On the authority of *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1) all the work done in this case is industrial. Any argument based on the word "industrial" which would exclude the Government of a State from pl. XXXV. would also exclude a municipality, because the decision in that case was that a municipality is a governing authority which carries out its functions for the welfare of the people over whom it has jurisdiction. That decision negatives the view that the character of the employer can prevent employment from being industrial. There is nothing in *Australian Workers' Union* v. *Adelaide Milling Co.* (2) to indicate that work which if done for a private individual would be industrial ceases to be industrial if done for a Government. For the purpose of deciding whether there is an industrial dispute, there is nothing to differentiate the bodies concerned in this case from municipalities.

Leverrier K.C. (with him *H. E. Manning*), for the Commonwealth, intervening. The powers which are left to the States after taking away the powers granted to the Commonwealth by the Constitution cannot be used for the purpose of cutting down the powers so granted. The statement that the executive powers of the States are to remain unimpaired must be read in a limited sense. Where there is express legislation by a State under which a certain individual is to perform certain duties, he is not performing an executive act when he performs those duties.

[ISAACS J. referred to *Anson on the Constitution*, 3rd ed., vol. II., part I., p. 2.]

Seeing that the law is carried into effect is executive, and an act is executive only when it is done on behalf of the Government not under the authority of any statute. Where by a statute the Executive has been divested of control, acts done in pursuance of the statute cease to be executive: the acts of persons over whom the Executive has ceased to have control are no longer executive acts. Assuming then that the Court holds that there is an exemption from pl. XXXV.

(1) 26 C.L.R., 508.

(2) 26 C.L.R., 460.

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of State Government agencies, that reasoning puts outside the category of Government agencies the Sydney Harbour Trust and the Melbourne Harbour Trust Commissioners and the Department of Navigation. The term " industrial disputes " is capable of different meanings according to the context. In the absence of any context to cut down its meaning the term should be given the widest meaning which it was capable of bearing at the time the Constitution was enacted. The operations carried on by the various bodies in this case involve the same relations between them and their employees as existed in the *Municipalities' Case* (1), and on the authority of that case a dispute between those bodies and their employees is an " industrial dispute " within pl. xxxv.

Latham, for the Melbourne Harbour Trust Commissioners. The Constitution embodies a rule of non-interference by the States with the means chosen by the Commonwealth, including the Parliament of the Commonwealth, for governing the Commonwealth in discharge of its powers. That rule is reciprocal, so that the Commonwealth Parliament has no power by legislation to bind the State Executives or the instrumentalities of the States, in the sense that it cannot bind an agency which discharges functions for a State. In the alternative the Commonwealth Parliament has no power to interfere with an agency of a State which discharges functions which are essentially governmental. The Commissioners are exempt under either of these alternatives. The Constitution looks to the preservation of the States in the administrative as well as in the legislative domain, and the Commonwealth cannot restrain the freedom of the States by exercising any control over the means used by the States for exerting their powers. In order to find out the powers of a State the Constitution of that State and the Federal Constitution must both be looked at. The State is found to have legislative, executive and judicial powers; and the present difficulty is to find what are the executive powers in relation to the doctrine of non-interference. The Commonwealth was, by the Federal Constitution, created a legal and political entity, and at the same time new States were brought into existence. The English theory of sovereignty

(1) 26 C.L.R., 508.

involves the assumption of one sovereign one territory, and before Federation the several colonies of Australia might, subject to the supremacy of the King in the Imperial Parliament and to certain express limitations, be properly called sovereign States. But since Federation the position is that the Commonwealth and the States exercise such sovereignty as they have in a single territory. That being so, there is no system of English jurisprudence which applies to the relation between them, so that the Court is faced with the position that there are the Commonwealth and the several States each equipped with full organs of government, legislative, executive and judicial; none of them has the full unlimited powers of the King in the Imperial Parliament; their relations and powers depend on written instruments; and the source of their powers is identical, the Imperial Parliament. The problem is how can the Commonwealth and the States live together in the same area? In considering the Federal Constitution, in order to arrive at the solution of that problem, the Court must make the Constitution work if possible. Some consideration must be had to consequences. If in construing the Constitution two constructions are open, one of which will lead to chaos, that which will make the Constitution work should be adopted. The question which arises is primarily, if not entirely, a question of the legislative powers of the Commonwealth. The Parliament of the Commonwealth is one of enumerated powers, and those powers are limited in three respects—as to area, as to subject matter and as to persons. The first limit is found in sec. 51 which is extended as to certain matters by sec. V. of the Act. As to subject matter the limitation is found in the enumeration of the subjects upon which the Commonwealth Parliament can legislate, *e.g.*, in secs. 51, 52, 99, 100. The limit as to persons is the critical one in this case. Laws being rules of conduct which affect persons, *i.e.*, persons in the eye of the law, by imposing duties or conferring rights upon them, sec. V. of the Act expresses affirmatively the extent of the legislative power as to persons. The word "people" in that section means merely persons, including corporations. It is the natural word to use to mean subjects. It does not mean the same thing as in America, where the sovereignty resides in the people in whom are the reserved powers. In sec. V. the word

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is distributive and not collective; it excludes the Crown. Sec. V. does not mention the States or the Governments of the States, although certain sections of the Constitution—which is part of the Act—do mention them (see secs. 114, 115, 119, 120). The essence of law in any system under the British Crown and in any other than a confederate system is that it must operate upon individuals, and that is the result which sec. V. is intended to bring about by using the word "people." The view that "people" includes the States would have the effect that the laws of the Commonwealth Parliament would bind the executive Governments of the States, though the Parliament of the Commonwealth did not wish them to do so. On the whole frame and structure of the Constitution and the covering Act, there is embodied in the Constitution the principle recognized in *D'Emden* v. *Pedder* (1) and the *Railway Servants' Case* (2). It is a quality of a federal system of government that it is a dual system and it is impossible to decide questions of conflict of powers upon one principle only (see *Attorney-General for Australia* v. *Colonial Sugar Refining Co.* (3)). It is impossible for a statute of the Parliament of Great Britain to be invalid, but that is not so under the Constitution. The invalidity of legislation in Australia may be *ab initio*, arising from an absence of power, or may arise *ex post facto*, owing to a conflict with a superior power. Sec. 109 is confined to legislation and to laws otherwise valid, and has nothing to do with the absence of power. It therefore cannot be used to solve any question of the validity of a law as to which either Parliament has exclusive power. In concept there are three spheres of powers—a Commonwealth exclusive sphere, a State exclusive sphere and a concurrent sphere. But the divisions of facts do not correspond with the divisions of concept. For instance, a law as to taxation might also be a law dealing with education, the power of taxation being concurrent and the power as to education being exclusively in the States. If the Commonwealth passed a law taxing school teachers in State schools according to the qualifications of their pupils as determined by the Act, such a law could not be dealt with by saying that it was not a law as to taxation, as was done in *R.* v. *Barger* (4);

(1) 1 C.L.R., 91.
(2) 4 C.L.R., 488.
(3) (1914) A.C., 237, at p. 252.
(4) 6 C.L.R., 41.

but if the power of the Commonwealth Parliament is limited only as to subject matter and territorial area, the effect of such an Act would be to render nugatory any State law laying down a standard of education different from that laid down in the Federal Act—although the State Act would be a valid law. The result of interpreting sec. 51 as empowering the Commonwealth Parliament to legislate subject to the limits only of subject matter and territorial area would be to give the Commonwealth power to destroy the State. But a reasonable construction of the Constitution is open which will avoid that result. Sec. 106 is intended to make it clear that the powers of the States are to continue. The words "subject to this Constitution" add nothing to the section, which would have the same meaning if they were omitted. Sec. 107 is also a definite assertion of the continuance of the State powers unless they have been exclusively vested in the Commonwealth or withdrawn from the States. That section is more than a reservation of powers or a re-grant of powers: it is an assertion that although the Commonwealth is supreme in its sphere the States are just as supreme in their spheres. The section applies only to parliamentary powers, but that involves the power to carry the laws into effect, and therefore the section has a real bearing on the executive power of the States. If the only limitation in sec. 51 is as to subject matter, then the result is that the exclusive powers of the States are placed in practically the same position as the concurrent powers. Therefore, having regard to the Federal nature of the Constitution, and to the omission from sec. V. of any reference to the States or to the executive Governments of the States, the conclusion is that it was the intention of the Constitution as deduced from its terms that the control of the State agencies, that is, of the means by which the States discharge their functions, is left to the States. The continued existence of the Federation requires that the powers of the Commonwealth should be subject to the implied limitation that they cannot be so used as to interfere with the exclusive control by the State of its own agencies. That view involves that the decision in *D'Emden* v. *Pedder* (1) was right in the principle laid down, but was wrong in applying that principle to the facts of the case. No distinction can

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

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be drawn between functions which are said to be strictly governmental and those which are not. The description of the strictly governmental functions as being the "primary and inalienable functions of a constitutional government" can only have a political application. None of the functions of government are inalienable: they may all be alienated and distributed amongst officers of the State. The description of the executive power in sec. 61 as extending in the case of the Commonwealth to the "execution and maintenance of this Constitution, and of the laws of the Commonwealth" describes also the executive power of the States. If that is so, it is difficult to distinguish between the primary and the other functions of government. The Melbourne Harbour Trust Commissioners exercise, by the authority of the State, powers which are prerogative rights of the Crown in relation to ports and harbours. They occupy the same position as the Board of Water Supply and Sewerage did in *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (1). It is not possible for an industrial dispute to exist between the Commissioners and their employees. If employees are already under the control of the general public of a State, there is not so much reason for introducing another control as where they are under the control of a local public only as in the case of a municipality. The decision in the *Municipalities' Case* (2) is negative; so that it is still open to draw a distinction between work which is done for the Government and work which is industrial in the sense used in pl. xxxv. It is not sufficient to look merely at what is done by the employees in order to find the criterion for determining what is an industrial dispute, but it is necessary to look at the whole concrete set of circumstances of the operations.

Flannery K.C. (with him *Evatt*), for the Sydney Harbour Trust, and the Colonial Treasurer and the Minister of Public Works and the Chief Secretary of New South Wales. Assuming the State Crown can in some cases be bound by pl. xxxv., on the proper construction of that placitum it does not apply to any of the New South Wales respondents. The matters involved are in each case executive acts of the Crown, and are of such a nature that it cannot be said that

(1) 12 C.L.R., 398, at p. 414. (2) 26 C.L.R., 508.

an "industrial dispute" can arise in regard to them. The placitum is directed to appointing a tribunal for settling disputes between persons in the relation of employer and employee who had no other means of settling their disputes, and was not intended to apply to the Governments of the States and persons employed by them, those persons being paid at the will of the Parliaments and being under the control of the Executives. In 1900 it was not within the concept of the term "industrial dispute" that it could exist between a Government and its servants. The remedy is inefficient for its purpose in the case of a State Government. Its effect is in such a case only moral, for Parliament cannot be compelled to pay higher wages than it chooses. The word "industrial" must be looked at from the point of view of the employer as well as from that of the employee in order to determine its meaning. The main operation which is being carried on must be considered. The fact that incidentally to a main operation something is done which would ordinarily be described as industrial does not make that which is done industrial if the main operation is not itself industrial.

Robert Menzies, in reply.

[ISAACS J. referred to *Fox* v. *Government of Newfoundland* (1).]

Cur. adv. vult.

Aug. 31.

The following written judgments were delivered :—

KNOX C.J., ISAACS, RICH AND STARKE JJ. In this case the Court has to apply the principles of law enunciated in the *Western Australian Trading Concerns Case* (2), just decided. In consonance with that decision, we have to examine the position of each respondent in order simply to see whether the dispute which exists in fact is, in its nature, "an industrial dispute" within the meaning of pl. XXXV. of sec. 51 of the Constitution. Up to a certain point that matter is settled. Though the respondents challenged the accuracy of the decision in the *Municipalities' Case* (3), that decision, like every other decision on the constitutional powers of the Commonwealth, must stand unless and until it is

(1) (1898) A.C., 667.

(2) *Ante*, 129.

(3) 26 C.L.R., 508.

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overruled by the requisite statutory majority. That case determined two points. First, it was held by five Justices to two that municipal corporations established under State laws are not, with regard to the making, maintenance, control or lighting of public streets, "instrumentalities"—as that term has been sometimes used—of State Government, and, therefore, are not in respect of such operations exempt from Commonwealth legislation under sec. 51 (xxxv.) of the Constitution—that is, even assuming the Government itself doing such work would be exempt. That part of the decision was arrived at by five of the present members of this Court, four being present in this case; but, in view of the decision in the *Western Australian Trading Concerns Case* (1), is now immaterial. The second point determined in that case was that, in order to constitute an "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution and within the meaning of the Act, it is not necessary that the undertaking in which the parties to the dispute are engaged should be an industry, a trade, or a business, carried on *for profit*. This was held by four of the present members of the Court, three being present in this case. On the argument challenging the accuracy of the second point, it became evident that in view of the four opinions so recently expressed, and still held by the three Justices who had formed part of the majority in the *Municipalities' Case* (2), and the absence of the fourth Justice, it was useless to proceed with the attempt to overrule that second point, and the Court so intimated. That point is maintained without further expression of opinion, not because it is to be taken as the opinion of either the Justice who differed in the *Municipalities' Case* (1) or the other two Justices composing the present Court (they expressing no opinion), but because it is a standing decision not overruled.

But though the State itself is not exempt where a private individual would not be, and though a private individual or company is not exempt merely because the undertaking is carried on by him or it without the object of profit, and therefore a State cannot escape simply because it should happen, for instance, to conduct an ordinary business enterprise at cost price, there still remains the

(1) *Ante*, 129. (2) 26 C.L.R., 508.

question of the nature of the dispute itself as to whether it is in its real character "industrial." The *Municipalities' Case* (1) affords an example of an industrial dispute. The making of roads and the lighting of streets was held to be essentially of an industrial nature. If done by a contractor for profit, no one would dream of questioning it. If by the Constitution "profit" is not a necessary element, the undertaking still remains industrial, even though the persons undertaking it do so without a view of making profit; and each department of it is part of the one industrial undertaking. It remains to consider individually the position of each of the respondents.

(1) *The Sydney Harbour Trust.*—It is true the Trust is in very close connection with the Government both in relation to funds and to control. It is true also that ports and harbours were among the matters as to which anciently the King exercised his prerogative. Ports and havens were, as *Blackstone* (vol. I., p. 264) states, among the *regalia*, for they are "the inlets and gates of the realm." But, as there appears also, the prerogative was limited, and (*inter alia*) any person had the right to load or discharge his merchandise in any part of the haven, and legislation had to be resorted to for the purpose of regulating the ports and harbours, altogether beyond the prerogative. Legislation as to harbours and docks, as appears by *Mersey Docks and Harbour Board* v. *Lucas* (2), has placed authorities of that character in the position of persons carrying on a "concern" and as liable to income tax on the profits they make. The undertaking of the Sydney Harbour Trust is therefore essentially an industrial concern, and is within the operation of sec. 51 (xxxv.) of the Constitution and of the *Commonwealth Conciliation and Arbitration Act*.

(2) *The Melbourne Harbour Trust* is similarly justiciable, and is, on the terms of the Act, an *à fortiori* case.

(3) *The Colonial Treasurer of New South Wales.*—The facts establish that the boats conveying pilots are employed as an adjunct to the business of piloting ships. The dispute is therefore properly to be regarded as industrial. The steam tug at the Clarence River is also industrial. As to the pleasure-launch at Sydney and the

(1) 26 C.L.R., 508.

(2) 8 App. Cas., 891.

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two launches for official business at Newcastle, the facts are not sufficiently stated to enable us to come to a definite conclusion.

(4) *The Minister of Public Works of New South Wales.*—The dockyard is a trading concern, and the vessels conveying workmen and material to and from the dockyards are appurtenant to the trading. As to those vessels, the State metal quarries, the ferry at Stockton, and the dredges, the Minister is a justiciable respondent.

(5) *The Chief Secretary of New South Wales* is a justiciable respondent with respect to the State trawling industry.

The second question should be answered in the terms to be formally stated by the Chief Justice.

HIGGINS J. It has just been decided that, when a State Government carries on an industry for the purposes of profit, it is subject to the powers of the Commonwealth Court of Conciliation and Arbitration created under sec. 51 (xxxv.) of the Constitution as if it were a private employer (1). Counsel in this case here, with good sense, avoided a repetition of the arguments involved in the previous case, and have applied themselves to the questions (1) whether, when the State Government is in fact in dispute with its employees as to the same matters as other employees, and the dispute has all the indicia of an industrial dispute extending &c., the State Government or any agency or creation of the State is subject to the said powers; and (2) whether, when the undertaking is not carried on for profit but for the good of the community, there can be an "industrial dispute."

It has already been decided in the *Municipalities' Case* (2) that municipalities can be treated as parties to a dispute within sec. 51 (xxxv.), although they do not carry on the operations for profit; and that decision must be treated as binding, so far as it goes.

I select as a typical concrete case that of the dredging operations carried on under the Minister of Public Works of New South Wales, in the Department of Public Works. "In the Department" of Public Works "there are many dredges dredging the harbours, bays, rivers, bars and anchorages, but not for hire or in any competition with others." The masters, officers and engineers are doing the

(1) *Ante*, 129. (2) 26 C.L.R., 508.

same kind of work as they would do, and as other masters, officers and engineers are doing, on other steam vessels in private employment; and the dispute is as to the wages, hours and conditions of employment. The object of sec. 51 (xxxv.) being to prevent strikes, to preserve continuity of operations in the interests of the public, the question is, does the constitutional power exclude the State and its employees in the dredging work from the benefit of the machinery devised for attaining that object?

Parliament has made no such exclusion. Under sec. 4 "industrial dispute" means simply an industrial dispute extending beyond the limits of any one State," and "*includes*" (1) "*any* dispute as to industrial matters," and (2) 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. "Industry" includes any business or undertaking of employers, and "any calling, service, employment, . . . or industrial occupation or avocation of employees" (Act, sec. 4).

But it is said that Parliament has in these words exceeded its powers. As pointed out in the case of *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1), we have no right to import into the Constitution any exception to the power of Parliament which is not expressed in the Constitution or necessarily implied. Where the Constitution means that the powers conferred on Parliament shall not be applied to the State operations, it expressly says so, as in pl. xiii. (banking); pl. xiv. (insurance); pl. ii. and sec. 114 (taxation); pl. i. and secs. 99, 100, 102 (trade and commerce). So that the only possible difficulty is as to the meaning of "industrial disputes" in sec. 51 (xxxv.). Do the words in their natural and ordinary meaning exclude disputes as to wages, &c., when the employer is the State exercising its executive powers for the benefit of the public, with the sanction of the State Parliament as shown by appropriations of revenue or otherwise?

I cannot find any ground for treating such disputes as excluded from the meaning of the words "industrial disputes." The words are not technical, and must be taken in their common acceptation.

(1) *Ante*, 129.

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What would the "man in the street" say, when there is a strike of officers or engineers on a Government dredge, if he were told that there is no "industrial dispute"? The words used in the Constitution are not even "disputes in an industry," but "*industrial* disputes"; and, according to *Webster's Dictionary*, "industrial," means "concerning those employed in labour, especially in manual labour, and their wages, duties and rights." So that the Commonwealth Parliament has power to make laws with respect to conciliation and arbitration for the prevention and settlement of disputes concerning those employed in labour and their wages, duties and rights. According to the *Amalgamated Society of Engineers' Case* (1) the fact that the State is the employer does not affect the power; and according to the *Municipalities' Case* (2) the fact that the employer does not carry on his undertaking for profit or in competition does not affect the power.

This view is, I admit, inconsistent with the answer to question 3 in the case of the *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (3)—as to the Board of Water Supply and Sewerage, Sydney. But that decision was based expressly on the *Railway Servants' Case* (4), which has just been overruled; and it was not, according to the views of those who gave it, strictly necessary to be answered. In my opinion, the decision, such as it was, should be overruled on this point. To summarize my view of the matter, I take this Act as being valid as to sec. 4, and as applying to any State activities in which there is a dispute between the State in its capacity as employer and its employees as to their reciprocal rights and duties; and the Act is binding, under sec. V. of the covering sections of the *Constitution Act*, on the Courts, Judges and people of every State, including under the word "people" those people of a State who legislate or execute the State law. As against a valid law under sec. 51 (xxxv.), or any other valid law made under the powers conferred on the Commonwealth Parliament, any State law or command is not binding—in effect, is not law at all.

Applying this view to the various respondents and operations

(1) *Ante*, 129.
(2) 26 C.L.R., 508.
(3) 12 C.L.R., 398.
(4) 4 C.L.R., 488.

mentioned in the case, I should say that it is proper for the Justice of the High Court to include the Sydney Harbour Trust in his decision, as being a party to the composite dispute in respect of the terms of employment of masters, officers and engineers who are members of the claimant organization. I should make a similar answer to the question as to the Melbourne Harbour Trust Commissioners; and as to the New South Wales Government in its Department of Navigation, so far as regards the pleasure-launch, the launch used as a tender to the pilot steamer, the two launches used for official business at Newcastle and the steam tug on the Clarence River.

I should make a similar answer to the question as to the New South Wales Government in its Department of Public Works, so far as regards its dredging operations, its Newcastle ferry service, its vessels carrying workers and material to and from the Government dockyards and the State metal quarries.

I should make a similar answer to the question as to the same Government in respect of its trawling industry.

But it is urged that on this broad view of the Commonwealth powers the Commonwealth Parliament may ruin the States; and that the Constitution assumes that the States are to continue and that their powers are to continue (except as provided by the Constitution). It is said that the Commonwealth Parliament through the Court of Conciliation may, on this broad view, entertain disputes as to stokers in the navy, as to type writers in the Premier's office, or as to men digging trenches in manœuvres. It is said that under the taxation power the Commonwealth Parliament could tax State members for every time that they enter the State Parliament; or tax every State voter on voting. But in the first place, as the Chief Justice pointed out during argument, the taxation would have to be on the same lines in all the States (sec. 51 (II.)); and such interferences with the States would be not only improbable but practically impossible. In the next place, the Commonwealth Parliament may admittedly ruin the States by not providing adequate defence, or by mad trade and commerce laws, or by its immigration laws, and so forth. Or the Commonwealth Parliament might tax all private property to its full capacity, and borrow so heavily that the States could not

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borrow at all. So, too, the States might resume all the property in the State, and leave the Commonwealth Parliament without any property to tax (sec. 114). The true answer is that the powers conferred by the Constitution are not to be construed by us as limited by these considerations. We, as a Court, have to obey the intention of the British Parliament, as expressed in the words of the Constitution, and are not to import into these words limitations based on our opinions of danger or expediency. Finally, Parliament may exclude from the jurisdiction of the Court any industrial disputes that it thinks fit; and under sec. 38 (*h*) of the Act the Court itself can refrain from determining a dispute if further proceedings are not necessary or desirable in the public interest.

But if this Court feels justified in implying any restriction as to State activities—any restriction on the power of Parliament under sec. 51 (xxxv.)—I concur in the view that the restriction should be limited to strictly Governmental functions—functions such as legislative, executive and judicial functions, without which a constitutional State cannot be conceived, functions which are essential and inalienable. The limitation (if any) should follow the lines of such cases as *Coomber* v. *Justices of Berks* (1) and *South Carolina* v. *United States* (2).

GAVAN DUFFY J. In view of the dissent I have expressed in the last case (3) I do not think advantage would come of my expressing any opinion founded on that dissent, and I have not had an opportunity of considering what answers should be given in view of the decision in that case. Accordingly I do not propose to deliver any judgment.

Question 1 *being withdrawn, question* 2 *answered as follows: The dispute found to exist in fact is an industrial dispute within the meaning of sec.* 51 (xxxv.) *of the Constitution as to* (*a*) *Sydney Harbour Trust*; (*b*) *Melbourne Harbour Trust*; (*c*) *Colonial Treasurer of New South Wales in respect of*

(1) 9 App. Cas., 61, at p. 74. (2) 199 U.S., 437.
(3) *Ante*, at pp. 171 *et seqq.*

pilot steamers and tenders thereto and steam tug at Clarence River; (d) Minister for Public Works of New South Wales in respect of vessels conveying workmen to and from dockyards, State metal quarries, and dredges, ferry service between Newcastle and Stockton; (e) Chief Secretary of New South Wales in respect of trawling industry. As to pleasure-launch at Sydney and two launches used for official business at Newcastle the facts are not sufficiently stated to enable us to determine the question.

Solicitors for the claimant, *Loughrey & Douglas.*

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

Solicitors for the Melbourne Harbour Trust Commissioners, *Malleson, Stewart, Stawell & Nankivell*, Melbourne, by *Allen, Allen & Hemsley.*

Solicitor for the New South Wales respondents, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.