the rents and profits of the land; and the questions stated in the case should be answered as follows: (1) Yes, as evidence; (2) One deduction of £5,000.

Question 1 *not answered. Question* 2 *answered "One deduction."*

Solicitors for the appellant, *Gillott, Moir & Ahern.*

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

B. L.

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NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Appl *R v Coldham; Ex parte Australian Social Welfare Union* 153 CLR 297

Not Foll *Coldham, Re; Ex parte Aust Social Welfare Union* 57 ALJR 574

Not Foll *Coldham, Re; Ex parte Aust Social Welfare Union* 57 ALJR 574

Dist *McMahon, Re; Ex parte Darvall* 56 ALJR 861

Cons *R v Marshall; Ex parte Federated Clerks Union of Aust* (1975) 132 CLR 595

Cons *Pitfield v Franki* (1970) 123 CLR 448

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN INSURANCE STAFFS' FEDERATION . . . . . } CLAIMANT;

AND

THE ACCIDENT UNDERWRITERS' ASSOCIATION AND OTHERS . . . . . } RESPONDENTS.

THE BANK OFFICIALS' ASSOCIATION . . CLAIMANT;

AND

THE BANK OF AUSTRALASIA AND OTHERS RESPONDENTS.

H. C. OF A. 1923.

MELBOURNE, *Oct.* 23, 24.

SYDNEY, *Dec.* 13.

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

Industrial Arbitration—Meaning of "industrial dispute"—Dispute between employer carrying on business of banking or insurance and employees—Powers of Commonwealth Parliament—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *sec.* 4.

Held, by *Isaacs, Higgins, Powers, Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that a dispute between employers who carry on the business of banking or the business of insurance and their employees engaged in the business as to the wages to be paid and the conditions of employment

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to be observed to or with respect to such employees is an "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution and of the *Commonwealth Conciliation and Arbitration Act* 1904-1921.

CASES STATED.

On a motion to the High Court by the General Accident, Fire and Life Assurance Corporation Ltd. under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, in an alleged industrial dispute in which the Australian Insurance Staffs' Federation, an organization of employees registered under the Act, was the claimant and the Accident Underwriters' Association and a large number of bodies carrying on the business of insurance in the several States were respondents, *Knox* C.J. stated, for the opinion of the Full Court, a case which was substantially as follows :—

1. An alleged dispute extending beyond the limits of more than one State of the Commonwealth between the Australian Insurance Staffs' Federation (the claimant organization) and the various respondents was referred to the Commonwealth Court of Conciliation and Arbitration on 22nd June 1922 under sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921.

2. The subject matter of such alleged dispute is the amount of wages to be paid and the conditions of employment to be observed by such respondents to and with respect to the persons employed by them in or in connection with the effecting of fire, accident, marine and other insurances.

3. The said respondents are insurers in various States of the Commonwealth, and effect fire, accident, marine and other insurances and for that purpose enter into written contracts of insurance.

4. Of the persons employed by the respondents a few canvass for business and assist agents of the respondents and a few inspect the risks proposed for insurance; but the rest of the employees of the respondents, who comprise the great majority of such employees, carry out the clerical work in connection with such contracts.

5. Such clerical work consists of filling in printed forms, entering up registers, typing or writing policies, receiving payments and making out receipts therefor, keeping ordinary books of account, typing or writing correspondence and other work of a clerical nature.

6. On 11th August 1923 a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* was taken out by the General Accident, Fire and Life Assurance Corporation, one of the respondents above named, for a decision upon certain questions which, upon the facts above stated and agreed upon by the parties, are in my opinion questions of law, and are stated for the opinion of the High Court as follows :—

> Is the alleged dispute an industrial dispute within the meaning of (1) the Constitution ; (2) the *Commonwealth Conciliation and Arbitration Act* 1904-1921 ?

On a similar motion by the Bank of Australasia in an alleged industrial dispute in which the Bank Officials' Association, an organization of employees registered under the Act, was the claimant and the Bank of Australasia and twelve other banks carrying on business in the several States were respondents, *Knox* C. J. stated, for the opinion of the Full Court, a case which was substantially as follows :—

1. An alleged dispute extending beyond the limits of more than one State of the Commonwealth between the Bank Officials' Association (the claimant organization) and the various banks was referred to the Commonwealth Court of Conciliation and Arbitration on 25th June 1923 under sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921.

2. The subject matter of such alleged dispute is the amount of wages to be paid and the conditions of employment to be observed by such banks to and with respect to the persons employed by them in or in connection with the banking businesses carried on by them.

3. The said banks carry on banking operations for profit in various States of the Commonwealth.

4. The industrial dispute alleged to exist relates to the rates of pay and/or conditions of employment of the following persons, members of the claimant Association employed by the said banks, namely, branch managers, relieving managers, tellers, security clerks, bill clerks, cashiers, branch accountants, head ledgerkeepers, chief correspondence clerks, clerks, messengers, and typistes.

5. The duties of the said persons are as follows :—Branch managers and relieving managers act as managers of branches under general

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directions from the head offices of their banks but are allowed to exercise and do exercise, subject to such directions, personal discretion particularly with reference to opening accounts and advancing money on overdraft up to the limit fixed by the head offices. Tellers receive, pay, and check money in the form of coin, cheques, bills, and other negotiable documents and make records of their work. Security clerks have the custody of non-negotiable securities held by the bank and perform clerical work in relation thereto. Bill clerks receive, record and check bills and cause them to be presented for acceptance and payment. Cashiers handle and record cash received from branches and other banks and generally deal with the receipt and despatch of coin. Branch accountants superintend the branch staff and act generally as deputies for the manager when necessary. Head ledgerkeepers perform clerical work and are generally the channel of reference between the ledgerkeeper and the chief officers of the branch. Chief correspondence clerks receive and distribute correspondence to the appropriate officers and check the despatch of letters; they also attend to formal correspondence. Clerks perform clerical duties of various descriptions. Messengers carry messages within and outside the bank, carry coin, assist in cleaning premises and direct customers to officers of the bank. Typistes operate typewriting machines and many of them take shorthand notes from dictation.

6. On 15th October 1923 a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 was taken out by the Bank of Australasia, one of the banks above named, for a decision upon certain questions which, upon the facts above stated and agreed upon by the parties, are in my opinion questions of law, and are stated for the opinion of the High Court as follows :—

> Is the alleged dispute an industrial dispute within the meaning of (1) the Constitution; (2) the *Commonwealth Conciliation and Arbitration Act* 1904-1921 ?

The two cases were argued together.

Owen Dixon K.C. (with him *Stanley Lewis*), for the applicants. The words " industrial disputes " in sec. 51 (xxxv.) of the Constitution

have no application to a dispute between employees and an employer whose occupation is the bringing himself into contractual relation with other persons, where that occupation has nothing to do with production, the performance of services, or the exercise of an art or a craft by the employer. Without altering the meaning of the English language, it is impossible to apply the word "industrial" to the operations of commerce. [Counsel referred to *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (1); *Proprietors of the Daily News Ltd.* v. *Australian Journalists' Association* (2); *Halsbury's Laws of England*, vol. XXVII., p. 598 (n. (*d*)); *Encyclopædia Britannica*, 10th ed., vol., XXXI., p. 459.]

Robert Menzies, for the claimant the Australian Insurance Staffs' Federation. The proper meaning of "industrial" in sec. 51 (XXXV.) of the Constitution is that given by *Griffith* C.J. in *Jumbunna Coal Mine, No Liability*, v. *Victorian Coal Miners' Association* (3), namely, it includes "all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life." It therefore covers all forms of employment, and the term "industrial disputes" covers all disputes between employers and employees as to the conditions of employment. [Counsel also referred to *Federated Sawmill, Timber Yard and General Woodworkers Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (4); *R.* v. *Deputy Industrial Registrar of the Commonwealth Court of Conciliation and Arbitration*; *Ex parte J. C. Williamson Ltd.* (5); *Municipal Employees' Case* (6); *R.* v. *Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild* (7); *Australian Tramway Employees' Association* v. *Prahran and Malvern Tramway Trust* (8); *Attorney General for New South Wales* v.

(1) (1918-19) 26 C.L.R., 508, at pp. 544, 547, 554, 573, 582, 587.
(2) (1920) 27 C.L.R., 532, at pp. 540, 546, 547.
(3) (1907-08) 6 C.L.R., 309, at p. 333.
(4) (1909) 8 C.L.R., 465, at pp. 488, 489.
(5) (1912) 15 C.L.R., 576.
(6) (1918-19) 26 C.L.R., at pp. 549, 554, 566.
(7) (1912) 15 C.L.R., 586, at pp. 607-609.
(8) (1913) 17 C.L.R., 680, at pp. 695, 696.

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Brewery Employees' Union of New South Wales (1); *Industrial Conciliation and Arbitration Act* 1894 (N.Z.); *Awards &c. under Industrial Arbitration Act*, 1894-1900, p. 279; *Inglis Clark's Australian Constitutional Law*, pp. 19 *et seqq.*; *Hobson's Industrial System* (1910), pp. 189, 239, 277, 278.]

Latham K.C. (with him *Robert Menzies*), for the claimant the Bank Officials' Association. The idea of an "industrial dispute" is not found by combining the meanings of the two words, but it is a conception of social economy and must be defined from that point of view. The essential thing in an "industrial dispute" is a strife between capital and labour. It is not merely a dispute between one individual and another. When there are found these elements—an employer using capital, and employees employed by him, and differences as to the terms or conditions of employment between such an employer and a considerable body of employees—then there is an "industrial dispute." A dispute between a large number of clerks employed by bankers and their employers as to the terms and conditions of employment would have those characteristics and would be an industrial dispute, and it would be immaterial to inquire whether each clerk was engaged in an industry.

Gregory (with him *Phillips*), for the Commonwealth intervening. The definition of "industrial dispute" in the judgment of *Griffith* C.J. in the *Jumbunna Case* (2) should be upheld. If it be necessary to limit the classes of employment in which there can be industrial disputes, they include all employments which provide services directly aiding production, and banking and insurance are within that limitation. The case of *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (3) shows that a craft union may be registered under the *Commonwealth Conciliation and Arbitration Act*; and, if craft unions can be parties to industrial disputes, it is impossible to limit industrial disputes in the way suggested by the applicants.

Cur. adv. vult.

(1) (1908) 6 C.L.R., 469, at pp. 501, 611.
(2) (1907-08) 6 C.L.R., at p. 333.
(3) (1912-13) 16 C.L.R., 245.

The following written judgments were delivered :—

KNOX C.J. In the *Municipalities' Case* (1) my brother *Gavan Duffy* said : " In my opinion an ' industrial dispute ' within the meaning of sec. 51 (xxxv.) of the Constitution is one in which a number of employees organized or united together are in contest with their employer or employers with respect to the remuneration of the employees, or with respect to any matter directly affecting them in the performance of their duties, in an undertaking or undertakings carried on for the purpose of gain and wholly or mainly by means of manual labour." Agreeing, as I do, with this definition of an " industrial dispute," I think the first question in each case should be answered in the negative. In this view it is unnecessary for me to express an opinion on question 2.

ISAACS AND RICH JJ. Both these cases for all essential purposes depend upon the same fundamental considerations. The two questions which have formed the matter in contest have long been more or less involved in judicial expressions of opinion. They now present themselves for definite judicial decision. They are important not only as affecting a considerable number of employees, but as marking with the special authority conferred on this Court by the Constitution two points of delimitation of Commonwealth power. They are : whether the expression " industrial disputes " in par. xxxv. of sec. 51 of the Constitution (1) is confined to undertakings carried on wholly or mainly by means of manual labour, (2) includes disputes as to conditions of employment in the businesses of banking or insurance.

Par. xxxv. of sec. 51 cannot be too carefully examined. Its terms are : " Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." More than once in the course of decisions in this Court has attention been drawn to the enormous, the volcanic, effect upon society of what is universally and aptly termed the " Industrial Revolution " of the 18th century. It marked the real point of departure from the old economic world to the new. The changes it has directly involved, the modifications of life and ideas that it has

(1) (1918-19) 26 C.L.R., at p. 584.

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incidentally produced, have entirely transformed the relations and outlook of society. Long before our Constitution was framed there was in existence a vast and interconnected system of economic action in which capital and labour, in organized, diversified, interlaced and complicated form, were co-operating to supply human wants and desires. The relations of capital and labour were not only altered but were still altering. Industrial disputes of great magnitude and far-reaching in their results had seriously affected the welfare of Australia. Into this vast and everchanging condition of industrialism came par. xxxv. of sec. 51 of the Constitution. At that moment "industrial disputes" were not something that had acquired a rigid meaning or attained a complete content and configuration. They were simply recognizable manifestations of industrial discontent. They were, so to speak, the growing pains of the social body in the struggle for justice between the co-operators in industry. The process of adjustment is progressive and possibly unending. It is impossible to delineate or define the term "industrial disputes" by adherence to the particular forms it had displayed up to 1900. It had certain essential attributes, but beyond those attributes it is incapable of delineation. Its recognition in the future life of the Commonwealth must depend on the features of the Commonwealth future industrial organization. It is, we think, possible to state the essential characteristics of the concept. This we have essayed in the *Municipalities' Case* (1); and for convenience sake we repeat it here :—"The concept may be thus formulated : Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation." In passing, we wish, in view of some observations during the discussion, to state that our references to the legal and medical professions were directed to the case where the personal skill of the practitioner was in effect the sole source of productiveness. Reverting to the concept itself, we are of opinion that a more rigid confinement of the central idea would be an error. The words of the Constitution are at least consistent with the broad

(1) (1918-19) 26 C.L.R., at p. 554.

sense contended for by the claimants, and all reasons that justify, and as we think require the Court to adhere to, that broad sense exist. The nature of the instrument, and the ultimate power being left to the judgment of the Australian people to determine what is best for their own welfare, are powerful and, as we conclude, deciding considerations, once the field is open to the two possible constructions. In those circumstances, if we were to attempt to confine the provision within the rigid bounds suggested, we should become, not the guardians, but the gaolers, of the Constitution and particularly of the specific provision that directly or indirectly connects itself with almost all branches of our national life and progress. When we look back along the line of development that marks the course of industry, it becomes evident that one practical indication of error in the contention is that the attempt would be patently useless. It must be seen that to attempt to stem the Atlantic tide of industrial disputes by some rigid legal definition would be so hopeless a task that no such futility can fairly be imputed to the people of Australia when they adopted the comprehensive terms we find in Constitution. And yet, if we were to adopt the invitation of the respondents and declare, in accordance with the first contention, that the paragraph in question is confined to undertakings carried on wholly or mainly by means of manual labour, we should, in our opinion, go very far on the road, not merely of futility, but of destruction. Let us see what that would lead to, so far as judicial decision can assist us. The Court of Appeal in England in *Morgan* v. *London General Omnibus Co.* (1) has held that an omnibus conductor at daily wages and paid daily was not engaged in manual labour, because he did not lift the passengers into and out of the omnibus : he merely invited passengers to enter and he took their fares. It was the confidence in his honesty, said the Court, that was the real source of his wages. Another Court, in *Cook* v. *North Metropolitan Tramways Co.* (2), has held that the driver of a tram-car is not engaged in manual labour. And a very eminent Judge held that there was a distinction between manual labour and manual work. " Telegraph clerks, and all persons engaged in writing," did *manual work* in his view, but they did not do *manual labour*. We presume he would have held that bank clerks and insurance clerks

(1) (1884) 13 Q.B.D., 832.

(2) (1887) 18 Q.B.D., 683.

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did manual work, but not manual labour. Again, in *Hunt* v. *Great Northern Railway Co.* (1) the Court held that the guard of a goods train was engaged in manual labour. The Court said (2) that the duty of a guard is "a duty requiring care, skill, and experience, and the labour which it involves is mental rather than physical. No doubt it would occasionally be his duty, where necessary, to assist the porters in the transhipment of goods to or from his train; but that is not enough to make him a person engaged in manual labour. His primary duty was to use his intelligence, not his hands." In *Bound* v. *Lawrence* (3) the Court of Appeal held that a grocer's assistant was not engaged in "manual labour" because, though he had to use his hands in considerable physical exertion in showing goods and making up parcels, his principal function was "selling to the customers across the counter." In *Bagnall* v. *Levinstein Ltd.* (4) two out of three eminent appellate Judges held that a scientific man employed by a dye and chemical manufacturing company was not engaged in manual labour, though engaged in an employment involving manual labour and for five-sixths of his time he was working as an ordinary though skilled workman. The acceptance of the first contention would no doubt attract the great body of judicial decision on the subject, and probably would lead to the utter annihilation of the major part of Commonwealth arbitration as it exists to-day. The Commonwealth Arbitration Court would be strewn with wrecks. The preponderance of judicial opinion in this Court so far expressed is certainly opposed to that view. So far as our own opinions are concerned they are with sufficient elaboration expressed in the *Municipalities' Case* (5). That opinion answered the first question in the negative. In the same case our brother *Higgins* was of the same opinion. That view was also, as we understand the judgment of our brother *Powers*, shared by him. It may or may not have been actually essential to the decision, but all or nearly all the Court thought it necessary to express opinions on the subject. In addition to the four present members of the Court just mentioned, there is the very broad view deliberately expressed by the late Chief Justice of the Court, in the *Jumbunna*

(1) (1891) 1 Q.B., 601.
(2) (1891) 1 Q.B., at p. 603.
(3) (1892) 1 Q.B., 226.
(4) (1907) 1 K.B., 531.
(5) (1918-19) 26 C.L.R., at pp. 565 *et seqq.*

Case (1), that "the term 'industry' should be construed as including all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life." And again *O'Connor* J., in the same case (2), attached to the word "industrial" in the Constitution "the broader sense," which would unquestionably cover the first question. There is, therefore, already a considerable body of accumulated judicial opinion on the matter, and tending to negative the first contention. We reaffirm our view previously expressed.

The second contention involves the essential nature of the business of banks and insurance companies in relation to industrial operations. There can, no doubt, be found in accredited works on finance and politics, references both to banking and insurance as departments of industry. These references are certainly of some force as indicating that the expression "industrial disputes" applied to those cases is not so inapt as the respondents' argument would suggest. But we rest upon the inherent fact of the nature of the part that banking and insurance both play in the scheme of national industrial activity. 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 would collapse. They directly furnish an essential instrument of production. Insurance companies increase the productivity of capital actually employed in industry by diminishing the uncertainty of its continuance. Unexpected losses are replaced, the risk of these being transferred to the accumulated fund that the insurance business provides. Banks and insurance companies alike, though in varying circumstances, provide for industry one essential commodity—capital; and without them modern industrial operations would be impossible. They perform their services to industry in many ways, adapting their assistance to the protean needs of society. We are utterly unable to sever legally what the hard facts of life have so closely united, and, therefore, conclude that the disputes now referred to us answer the description of "industrial disputes" within the meaning of the Constitution. If that be so, it necessarily follows that they are within the statute.

(1) (1907-08) 6 C.L.R., at p. 333. (2) (1907-08) 6 C.L.R., at p. 367.

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Our answer to both questions in each of the two cases stated is in the affirmative.

HIGGINS J. *Insurance Employees' Case.*—This case raises, for the first time in a direct form, the question whether clerical workers in a business such as that of insurance, if they are in dispute with their employers, are engaged in an "industrial dispute" within the meaning of the Constitution, sec. 51 (xxxv.).

It is not disputed that the Act passed under the Constitution covers such a dispute; but if the Constitution does not cover it, the Act will, to that extent, be invalid.

It is not contended that clerical workers in a business such as that of a gas company cannot be covered by the words "industrial dispute" within the meaning of the Constitution. All the Justices who sat in the case of *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (1) agreed that the employees other than manual labourers may be parties to an industrial dispute within the meaning of the Constitution. The formal answer to question 3 in that case—"Is the Court" of Conciliation and Arbitration "competent to entertain claims on behalf of clerks on the subject of their wages"—was "Yes."

The main point taken, as I understand, by this insurance company is that insurance officers are not engaged in manufacture or production. Yet it is admitted that transport workers—such as carriers, such as seamen—can be parties to an industrial dispute within the Constitution. Counsel for the company was logically driven to the position that under the Constitution the Court of Conciliation can deal with disputes between manufacturing grocers and their employees, but not with disputes between ordinary retail grocers and their employees.

What is an "industrial dispute"? The man in the street, I should think, would say it was a dispute between employers and employees as to the conditions of their employment. We are not allowed to ask the "man in the street" however; but we are allowed to refer to standard dictionaries. The *Standard Dictionary* says that "industrial" means "of or pertaining to industry"; and

(1) (1919) 27 C.L.R., 72.

that " industry " means " labour employed in production, especially in manufacturing ; *useful labour in general.*" The *Oxford Dictionary* says that " industrial " means " pertaining to, or of the nature of, industry or productive labour " ; and that " industry " means " (4) systematic work or labour ; *habitual employment in some useful work*, now especially in the productive arts or manufactures." This is said in the dictionary to be one of the two prevalent senses. I presume that the insurance company would not refuse to apply the adjective " useful " to its operations, or to the operations of its clerks ; so that even on this line of argument it would seem that a dispute between clerical workers in the business of insurance and their employers should be treated as an industrial dispute.

But this line of argument is not quite satisfactory : the problem is not to find the meaning of the separate words and then add the meanings together, but it is to find the meaning of the combination " industrial disputes." No dictionary tells us that. The words are not technical, but popular—*uti loquitur vulgus.* As we cannot take the evidence of the man in the street, and as the man in the street's meaning is disputed, it is proper to turn to the context, and in particular to the placitum xxxv. There is power in sec. 51 for the Federal Parliament to make laws for the peace, order and good government of the Commonwealth with respect to (xxxv.) " conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." It is clear that the things called " industrial disputes " were regarded as evils to the Commonwealth, evils to be prevented or settled (that is, stopped) on reasoned investigation. The target at which the power is aimed is to prevent or bring to an end the stoppage of operations because of the differences, between undefined employers and employees, as to the conditions of employment. Prima facie, therefore, any dispute between employers and employees as to the conditions of employment of useful labour, if a strike or stoppage of operations may conceivably result, could be an industrial dispute. I do not use these words as a definition of " industrial dispute " ; I merely point out that the evil results at which the constitutional power is aimed may be apprehended in the case of insurance clerks or bank clerks as well as in the case of labourers or of artisans or of seamen or navigating officers or

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of gas clerks; and that, prima facie, there is nothing in the nature of the business or industry to induce us to treat the constitutional power as confined to manufacture or production of material commodities. It is not denied that strikes are conceivable in such a business as insurance (or banking), or, indeed, that strikes have actually occurred. The burden, therefore, is shifted, and it lies on this insurance company to show that disputes which come within the evils to be suppressed are excepted by the Constitution, expressly or by necessary implication. I can find no such exception, and I gather from the carefully weighed words of the late Chief Justice *Griffith* that no such exception occurred to him. In the case, in 1908, of *Jumbunna Coal Mine, No Liability*, v. *Victorian Coal Miners' Association* (1), he said :—" A question which arises at the outset is, what is an ' industrial dispute ' within the meaning of the Constitution ? It must, of course, be a dispute relating to an ' industry,' and, in my judgment, the term ' industry ' should be construed as including *all forms of employment* in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life." Nor did such an exception occur to the mind of any of the other Justices who took part in that judgment.

There is also a consideration to be faced in interpreting the Constitution, which is not to be faced in interpreting a mere Act of Parliament; it is that the words of the Constitution are, presumably, to operate for all time. A mere Act can be altered any day as circumstances change; but a Constitution is an instrument enabling Parliament to make laws to meet the fluctuations of facts and conditions. I do not take the view that the denotation of " industrial disputes " became fixed and rigid for ever on the day that the Constitution received the royal signature or came into operation; I have expressed my view on this matter in the *Municipalities' Case* (2). I mentioned there that though telegraphs and telephones did not exist when the United States Constitution was adopted, and " commerce " could not then include communication by these unknown services, yet the Supreme Court of the United States held that Congress could make

(1) (1907-08) 6 C.L.R., at pp. 332-333.

(2) (1918-19) 26 C.L.R., at pp. 572, 576.

laws on the subject by virtue of its power to "regulate commerce . . . among the several States." The confident assertion made by counsel for the insurance company, that nobody ever dreamt at the making of the Constitution of insurance employees or banking employees as coming under "industrial disputes," seems to be well answered by *Marshall* C.J. in *Dartmouth College* v. *Woodward* (1). There it was held that a charter granted to a college by the British Crown before separation was a "contract" within the section in the Constitution forbidding any State to make a law impairing the obligation of contracts. "It is more than possible," said *Marshall* C.J., "that the preservation of rights of this description was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reasons for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception."

I think that this reasoning justifies the statement that if the words "industrial disputes" are capable of covering disputes of insurance clerks with their employers, the burden lies on the insurance company here to show that such disputes are excepted, expressly or by necessary implication.

Considerable stress has been laid by counsel on a decision given by

(1) (1819) 4 Wheat., 518, at pp. 644-645.

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Edwards J. in New Zealand in the case of *Amalgamated Grocers' Assistants* v. *Wardell* (1). The learned Judge there decided that grocers' assistants were not engaged in an "industry," and that therefore there could be no industrial dispute, within the meaning of the Act, between them and their employers. This decision rests on the particular words used in the New Zealand Act, which defined an "industrial dispute" as a dispute relating to "industrial matters," and defined "industrial matters" as matters affecting any "business trade manufacture undertaking calling or employment of *an industrial character.*" Apparently, to have an "industrial character," *Edwards* J. thought that the employment must be in a manufacturing or producing concern. He relied on the use of the word "workman" in the Act, and on the power given to inspect factories but not shops, and on the fact that in New Zealand there was a special Act dealing with the position of shop assistants. It would be idle for me either to agree or disagree with this construction of the Act; but I noticed that his Honor said the question was very difficult, and that his decision would not necessarily conclude the matter. It is enough to say that the words in the New Zealand Act are not found in our Constitution. That decision was soon followed by the same learned Judge in *Christchurch United Tramway, Livery Stables, Grooms, &c., Union* v. *Christchurch Tramway Co.* (2), in which it was held that tramway employees, livery stable men, grooms, &c., could not be parties to an industrial dispute within the Act. The Act as so interpreted was soon altered by the New Zealand Parliament. Our problem is to find the limits of "industrial disputes extending" &c. within the natural meaning of our Constitution.

I am glad to observe that no attempt has been made in this case to object to the form of the case stated—"an alleged dispute"—such as succeeded in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (3) and other such cases. I think it is now recognized that a case may be stated for the determination of the law on facts stated, as well as on facts found—as on a demurrer.

I am of opinion that the questions should both be answered in the affirmative.

(1) Awards &c. under Industrial Arbitration Act, 1894-1900, 279.

(2) (1899) 2 N.Z.G.L.R., 104.

(3) (1913) 16 C.L.R., 591.

Bank Officials' Case.—In my opinion, the answer to both questions should be in the affirmative—for the reasons which I have stated in the *Insurance Employees' Case*. Both cases have been argued together.

GAVAN DUFFY J. I agree with the judgment of the Chief Justice.

POWERS J. The questions to be answered in these two special cases and the facts on which the answers are to be given have been fully set forth in the judgments just delivered. The question as to what class, or classes, of employment can be the subject of an industrial dispute within the meaning of those words in the Act, and in the Constitution, has been before this Court on different occasions, and, although the members of the Court only decided in each case whether the particular class of employment in question could be the subject of an industrial dispute, they dealt generally with the questions of "industry" and "industrial matters" in each case. In the two cases now before the Court it is admitted that employers and employees engaged either in the banking business or industry, or in the insurance business or industry, could be engaged in an industrial dispute within the meaning of the words in the *Commonwealth Conciliation and Arbitration Act*, and the only question for the Court to decide is whether the disputes referred into Court or either of them are industrial disputes within the meaning of the words used in pl. XXXV. of sec. 51 of the Constitution. Counsel for the respondents in both cases admitted that they could not ask for a different decision in the two cases—banking and insurance.

The question as to what is recognised by the Court as "industrial disputes" was fully dealt with by the members of the Court in the *Jumbunna Case* (1) and in the *Municipalities' Case* (2). At one time it was contended that no one but manual labourers could be engaged in an industrial dispute. Later on, it was recognized by all members of the Court that clerks employed in connection with an "industry" could be engaged in an industrial dispute within the meaning of the words in the Constitution. Whether a dispute is held by the Court to be within the words in the Constitution depends, and has depended

(1) (1907-08) 6 C.L.R., 309. (2) (1918-19) 26 C.L.R., 508.

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in the past, on whether a narrow or wide construction should be placed on the words used in the Constitution. The wider construction has always been placed on the words " industrial dispute " by a majority of this Court, especially in the two important cases previously mentioned : the *Jumbunna Case* (1), and the *Municipalities' Case* (2). In the *Jumbunna Case* the late Chief Justice (Sir *Samuel Griffith*) said (3) :—" A question which arises at the outset is, what is an ' industrial dispute ' within the meaning of the Constitution ? It must, of course, be a dispute relating to an ' industry,' and, in my judgment, the term ' industry ' should be construed as including all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudically affect the orderly conduct of the ordinary operations of civil life." Surely a cessation of the banks' operations would come within the definition quoted. The late Mr. Justice *O'Connor* said (4) :—" The words " in the Act " are free from ambiguity, and must be construed with their ordinary grammatical meaning. So construed, the definition includes within the term ' industry ' every kind of employment for pay, hire, advantage, or reward except agricultural, viticultural, horticultural, or dairying pursuits " (because excepted by the Act). " It meant just what the two English words in their ordinary meaning conveyed to ordinary persons, and the meaning of these words seems to be now much what it was then " (when the Constitution was framed). Referring to the use of the words in the Constitution, *O'Connor* J. said (5) : " And it is certainly fair to assume that the expression ' industrial disputes ' was at the time of the passing of the Acts commonly used in Australia " (at the time the Constitution was established) " to cover every kind of dispute between master and workman in relation to any kind of labour." There is nothing in the Constitution to show that the words were intended to be used in the narrower sense ; on the contrary the scope and purpose of sub-sec. xxxv. would lead to an opposite conclusion. In the *Municipalities' Case* (2) the majority of the Court adopted the wider construction, and held that, in order to constitute an industrial

(1) (1907-08) 6 C.L.R., 309.
(2) (1918-19) 26 C.L.R., 508.
(3) (1907-08) 6 C.L.R., at pp. 332-333.
(4) (1907-08) 6 C.L.R., at p. 365.
(5) (1907-08) 6 C.L.R., at p. 366.

dispute within the meaning of sec. 51 (xxxv.) of the Constitution and of the *Commonwealth Conciliation and Arbitration Act* 1904-1915, it was not necessary that the *undertaking* in which the parties to the dispute are engaged should be an *industry*, *trade* or *business* carried on for profit. It was held in that case that an " industrial dispute " might arise in which employees were not manual workers. I feel satisfied that, at the time the Constitution came into force, the term " industrial disputes " did include disputes between employers and employees as to wages and conditions of work, in any " undertaking, business or industry," and not only an " industry " in the narrowest meaning of the word.

In these cases there are disputes between employers and employees as to wages to be paid to officers—ordinary clerks and messengers—and as to the conditions of work to be observed by the employers. There is no doubt about " banking " and " insurance " both being " businesses," and both are necessary parts of the industrial development of the country as industries are carried on at present. Both banking and insurance are sometimes referred to by writers as industries. It would be hard to imagine what effect a strike for a month of all bank clerks, officers and messengers would have on industrial work generally ; and it is hard to believe that such a strike would not have been called an " industrial dispute " in 1900, or that it would not be so regarded to-day. The cessation of insurance business would at once cause an increase in the cost of building operations and in the price of goods and materials for other industrial occupations if the employers had to bear individually the risk of loss by fire and otherwise. " Industrial insurance " is part of the work of many large insurance companies.

I hold the views which I expressed in the *Municipalities' Case* (1) in 1919 as to what disputes are included in " industrial disputes " within the meaning of those words in the Constitution. I hold that the disputes referred into Court, mentioned in the special cases before the Court, are " industrial disputes " within the meaning of the Act and of the Constitution, and that the answers to the questions in the two special cases should in both cases be " Yes."

(1) (1918-19) 26 C.L.R., 508.

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STARKE J. The question is whether a dispute between the clerical workers in insurance offices and banks, and their employers, is an industrial dispute within the meaning of the Constitution and the Arbitration Act of the Commonwealth. At first I was disposed to think that the question should be answered in the negative, but reflection has led me to an opposite conclusion.

The concept an "industrial dispute" is, as Mr. *Latham* said, one of social economy, and the power conferred by the Constitution in relation to industrial disputes is focussed upon the dislocation or possible dislocation of the industrial structure or organization of the community. A community is industrially organized with a view to the production and distribution of wealth, and the "industrial mechanism of society" is not confined to manual labourers, nor to persons engaged in the actual production and distribution of material commodities or in some trade or craft. It 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." (See *Labour and Capital after the War* (edited by S. J. Chapman), essay by R. H. Tawney; *The Principles of Economics*, by W. S. Jevons; *The Industrial System*, by J. A. Hobson.) The functions of insurance and banking simply constitute the financial side of the industrial system, and are attendant upon its directly productive and distributive activities. No doubt insurance companies and banks do not produce material commodities, but simply engage in business transactions, in the sense of finance operations, and equally, no doubt, the clerks in their employ are not engaged in any art or craft involving the production of material commodities. Neither, however, are clerks in gas-works or journalists in newspaper offices; and yet, as I understand the decisions of this Court, both are within the ambit of the constitutional power. Looking at the purpose of that power, what difference can it make if the industrial function, e.g., that of banking or insurance, be performed by means of a separate and independent business, instead of as a part or branch of a firm or business producing a commodity? The withdrawal of the service will in either case be equally detrimental to the industrial system of the community and might result in its dislocation. And the function of sec. 51, pl.

xxxv., of the Constitution is to enable Parliament, by means of the power there conferred, to prevent that dislocation or to settle it if it has occurred. The Constitution must receive an interpretation which will enable Parliament to exercise that power effectively over the whole area of industrial service within the ambit of the power.

It has been said that this view is opposed to the plain, ordinary, popular and primary meaning of the words " industrial dispute." It is true that the industrial disputes best known to us are connected with producing or transport industries or services, in which manual labour is mainly employed. But the fact that our experience of industrial disputes is limited affords no ground for denying the authority of Parliament over the whole industrial field.

The question for the opinion of this Court should be answered, in both cases, in the affirmative.

Questions answered in the affirmative.

Solicitors for the applicants, *Derham, Robertson & Derham.*

Solicitors for the claimants, *Blackburn & Slater ; Rogers & Rogers.*

B. L.