[HIGH COURT OF AUSTRALIA.]

THE FEDERATED STATE SCHOOL TEACHERS' ASSOCIATION OF AUSTRALIA . . . } CLAIMANT;

AND

THE STATE OF VICTORIA AND OTHERS . RESPONDENTS.

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MELBOURNE, *March* 18.

SYDNEY, *April* 22.

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

*Industrial Arbitration*—"*Industrial dispute*"—"*Industry*," *meaning of*—*Dispute between State and school teachers employed by State*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1928 (*No.* 13 *of* 1904—*No.* 18 *of* 1928), *sec.* 4.

*Held*, by *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), that the educational activities of the States carried on under the appropriate statutes and statutory regulations of each State relating to education did not constitute an "industry" within the meaning of sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928; that the occupation of the teachers so employed was not an "industrial" occupation, and that the dispute which existed between the States and the teachers employed by them was therefore not an "industrial dispute" within sec. 51 (xxxv.) of the Constitution.

SUMMONS under sec. 21AA of *Commonwealth Conciliation and Arbitration Act* 1904-1926.

The claimant, the Federated State School Teachers' Association of Australia, by plaint filed in the Commonwealth Court of Conciliation and Arbitration set out that it was in dispute with the respondents, the State of Victoria, His Majesty the King in the right of the State of Victoria, the State of Tasmania, and His Majesty the King in the right of the State of Tasmania, in respect of definitions, salaries, appeal, holidays, size of schools, sick leave, furlough, removal expenses, housing, furniture and equipment, staffing conditions, board of reference and other conditions of work.

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The respondents by their answer raised (*inter alia*) the question whether the dispute was an "industrial dispute" within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1926 and of sec. 51, pl. xxxv., of the Constitution.

The claimant issued a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1926 for the determination of the following question:

> Is the dispute the subject matter of plaint No. 241 of 1928 in the Commonwealth Court of Conciliation and Arbitration existing or threatened or impending or probable as an industrial dispute extending beyond the limits of any one State within the meaning of (1) the Constitution of the Commonwealth, (2) the *Commonwealth Conciliation and Arbitration Act* 1904-1926.

The summons came before *Starke* J., who referred it to the Full Court.

*Ham* K.C. (with him *Fullagar*), for the claimant If this is an "industrial dispute" within the meaning of the Constitution, it clearly comes within the *Commonwealth Conciliation and Arbitration Act* 1904-1926. "Industrial dispute" is an ambiguous and elastic term, but the word "industrial" in that expression should be given its wider meaning of pertaining "to industry," and not "to an industry." This wider interpretation has been definitely adopted by the Court (*Jumbunna Coal Mine, No Liability*, v. *Victorian Coal Miners' Association* (1)). The Court has definitely reached the discrimen of profit (*Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (2)). The binding authority in this matter is now *Australian Insurance Staffs' Federation* v. *Accident Underwriters' Association*; *Bank Officials' Association* v. *Bank of Australasia* (3). Various reasons were given by the majority Judges in that case, but the present case would be within each of them. The true *ratio decidendi* is to be found in the judgment of *Starke* J. (4). A dispute of the present nature might dislocate

(1) (1908) 6 C.L.R. 309, at pp. 332, 365, 370.
(2) (1919) 26 C.L.R. 508.
(3) (1923) 33 C.L.R. 517.
(4) (1923) 33 C.L.R., at p. 536.

the industrial structure or organization of the community. The teaching profession is part of the industrial mechanism of society. The State holds technical classes. Teachers prepare persons for industrial employment. There is the required combination of capital and labour.

[ISAACS J. Are fees paid in the State schools ?]

In the secondary schools fees are paid but not in the primary. [Counsel referred to *Brimelow* v. *Casson* (1); *Fabian Meare* on *Educational Foundations of Trade and Industry*; *S. and D. Webb's Industrial Democracy*; *Webb's History of Trade Unionism*; *J. A. Hobson* on the *Industrial System*.]

*C. Gavan Duffy*, for the State of Victoria. The cases are difficult since the reasons given by the various Judges cannot be reconciled. It is open to argument that some of them are wrongly decided. The only matters definitely decided are that an " industrial dispute " need not be a dispute in connection with an undertaking carried on for profit or one wholly carried on by manual labour. If the *Insurance Staffs' Case* (2) is to be taken as the governing case, no *ratio decidendi* other than those suggested can be extracted from it. If the judgment of *Starke* J. in that case is to be taken as the test, teaching is not part of the industrial organization of the State. It is not concerned with the production or distribution of wealth. In order to extend it to cover the teaching profession, it would be necessary to make it wide enough to cover any dispute of any kind, however limited, between employer and employee. The joint judgments of *Isaacs* and *Rich* JJ. in the *Insurance Staffs' Case* and in the *Municipal and Shire Council Employees' Case* (3) must be read as a whole and also in the light of what they said in the *Insurance Staffs' Case*. Read thus, they are no authority for treating the present dispute as an " industrial " dispute. [Counsel also referred to *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (4) and *Proprietors of the Daily News Ltd.* v. *Australian Journalists' Association* (5).]

(1) (1924) 1 Ch. 302, at p. 313.
(2) (1923) 33 C.L.R. 517.
(3) (1919) 26 C.L.R. 508.
(4) (1919) 27 C.L.R. 72.
(5) (1920) 27 C.L.R. 532.

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*Robert Menzies* K.C. (with him *Tait*), for the State of Tasmania. There is only one principle underlying all the majority judgments in the *Insurance Staffs' Case* (1), namely, that laid down by *Starke* J. To come within that principle a dispute must be directly connected with the industrial organization of the State: there must be an organic connection with the production and distribution of wealth. The teaching profession is no more organically connected with the production and distribution of wealth than the nursing profession or the medical profession or the profession of a minister of religion. Education is primarily directed to the production of a good citizen and a complete human being, and not to the production of an efficient cog in the industrial machine.

*Cur. adv. vult.*

April 22.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The States of Victoria and Tasmania have established a system of public instruction or education, and defrayed the cost of so doing out of moneys appropriated by their Parliaments. The system, as to primary or elementary education, is free, secular and compulsory; but in some special subjects and in some classes of schools, such, for instance, as District High Schools in Victoria and certain Technical Schools in Tasmania, fees may be prescribed for tuition, pursuant to statutes and regulations of the particular State. The relevant statutes of the two States are as follows: Victoria, *Education Acts* 1915-1916; Tasmania, *Education Acts* 1885, 1898 and 1905, *Free Education Act* 1908. The States have to erect and maintain, at great cost, school buildings in which instruction can be given, and to employ a great many teachers for the purpose of imparting that instruction. A large number of these teachers have formed an association, and have registered it as an organization under the Commonwealth Arbitration Act. The organization, in 1928, filed a plaint (No. 241 of 1928) in the Commonwealth Court of Conciliation and Arbitration, alleging an industrial dispute extending beyond the limits of a State as to the salaries and conditions of employment

(1) (1923) 33 C.L.R. 517.

with respect to persons employed by the States of Victoria and Tasmania, in connection with teaching, under the appropriate statutes and statutory regulations of each State relating to education. In March 1929 the organization issued a summons out of this Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1926, applying for a decision on the following questions: —"Is the dispute the subject matter of plaint No. 241 of 1928 in the Commonwealth Court of Conciliation and Arbitration existing or threatened or impending or probable as an industrial dispute extending beyond the limits of any one State within the meaning of (1) the Constitution of the Commonwealth, (2) the *Commonwealth Conciliation and Arbitration Act* 1904-1926?" This summons was ordered to be argued before the Full Court, and has been so argued, and now falls for decision.

In *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1) this Court held "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." And the *Commonwealth Conciliation and Arbitration Act* 1904-1926, sec. 4, provides that "'industrial dispute' means an industrial dispute extending beyond the limits of any one State and includes . . . any dispute in relation to employment in an industry carried on by or under the control of . . . a State or any public authority constituted under . . . a State." So that there is no doubt that the Commonwealth legislation applies in this case to the States. The question, then, is whether the organization and its members can become involved in an industrial dispute with the Governments of the States or either of them in connection with the educational systems established by them.

Looking at the matter from the point of view of the States, can these systems be described as industries or industrial activities? Economists, notably Mr. *J. A. Hobson* (*The Industrial System*), say that a scientific interpretation requires us to include in the word "industry" processes which are concerned with services

(1) (1920) 28 C.L.R. 129, at p. 155.

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such as the administrative services of public officials and the skilled professional advice of doctors and lawyers. But the Constitution is not a thesis upon economics. It is an instrument of Government, dealing, in sec. 51, pl. xxxv., with a subject matter—industrial disputes—in the ordinary and popular acceptation of that term. Apart from the economic view just mentioned, several suggestions have been made in this Court as to the interpretation of the term "industrial dispute." The "sphere of industrialism," it has been said, will be found in operations in which capital and labour are contributed in co-operation for the satisfaction of human wants and desires (*Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1) ); or in any operations in which the relation of employer and employee subsists, including, perhaps, demarcation disputes (*Australian Insurance Staffs' Federation* v. *Accident Underwriters' Association* (2) ); or in operations which are carried on wholly or mainly by manual labour (*Municipal Employees' Case* (3); *Insurance Staffs' Case* (4) ); or in operations with a view to the production or distribution of wealth (*Insurance Staffs' Case* (5) ). No other interpretation or description of "industrial dispute" or the "sphere of industrialism" was attempted at the Bar; and these suggestions will be found, we think, the most divergent meanings of which the phrases are reasonably capable.

The economic view has never been accepted by this Court: it is too wide. That confining the description of the phases to operations carried on by manual labourers is rejected as too narrow (*Insurance Staffs' Case* (6) ). And the view that the sphere of industrialism is to be found in operations in which the relation of employer and employee subsists is also, in our opinion, too wide: it approaches the economic view, and would bring within the range of the industrial power of the Commonwealth services of all kinds whatever. It cannot, we think, be supported, for it ignores the use of the word "industrial" in the composite expression "industrial dispute" in the Constitution.

(1) (1919) 26 C.L.R., at p. 554.
(2) (1923) 33 C.L.R., at p. 529.
(3) (1919) 26 C.L.R., at p. 584.
(4) (1923) 33 C.L.R., at p. 523.
(5) (1923) 33 C.L.R., at p. 536.
(6) (1923) 33 C.L.R. 517.

Testing this case, therefore, by the other suggested criteria or badges of industrialism, can it be said that the educational activities of the States constitute an industry ? So far as the matter is one of fact, we would say that they cannot. They bear no resemblance whatever to an ordinary trade, business or industry. They are not connected directly with, or attendant upon, the production or distribution of wealth ; and there is no co-operation of capital and labour, in any relevant sense, for a great public scheme of education is forced upon the communities of the States by law. It was said that if the activities were carried on by a private person, such as a schoolmaster, then the operations would be described as a business, a trade, or an industry. Shortly, that argument is met by the fact that a private person could no more carry on this system of public education than he could carry on His Majesty's Treasury or any of the other executive departments of Government ; and if he were authorized to do so, which is almost inconceivable, then he would no more carry on an industry than the State does now.

Looking now at the matter from the point of view of the teachers, can their occupation be described as an industrial one ? Industry includes, by force of sec. 4 of the *Commonwealth Conciliation and Arbitration Act*, " any calling, service, employment, handicraft, or industrial occupation or avocation of employees on land or water." It is engagement in an occupation, and not employment in the business or industry of the employer that is the feature of this definition. But even if this be so, the definition cannot enlarge the meaning of the phrase " industrial dispute " in the Constitution, and the occupation must be of an industrial nature. It was argued that it is inapplicable in the case of State activities, because industrial dispute means, so far as the States are concerned, any dispute in relation to employment " *in an industry carried on by or under the control of . . . a State*," &c. (see sec. 4). But we need not determine this point, for the occupation of the State school teachers is not industrial. An occupation confined to teaching in the schools of the States has impressed upon it the character of the activity in which it is exercised. If carrying on a system of public education is not within the sphere of industrialism, those who confine their efforts

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to that activity cannot be engaged in an industry or in an industrial occupation or pursuit.

The questions submitted for the decision of the Court should be answered in the negative.

ISAACS J. The basic question raised by this case, strange as it may seem, is whether the occupation of employees engaged in education, itself universally recognized as the key industry to all skilled occupations, is "industrial" within the meaning of the Constitution. Put concretely for determination, it is whether an "industrial dispute" within the meaning of the Federal Constitution is legally possible between the States of Victoria and Tasmania on the one hand and the teachers they employ on the other. The answer does not involve any abstruse doctrine of law or technical expression. It is, however, a matter of law (*City of Halifax* v. *Estate of J. P. Fairbanks* (1) ) and depends entirely on the meaning which the members of this Court as intelligent citizens, presumably conversant with the current knowledge of the subject, attach to the everyday expression "industrial dispute" as an integral part of the English language. The employees are claiming better conditions of employment, such as are constantly made the subject of recognized industrial disputes. The employers refuse the demands and, the employees having entered the Commonwealth Arbitration Court for redress, this Court is asked to declare whether the dispute is or is not an "industrial dispute." The employers maintain that though it is confessedly within the scope of the Arbitration Act, it is entirely outside the Constitution, and, therefore, beyond the power of the Commonwealth Parliament in any circumstances to deal with by arbitration.

*The Employers' Theory.*—Learned counsel for the employers ultimately rested on one reason only to sustain this serious contention. Why they did so will be plain from an examination of the now accepted and unchallenged decisions of this Court. Consistently with those decisions as they stand, the answer here, as will be presently seen, must be in favour of the employees, apart from a rather hesitating attempt to base a theory on some expressions in

(1) (1928) A.C. 117, at p. 123.

two of the decisions referred to. The expressions relied on were that " a community is industrially organized with a view to the production and distribution of wealth " (*Insurance Staffs' Case* (1) ) and " capital and labour in co-operation for the satisfaction of material human needs " (*Municipal Employees' Case* (2) ). The theory advanced to support the contention was remarkable and, if correct, far-reaching. It is independent of the particular circumstances or terms of employment, and these, therefore, may for the moment be disregarded. The theory was that society is industrially organized for the production and distribution of wealth in the sense of tangible, ponderable, corpuscular wealth, and therefore an " industrial dispute " cannot possibly occur except where there is furnished to the public—the consumers—by the combined efforts of employers and employed, wealth of that nature. Consequently, say the employers, " education " not being " wealth " in that sense, there never can be an " industrial dispute " between employers and employed engaged in the avocation of education, regardless of the wealth derived by the employers from the joint co-operation.

The contention sounds like an echo from the dark ages of industry and political economy. It not merely ignores the constant currents of life around us, which is the real danger in deciding questions of this nature, but it also forgets the memorable industrial organization of the nations, not for the production or distribution of material wealth, but for service, national service, as the service of organized industry must always be. Examination of this contention will not only completely dissipate it, but will also serve to throw material light on the question in hand generally. The contention is radically unsound for two great reasons. It erroneously conceives the object of national industrial organization and thereby unduly limits the meaning of the terms " production " and " wealth " when used in that connection. But it further neglects the fundamental character of " industrial disputes " as a distinct and insistent phenomenon of modern society. Such disputes are not simply a claim to share the material wealth jointly produced and capable of registration in statistics. At heart they are a struggle, constantly becoming more intense on the part of the employed group engaged in co-operation

(1) (1923) 33 C.L.R., at p. 536. (2) (1919) 26 C.L.R., at p. 561.

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with the employing group in rendering services to the community essential for a higher general human welfare, to share in that welfare in a greater degree. (See, for instance, Lord *Askwith's* work on *Industrial Problems and Disputes*, at p. 25.) All industrial enterprises contribute more or less to the general welfare of the community, and this is a most material consideration when we come to determine the present question apart from the particular contention raised at the Bar.

That contention, if acceded to, would be revolutionary. Some of the industries up to the present recognized as legitimately within the ambit of the Constitution, would have to be regarded as outside its limits ; for instance, musicians and actors and tramway employees, pilots of ships, street lighters and cinema operators. How could it reasonably be said that a comic song or a jazz performance, or the representation of a comedy, or a ride in a tramcar or motor-bus, piloting a ship, lighting a lamp or showing a moving picture is more " material " as wealth than instruction, either cultural or vocational ? Indeed, to take one instance, a workman who travels in a tramcar a mile from his home to his factory is no more efficient for his daily task than if he walked ten yards, whereas his technical training has a direct effect in increasing output. If music or acting or personal transportation is admitted to be " industrial " because each is productive of wealth to the employer as his business undertaking, then an educational establishment stands on the same footing. But if education is excluded for the reason advanced, how are we to admit barbers, hairdressers, taxi-cab drivers, furniture removers, and other occupations that readily suggest themselves ? And yet the doctrine would admit manufacturers of intoxicants and producers of degrading literature and pictures, because these are considered to be " wealth." The doctrine would concede, for instance, that establishments for the training of performing dogs, or of monkeys simulating human behaviour, would be " industrial," because one would have increased material wealth, that is, a more valuable dog or monkey, in the sense that one could exchange it for more money. If parrots are taught to say " Pretty Polly " and to dance on their perch, that is, by concession, industrial, because it is the production of wealth. But if Australian youths are trained to read and write

their language correctly and in other necessary elements of culture and vocation making them more efficient citizens, fitting them with more or less directness to take their place in the general industrial ranks of the nation and to render the services required by the community, that training is said not to be wealth and the work done by teachers employed is said not to be industrial. The consequence, it is said, is that employment in the service rendered to the community by education is not one which can give rise to Commonwealth arbitration. That is certainly not my view and is legally, economically and historically opposed to a vast and formidable array of recorded opinion. As to legal precedents, there can, in the *Insurance Staffs' and Bank Officials' Case* (1), be found, in statement and in reference, the opinions of *Griffith* C.J., *O'Connor* J., *Higgins* J., *Powers* J., *Rich* J. and myself in clear opposition to that contention. With respect to the opinions of my learned brothers the Chief Justice and *Gavan Duffy* J. in the same case, if the condition as to manual labour be eliminated, I see nothing in those judgments to support the employers' view in this case. Whatever assistance the contention might receive from economists who wrote in a world of commerce and industry that has long ceased to exist, its position to-day is hopeless. A quotation which I take from the judgment of my brother *Starke* in the *Insurance Staffs' and Bank Officials' Case* (2) states the view of *R. H. Tawney* in these words: "It"—that is, the industrial mechanism of society—"includes all those bodies of men associated, in various degrees of competition and co-operation, to win their living by providing the community *with some service which it requires.*" (The italics are mine.) The view so expressed is incontrovertible. The community is industrially organized for "*services*," which expression is the genus, and material objects are only one species of that genus. Professor *Hearn* recognized this truth in his *Plutology* (pp. 7-8) over sixty years ago, graphically dealing specifically with "industrial" wants and desires. In 1920 the University of Manchester published a volume entitled *Labour and Industry*, containing lectures delivered in the Department of Industrial Administration in the Manchester College of Technology. In one of these Mr. *Cole* of the Labour Research

(1) (1923) 33 C.L.R. 517.

(2) (1923) 33 C.L.R., at p. 536.

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Department refers (p. 63) to " the most vital factor in industrial organization, the co-operation and willingness to work of the mass of the people who *produce and distribute goods and render services.*" (The italics are mine.) Mr. *Cole*, it will be observed, distinguishes between " goods " and " services," following a not infrequent line of thought in other connections, but the main point is he includes " services " on the same footing as " goods " in industrial organization. In another of those lectures, the distinction disappears and the generic term is used. I refer to the lecture given by the Right Hon. Mr. *Whitley*, M.P., whose views naturally command attention. He speaks not of " material wealth " produced by industrial enterprise, but constantly of " services " and " counter-services." He so terms the result of industry, both as between nations (pp. 4-6) and in relation to home requirements (pp. 8-9). The words " production and wealth " used in the collocation have been given a meaning in accordance with the subject matter. So also by *J. A. Hobson* in *Work and Wealth* (p. 3), Mrs. *Gertrude Williams* of London University in *Social Aspects of Industrial Problems* (p. 4) and *R. G. Hawtrey* in *The Economic Problem* (1926), p. 27—the matter being summed up thus by the last named writer : " *But even where the product is a material object or commodity, the process of production consists of services rendered.*" So also Professor *Davenport* of Missouri University in the *Economics of Enterprise* (1913), particularly at p. 129, and Professor *Chapman* in *Social Betterment* (1914), part of the *Brassey and Chapman* trilogy, *Work and Wages*, at p. 4. It was on these considerations that my brother *Rich* and I, as far back as 1919, acting on the principles of interpretation enunciated by Lord *Hobhouse* in *Bank of Toronto* v. *Lambe* (1), and since affirmed both in *City of Halifax* v. *Estate of J. P. Fairbanks* (2) and in *The King* v. *Caledonian Collieries Ltd.* (3), formulated the concept of industrial dispute ; and we repeated it in 1923. That has been greatly canvassed during the argument in the present case. If accurate, it is fatal to the employers' contention. I adhere to it. It runs thus : " Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the

(1) (1887) 12 App. Cas. 575, at pp. 581, 582.

(2) (1928) A.C. 117.

(3) (1928) A.C. 358, at pp. 361, 362.

satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation" (1).

First of all, there is co-operation of "capital" and "labour." Everyone knows that means, in the context, the co-operation of employer and employed, the words "capital and labour" being representative of the two classes of co-operators. They are the "partners" referred to by Professor *Hearn* in his work mentioned. In his recent work *Labour Relations in Industry, Dwight Lowell Hoopingarner*, M.A., formerly lecturer, Harvard University, says (p. 11): "There is a marked division of the active parties in industry into the two groups of employing and employed. In this system—often thought of as the wage system—the one hires and the other is hired." The formula has obviously reference to that alone. The next feature to observe is that it has reference to the co-operation of the two groups "for the satisfaction of human wants and desires." As appears from the *Municipal Employees' Case* (2) the wants and desires referred to are "material," that is, not spiritual. It is not that the objects by which they are satisfied are material, that is to say, corpuscular. The theory propounded for the employers rests on no foundation of fact or experience or recognized opinion. It would cripple the constitutional power. It is in my opinion, a radical error to limit "industrial disputes" in the Constitution to those enterprises that produce or distribute wealth, unless the terms are understood so as to make the limitation useless for the purpose of the employers' contention in this case.

*The Employment.*—The conclusion just stated makes it necessary now to consider the actual nature and circumstances of the teachers employment. These are found in the statutory regulations of the two States. The scheme of the Victorian legislation on education may for present purposes be thus summarized:—It requires under penalties children of a certain age to be educated in certain secular subjects. *It does not insist that the required education be given by the State*: that may be given at any qualified private school and, if so given, that is sufficient. But for those who are not privately educated the State provides public schools and all necessary furniture

(1) (1919) 26 C.L.R., at p. 554. (2) (1919) 26 C.L.R., at p. 561.

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and apparatus for the required standard of instruction. For elementary subjects no charge is made, but for other subjects fees are charged. Such public schools include (*inter alia*) preparatory trade schools, trade schools and others for technical education. The subjects taught in those *public* schools are not only of a general cultural character, but are also vocational, being specially and specifically directed in the latter class to manual training including workshop practice and theoretical and practical training in subjects bearing on industrial requirements. There is a Council of Education for over-sight and report and one-fourth of the Council are "representatives of industrial interests of whom two shall be representatives of agriculture." Finally a staff of employees, called teachers, is provided for in order to impart the necessary instruction to pupils precisely as is done in the alternative private schools. There are, of course, provisions as to Ministerial control, common to almost all enactments where the State assumes non-essential functions.

The legislation may be therefore divided into two distinct parts. These are:—(1) *Governmental regulation*—This branch makes a certain degree of education compulsory and authorizes the expenditure of public funds for any purpose authorized by the Act. For reasons to be stated this part is outside all possible private power and authority. Officials administering this branch of the Act are representative of regal functions only and outside the industrial power. (2) *Educational service*—This branch having been authorized by virtue of the regal power of legislation is undertaken accordingly by the State, just as a company would, if authorized, undertake a railway or other industrial enterprise. The State provides the capital in the form of land, buildings, apparatus and salaries; the teachers appointed co-operate with their labour just as in a private school. Not only can this be done privately, but it is done privately. Tens of thousands of children are educated in non-State schools, notably in Roman Catholic schools, and the statutory scheme accepts the private education as sufficient compliance with its governmental law. The Tasmanian scheme is, and is conceded to be identical for present purposes, with that of Victoria. Why, then, is not the dispute for better working conditions in the educational

service branch, made by the employed group upon their employers in relation to the joint service to the community, an industrial dispute ? Suppose, instead of education, it were the sale of liquor or meat, what would be the answer ? If, for instance, governmental regulations were passed compelling or forbidding the consumption of certain liquors or meat, and providing hotels or butchers' shops to be optionally used, all precisely as schools are provided, would the State be free of regulation under the relevant constitutional provision as to its employees in the trading branches ? If it would, this Court must overrule many of its deliberate decisions so far unchallenged. If it would not, where is the distinction in the present case ?

*Prior Decisions.*—We have reached a stage in the judicial decisions of this Court when at least some propositions can be taken as settled, and if doubt exists as to their meaning and extent the specific cases to which they have been applied will resolve it. These propositions are : (1) A State is not exempt from the operation of the *Commonwealth Conciliation and Arbitration Act* where a private individual would not be (per *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. in *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 2] (1) ) ; (2) a private individual or company is not exempt merely because the undertaking is carried on by him or it without the object of profit (*ib.*) ; (3) the nature of the *dispute* must be considered as to whether it is industrial (*ib.*) ; (4) the last preceding question is determined by the nature of *the actual function concerned*, as " the making of roads and the lighting of streets " (*ib.*) ; and (5) " industrial disputes " are not confined to manual labourers (*Insurance Staffs' and Bank Officials' Case* (2) ). In the application of these propositions there is, plainly apparent, one distinct feature of negative character : it is that *in no case has the Court paid any regard to the policy of the State in assuming a special function.* Policy there must always be in such a case. But that is motive only and cannot affect the character of the function assumed. If in the hands of a private individual that function, of course apart from any governmental powers which the State thinks fit to call in aid in its own case, would be industrial,

(1) (1920) 28 C.L.R. 436, at p. 448. (2) (1923) 33 C.L.R. 517.

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then the function assumed retains its industrial character unchanged by the motivating policy. Otherwise it is perfectly obvious a State could embark on every trade as a matter of policy and utterly nullify the Commonwealth power.

On the principles I have stated the Colonial Treasurer of New South Wales was held to be justiciable in relation to piloting ships; the Minister of Public Works in New South Wales in relation to dockyards and the Chief Secretary of New South Wales in relation to State trawling were also held to be justiciable because the nature of the dispute in each case was, by reason of the actual work done, held to be industrial. Similarly as to State railways and municipal works.

In no case has it ever been suggested that Crown officials engaged in administering true, essential governmental authority come within the ambit of the industrial disputes power. For instance, no one has ever thought that Treasury officials performing duties under the *State Trading Concerns Act* 1916 of Western Australia, or under the State railway systems are within the Commonwealth industrial dispute jurisdiction although the trading employees are. There is a line of demarcation inherent in all British Constitutions which inexorably divides the two classes of cases. The State is capable of performing both classes of functions; but they must be clearly distinguished. One class consists of what have been aptly termed "the primary and inalienable functions of a constitutional Government." These are impossible of performance by private individuals, and appertain solely to the Crown in its regal character. This aspect has been carefully expounded by my brother *Rich* and myself in the *Municipal Employees' Case* (1), and without repetition I refer to what is there said by us. The distinction there drawn derived no small confirmation from the observations of various learned Lords in the case of *Food Controller* v. *Cork* (2) (see per Earl of *Birkenhead* (3), Lord *Atkinson* (4) and Lord *Shaw of Dunfermline* (5)). *Ex facie* regal functions are outside the concept of industrialism. Other functions voluntarily undertaken by the State, but which are

(1) (1919) 26 C.L.R., at pp. 528 *et seqq.*
(2) (1923) A.C. 647.
(3) (1923) A.C., at p. 657.
(4) (1923) A.C., at p. 659.
(5) (1923) A.C., at p. 666.

ordinarily or primarily the subject of private individual enterprise —and education is patently one of these—stand in a totally different position. In relation to these latter functions, the State, by the authority of its regal functions, has chosen itself to occupy a position in the market-place which it could have left or entrusted to private citizens. Instances are found in the cases already mentioned, where the role it undertook brought its activity within the scope of the national power contained in placitum xxxv. of sec. 51 of the Constitution. Regal functions are inescapable and inalienable. Such are the legislative power, the administration of the laws, the exercise of the judicial power. Non-regal functions may be assumed by means of the legislative power. But when they are assumed the State acts simply as a huge corporation, with its legislation as the charter. Its action under the legislation, so far as it is not regal execution of the law is merely analogous to that of a private company similarly authorized. Apart from regal enforcement of law, constitutional or otherwise, any private individual could do, and private individuals in fact do, all that is done under the education schemes of Victoria and Tasmania.

It cannot, consistently with the decided instances already mentioned, be maintained that the industrial (educational) function assumed in the Education Acts is protected by the regal (governmental) functions called in aid. On the contrary, in each of those instances the nature of the function actually performed was taken as the test. If it was a function that a private person could lawfully do and being so done was industrial, that was sufficient. The instance of the Minister for Public Works of New South Wales is a particularly strong case. The facts are fully set out in *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 2] (1). A dispute was held to be "industrial" between the State and certain of its employees under the *Public Service Act*, including persons employed on dredges, simply dredging harbours, &c., for the Government but not for hire or in any competition with others, and employed on a Government ferry between Newcastle and Stockton, the ferry being free. The dredges were, of course, authorized by statute, were provided out of the

(1) (1920) 28 C.L.R., at p. 439.

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Consolidated Revenue on parliamentary votes and nothing could be more exclusively public functions than those performed by the dredges and the ferry. But in the opinion of five Justices the dispute was "industrial," plainly because the work done by the employees was not a regal function but work that could be done—if authorized—by private individuals and, if so done, would ordinarily be regarded as industrial. In passing, it may be noted that this instance is a complete answer also to the contention as to the "production and distribution of wealth."

In all essential respects the case of the pilot boats of the Navigation Department of New South Wales stands in the same position. The dispute was there held to be industrial because the boats—though purely Government boats—conveyed pilots and were therefore considered as an adjunct to the business of piloting: *a fortiori*, if as a matter of policy the Government had undertaken the whole function of piloting, even if not for profit—as the States here have undertaken the function of school teaching, which is inherently a business. The Western Australian *State Trading Concerns Act* 1916 employs a name in itself suggestive. But a label is nothing in this case. Except so far as education itself differs from (say) "State ferries," no distinction can be made for present purposes between that Act and the education legislation of Victoria and Tasmania. The Western Australian Act makes every "concern" unless Parliament consents to a sale or lease, a purely Government enterprise in regard to proprietorship, administration, capital, funds, accounting to Consolidated Revenue, liabilities, and otherwise. Yet we have held a dispute between the Minister and the engineers employed by him to be industrial. So with the New South Wales trawling.

The State railways are most instructive. It is impossible to imagine a more distinct scheme of Government policy. For the sake of national development, private enterprise being both inadequate and inappropriate, the States, at an enormous expenditure totalling about £300,000,000, have undertaken to provide and have provided "State railways" and virtually as a monopoly. Out of public funds they have built, maintained and equipped the railways and placed them under Government administration. The interposition of a corporation called a Commissioner or Commissioners is

immaterial for this purpose, and on this point the observations of *Griffith* C.J., in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees Association* (1), are incontestably true. Even with this interposition the Victorian legislative scheme provides for the Minister's supervision in various important ways. The moneys required for salaries are voted by Parliament. The Minister's approval is necessary for many instances of expenditure, as additional platforms, drains, sidings, bridges ; for the discontinuance of workshops, for new rolling stock, for contracts over £5,000, and in other ways of considerable importance. It is also manifest on the face of the Act that the powers entrusted to the Commissioners by Parliament notwithstanding the Ministerial control are such as would never be entrusted and could never be entrusted to a private person. For instance the expenditure of Crown moneys and the making of contracts involving public expenditure and other instances of management and control. Nevertheless, all the railway services of the States are held to be within the relevant constitutional provision. And why ? Simply because whatever governmental regal authority is at the back of the actual service rendered to the community, the inherent nature of that service is not regal, and is such as a private person authorized to render similar service could perform. The particular terms of the public statutes are immaterial for this purpose. The material question is : *What is the nature of the actual function assumed*—is it a service that the State could have left to private enterprise, and, if so fulfilled, could such a dispute be " industrial " ? No other test could satisfy all the standing decisions in which the dispute has been held justiciable, or would permit the existing awards in those matters to continue valid.

By this process of elimination we arrive at the only real question left open by the decisions, namely, whether if private scholastic establishments carried on teaching on the same lines as the State schools, giving elementary education free, and charging fees for the higher subjects, providing the same curriculum and so on, by means of employed teachers, would such a dispute as we have here be an

(1) (1906) 4 C.L.R. 488, at p. 535.

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industrial dispute? I asked the question of learned counsel for the States, and received a frank reply in the negative. Doubtless an affirmative answer would have meant surrender and so that position must be examined.

*Education.*—It was urged during the argument that education, even when provided by the co-operation of capital and labour, was not even an adjunct to industrial operations. That cannot possibly, at this hour, be accepted as true. I have already indicated my view that education so provided constitutes in itself an independent industrial operation as a service rendered to the community. Charles Dickens evidently thought so when ninety years ago Squeers called his school "the shop" and prided himself on Nickleby's being "cheap" at £5 a year and commensurate living conditions. The world has not turned back since then. In 1926 the Committee on Industry and Trade, in their report to the British Prime Minister, include among "Trade Unions" those called "teaching." It there appears that in 1897 there were six unions with a total membership of 45,319, and in 1924 there were seventeen unions with a membership of 194,946. The true position of education in relation to the actively operative trades is not really doubtful. Education, cultural and vocational, is now and is daily becoming as much the artisan's capital and tool, and to a great extent his safeguard against unemployment, as the employers' banking credit and insurance policy are part of his means to carry on the business. There is at least as much reason for including the educational establishments in the constitutional power as "labour" services, as there is to include insurance companies as "capital" services.

It is a commonly accepted feature of our industrial mechanism that it is, and has for nearly a century been, of increasing complexity and organization. That is emphasized from *Palgrave's Dictionary of Political Economy* (vol. II., p. 404) to *Hoopingarner* in 1925 (at p. 3). The specialization of capital and labour, and the interdependence of industries constitute the outstanding characteristic of industrial organization to-day.

In that compound process, two facts emerge with respect to education. One is that industrial education is less and less left to apprenticeship systems. That is pointedly referred to by Lord

*Askwith* in the work quoted, at pp. 4 and 20. A lad does *not*, he says, learn his trade by apprenticeship in the highly subdivided and specialized factories. We know a lad has more and more to acquire the necessary knowledge in technical schools. The second fact is almost a corollary to the first. Professor *Chapman* in his *Work and Wages*, at p. 175, refers to the newer educational idea rapidly being assimilated, "that of adapting education to the diverse requirements of after life." The whole of his chapter IV. is enlightening, and especially, for present purposes, the author's description of the larger schools as "*great educational factories*" (p. 174), and the influence technical education has on the skilled trades. On p. 178 is a passage confirmatory of Lord *Askwith's* view above quoted, and on p. 179 is a reference to the practice of some employers to give their young people time off to attend technical classes. It is obvious that in presence of great subdivision such prior and external instruction is necessary even to guard against unemployment.

Now, it is on precisely these lines that, as has been briefly outlined, the present systems of education in Victoria and Tasmania are moulded. These, however, are but modern adaptations of the old and well understood fact that the efficiency of the worker is generally directly affected by his education. *McCulloch*, in his *Political Economy*, 5th ed. (1864), says, at p. 143: "The questions respecting the improvements of machinery and of the skill and industry of the labourer are at bottom identical." No doubt, for unskilled labour what has been called the steam-engine theory of efficiency, that is, sufficient bodily nourishment, is the sole consideration. And in many cases mere illiteracy does not detract from the use of tools. "Nevertheless," says *Taussig*, in his *Principles of Economics*, vol. I, p. 102, "*education increases productiveness and propagates new kinds of efficiency.*" *Hearn*, in *Plutology*, p. 33, confirms that. Mrs. *Gertrude Williams* (*op. cit.*), at p. 146, testifies to the fact that operatives with secondary education are by many employers deliberately selected as skilled mechanics, even though they have no industrial experience. *Marshall* in his *Industry and Trade* (1919), p. 361, quotes Mr. *Carnegie* as believing that the scientifically educated youth is pushing the trained mechanic very

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hard. *R. G. Hawtrey*, in *The Economic Problem* (1926), says, at p. 358: "The preliminary training is a part of the occupation, and it is a kind of capital outlay." A very practical recognition of the direct effect of training upon the industrial output is afforded by the American Federal *Vocational Education Law* of 1917, of which the *Federal Agency of Administration* says: "Its specific aim is to make efficient wage earners" (see *Hoopingarner*, at pp. 218-219). It is impossible, in my opinion, to deny its direct and increasingly close relation to the actual work performed in operative establishments. Even if "education," cultural and vocational, had no other claim industrially than as a mere adjunct of indubitable industrial enterprise, it would, for the reasons last stated, come within the constitutional provision. Nevertheless, I wish to make it plain that for the earlier reasons given I hold it to be within the provision independently.

For all these reasons I am of opinion that education is within the constitutional provision under consideration, and that the question raised on this application should be answered by saying there is an industrial dispute.

RICH J. This case evoked another of the often repeated and always unsuccessful attempts to determine the connotation of the vague and indeterminate words "industrial dispute." A review of the many disquisitions of each of the Justices past and present of this Court recalls an observation made by Sir *Frederick Pollock* in an essay not inappropriately entitled "*Mystic Experience and Philosophy*," in his book called also with some appropriateness *Outside the Law*: "The only inference we can draw is that every one of the seers expressed his insight, naturally and inevitably, in a form conditioned by the terms and symbols which were familiar to him." To borrow an apt phrase from Professor *Gilbert Murray*, "they are all trying to say the same ineffable thing. Whoever is convinced that any one form is better than the rest must base his conviction on some independent external ground. The mystics themselves are not in accord on the question whether any such grounds can be assigned."

*Higgins* J. himself, in the *Municipal Employees' Case* (1), said :— "It is not necessary for us, in order to determine whether this dispute (a dispute between street cleaners, street lighters, &c., and their employer, the municipality) is an industrial dispute, to define fully 'industrial dispute'—to enumerate even all the characteristics, the full connotation of an industrial dispute ; any more than it is necessary for us to define what is a dog when we determine that a certain animal is a dog. To my mind, a great deal of time is wasted and harm done by the premature efforts of Courts to define exhaustively expressions of common speech."

In this case the question is whether a dispute as to wages and conditions raised by teachers employed by the States in their various schemes of national education answers any description conveyed by the English words "industrial dispute." It is difficult to suppose that any person not indoctrinated by a long course of quasi-philosophic and quasi-economic dissertations would ever apply the term "industrial" to such a controversy. Indeed, even to one hardened by such discussions, the application of the term "industrial dispute" seems to lack justification either in the natural meaning of the words or the judicial explanations of their implications.

It seems to me that the relation of the State to its teachers does not include the important element mentioned in the joint judgment of my brother *Isaacs* and myself in the *Municipal Employees' Case* (2), namely, capital and labour co-operating to produce a result which is the outcome of their combined efforts. There is not an industry as in the case of the journalists (*Proprietors of the Daily News Ltd.* v. *Australian Journalists' Association* (3) : "A newspaper is a commercial enterprise, and the co-operators in its production, from the proprietors to the office-boy, are engaged in one industrial operation." Teaching does not, like banking and insurance, play a part "in the scheme of national industrial activity." In the *Australian Insurance Staffs' and Bank Officials' Case* (4) my brother *Isaacs* and I said :—"They are indispensable portions of the general industrial mechanism. Without the aid of the capital and credit furnished by bankers the present system of industrial organization

(1) (1919) 26 C.L.R., at p. 574.
(2) (1919) 26 C.L.R., at p. 555.
(3) (1920) 27 C.L.R., at p. 540.
(4) (1923) 33 C.L.R., at p. 527

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would collapse. They directly furnish an essential instrument of production." This element is wholly lacking in the profession of teaching. Mr. *Ham* attempted to find in the function of school teaching some industrial purpose. He suggested that knowledge was a prerequisite to industrial efficiency. Whether this be so or not, it cannot be said that the industrial system could not exist without national education. The existence of human beings is no doubt necessary but it is absurd to suggest that everything that goes to make the man forms a part of the community " industrially organized with a view to the production and distribution of wealth."

I answer the questions propounded in the negative.

*Questions answered in the negative. Appellant to pay respondents' costs.*

Solicitors for the claimant, *Maurice Blackburn & Tredinnick.*

Solicitor for the respondent the State of Victoria, *Frank G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent the State of Tasmania, *Blake & Riggall*, for the Crown Solicitor for Tasmania.

H. D. W.