HIGH COURT OF AUSTRALIA

Federated Municipal & Shire Council Employees' Union of Australia

Vs.

City of Melbourne

(Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.)

19.05.1919

JUDGMENT

GRIFFITH C.J.

This case raises the question of the existence and extent of the immunity of municipalities as instrumentalities of Government of the States. The matter came before the High Court in *Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1]*[1] in 1911, when the Court intimated that, in its opinion, if a municipal corporation chooses to engage in what has lately been called "municipal trading," and joins the ranks of employers in industries, it is liable to the same Federal laws as other employers engaged in the same industries.

In that case various decisions of the Supreme Court of the United States of America were cited. This Court left undecided, without expressing any opinion upon it, the question whether, and how far, a municipality is subject to the jurisdiction or award of the Arbitration Court.

The principal American cases cited were the following:— *The Mayor v. Ray*[2] , in which the Court said:—"A municipal corporation is a subordinate branch of the domestic government of the State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. ... Our system of local and municipal government is copied, in its general features, from that of England... They are not trading corporations and ought not to become such." *Meriwether v. Garrett*[3] :—"Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer ... This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text writers." *Stoutenburgh v. Hennick*, in which *Fuller*[4] :—"It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity." *Pollock v. Farmers' Loan and Trust Co.*, in which *Fuller*[5] : "A municipal corporation is the representative of the State and one of the instrumentalities of the State government." And the important case of *South Carolina v. United States*[6] .

The present case was argued at the September sittings of the Court, when argument on the main

point was concluded, and the Court reserved judgment on it, leaving for further argument after judgment the application to the different forms of municipal activity of any general rule which it might lay down.

The matter now comes for our determination, and I will give my opinion.

I regard these decisions of the Supreme Court of the United States as to the immunities of municipal corporations rather as historical expositions of the unwritten law which the thirteen colonies had brought with them from the Mother Country and carried with them into the Union than as interpretations of the Constitution of that Federation. As such, they are entitled to very great weight. In the view of those eminent men, who were after all only stating matters of common knowledge, it was part of the unwritten law and of the system of English government which the colonists brought with them to America, that the functions of government were divided between the central Government and the local or municipal bodies, and that certain powers were allocated to these latter, not as agents or servants of the central Government, but as independent authorities, created by the Legislature, and subject of course to it, but who were entitled as independent organs of the Government of the Colony to equal freedom in the performance of their functions. And they did not find anything in the Federal Constitution which authorized any interference with this freedom. The doctrines of the law of master and servant, and of principal and agent, deal with matters on a lower plane, and are wholly beside the question.

In my opinion, this exposition of the law is historically applicable to the Australian Colonies. And it follows, in my opinion, that a municipal authority, in the discharge of that portion of the general mass of State functions which had been entrusted to it at the date of Federation, is entitled to the same immunity from Commonwealth interference as the State itself would be in the discharge of similar functions.

Barton J

. read the following judgment:—

My learned brother *Powers*, as Deputy President of the Commonwealth Court of Conciliation and Arbitration, asks the Bench to determine a question of great moment from the aspect of the relations between Commonwealth and State in the Australian Federation. A dispute between the parties is before him in that Court.

The claimant is a registered organization of employees. There are six hundred and fifty-eight respondents, consisting mainly of city, municipal, borough and shire councils, which, for convenience, are in the case grouped under the name of municipal corporations. Each of them exists under the statutory law of one or other of the States of the Commonwealth. They are now constituted under one or other of the Local Government Acts of Victoria, New South Wales or Tasmania. The claims are in respect of work done by members of the organization employed by the municipal corporations in municipal works which are not carried on for "municipal trading" purposes. The organization contended that even in the case of such operations the Arbitration Court had jurisdiction. The respondents denied this contention, their ground being that the municipal corporations are instrumentalities of the States under which they are constituted.

The question originally submitted for the opinion of this Court was this: "Has the Commonwealth Court of Conciliation and Arbitration power or jurisdiction to determine by an award the dispute

between the organization and the municipal corporations, constituted under or subject to the provisions of the three Acts mentioned, so far as the dispute relates to such operations of the said municipal corporations as do not consist of municipal trading?" During the argument, the learned Deputy President, who was one of the Court, altered this question, with the approbation of the rest of us, by striking out the final words, "as do not consist of municipal trading," and putting in their place these words: "as consist of the making, maintenance, control and lighting of public streets or any of them" —meaning, of course, the public streets of the municipality concerned. The arguments followed in the main the lines of the contentions described in the case stated. Besides the parties to the dispute, we had the advantage of hearing counsel for the Commonwealth and for each of the States concerned, who had all obtained leave to intervene.

Apparently the question as altered, in its inclusion of street lighting, refers to the ordinary lighting for public convenience, supported by municipal taxation, and not to the special lighting of places of business and residences, &c., undertaken by contract with individuals and for profit. I mean that the question includes only that lighting which it is contended is part of the governmental work of the municipality, as distinct from that which is a mere commercial undertaking for pay or reward. Although the principle at issue was touched in a previous case, as I shall point out, it now comes before us for the first time as matter for decision. In the elaborate argument that we heard, many cases were cited and discussed, but I propose to refer only to a few, comparatively, which may help me in the process of elucidating the real question.

First, it is sufficient merely to mention such cases as *D'Emden v. Pedder*[7] ; *Baxter v. Commissioners of Taxation (N.S.W.)*[8] ; *The Railway Servants' Case*[9] (a decision which, as the Court intimated in the course of the present case, it would be a waste of time to attack). Taken together, these cases, and indeed others, completely establish, as a necessary implication from the whole scheme of the Constitution, the immunity of the Commonwealth or a State and the instrumentalities or agencies of its government from interference at the hands of the other authority, whether by way of taxation or otherwise; an immunity, as the last-mentioned case establishes, not in any wise affected in the case of the States by the terms of sub-sec. XXXV. of sec. 51 in the *Constitution*. I have no doubt that municipal corporations are such instrumentalities in respect of the governing functions committed to them, and I propose to make that clear presently.

But it would be going a good deal further to say that municipal corporations are entitled to this immunity from interference by the Commonwealth in respect of all of their operations. If they are not, then it must be ascertained whether the immunity extends to such operations as are the subject of the question raised by the case stated. The contention for the claimant is that municipal corporations stand altogether outside this immunity, which is confined, they urge, to the case of the directly governmental operations of the State itself; that municipal corporations are not in that sense instrumentalities or agencies of the State, but independent bodies created for certain purposes and not subject to the control of the State. Their position was likened to that which arose in *Mersey Docks v. Cameron*[10] , *Gilbert v. Corporation of Trinity House*[11] , and similar cases, on which much reliance was placed. But these cases do not apply to such a position as the present one. They go to show the liability of certain corporations (not municipal), (1) to be taxed by the State to which they belong, (2) to be sued for negligence by subjects of that State—in each case on the ground that the corporation could not be held to share the immunity from liability of the Government of that State. The corporation in the first-named case claimed immunity from taxation on the ground that the Crown does not tax itself. The corporation in the *Trinity House Case* claimed immunity in an action for negligence on the ground that "The King can do no wrong," since legislation, where the Crown is not expressly mentioned, is held to apply to the subject and not to the Government. In both

instances the claim was rejected. But these corporations were not defending themselves from the Government of any sphere extraneous to that of their own State on the ground that they were free from interference from that quarter. The question of liability as between State and State or between Commonwealth and State stands on wholly different grounds. It is not because the State may tax or the citizen of that State may sue that the Commonwealth may tax or its citizens outside the State may sue. The question has to be determined on different considerations. If, for instance, it were admitted that the State of Victoria could tax its own municipal corporations, it would not follow that the Commonwealth could for that reason tax the municipal corporations of Victoria. If the Commonwealth could impose such taxation, which I am far from saying, it could only be by reason of power given by the Constitution as in sec. 51 (II.). But power to interfere with municipal corporations is not given anywhere by the Constitution. Indeed by the direct implication of sec. 51 (XX.) such corporations are protected from the legislative power of the Commonwealth. There is, above all things, a prohibition underlying the whole of the Constitution, which, it is to be remembered, is sedulous in preserving the respective spheres of State and Commonwealth. It is a prohibition of action on the part of either tending to invade or impair, by means not distinctly authorized, the powers of the other in the sphere allotted to the one or preserved to the other. And it is in each case to be determined in which sphere is included the matter over which power is claimed. Is, then, the control of municipal corporations within the sphere of the Commonwealth, or within that of the State which creates them, and under which they subsist in the sense that their granted powers can be increased, or diminished, or abolished at the will of the grantor, the Parliament of the State? That question can only be answered in the negative. The cited case of *Powell v. Apollo Candle Co.*[12] has nothing to do with this question so far as the main point decided is concerned; though where the Judicial Committee held that duties levied by the Order in Council there in question were really levied by the authority of the Legislature, and not that of the Executive, they may have provided the present respondents with a useful analogy. These municipal bodies are independent only in the sense that they may exercise the powers allotted to them without interference save on the part of the State Legislature. They have power to pass subsidiary legislation such as by-laws (in the case of some shires ordinances), but they are distinctly subordinate to the powers of the State; they move entirely within the sphere of, and are subject to, its laws. But these matters are no doubt of concern to the State, and, in fact, within its ambit, equivalent to national matters. Such are, for instance, the making, maintenance, and control of communications. Of these the State attends to railways, telegraphs, and main roads; the municipalities, to roads not main ones, within their boundaries, and to streets. They are all part of one great concern. One may apply to the State the words of *Cockburn* J. in *Purcell v. Sowler*[13] :—"The Court below seems to have distinguished between the general and the local administration of the poor law, holding that the general administration was a matter of national concern, while the administration in a particular district was not. But it seems to me that whatever is a matter of public concern when administered in one of the Government Departments, is matter of public concern when administered by the subordinate authorities of a particular district. It is one of the characteristic features of the government of this country that, instead of being centralized, many important branches of it are committed to the conduct of local authorities. Thus the business of counties, and that of cities and boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighbourhood that it is not a matter of public concern." True, these words were used in deciding a libel case, but they are aptly descriptive of the relation of local authorities to the government of the country concerned. And anyone, more especially if he has compared the Federal Constitution with that of the State and considered the legislation of the latter, will admit that the country concerned is in this connection the State and not the Commonwealth.

I turn to some American cases in addition to those cited by the learned Chief Justice. I refer to them because the statements seem to me to be accurate and the reasoning cogent. In *Ottawa v. Carey*[14] , in 1883, *Waite* C.J. said:—"Municipal corporations are created to aid the State Government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established... To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect." In other words, the State has granted to the corporation, during the pleasure of the Legislature, some of its powers, and it retains the rest.

In *United States v. Railroad Co.*[15] it was held that a municipal corporation is a part of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues. *Clifford* and *Miller*[16] that "private property held by a corporation in a proprietary right, and used merely in a commercial sense for the income, gains, and profits," which they thought the subject of the litigation was in effect, might be taxable just the same as property used by an individual or by any other corporation. That is, I think, undeniable. But the principle laid down by the judgment of the Court stands unimpaired. In delivering it, *Hunt*[17] :—"A municipal corporation like the City of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its Legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation" (*i.e.*[18] :—"Was it exercised for the benefit of the municipality, that is, in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power?" If it were so acting, the bonds were not taxable by Congress.

In *Atkin v. Kansas*[19] , where the decision was that it was within the power of a State, notwithstanding the 14th amendment of the *United States Constitution*, to prescribe the conditions on which it would permit public work to be done on behalf of itself or its municipalities, the Statute impeached dealt with hours of labour, rates of wages, &c. The precise question decided is not in issue here, nevertheless the case is important on the present question by reason of some passages in the judgment of the Court, delivered by *Harlan* J., as to the relation existing between a State and its municipal corporations. "Such corporations," [20] , "are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the Legislature; the authority of the Legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed."

The judgment cited a previous case of *Williams v. Eggleston*[21] , in which the Court had said: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the

Legislature." [22] :—"Municipal corporations owe their origin to, and derive their powers and rights wholly from, the Legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the Legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations of the State, and the corporations could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the Legislature." [23] , "it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character." I fully adopt that proposition.

These strong passages harmonize in reason with the decision in *Flint v. Stone Tracy Co.*[24] , following *South Carolina v. United States*[25] , that the exemption from Federal taxation of the means and instrumentalities employed in carrying on the governmental operations of the States does not extend to State agencies and instrumentalities used for carrying on business of a private character. This limitation of an admitted principle, of course, covers the operations of municipal corporations which are conducted by municipal bodies for commercial or trading purposes: for those of gain or profit and not for those of government.

It has been pointed out more than once from this Bench that when it cites American decisions it is fully conscious that they are not authorities by which it is bound. But it is entitled to adopt the reasoning adduced in support of such decisions when it is convinced of the soundness of the reasons and when they are applicable to the facts of the case in hand. And in that conviction I apply to this case the quotations I have made.

My views, as well as those of the learned Chief Justice and the late *O'Connor* J., as to the limitations mentioned, are expressed, though extra-judicially, in *Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1]*[26] . I adhere as a matter of decision to what, with my colleagues, I then put as an opinion invoked by the parties.

So far, then, as its "municipal trading" or the carrying on of business commercially for purposes of gain and profit is concerned, a municipal corporation is, in my view, in no better position than a private trading corporation, or indeed an individual, would occupy, and cannot claim immunity from the exercise of Federal powers to any greater extent than such a company or person. But to the extent that its functions which are exercised under the statutory authority of the State are governmental, in the sense shown by the above observations and quotations, the municipal corporation shares the immunity of the State itself from Federal interference, just as the Commonwealth and its instrumentalities may not be undermined or impaired by the State.

The operations described in the question stated are, in my opinion, clearly governmental, and I therefore hold that the Arbitration Court can no more interfere with the respondent municipal organizations in these respects than could its creator, the Parliament of the Commonwealth.

I must therefore answer the question stated in the negative. This answer applies to the first branch of the argument. As the majority of the Bench are of a different opinion, argument is to be taken on the second branch—whether there can be an industrial dispute extending &c. between the municipal corporations and their employees in respect of the operations mentioned, regard being had to par.

XXXV. of sec. 51 of the *Constitution* and also to the *Conciliation and Arbitration Act of the Commonwealth*.

Isaacs and Rich JJ

. (read by Isaacs J.):—

As the case stands amended, the question of law stated for the opinion of this Court is whether the Commonwealth Court of Conciliation and Arbitration has jurisdiction to settle a dispute as to wages and hours, and other conditions of employment, between municipal corporations and such of their employees as are employed in the construction and maintenance of the public streets of the municipalities.

The argument upon this question has been divided into two branches. The first branch is whether the words "industrial disputes" in pl. XXXV. of sec. 51 of the *Constitution* are limited to disputes in "an industry" in the sense of a specific business or avocation in which both employer and employees are engaged, or whether they extend to cover all disputes of an industrial nature—that is, for instance, where the employees are engaged in industry in the broad sense by working in the service of the employers and the dispute is as to the conditions of employment either as between employers and employees or as between different classes of employees, such as demarcation disputes. The second branch is whether, supposing the words "industrial disputes" have the wider connotation, municipalities are subject to the jurisdiction of the Commonwealth tribunal, having regard to their relation to the State system of government. The argument so far—though something was said as to the first branch—was ultimately limited to the second branch, leaving the first to be argued out in the event of the opinion of the Court on the second branch making that course necessary.

If municipalities, on the true construction of the Constitution, are outside the sphere of Commonwealth jurisdiction, in relation to their construction and repair of roads, by reason of their position as an "instrumentality," as it is called, of State government, it matters not whether road construction or maintenance can or cannot be considered "an industry" in the narrower sense. The language of pl. XXXV., read as part of sec. 51, is as follows: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... (*xxxv.*) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." No express limitation is placed on the class of disputants in the placitum itself or elsewhere in the Constitution.

The laws, therefore, that may be made under that specific power, so far as any express limitation is concerned, extend to all industrial disputes in the Commonwealth extending beyond the limits of any one State. And covering section V. of the *Constitution Act* makes the Constitution itself, and all laws made under it "binding on the Courts, Judges, and *people* of every State and of every part of the Commonwealth, *notwithstanding anything in the laws of any State.*" Any constitutional exemption of municipalities from the operation of such laws must, therefore, rest upon some implication of law, which when applied to pl. XXXV. excludes their industrial disputes from the words "industrial disputes" there found.

It has already been decided by this Court (*Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 2]*[27]) that a municipal corporation in Victoria so far as it engages in trading occupation, is subject to the jurisdiction of the Arbitration Court. This shows that the mere fact that a corporation may be created or abolished by the State is no reason for

exemption from Commonwealth jurisdiction. A distinction was drawn in that case between trading and non-trading operations, but, although trading operations were held to fall within the jurisdiction of the Court, the decision did not lay down "trading" as the *discrimen*. It was not necessary to do so. The question of how far non-trading operations attracted the jurisdiction was left undetermined. In that case, "trading" and "governing" were contrasted; but there are municipal functions which are neither the one nor the other. The care of parks and the establishment of free libraries could not properly be brought under either head. We have now to consider the true line of demarcation, if there is one. The question, then, as to the implied exclusion of non-trading operations from the arbitral jurisdiction of the Commonwealth is this: *Where do we find the restrictive implication of law*? It is suggested, using American terminology, that municipalities are "State instrumentalities." Tested by British standards—which are the only legitimate standards—such a term, to have any meaning which would attract a legal implication restricting the meaning of the words "industrial disputes," must denote that municipalities are, in relation to the subject matter of disputes, true functionaries of the State Government, that is, the King's Government.

A clear distinction must be noted and preserved between the expression "the Government of the country" in the sense of the King's representatives or agents in the concrete sense, and the expression "the government of the country" in the abstract sense of the process of governing the country in whole or in part. The first denotes the *persons* who act, and the second denotes *acts* done. Again, the functions performed by "the Government" in the concrete sense, including in that term those who represent the Government *pro hac vice*, are the acts of the General Government, that is, theoretically, the Crown; but there may be functions coming under the second head which are not in any real sense acts of the General Government. For instance, as early as the reign of Queen Anne, the Court of King's Bench said, speaking of a case concerning the City of London, "a corporation is properly an investing the people of the place with *the local government thereof*, and therefore their *law* shall bind strangers" (*Cuddon v. Eastwick*[28]). A "by-law" is a law (*Hopkins v. Swansea*[29] and *London Association of Shipowners and Brokers v. London and India Docks Joint Committee*[30]). In *Arnold on Municipal Corporations* (1851), at p. 3, there is the following definition: "A municipal corporation, therefore, is a civil corporation aggregate, established for the purpose of investing the inhabitants of a particular borough or place with the power of self-government, and with certain other privileges and franchises." Royal Charters creating municipal corporations and investing them with powers were not imposed on the locality, but were offered and might be accepted or rejected; and, if accepted, it was taken that every person who chose to be or to come within the area of the powers granted subjected himself to the control conferred. Indeed, municipal corporations were the creation not merely of the Crown, but also of subjects who had *jura regalia.* (See fully on this subject, *Grant on Corporations*, particularly pp. 10 *et seqq.*) The Act of 1835 (5 & 6 Will. IV. c. 76), which was referred to in argument, did not destroy the old corporations; they remained, but under new governmental powers (*Attorney-General v. Corporation of Leicester*[31]). The charters creating new corporations were still issued under the royal prerogative, although, when once created, the new municipality is *pro tanto* invested with the statutory functions and powers (*Grant*, p. 16).

By various later English enactments, many municipal corporations were enabled to undertake works some of which may usefully be referred to here; as, for instance, the establishment of museums of art and science, the providing of baths and wash-houses, the removal of nuisances, the appointment of police constables, and the establishment of salaried police magistrates. They may, at common law, be liable to repair highways and bridges, and may make rates for the purpose; they could in some instances supply water, and impose water rates. All these instances and others, with the appropriate authorities and references, are to be found in *Grant on Corporations*, *passim*, and in the

article "Municipal Corporations" by Mr. *Manson* in the *Encyclopædia of the Laws of England* (2nd ed.), vol. *ix.*, pp. 466 *et seqq.* The later English legislation does not affect the fundamental character of the system. To borrow Mr. *Manson's* quotation, the motto is "*Spartam nactus es, hanc exorna*." The duties and functions of the corporation are, at least in the main, entirely local and for the benefit and advantage of the inhabitants of the locality or persons transiently coming there.

The distinction between the functions of such bodies and those of the General Government has been very clearly marked by the Courts. The fundamental case is *Coomber v. Justices of Berks*[32] . But, before quoting the ruling passage from that case, reference should be made to some other cases. In *R. v. Mayor of Sheffield*[33] *Blackburn* J. refers to the reason why the Act of 1835 was passed, namely, to control the corporations, to cut down their ownership of the municipal property, and to check their expenditure by appropriating the fund to certain purposes such as debts, police expenses, prosecutions, payment of constables, &c., and any surplus "for the public benefit of the inhabitants and improvement of the borough" —deficiencies to be made good by rates. This view was adopted by *Jessel* M.R. in *Attorney-General v. Mayor of Brecon*[34] [35] , "is part of the municipal government of the town," and "is vested in the corporation for the benefit of the town as part of the government of the town; and he who seeks to interfere with the privileges and duties connected with the regulations must be resisted, and, of course, resisted at the expense of the corporation."

This all tends to show, both by its affirmative propositions and negatively by the absence of any reference to the Crown or the Attorney-General, that the municipality was regarded in relation to its rights and powers as independent of the General Government acting for the whole country. Then the Courts have also had to consider the position of municipalities from the standpoint of their obligation to contribute to rates. Prior to the Act of 1835, municipalities were liable to the poor rate (*R. v. Mayor of York*[36]). In 1839 and 1840 the Court of Queen's Bench held them no longer liable, having regard to the provisions of the Act of 1835, sec. 92, and the public nature of their functions (*R. v. Mayor of Liverpool*[37] and *R. v. Inhabitants of Exminster*[38]). Lord *Denman* C.J., in the *Liverpool Case*[39] , spoke of the "public" purposes as in "extent and approximation to something like national benefit." Parliament, however, in 1841, by Act 4 & 5 Vict. c. 48 promptly rejected the notion of any such intention on its part in passing the Act of 1835. After reciting the decisions, it declared the expediency of the municipal corporations being rateable, and enacted that they should be rated.

There was, of course, always the Crown exemption, because the Crown was not included expressly or by necessary implication. In *County Council of Middlesex v. St. George's Union*[40] it was expressly argued for the County Council, whose property was sought to be assessed, that it was exempt because "the government of each county is none the less administered by the Sovereign according to the theory of the Constitution because it is administered through local agencies." On the other hand, it was contended for the Assessment Committee that "it is not enough that it should be used for purposes of government; it must be used for the purposes of that part of the government of the country which is theoretically administered by the Crown." In delivering judgment *Cave*[41] that in the authorities "a distinction has been drawn between Crown or Imperial purposes, such as the administration of justice, and purposes of local government." The learned Judge also observed: "whether a municipal authority be created by charter or by Statute, its purposes must equally be local." *Wills*[42] the arguments were repeated and the judgment affirmed. There is, however, one passage in the judgment of *Lopes*[43] which deserves special notice. The Lord Justice first refers to Lord *Westbury's* judgment in *Mersey Docks v. Cameron*[44] , where that learned Lord uses the phrase "the Government of the country" in the concrete sense of the King's Government. Then *Lopes* L.J. states the inclination of his opinion that prior to 1888 the whole of the building would

have been exempt "because at that time the administrative business of the county was done by the justices in Quarter Sessions assembled as such, and by virtue of the authority which they derived from the Crown." "But," proceeds the learned Judge, "in 1888 a great change took place. The judicial business of the county continued to be performed by the justices in Quarter Sessions, but the administrative business was transferred to the County Council, who in performing their functions do not act by virtue of any judicial office, or as being servants of the Crown." And so he held that so much of the building as was occupied for Crown purposes was not rateable; but so much as was occupied by the County Council for administrative or municipal purposes was rateable.

These decisions applied the principle of *Coomber's Case*[45] , which is stated most clearly by Lord *Watson* at p. 74. The learned Lord adopted Lord Chancellor *Westbury's* view that the exemption of the Crown extends "not only to the immediate and actual servants of the Crown but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country." Then Lord *Watson* proceeded to say: "Seeing that, in my opinion, the administration of justice, the maintenance of order, and the repression of crime, are among the primary and *inalienable functions of a constitutional Government*, I have no hesitation in holding that Assize Courts and police stations have been erected for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities." Here we have the *discrimen* of Crown exemption. If a municipality either (1) is legally empowered to perform and does perform any function whatever for the Crown, or (2) is lawfully empowered to perform and does perform any function which constitutionally is inalienably a Crown function—as, for instance, the administration of justice—the municipality is in law presumed to represent the Crown, and the exemption applies. Otherwise, it is outside that exemption, and, if impliedly exempted at all, some other principle must be resorted to. The making and maintenance of streets in the municipality is not within either proposition.

It is true, as observed by the Privy Council in *Farnell v. Bowman*[46] , that "the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works." In New South Wales and Victoria, as in other Australian States, the railways are governmental undertakings, and the Commissioners, for such a purpose as the present, represent the Crown. But the undertaking of railways is not what Lord *Watson* calls "an inalienable function of a constitutional government." The Deniliquin and Moama Railway is a private enterprise; the Hobson's Bay Railway in Victoria was a private enterprise; the Mount Lyell Railway in Tasmania is a private railway. Government tramways are assumed as governmental functions; while municipal tramways are not, notwithstanding rules and regulations which govern the traffic upon them. In Australia, when settlement began, the Government was obliged to construct roads in the new country; but when municipal institutions arose that function was for local purposes handed over to the municipalities, and where they did not exist the Government retained the function. Where the transfer, however, took place, the municipality, as a matter of principle, stood in relation to that function exactly as a municipality stood in England to the same function—namely, it was simply local government as distinguished from general or Crown government, and the rights, powers and privileges of the municipality depended on Statute. The passage above quoted from the judgment of *Lopes* L.J. in the *County Council of Middlesex Case*[47] has close application.

What doctrine of construction, then, can by implication exclude municipalities in relation to such a function from the constitutional purview of pl. XXXV. of sec. 51? Apart from the doctrine that the Crown is not bound by Statute unless included by express words or clear intendment (*Attorney-*

General for New South Wales v. Curator of Intestate Estates[48]), ordinary British law offers no canon of construction which would have that effect. This is a doctrine as well recognized in America in both Federal and State Courts as it is in our own jurisprudence. For instance, in *Jones v. Tatham*[49] *Lewis* J. says: "The general business of the legislative power is to establish laws for individuals, not for the Sovereign; and when the rights of the Commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied." The Supreme Court of the United States affirmed the principle in *Guarantee Co. v. Title Guaranty Co.*[50] . This constitutional doctrine effectively guards the State Governments, and, under that denomination, guards their agents and representatives within the terms of Lord *Watson's* judgment from coercion by Federal law except where the State Government is expressly named in the Constitution or where its subject matter indicates that the State Government also must be bound. But apart from that, the question is one of conflict between two laws—Federal and State—both assumedly within respective powers, and both in terms operating on the same persons or other subject matter. If power is wanting *cadit quæstio*. But if the power exists in general terms and the law is passed in general terms, then, apart from implied exclusion from the general term, it comes to a question of supremacy.

The constitutional doctrine of the actual decision in *D'Emden v. Pedder*[51] is founded on the principle of supremacy, and on nothing else (see pp. 110-111). It applied sec. 109 of the *Constitution*; it assumed the power in each Parliament, so far as its own Constitution was concerned, to pass the respective laws; it further assumed, as is the truth, that all executive power of a self-governing Colony is ultimately referable for its authority to some legislative provision: it then placed the true ultimate legislative authorities in juxtaposition, and declared in case of conflict the supremacy of the *Federal Constitution* or *Federal Act*. That is precisely what *Marshall* C.J. said, in *McCulloch v. Maryland*[52] , in these words: "There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, *is declared to be supreme* over that which exerts the control." The same point was very distinctly put, with respect to Federal officers' freedom from State control, in *Ohio v. Thomas*[53] .

Stress, it is observed, is here laid on the fact that *D'Emden v. Pedder*[54] is an application of the constitutional declaration of supremacy in sec. 109 of the *Constitution*, which itself rests for its binding force on covering section V. of the Act—that section being, after all, the controlling provision of the Imperial Parliament. And the reason stress is laid on that fact is that, although the case itself declared the inability of the State to fetter Commonwealth agencies, it was argued that the principle of the decision in that case must be reciprocal. As soon as it is perceived that the principle of the decision is "supremacy," it is manifest that there can be no reciprocity. *D'Emden v. Pedder*, therefore, can be laid aside so far as this case is concerned. Any application of the doctrine of reciprocity must depend on some decision other than *D'Emden v. Pedder*, applying rightly or wrongly the actual decision in that case. The only possible ground for excluding municipalities from arbitral jurisdiction in any given case, is utter want of Federal power, apart from any opposing State enactment. If the power exists, *D'Emden v. Pedder* annihilates the opposing enactment; if the power does not exist, the case is inapplicable. The position is simply stated. The Constitution connotes the continued existence unimpaired of both the Commonwealth and the States as governing bodies in their respective spheres of jurisdiction. The King is the same King throughout Australia (*Williams v. Howarth*[55]). But his powers are not the same in every sphere of jurisdiction; and they are exercised by different agents, differently constituted and authorized, according to the sphere of jurisdiction in which they are to operate. The Constitution preserves the most absolute freedom of action—legislative, executive and judicial—in every sphere, but subject to this qualification: that,

wherever there would otherwise be a conflict if the two agencies met on the same field, there shall be no conflict, because, to the extent of interference with the operation of Commonwealth action, State law shall be invalid—which also invalidates everything dependent upon it. Municipal powers, which are the creation of State law, are not, as such, within the sphere of Commonwealth jurisdiction, and therefore, in the main, conflict is not possible. But the lines of municipal powers and action may at some points intersect Commonwealth powers, and, where they do, Commonwealth law must prevail. This does not interfere with State legislative power, except to the extent expressly stated by the Constitution; it does not interfere with State action at all, because the municipal council is not a part of the State General Government, any more than an individual would be if he were authorized by State law to make roads and charge tolls. On the basis of British precedent, therefore, the jurisdiction is given by general words, which no other part of the Constitution, on ordinary principles of construction, restricts, and which, therefore, according to *R. v. Burah*[56] , no Court is entitled to limit.

Reliance, however, is placed on American authorities to the effect that municipalities are State "instrumentalities." Those authorities cannot prevail here, if opposed to the principles underlying our own jurisprudence. But a short reference to them may be desirable. The general principle of State action is well established by the decisions in America. Perhaps, for the present purpose, it is as well stated as anywhere in *Ex parte Virginia*[57] , where it is said:—"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." It is also a basic principle in American jurisprudence that the power of the various State organs cannot be delegated. This principle, however, as pointed out in *Willoughby on the Constitution* (vol. *ii.*, sec. 774, p. 1317), is subject to one exception. "The exception," says the learned author, "is with reference to the delegation of powers to local governments." He says the exception is based on the antiquity of the Anglo-Saxon practice of local government antedating the adoption of the Constitution. This view may receive support from the judgment of *Gray* C.J. in *Hill v. Boston*[58] . *Cooley on Constitutional Limitations*, 6th ed., chap. *viii.*, pp. 226-227, expresses the matter somewhat differently. There we find expressions which modify the notion that the municipality can be regarded in the same light as the State. It is said, "The Legislature ... is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers *is not understood as to belong properly to the State.*"

Undoubtedly we find various expressions to the effect that "public corporations are but parts of the machinery employed in carrying on the affairs of the State" (*Cooley*, p. 229, note 2, quoting from the judgment of a State Court). But the judicial opinions we meet with are varied in form. Some are very close to the English view already cited. For instance, in *Walla Walla City v. Walla Walla Water Co.*[59] *Brown* J., in delivering the unanimous opinion of the Court (which included the present Chief Justice, the late Chief Justice *Fuller* and other eminent Judges) said:—"It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as *the agent of the State* for the preservation of peace and the protection of persons and property, and its acts as the *agent of its citizens* for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business." At p. 10 the learned Justice refers to a case, where it was held that "a contract to put electric wires under ground was ... for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the State at large, and that with reference to such contracts the city must be regarded as a private corporation." Another case is referred to as to waterworks. No mention is made of trading in electricity or water. Indeed, the observations on p. 11 show that trading is immaterial, because the Court says, with reference to the case in hand, that the city might furnish the water free of charge to its citizens and raise the necessary funds by a general tax. When other cases which were

referred to during the argument such as *Vilas v. Manila*[60] are considered in conjunction with the *Walla Walla Case*[61] , they are not insusceptible of reduction to the same view as is taken in England. Government control of the conduct of individuals is undoubtedly of a different nature from trading functions, and both are distinct from power to contract for road making.

Sufficient has been said to indicate that American opinion cannot be said to be clearly and decidedly opposed to the English rule: it always professes to follow the English notion of municipal status, and nowhere is it based on any difference of result owing to the Federal system. Perhaps one of the clearest cases illustrating the distinction between the State and the local public is *Barree v. City of Cape Girardeau*[62] , citing *Bullmaster v. City of Joseph*[63] . But that case expressly treats the making and care of streets as private municipal matters, and not as governmental.

In this situation the law as appearing from considerations of British law, as here understood, should prevail, and the question should be so answered as to affirm the jurisdiction of the Court of Conciliation and Arbitration over municipalities in respect of street construction and maintenance, subject to the other branch of the respondents' argument with reference to the meaning of "industrial dispute."

Higgins J

. read the following judgment:—

The question as amended relates only to persons employed by the municipalities in "the making, maintenance, control and lighting of public streets" : Can there be an award as between the Union and the municipalities?

It has been decided in the *Railway Servants' Case*[64] that the Court of Conciliation and Arbitration has no powers either of conciliation or of arbitration as to disputes between State railway commissioners and their employees—that a railway servants' union cannot even be registered. Counsel for the Union attempted to impugn the decision in this case; but, as the majority of my learned colleagues intimated that the attempt would be futile, counsel refrained from further argument on the subject. In this judgment I treat the decision as binding.

The American cases cited as to interference with State "instrumentalities" (the term is not familiar in English law) relate, in most cases, to taxation; and taxation is, in very nature, a burden on the person taxed. For my part, I am not satisfied that the essential nature of the power conferred by sec. 51 (XXXV.) of the *Constitution*, and exercised by the Act made thereunder, has been sufficiently considered. Conciliation is not necessarily a burden; arbitration, even if it end in a compulsory award, is not necessarily a burden. These processes are primarily meant to aid both parties to the dispute—meant as an aid to industrial peace, to the peaceful prosecution of the industries needed by the public. Under the Act, the first duty of the Court, as to an industrial dispute of which it gets cognizance, is to try to reconcile the parties, to get an agreement. It has no right to make an award except to the extent that it cannot get an agreement (secs. 23, 24). It is found, indeed, that as the principles of the Court become known the number of agreements is increasing, the number of awards decreasing. Such an Act as our Australian Act is not, I think, dealt with in any American cases. Under English law, Acts of Parliament do not bind the Crown unless by express words or by necessary implication; but there is an exception when the Act is made for the public good, the advancement of religion and justice, and to prevent injury and wrong (*Bacon's Abridgment*, 7th ed., vol. *vi.*, p. 462; per *Jessel* M.R., *Ex parte Postmaster-General*[65]).

But I shall assume that the Act is a burden in the same way that a tax is a burden. Who is exempt from the burden? I shall first consider the matter on the lines of the English law. Does the Act bind the Crown; and, if it does not bind the Crown, are municipalities agents of the Crown within the rule exempting agents of the Crown as well as the Crown itself? The Crown is not bound by a Statute unless by express words or necessary implication. This is a mere rule of construction—a rule which yields to the clearly expressed intention of Parliament. In the case of this Act there is no doubt as to the intention of Parliament to bind the Crown's undertakings; for, by sec. 4, an "industrial dispute" of which the Court may take cognizance includes "any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State." There is no doubt, therefore, that, if there be a two-State dispute in relation to employment in an industry carried on by or under the control of a State or any public authority constituted under the State, the State—or the Crown in right of the State—was not meant to be exempt from the provisions of the Act. But even if the Crown and its agents were immune from the Act, municipalities are not agents of the Crown so as to share in the immunity. The fact that municipalities exist for public purposes does not make them immune. In England they have always been held liable to church rates, to sewers rates, to poor rates, to income tax, to land tax (see *Rawlinson*, *Municipal Corporation Act* 1883, 8th ed., p. 220). The same principle is applied to municipal corporations as to the trustees of the Mersey docks (*Mersey Docks v. Cameron*[66]), to the University of Edinburgh (*Greig v. University of Edinburgh*[67]), to Trinity House (*Gilbert v. Trinity House*[68]). The distinction between governmental purposes and purposes of local government is emphatically shown in the case of the *County Council of Middlesex v. Assessment Committee of St. George's Union*[69] . In that case, the guild-hall of a county council was used for a double purpose—the administration of justice (quarter sessions), and municipal purposes; and it was held that the guild-hall was rateable so far as it was occupied for municipal purposes, not rateable so far as it was occupied for the administration of justice—a strictly governmental purpose, a function of the Crown. Therefore, so far as the English authorities are concerned, there seems to be no possible ground for the contention that municipalities are not subject to this Act.

But certain American authorities are invoked which treat municipal corporations as being "agencies" or "instrumentalities" of the State, and as being, therefore, immune from the operation of Federal laws. The immunity of the State itself from the operation of Federal laws does not rest on mere construction; it is an immunity which no Act of the Federal Congress can take away. There is nothing express in our Constitution in favour of the immunity. On the other hand, there is an express provision that the Commonwealth shall not "impose any tax on property of any kind belonging to a State" (sec. 114). At first sight, this express immunity ought to be treated as excluding any implication of immunity from laws as to conciliation and arbitration. Under the covering section V., "all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State ... notwithstanding anything in the laws of any State" ; and under sec. 109 of the *Constitution*, when a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail. Under sec. 106, the whole Constitution of the State is subject to the *Federal Constitution*—subject to the powers conferred by the latter Constitution on the Federal Parliament with regard to the subjects specified. But I must treat the *Railway Servants' Case*[70] as binding, and as involving the immunity of the State Ministers and the managers of State railways from laws as to conciliation and arbitration. The question remains: Does the immunity extend to municipalities?

Now, the Supreme Court of the United States speaks of such a corporation as being "a political division of the State" (*Van Brocklin v. State of Tennessee*[71]). "A municipal corporation is, so far

as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government" (*Atkin v. Kansas*[72]). "A municipal corporation is the representative of the State and one of the instrumentalities of the State Government" ; and therefore the property and revenues of the municipality have been held to be not subject to Federal taxation (*Pollock v. Farmers' Loan and Trust Co.*[73]). Expressions of this sort are very numerous; but I cannot find that they have any basis in our law, or that they are consistent with the history of English municipal corporations. I have not had the time to satisfy myself as to the origin of this doctrine; but it would seem to have found ready acceptance in a country in which, as de Tocqueville points out, municipal officials collect the State taxes and carry out most of the State Statutes (*Democracy in America* (1862), vol. *i.*, p. 68). According to Ashley (*Federal State*, chap. *xxi.*), almost all the laws of the State are carried out by local officials—Judges, sheriffs, health officers. But whatever may be the history of the doctrine, it appears that the tendency of recent decisions is to draw a sharp line between the ordinary activities of a municipality and the activities of a strictly governmental character—such as the judiciary, the administration, the Legislature of the State. In the case of the *United States v. Railroad Co.*[74] the Court said:—"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this Court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agents and instruments from the taxing power of the Federal Government." In the case of *South Carolina v. United States*[75] , a State having taken up the business of selling intoxicating liquors, and the question being whether its agents were liable to the Federal licence tax, the Court summed up the position by saying that "the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character." In the case of *Flint v. Stone Tracy Co.*[76] the Court, after reviewing the cases, said:—"The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the State. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws and similar governmental functions, cannot be taxed by the Federal Government." [77] :—"It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. ... The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character." In *Vilas v. Manila*[78] the Court spoke of "the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred." I know of no American case which lays it down that municipalities are exempt, as agents of the State or otherwise, from a Federal Statute which purports to bind them—I mean, of course, a Federal Statute made within the scope of the Federal powers—in matters outside the State's essential functions of legislation, administration and the judiciary. No ground whatever has been adduced for treating the immunity of State agencies as being wider in Australia than in the United States, as extending to the making, maintenance, control and lighting of the public streets. These are not matters of the "strictly governmental character" referred to in the American cases.

I very much doubt, also, whether it is proper, under our law, to call a municipality an agent of the State at all. The municipality is created by the State, no doubt; but not everything created by the

State, even for the benefit of the people of a locality, is an agent of the State. There is an oak-tree—a forbidden tree; it must not be touched—its fruit, or its leaves, or its wood. But the tree drops an acorn which takes root. The young tree is not within the prohibition. To be a product is not to be an agent. In the United States I find that State universities are called "agencies" of the State; but under our law they would not be "agents" of the State in any relevant legal sense. The axiom *Qui facit per alium facit per se* is inapplicable; the acts of such agencies are not the acts of the State as principal. Are we prepared to follow the Courts of the United States in the corollaries of their doctrine that municipalities are "political subdivisions" or "agencies" of the State? An employee who is injured by the negligence of county asylum authorities (in regard to a steam mangle) has no remedy (*Hughes v. Co. of Munroe*[79]). A citizen is injured by the negligence of a municipality in blasting; he has no cause of action (*Howard v. Worcester*[80]). A child is injured by the neglect of the city to keep a sound staircase for its school; an action will not lie (*Hill v. Boston*[81]). Under our law, municipalities are liable in damages for causing nuisances to a highway, or for neglect to repair a sewer grating (*Borough of Bathurst v. Macpherson*[82] ; and see *Municipal Council of Sydney v. Bourke*[83] ; *Municipal Council of Willoughby v. Halstead*[84]). If the King is the principal, and the municipality is his agent, how comes it that no attempts are made to treat municipal debentures as Government debentures, to treat the Government as liable for the wages of street cleaners, or to treat the Government as liable for the torts of municipalities? Under the Statutes of most of the Australian States, and of the Commonwealth (*Judiciary Act*, secs. 56, &c.) the King is liable in action of tort as well as of contract. In my opinion, there is nothing in the decided cases, either American or English, to justify the proposition that municipalities are exempt from the operation of Federal laws, or, in particular, from the operation of laws made under sec. 51 (XXXV.) of the *Constitution*.

Gavan Duffy J.

I agree in the opinion of the majority of the Court, but I do not propose to deliver any reasoned judgment until we have dealt with the whole matter.

Powers J.

I agree with my learned brothers who hold that municipal corporations established under State laws are not, with regard to the making, maintenance, control or lighting of public streets, instrumentalities of State Government, and, therefore, are not, in respect of such operations, exempt from Commonwealth legislation under sec. 51 (XXXV.) of the *Constitution*.

Question answered in the affirmative.

Solicitors for the claimant organization, Farlow & Barker.

Solicitors for the respondents, Malleson, Stewart, Stawell & Nankivell; Maddock, Jamieson & Lonie; T. W. K. Waldron; E. J. D. Guinness, Crown Solicitor for Victoria; J. V. Tillett, Crown Solicitor for New South Wales; A. Banks-Smith, Crown Solicitor for Tasmania.

H C of A

20 June 1919

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Bryant and Owen Dixon, for the claimant organization.

Starke and Stanley Lewis, for the City of Melbourne and certain Victorian municipalities.

Mann and Eager, for the Commonwealth, intervening.

Stanley Lewis, for the Municipal Council of Sydney.

Sir Edward Mitchell K.C. and Davis, for the State of Victoria, intervening.

J. A. Browne, for the State of New South Wales, intervening, and for the Sydney Harbour Trust, intervening.

Cussen, for the State of Tasmania, intervening.

May 19, 1919

Griffith C.J.

read the following judgment:—

This case raises the question of the existence and extent of the immunity of municipalities as instrumentalities of Government of the States. The matter came before the High Court in *Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1]*[85] in 1911, when the Court intimated that, in its opinion, if a municipal corporation chooses to engage in what has lately been called "municipal trading," and joins the ranks of employers in industries, it is liable to the same Federal laws as other employers engaged in the same industries.

In that case various decisions of the Supreme Court of the United States of America were cited. This Court left undecided, without expressing any opinion upon it, the question whether, and how far, a municipality is subject to the jurisdiction or award of the Arbitration Court.

The principal American cases cited were the following:— *The Mayor v. Ray*[86] , in which the Court said:—"A municipal corporation is a subordinate branch of the domestic government of the State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. ... Our system of local and municipal government is copied, in its general features, from that of England... They are not trading corporations and ought not to become such." *Meriwether v. Garrett*[87] :—"Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer ... This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text writers." *Stoutenburgh v. Hennick*, in which *Fuller*[88] :—"It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity." *Pollock v. Farmers' Loan and Trust Co.*, in which *Fuller*[89] : "A municipal corporation is the representative of the State and

one of the instrumentalities of the State government." And the important case of *South Carolina v. United States*[90] .

The present case was argued at the September sittings of the Court, when argument on the main point was concluded, and the Court reserved judgment on it, leaving for further argument after judgment the application to the different forms of municipal activity of any general rule which it might lay down.

The matter now comes for our determination, and I will give my opinion.

I regard these decisions of the Supreme Court of the United States as to the immunities of municipal corporations rather as historical expositions of the unwritten law which the thirteen colonies had brought with them from the Mother Country and carried with them into the Union than as interpretations of the Constitution of that Federation. As such, they are entitled to very great weight. In the view of those eminent men, who were after all only stating matters of common knowledge, it was part of the unwritten law and of the system of English government which the colonists brought with them to America, that the functions of government were divided between the central Government and the local or municipal bodies, and that certain powers were allocated to these latter, not as agents or servants of the central Government, but as independent authorities, created by the Legislature, and subject of course to it, but who were entitled as independent organs of the Government of the Colony to equal freedom in the performance of their functions. And they did not find anything in the Federal Constitution which authorized any interference with this freedom. The doctrines of the law of master and servant, and of principal and agent, deal with matters on a lower plane, and are wholly beside the question.

In my opinion, this exposition of the law is historically applicable to the Australian Colonies. And it follows, in my opinion, that a municipal authority, in the discharge of that portion of the general mass of State functions which had been entrusted to it at the date of Federation, is entitled to the same immunity from Commonwealth interference as the State itself would be in the discharge of similar functions.

Barton J

. read the following judgment:—

My learned brother *Powers*, as Deputy President of the Commonwealth Court of Conciliation and Arbitration, asks the Bench to determine a question of great moment from the aspect of the relations between Commonwealth and State in the Australian Federation. A dispute between the parties is before him in that Court.

The claimant is a registered organization of employees. There are six hundred and fifty-eight respondents, consisting mainly of city, municipal, borough and shire councils, which, for convenience, are in the case grouped under the name of municipal corporations. Each of them exists under the statutory law of one or other of the States of the Commonwealth. They are now constituted under one or other of the Local Government Acts of Victoria, New South Wales or Tasmania. The claims are in respect of work done by members of the organization employed by the municipal corporations in municipal works which are not carried on for "municipal trading" purposes. The organization contended that even in the case of such operations the Arbitration Court had jurisdiction. The respondents denied this contention, their ground being that the municipal

corporations are instrumentalities of the States under which they are constituted.

The question originally submitted for the opinion of this Court was this: "Has the Commonwealth Court of Conciliation and Arbitration power or jurisdiction to determine by an award the dispute between the organization and the municipal corporations, constituted under or subject to the provisions of the three Acts mentioned, so far as the dispute relates to such operations of the said municipal corporations as do not consist of municipal trading?" During the argument, the learned Deputy President, who was one of the Court, altered this question, with the approbation of the rest of us, by striking out the final words, "as do not consist of municipal trading," and putting in their place these words: "as consist of the making, maintenance, control and lighting of public streets or any of them" —meaning, of course, the public streets of the municipality concerned. The arguments followed in the main the lines of the contentions described in the case stated. Besides the parties to the dispute, we had the advantage of hearing counsel for the Commonwealth and for each of the States concerned, who had all obtained leave to intervene.

Apparently the question as altered, in its inclusion of street lighting, refers to the ordinary lighting for public convenience, supported by municipal taxation, and not to the special lighting of places of business and residences, &c., undertaken by contract with individuals and for profit. I mean that the question includes only that lighting which it is contended is part of the governmental work of the municipality, as distinct from that which is a mere commercial undertaking for pay or reward. Although the principle at issue was touched in a previous case, as I shall point out, it now comes before us for the first time as matter for decision. In the elaborate argument that we heard, many cases were cited and discussed, but I propose to refer only to a few, comparatively, which may help me in the process of elucidating the real question.

First, it is sufficient merely to mention such cases as *D'Emden v. Pedder*[91] ; *Baxter v. Commissioners of Taxation (N.S.W.)*[92] ; *The Railway Servants' Case*[93] (a decision which, as the Court intimated in the course of the present case, it would be a waste of time to attack). Taken together, these cases, and indeed others, completely establish, as a necessary implication from the whole scheme of the Constitution, the immunity of the Commonwealth or a State and the instrumentalities or agencies of its government from interference at the hands of the other authority, whether by way of taxation or otherwise; an immunity, as the last-mentioned case establishes, not in any wise affected in the case of the States by the terms of sub-sec. XXXV. of sec. 51 in the *Constitution*. I have no doubt that municipal corporations are such instrumentalities in respect of the governing functions committed to them, and I propose to make that clear presently.

But it would be going a good deal further to say that municipal corporations are entitled to this immunity from interference by the Commonwealth in respect of all of their operations. If they are not, then it must be ascertained whether the immunity extends to such operations as are the subject of the question raised by the case stated. The contention for the claimant is that municipal corporations stand altogether outside this immunity, which is confined, they urge, to the case of the directly governmental operations of the State itself; that municipal corporations are not in that sense instrumentalities or agencies of the State, but independent bodies created for certain purposes and not subject to the control of the State. Their position was likened to that which arose in *Mersey Docks v. Cameron*[94] , *Gilbert v. Corporation of Trinity House*[95] , and similar cases, on which much reliance was placed. But these cases do not apply to such a position as the present one. They go to show the liability of certain corporations (not municipal), (1) to be taxed by the State to which they belong, (2) to be sued for negligence by subjects of that State—in each case on the ground that the corporation could not be held to share the immunity from liability of the Government of that

State. The corporation in the first-named case claimed immunity from taxation on the ground that the Crown does not tax itself. The corporation in the *Trinity House Case* claimed immunity in an action for negligence on the ground that "The King can do no wrong," since legislation, where the Crown is not expressly mentioned, is held to apply to the subject and not to the Government. In both instances the claim was rejected. But these corporations were not defending themselves from the Government of any sphere extraneous to that of their own State on the ground that they were free from interference from that quarter. The question of liability as between State and State or between Commonwealth and State stands on wholly different grounds. It is not because the State may tax or the citizen of that State may sue that the Commonwealth may tax or its citizens outside the State may sue. The question has to be determined on different considerations. If, for instance, it were admitted that the State of Victoria could tax its own municipal corporations, it would not follow that the Commonwealth could for that reason tax the municipal corporations of Victoria. If the Commonwealth could impose such taxation, which I am far from saying, it could only be by reason of power given by the Constitution as in sec. 51 (II.). But power to interfere with municipal corporations is not given anywhere by the Constitution. Indeed by the direct implication of sec. 51 (XX.) such corporations are protected from the legislative power of the Commonwealth. There is, above all things, a prohibition underlying the whole of the Constitution, which, it is to be remembered, is sedulous in preserving the respective spheres of State and Commonwealth. It is a prohibition of action on the part of either tending to invade or impair, by means not distinctly authorized, the powers of the other in the sphere allotted to the one or preserved to the other. And it is in each case to be determined in which sphere is included the matter over which power is claimed. Is, then, the control of municipal corporations within the sphere of the Commonwealth, or within that of the State which creates them, and under which they subsist in the sense that their granted powers can be increased, or diminished, or abolished at the will of the grantor, the Parliament of the State? That question can only be answered in the negative. The cited case of *Powell v. Apollo Candle Co.*[96] has nothing to do with this question so far as the main point decided is concerned; though where the Judicial Committee held that duties levied by the Order in Council there in question were really levied by the authority of the Legislature, and not that of the Executive, they may have provided the present respondents with a useful analogy. These municipal bodies are independent only in the sense that they may exercise the powers allotted to them without interference save on the part of the State Legislature. They have power to pass subsidiary legislation such as by-laws (in the case of some shires ordinances), but they are distinctly subordinate to the powers of the State; they move entirely within the sphere of, and are subject to, its laws. But these matters are no doubt of concern to the State, and, in fact, within its ambit, equivalent to national matters. Such are, for instance, the making, maintenance, and control of communications. Of these the State attends to railways, telegraphs, and main roads; the municipalities, to roads not main ones, within their boundaries, and to streets. They are all part of one great concern. One may apply to the State the words of *Cockburn* J. in *Purcell v. Sowler*[97] :—"The Court below seems to have distinguished between the general and the local administration of the poor law, holding that the general administration was a matter of national concern, while the administration in a particular district was not. But it seems to me that whatever is a matter of public concern when administered in one of the Government Departments, is matter of public concern when administered by the subordinate authorities of a particular district. It is one of the characteristic features of the government of this country that, instead of being centralized, many important branches of it are committed to the conduct of local authorities. Thus the business of counties, and that of cities and boroughs, is, to a great extent, conducted by local and municipal government. It is not, therefore, because the matter under consideration is one which in its immediate consequences affects only a particular neighbourhood that it is not a matter of public concern." True, these words were used in

deciding a libel case, but they are aptly descriptive of the relation of local authorities to the government of the country concerned. And anyone, more especially if he has compared the Federal Constitution with that of the State and considered the legislation of the latter, will admit that the country concerned is in this connection the State and not the Commonwealth.

I turn to some American cases in addition to those cited by the learned Chief Justice. I refer to them because the statements seem to me to be accurate and the reasoning cogent. In *Ottawa v. Carey*[98] , in 1883, *Waite* C.J. said:—"Municipal corporations are created to aid the State Government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established... To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect." In other words, the State has granted to the corporation, during the pleasure of the Legislature, some of its powers, and it retains the rest.

In *United States v. Railroad Co.*[99] it was held that a municipal corporation is a part of the sovereign power of the State, and is not subject to taxation by Congress upon its municipal revenues. *Clifford* and *Miller*[100] that "private property held by a corporation in a proprietary right, and used merely in a commercial sense for the income, gains, and profits," which they thought the subject of the litigation was in effect, might be taxable just the same as property used by an individual or by any other corporation. That is, I think, undeniable. But the principle laid down by the judgment of the Court stands unimpaired. In delivering it, *Hunt*[101] :—"A municipal corporation like the City of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its Legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation" (*i.e.*[102] :—"Was it exercised for the benefit of the municipality, that is, in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the City of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power?" If it were so acting, the bonds were not taxable by Congress.

In *Atkin v. Kansas*[103] , where the decision was that it was within the power of a State, notwithstanding the 14th amendment of the *United States Constitution*, to prescribe the conditions on which it would permit public work to be done on behalf of itself or its municipalities, the Statute impeached dealt with hours of labour, rates of wages, &c. The precise question decided is not in issue here, nevertheless the case is important on the present question by reason of some passages in the judgment of the Court, delivered by *Harlan* J., as to the relation existing between a State and its municipal corporations. "Such corporations," [104] , "are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the Legislature; the authority of the Legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the

people of the municipality shall not thereby be destroyed."

The judgment cited a previous case of *Williams v. Eggleston*[105] , in which the Court had said: "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the Legislature." [106] :—"Municipal corporations owe their origin to, and derive their powers and rights wholly from, the Legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the Legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations of the State, and the corporations could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the Legislature." [107] , "it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character." I fully adopt that proposition.

These strong passages harmonize in reason with the decision in *Flint v. Stone Tracy Co.*[108] , following *South Carolina v. United States*[109] , that the exemption from Federal taxation of the means and instrumentalities employed in carrying on the governmental operations of the States does not extend to State agencies and instrumentalities used for carrying on business of a private character. This limitation of an admitted principle, of course, covers the operations of municipal corporations which are conducted by municipal bodies for commercial or trading purposes: for those of gain or profit and not for those of government.

It has been pointed out more than once from this Bench that when it cites American decisions it is fully conscious that they are not authorities by which it is bound. But it is entitled to adopt the reasoning adduced in support of such decisions when it is convinced of the soundness of the reasons and when they are applicable to the facts of the case in hand. And in that conviction I apply to this case the quotations I have made.

My views, as well as those of the learned Chief Justice and the late *O'Connor* J., as to the limitations mentioned, are expressed, though extra-judicially, in *Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 1]*[110] . I adhere as a matter of decision to what, with my colleagues, I then put as an opinion invoked by the parties.

So far, then, as its "municipal trading" or the carrying on of business commercially for purposes of gain and profit is concerned, a municipal corporation is, in my view, in no better position than a private trading corporation, or indeed an individual, would occupy, and cannot claim immunity from the exercise of Federal powers to any greater extent than such a company or person. But to the extent that its functions which are exercised under the statutory authority of the State are governmental, in the sense shown by the above observations and quotations, the municipal corporation shares the immunity of the State itself from Federal interference, just as the Commonwealth and its instrumentalities may not be undermined or impaired by the State.

The operations described in the question stated are, in my opinion, clearly governmental, and I therefore hold that the Arbitration Court can no more interfere with the respondent municipal organizations in these respects than could its creator, the Parliament of the Commonwealth.

I must therefore answer the question stated in the negative. This answer applies to the first branch of the argument. As the majority of the Bench are of a different opinion, argument is to be taken on the second branch—whether there can be an industrial dispute extending &c. between the municipal corporations and their employees in respect of the operations mentioned, regard being had to par. XXXV. of sec. 51 of the *Constitution* and also to the *Conciliation and Arbitration Act of the Commonwealth*.

Isaacs and Rich JJ

. (read by Isaacs J.):—

As the case stands amended, the question of law stated for the opinion of this Court is whether the Commonwealth Court of Conciliation and Arbitration has jurisdiction to settle a dispute as to wages and hours, and other conditions of employment, between municipal corporations and such of their employees as are employed in the construction and maintenance of the public streets of the municipalities.

The argument upon this question has been divided into two branches. The first branch is whether the words "industrial disputes" in pl. XXXV. of sec. 51 of the *Constitution* are limited to disputes in "an industry" in the sense of a specific business or avocation in which both employer and employees are engaged, or whether they extend to cover all disputes of an industrial nature—that is, for instance, where the employees are engaged in industry in the broad sense by working in the service of the employers and the dispute is as to the conditions of employment either as between employers and employees or as between different classes of employees, such as demarcation disputes. The second branch is whether, supposing the words "industrial disputes" have the wider connotation, municipalities are subject to the jurisdiction of the Commonwealth tribunal, having regard to their relation to the State system of government. The argument so far—though something was said as to the first branch—was ultimately limited to the second branch, leaving the first to be argued out in the event of the opinion of the Court on the second branch making that course necessary.

If municipalities, on the true construction of the Constitution, are outside the sphere of Commonwealth jurisdiction, in relation to their construction and repair of roads, by reason of their position as an "instrumentality," as it is called, of State government, it matters not whether road construction or maintenance can or cannot be considered "an industry" in the narrower sense. The language of pl. XXXV., read as part of sec. 51, is as follows: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... (*xxxv.*) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." No express limitation is placed on the class of disputants in the placitum itself or elsewhere in the Constitution.

The laws, therefore, that may be made under that specific power, so far as any express limitation is concerned, extend to all industrial disputes in the Commonwealth extending beyond the limits of any one State. And covering section V. of the *Constitution Act* makes the Constitution itself, and all laws made under it "binding on the Courts, Judges, and *people* of every State and of every part of the Commonwealth, *notwithstanding anything in the laws of any State.*" Any constitutional exemption of municipalities from the operation of such laws must, therefore, rest upon some implication of law, which when applied to pl. XXXV. excludes their industrial disputes from the words "industrial disputes" there found.

It has already been decided by this Court (*Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. [No. 2]*[111]) that a municipal corporation in Victoria so far as it engages in trading occupation, is subject to the jurisdiction of the Arbitration Court. This shows that the mere fact that a corporation may be created or abolished by the State is no reason for exemption from Commonwealth jurisdiction. A distinction was drawn in that case between trading and non-trading operations, but, although trading operations were held to fall within the jurisdiction of the Court, the decision did not lay down "trading" as the *discrimen*. It was not necessary to do so. The question of how far non-trading operations attracted the jurisdiction was left undetermined. In that case, "trading" and "governing" were contrasted; but there are municipal functions which are neither the one nor the other. The care of parks and the establishment of free libraries could not properly be brought under either head. We have now to consider the true line of demarcation, if there is one. The question, then, as to the implied exclusion of non-trading operations from the arbitral jurisdiction of the Commonwealth is this: *Where do we find the restrictive implication of law*? It is suggested, using American terminology, that municipalities are "State instrumentalities." Tested by British standards—which are the only legitimate standards—such a term, to have any meaning which would attract a legal implication restricting the meaning of the words "industrial disputes," must denote that municipalities are, in relation to the subject matter of disputes, true functionaries of the State Government, that is, the King's Government.

A clear distinction must be noted and preserved between the expression "the Government of the country" in the sense of the King's representatives or agents in the concrete sense, and the expression "the government of the country" in the abstract sense of the process of governing the country in whole or in part. The first denotes the *persons* who act, and the second denotes *acts* done. Again, the functions performed by "the Government" in the concrete sense, including in that term those who represent the Government *pro hac vice*, are the acts of the General Government, that is, theoretically, the Crown; but there may be functions coming under the second head which are not in any real sense acts of the General Government. For instance, as early as the reign of Queen Anne, the Court of King's Bench said, speaking of a case concerning the City of London, "a corporation is properly an investing the people of the place with *the local government thereof*, and therefore their *law* shall bind strangers" (*Cuddon v. Eastwick*[112]). A "by-law" is a law (*Hopkins v. Swansea*[113] and *London Association of Shipowners and Brokers v. London and India Docks Joint Committee*[114]). In *Arnold on Municipal Corporations* (1851), at p. 3, there is the following definition: "A municipal corporation, therefore, is a civil corporation aggregate, established for the purpose of investing the inhabitants of a particular borough or place with the power of self-government, and with certain other privileges and franchises." Royal Charters creating municipal corporations and investing them with powers were not imposed on the locality, but were offered and might be accepted or rejected; and, if accepted, it was taken that every person who chose to be or to come within the area of the powers granted subjected himself to the control conferred. Indeed, municipal corporations were the creation not merely of the Crown, but also of subjects who had *jura regalia.* (See fully on this subject, *Grant on Corporations*, particularly pp. 10 *et seqq.*) The Act of 1835 (5 & 6 Will. IV. c. 76), which was referred to in argument, did not destroy the old corporations; they remained, but under new governmental powers (*Attorney-General v. Corporation of Leicester*[115]). The charters creating new corporations were still issued under the royal prerogative, although, when once created, the new municipality is *pro tanto* invested with the statutory functions and powers (*Grant*, p. 16).

By various later English enactments, many municipal corporations were enabled to undertake works some of which may usefully be referred to here; as, for instance, the establishment of museums of art and science, the providing of baths and wash-houses, the removal of nuisances, the appointment

of police constables, and the establishment of salaried police magistrates. They may, at common law, be liable to repair highways and bridges, and may make rates for the purpose; they could in some instances supply water, and impose water rates. All these instances and others, with the appropriate authorities and references, are to be found in *Grant on Corporations*, *passim*, and in the article "Municipal Corporations" by Mr. *Manson* in the *Encyclopædia of the Laws of England* (2nd ed.), vol. *ix.*, pp. 466 *et seqq.* The later English legislation does not affect the fundamental character of the system. To borrow Mr. *Manson's* quotation, the motto is "*Spartam nactus es, hanc exorna*." The duties and functions of the corporation are, at least in the main, entirely local and for the benefit and advantage of the inhabitants of the locality or persons transiently coming there.

The distinction between the functions of such bodies and those of the General Government has been very clearly marked by the Courts. The fundamental case is *Coomber v. Justices of Berks*[116] . But, before quoting the ruling passage from that case, reference should be made to some other cases. In *R. v. Mayor of Sheffield*[117] *Blackburn* J. refers to the reason why the Act of 1835 was passed, namely, to control the corporations, to cut down their ownership of the municipal property, and to check their expenditure by appropriating the fund to certain purposes such as debts, police expenses, prosecutions, payment of constables, &c., and any surplus "for the public benefit of the inhabitants and improvement of the borough" —deficiencies to be made good by rates. This view was adopted by *Jessel* M.R. in *Attorney-General v. Mayor of Brecon*[118] [119] , "is part of the municipal government of the town," and "is vested in the corporation for the benefit of the town as part of the government of the town; and he who seeks to interfere with the privileges and duties connected with the regulations must be resisted, and, of course, resisted at the expense of the corporation."

This all tends to show, both by its affirmative propositions and negatively by the absence of any reference to the Crown or the Attorney-General, that the municipality was regarded in relation to its rights and powers as independent of the General Government acting for the whole country. Then the Courts have also had to consider the position of municipalities from the standpoint of their obligation to contribute to rates. Prior to the Act of 1835, municipalities were liable to the poor rate (*R. v. Mayor of York*[120]). In 1839 and 1840 the Court of Queen's Bench held them no longer liable, having regard to the provisions of the Act of 1835, sec. 92, and the public nature of their functions (*R. v. Mayor of Liverpool*[121] and *R. v. Inhabitants of Exminster*[122]). Lord *Denman* C.J., in the *Liverpool Case*[123] , spoke of the "public" purposes as in "extent and approximation to something like national benefit." Parliament, however, in 1841, by Act 4 & 5 Vict. c. 48 promptly rejected the notion of any such intention on its part in passing the Act of 1835. After reciting the decisions, it declared the expediency of the municipal corporations being rateable, and enacted that they should be rated.

There was, of course, always the Crown exemption, because the Crown was not included expressly or by necessary implication. In *County Council of Middlesex v. St. George's Union*[124] it was expressly argued for the County Council, whose property was sought to be assessed, that it was exempt because "the government of each county is none the less administered by the Sovereign according to the theory of the Constitution because it is administered through local agencies." On the other hand, it was contended for the Assessment Committee that "it is not enough that it should be used for purposes of government; it must be used for the purposes of that part of the government of the country which is theoretically administered by the Crown." In delivering judgment *Cave*[125] that in the authorities "a distinction has been drawn between Crown or Imperial purposes, such as the administration of justice, and purposes of local government." The learned Judge also observed: "whether a municipal authority be created by charter or by Statute, its purposes must equally be local." *Wills*[126] the arguments were repeated and the judgment affirmed. There is, however, one

passage in the judgment of *Lopes*[127] which deserves special notice. The Lord Justice first refers to Lord *Westbury's* judgment in *Mersey Docks v. Cameron*[128] , where that learned Lord uses the phrase "the Government of the country" in the concrete sense of the King's Government. Then *Lopes* L.J. states the inclination of his opinion that prior to 1888 the whole of the building would have been exempt "because at that time the administrative business of the county was done by the justices in Quarter Sessions assembled as such, and by virtue of the authority which they derived from the Crown." "But," proceeds the learned Judge, "in 1888 a great change took place. The judicial business of the county continued to be performed by the justices in Quarter Sessions, but the administrative business was transferred to the County Council, who in performing their functions do not act by virtue of any judicial office, or as being servants of the Crown." And so he held that so much of the building as was occupied for Crown purposes was not rateable; but so much as was occupied by the County Council for administrative or municipal purposes was rateable.

These decisions applied the principle of *Coomber's Case*[129] , which is stated most clearly by Lord *Watson* at p. 74. The learned Lord adopted Lord Chancellor *Westbury's* view that the exemption of the Crown extends "not only to the immediate and actual servants of the Crown but to all other persons, not being servants of the Crown, whose occupation was ascribable to a bare trust for purposes required and created by the Government of the country." Then Lord *Watson* proceeded to say: "Seeing that, in my opinion, the administration of justice, the maintenance of order, and the repression of crime, are among the primary and *inalienable functions of a constitutional Government*, I have no hesitation in holding that Assize Courts and police stations have been erected for proper government purposes and uses, although the duty of providing and maintaining them has been cast upon county or other local authorities." Here we have the *discrimen* of Crown exemption. If a municipality either (1) is legally empowered to perform and does perform any function whatever for the Crown, or (2) is lawfully empowered to perform and does perform any function which constitutionally is inalienably a Crown function—as, for instance, the administration of justice—the municipality is in law presumed to represent the Crown, and the exemption applies. Otherwise, it is outside that exemption, and, if impliedly exempted at all, some other principle must be resorted to. The making and maintenance of streets in the municipality is not within either proposition.

It is true, as observed by the Privy Council in *Farnell v. Bowman*[130] , that "the local Governments in the Colonies, as pioneers of improvements, are frequently obliged to embark in undertakings which in other countries are left to private enterprise, such, for instance, as the construction of railways, canals, and other works." In New South Wales and Victoria, as in other Australian States, the railways are governmental undertakings, and the Commissioners, for such a purpose as the present, represent the Crown. But the undertaking of railways is not what Lord *Watson* calls "an inalienable function of a constitutional government." The Deniliquin and Moama Railway is a private enterprise; the Hobson's Bay Railway in Victoria was a private enterprise; the Mount Lyell Railway in Tasmania is a private railway. Government tramways are assumed as governmental functions; while municipal tramways are not, notwithstanding rules and regulations which govern the traffic upon them. In Australia, when settlement began, the Government was obliged to construct roads in the new country; but when municipal institutions arose that function was for local purposes handed over to the municipalities, and where they did not exist the Government retained the function. Where the transfer, however, took place, the municipality, as a matter of principle, stood in relation to that function exactly as a municipality stood in England to the same function—namely, it was simply local government as distinguished from general or Crown government, and the rights, powers and privileges of the municipality depended on Statute. The passage above quoted from the judgment of *Lopes* L.J. in the *County Council of Middlesex Case*[131] has close

application.

What doctrine of construction, then, can by implication exclude municipalities in relation to such a function from the constitutional purview of pl. XXXV. of sec. 51? Apart from the doctrine that the Crown is not bound by Statute unless included by express words or clear intendment (*Attorney-General for New South Wales v. Curator of Intestate Estates*[132]), ordinary British law offers no canon of construction which would have that effect. This is a doctrine as well recognized in America in both Federal and State Courts as it is in our own jurisprudence. For instance, in *Jones v. Tatham*[133] *Lewis* J. says: "The general business of the legislative power is to establish laws for individuals, not for the Sovereign; and when the rights of the Commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied." The Supreme Court of the United States affirmed the principle in *Guarantee Co. v. Title Guaranty Co.*[134] . This constitutional doctrine effectively guards the State Governments, and, under that denomination, guards their agents and representatives within the terms of Lord *Watson's* judgment from coercion by Federal law except where the State Government is expressly named in the Constitution or where its subject matter indicates that the State Government also must be bound. But apart from that, the question is one of conflict between two laws—Federal and State—both assumedly within respective powers, and both in terms operating on the same persons or other subject matter. If power is wanting *cadit quæstio*. But if the power exists in general terms and the law is passed in general terms, then, apart from implied exclusion from the general term, it comes to a question of supremacy.

The constitutional doctrine of the actual decision in *D'Emden v. Pedder*[135] is founded on the principle of supremacy, and on nothing else (see pp. 110-111). It applied sec. 109 of the *Constitution*; it assumed the power in each Parliament, so far as its own Constitution was concerned, to pass the respective laws; it further assumed, as is the truth, that all executive power of a self-governing Colony is ultimately referable for its authority to some legislative provision: it then placed the true ultimate legislative authorities in juxtaposition, and declared in case of conflict the supremacy of the *Federal Constitution* or *Federal Act*. That is precisely what *Marshall* C.J. said, in *McCulloch v. Maryland*[136] , in these words: "There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, *is declared to be supreme* over that which exerts the control." The same point was very distinctly put, with respect to Federal officers' freedom from State control, in *Ohio v. Thomas*[137] .

Stress, it is observed, is here laid on the fact that *D'Emden v. Pedder*[138] is an application of the constitutional declaration of supremacy in sec. 109 of the *Constitution*, which itself rests for its binding force on covering section V. of the Act—that section being, after all, the controlling provision of the Imperial Parliament. And the reason stress is laid on that fact is that, although the case itself declared the inability of the State to fetter Commonwealth agencies, it was argued that the principle of the decision in that case must be reciprocal. As soon as it is perceived that the principle of the decision is "supremacy," it is manifest that there can be no reciprocity. *D'Emden v. Pedder*, therefore, can be laid aside so far as this case is concerned. Any application of the doctrine of reciprocity must depend on some decision other than *D'Emden v. Pedder*, applying rightly or wrongly the actual decision in that case. The only possible ground for excluding municipalities from arbitral jurisdiction in any given case, is utter want of Federal power, apart from any opposing State enactment. If the power exists, *D'Emden v. Pedder* annihilates the opposing enactment; if the power does not exist, the case is inapplicable. The position is simply stated. The Constitution connotes the continued existence unimpaired of both the Commonwealth and the States as governing bodies in

their respective spheres of jurisdiction. The King is the same King throughout Australia (*Williams v. Howarth*[139]). But his powers are not the same in every sphere of jurisdiction; and they are exercised by different agents, differently constituted and authorized, according to the sphere of jurisdiction in which they are to operate. The Constitution preserves the most absolute freedom of action—legislative, executive and judicial—in every sphere, but subject to this qualification: that, wherever there would otherwise be a conflict if the two agencies met on the same field, there shall be no conflict, because, to the extent of interference with the operation of Commonwealth action, State law shall be invalid—which also invalidates everything dependent upon it. Municipal powers, which are the creation of State law, are not, as such, within the sphere of Commonwealth jurisdiction, and therefore, in the main, conflict is not possible. But the lines of municipal powers and action may at some points intersect Commonwealth powers, and, where they do, Commonwealth law must prevail. This does not interfere with State legislative power, except to the extent expressly stated by the Constitution; it does not interfere with State action at all, because the municipal council is not a part of the State General Government, any more than an individual would be if he were authorized by State law to make roads and charge tolls. On the basis of British precedent, therefore, the jurisdiction is given by general words, which no other part of the Constitution, on ordinary principles of construction, restricts, and which, therefore, according to *R. v. Burah*[140] , no Court is entitled to limit.

Reliance, however, is placed on American authorities to the effect that municipalities are State "instrumentalities." Those authorities cannot prevail here, if opposed to the principles underlying our own jurisprudence. But a short reference to them may be desirable. The general principle of State action is well established by the decisions in America. Perhaps, for the present purpose, it is as well stated as anywhere in *Ex parte Virginia*[141] , where it is said:—"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." It is also a basic principle in American jurisprudence that the power of the various State organs cannot be delegated. This principle, however, as pointed out in *Willoughby on the Constitution* (vol. *ii.*, sec. 774, p. 1317), is subject to one exception. "The exception," says the learned author, "is with reference to the delegation of powers to local governments." He says the exception is based on the antiquity of the Anglo-Saxon practice of local government antedating the adoption of the Constitution. This view may receive support from the judgment of *Gray* C.J. in *Hill v. Boston*[142] . *Cooley on Constitutional Limitations*, 6th ed., chap. *viii.*, pp. 226-227, expresses the matter somewhat differently. There we find expressions which modify the notion that the municipality can be regarded in the same light as the State. It is said, "The Legislature ... is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers *is not understood as to belong properly to the State.*"

Undoubtedly we find various expressions to the effect that "public corporations are but parts of the machinery employed in carrying on the affairs of the State" (*Cooley*, p. 229, note 2, quoting from the judgment of a State Court). But the judicial opinions we meet with are varied in form. Some are very close to the English view already cited. For instance, in *Walla Walla City v. Walla Walla Water Co.*[143] *Brown* J., in delivering the unanimous opinion of the Court (which included the present Chief Justice, the late Chief Justice *Fuller* and other eminent Judges) said:—"It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as *the agent of the State* for the preservation of peace and the protection of persons and property, and its acts as the *agent of its citizens* for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business." At p. 10 the learned Justice refers to a case, where it was held that "a contract to put electric wires under ground was ... for the private advantage of the city as a legal personality, distinct from considerations connected with the

government of the State at large, and that with reference to such contracts the city must be regarded as a private corporation." Another case is referred to as to waterworks. No mention is made of trading in electricity or water. Indeed, the observations on p. 11 show that trading is immaterial, because the Court says, with reference to the case in hand, that the city might furnish the water free of charge to its citizens and raise the necessary funds by a general tax. When other cases which were referred to during the argument such as *Vilas v. Manila*[144] are considered in conjunction with the *Walla Walla Case*[145] , they are not insusceptible of reduction to the same view as is taken in England. Government control of the conduct of individuals is undoubtedly of a different nature from trading functions, and both are distinct from power to contract for road making.

Sufficient has been said to indicate that American opinion cannot be said to be clearly and decidedly opposed to the English rule: it always professes to follow the English notion of municipal status, and nowhere is it based on any difference of result owing to the Federal system. Perhaps one of the clearest cases illustrating the distinction between the State and the local public is *Barree v. City of Cape Girardeau*[146] , citing *Bullmaster v. City of Joseph*[147] . But that case expressly treats the making and care of streets as private municipal matters, and not as governmental.

In this situation the law as appearing from considerations of British law, as here understood, should prevail, and the question should be so answered as to affirm the jurisdiction of the Court of Conciliation and Arbitration over municipalities in respect of street construction and maintenance, subject to the other branch of the respondents' argument with reference to the meaning of "industrial dispute."

Higgins J

. read the following judgment:—

The question as amended relates only to persons employed by the municipalities in "the making, maintenance, control and lighting of public streets" : Can there be an award as between the Union and the municipalities?

It has been decided in the *Railway Servants' Case*[148] that the Court of Conciliation and Arbitration has no powers either of conciliation or of arbitration as to disputes between State railway commissioners and their employees—that a railway servants' union cannot even be registered. Counsel for the Union attempted to impugn the decision in this case; but, as the majority of my learned colleagues intimated that the attempt would be futile, counsel refrained from further argument on the subject. In this judgment I treat the decision as binding.

The American cases cited as to interference with State "instrumentalities" (the term is not familiar in English law) relate, in most cases, to taxation; and taxation is, in very nature, a burden on the person taxed. For my part, I am not satisfied that the essential nature of the power conferred by sec. 51 (XXXV.) of the *Constitution*, and exercised by the Act made thereunder, has been sufficiently considered. Conciliation is not necessarily a burden; arbitration, even if it end in a compulsory award, is not necessarily a burden. These processes are primarily meant to aid both parties to the dispute—meant as an aid to industrial peace, to the peaceful prosecution of the industries needed by the public. Under the Act, the first duty of the Court, as to an industrial dispute of which it gets cognizance, is to try to reconcile the parties, to get an agreement. It has no right to make an award except to the extent that it cannot get an agreement (secs. 23, 24). It is found, indeed, that as the principles of the Court become known the number of agreements is increasing, the number of

awards decreasing. Such an Act as our Australian Act is not, I think, dealt with in any American cases. Under English law, Acts of Parliament do not bind the Crown unless by express words or by necessary implication; but there is an exception when the Act is made for the public good, the advancement of religion and justice, and to prevent injury and wrong (*Bacon's Abridgment*, 7th ed., vol. *vi.*, p. 462; per *Jessel* M.R., *Ex parte Postmaster-General*[149]).

But I shall assume that the Act is a burden in the same way that a tax is a burden. Who is exempt from the burden? I shall first consider the matter on the lines of the English law. Does the Act bind the Crown; and, if it does not bind the Crown, are municipalities agents of the Crown within the rule exempting agents of the Crown as well as the Crown itself? The Crown is not bound by a Statute unless by express words or necessary implication. This is a mere rule of construction—a rule which yields to the clearly expressed intention of Parliament. In the case of this Act there is no doubt as to the intention of Parliament to bind the Crown's undertakings; for, by sec. 4, an "industrial dispute" of which the Court may take cognizance includes "any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State." There is no doubt, therefore, that, if there be a two-State dispute in relation to employment in an industry carried on by or under the control of a State or any public authority constituted under the State, the State—or the Crown in right of the State—was not meant to be exempt from the provisions of the Act. But even if the Crown and its agents were immune from the Act, municipalities are not agents of the Crown so as to share in the immunity. The fact that municipalities exist for public purposes does not make them immune. In England they have always been held liable to church rates, to sewers rates, to poor rates, to income tax, to land tax (see *Rawlinson*, *Municipal Corporation Act* 1883, 8th ed., p. 220). The same principle is applied to municipal corporations as to the trustees of the Mersey docks (*Mersey Docks v. Cameron*[150]), to the University of Edinburgh (*Greig v. University of Edinburgh*[151]), to Trinity House (*Gilbert v. Trinity House*[152]). The distinction between governmental purposes and purposes of local government is emphatically shown in the case of the *County Council of Middlesex v. Assessment Committee of St. George's Union*[153] . In that case, the guild-hall of a county council was used for a double purpose—the administration of justice (quarter sessions), and municipal purposes; and it was held that the guild-hall was rateable so far as it was occupied for municipal purposes, not rateable so far as it was occupied for the administration of justice—a strictly governmental purpose, a function of the Crown. Therefore, so far as the English authorities are concerned, there seems to be no possible ground for the contention that municipalities are not subject to this Act.

But certain American authorities are invoked which treat municipal corporations as being "agencies" or "instrumentalities" of the State, and as being, therefore, immune from the operation of Federal laws. The immunity of the State itself from the operation of Federal laws does not rest on mere construction; it is an immunity which no Act of the Federal Congress can take away. There is nothing express in our Constitution in favour of the immunity. On the other hand, there is an express provision that the Commonwealth shall not "impose any tax on property of any kind belonging to a State" (sec. 114). At first sight, this express immunity ought to be treated as excluding any implication of immunity from laws as to conciliation and arbitration. Under the covering section V., "all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State ... notwithstanding anything in the laws of any State" ; and under sec. 109 of the *Constitution*, when a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail. Under sec. 106, the whole Constitution of the State is subject to the *Federal Constitution*—subject to the powers conferred by the latter Constitution on the Federal Parliament with regard to the subjects specified. But I must treat the *Railway Servants'*

Case[154] as binding, and as involving the immunity of the State Ministers and the managers of State railways from laws as to conciliation and arbitration. The question remains: Does the immunity extend to municipalities?

Now, the Supreme Court of the United States speaks of such a corporation as being "a political division of the State" (*Van Brocklin v. State of Tennessee*[155]). "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government" (*Atkin v. Kansas*[156]). "A municipal corporation is the representative of the State and one of the instrumentalities of the State Government" ; and therefore the property and revenues of the municipality have been held to be not subject to Federal taxation (*Pollock v. Farmers' Loan and Trust Co.*[157]). Expressions of this sort are very numerous; but I cannot find that they have any basis in our law, or that they are consistent with the history of English municipal corporations. I have not had the time to satisfy myself as to the origin of this doctrine; but it would seem to have found ready acceptance in a country in which, as de Tocqueville points out, municipal officials collect the State taxes and carry out most of the State Statutes (*Democracy in America* (1862), vol. *i.*, p. 68). According to Ashley (*Federal State*, chap. *xxi.*), almost all the laws of the State are carried out by local officials—Judges, sheriffs, health officers. But whatever may be the history of the doctrine, it appears that the tendency of recent decisions is to draw a sharp line between the ordinary activities of a municipality and the activities of a strictly governmental character—such as the judiciary, the administration, the Legislature of the State. In the case of the *United States v. Railroad Co.*[158] the Court said:—"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this Court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agents and instruments from the taxing power of the Federal Government." In the case of *South Carolina v. United States*[159] , a State having taken up the business of selling intoxicating liquors, and the question being whether its agents were liable to the Federal licence tax, the Court summed up the position by saying that "the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character." In the case of *Flint v. Stone Tracy Co.*[160] the Court, after reviewing the cases, said:—"The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the State. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws and similar governmental functions, cannot be taxed by the Federal Government." [161] :—"It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. ... The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, and which the State can only do itself, and those activities which are of a private character." In *Vilas v. Manila*[162] the Court spoke of "the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred." I know of no American case which lays it down that municipalities are exempt, as agents of the State or otherwise, from a Federal Statute which purports to bind them—I mean, of course, a Federal Statute made within the scope of the Federal powers—in matters outside the State's essential functions of legislation, administration and the judiciary. No ground whatever has been adduced for treating the immunity of

State agencies as being wider in Australia than in the United States, as extending to the making, maintenance, control and lighting of the public streets. These are not matters of the "strictly governmental character" referred to in the American cases.

I very much doubt, also, whether it is proper, under our law, to call a municipality an agent of the State at all. The municipality is created by the State, no doubt; but not everything created by the State, even for the benefit of the people of a locality, is an agent of the State. There is an oak-tree—a forbidden tree; it must not be touched—its fruit, or its leaves, or its wood. But the tree drops an acorn which takes root. The young tree is not within the prohibition. To be a product is not to be an agent. In the United States I find that State universities are called "agencies" of the State; but under our law they would not be "agents" of the State in any relevant legal sense. The axiom *Qui facit per alium facit per se* is inapplicable; the acts of such agencies are not the acts of the State as principal. Are we prepared to follow the Courts of the United States in the corollaries of their doctrine that municipalities are "political subdivisions" or "agencies" of the State? An employee who is injured by the negligence of county asylum authorities (in regard to a steam mangle) has no remedy (*Hughes v. Co. of Munroe*[163]). A citizen is injured by the negligence of a municipality in blasting; he has no cause of action (*Howard v. Worcester*[164]). A child is injured by the neglect of the city to keep a sound staircase for its school; an action will not lie (*Hill v. Boston*[165]). Under our law, municipalities are liable in damages for causing nuisances to a highway, or for neglect to repair a sewer grating (*Borough of Bathurst v. Macpherson*[166] ; and see *Municipal Council of Sydney v. Bourke*[167] ; *Municipal Council of Willoughby v. Halstead*[168]). If the King is the principal, and the municipality is his agent, how comes it that no attempts are made to treat municipal debentures as Government debentures, to treat the Government as liable for the wages of street cleaners, or to treat the Government as liable for the torts of municipalities? Under the Statutes of most of the Australian States, and of the Commonwealth (*Judiciary Act*, secs. 56, &c.) the King is liable in action of tort as well as of contract. In my opinion, there is nothing in the decided cases, either American or English, to justify the proposition that municipalities are exempt from the operation of Federal laws, or, in particular, from the operation of laws made under sec. 51 (XXXV.) of the *Constitution*.

Gavan Duffy J.

I agree in the opinion of the majority of the Court, but I do not propose to deliver any reasoned judgment until we have dealt with the whole matter.

Powers J.

I agree with my learned brothers who hold that municipal corporations established under State laws are not, with regard to the making, maintenance, control or lighting of public streets, instrumentalities of State Government, and, therefore, are not, in respect of such operations, exempt from Commonwealth legislation under sec. 51 (XXXV.) of the *Constitution*.

Question answered in the affirmative.

Solicitors for the claimant organization, Farlow & Barker.

Solicitors for the respondents, Malleson, Stewart, Stawell & Nankivell; Maddock, Jamieson & Lonie; T. W. K. Waldron; E. J. D. Guinness, Crown Solicitor for Victoria; J. V. Tillett, Crown Solicitor for New South Wales; A. Banks-Smith, Crown Solicitor for Tasmania.

1. [1911] HCA 31; 12 C.L.R., 398.

2. [1873] USSC 103; 86 U.S., 468, at pp. 475-476.

3. 102 U.S., at p. 511.

4. 129 U.S., at p. 147.

5. 157 U.S., at p. 584.

6. [1905] USSC 184; 199 U.S., 437.

7. [1904] HCA 1; 1 C.L.R., 91.

8. [1907] HCA 76; 4 C.L.R., 1087.

9. [1906] HCA 94; 4 C.L.R., 488.

10. [1865] EngR 610; 11 H.L.C., 443; 11 Eng. Rep., 1405.

11. 17 Q.B.D., 795.

12. 10 App. Cas., 282.

13. 2 C.P.D., at p. 218.

14. 108 U.S., 110, at p. 121.

15. [1872] USSC 164; 17 Wall., 322.

16. 17 Wall., at p. 334.

17. 17 Wall., at p. 329.

18. 17 Wall., at p. 330.

19. [1903] USSC 192; 191 U.S., 207.

20. 191 U.S., at pp. 220-221.

21. [1898] USSC 81; 170 U.S., 304, at p. 310.

22. 191 U.S., at p. 221.

23. 191 U.S., at p. 222.

24. [1911] USSC 40; 220 U.S., 107.

25. [1905] USSC 184; 199 U.S., 437.

26. [1911] HCA 31; 12 C.L.R., 398.

27. [1913] HCA 71; 16 C.L.R., 245

28. 1 Salk., 192.

29. [1839] EngR 122; 4 M. & W., 621, at p. 640.

30. (1892) 3 Ch., 242, at p. 252.

31. [1846] EngR 597; 9 Beav., 546.

32. 9 App. Cas., 61.

33. L.R. 6 Q.B., 652, at p. 661.

34. 10 Ch. D., 204.

35. 10 Ch. D., at p. 219.

36. [1837] EngR 468; 6 A. & E., 419.

37. [1839] EngR 371; 9 A. & E., 435.

38. [1840] EngR 261; 12 A. & E., 2.

39. 9 A. & E., at p. 442.

40. (1896) 2 Q.B., 143.

41. (1896) 1 Q.B., at p. 146.

42. (1897) 1 Q.B., 64.

43. (1897) 1 Q.B., at pp. 70-71.

44. 11 H.L.C., at p. 505.

45. 9 App. Cas., 61.

46. 12 App. Cas., 643, at p. 649.

47. (1897) 1 Q.B., at p. 71.

48. (1907) A.C., 519, at p. 523.

49. 20 Pa. St. Rep., 398, at p. 411.

50. [1912] USSC 93; 224 U.S., 152.

51. [1904] HCA 1; 1 C.L.R., 91.

52. 4 Wheat., at p. 431.

53. [1899] USSC 59; 173 U.S., 276, at p. 284.

54. [1904] HCA 1; 1 C.L.R., 91.

55. (1905) A.C., 551.

56. 3 App. Cas., 889, at p. 905.

57. [1879] USSC 52; 100 U.S., 339, at p. 347.

58. 122 Mass., 344.

59. [1898] USSC 156; 172 U.S., 1, at p. 8.

60. 220 U.S., at p. 356.

61. [1898] USSC 156; 172 U.S., 1.

62. 114 Am. St. Rep., 763, at p. 767.

63. 70 Mo. App., 60.

64. [1906] HCA 94; 4 C.L.R., 488.

65. 10 Ch. D., 595, at p. 601.

66. [1865] EngR 610; 11 H.L.C., 443.

67. L.R. 1 H.L. (Sc.), 348.

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69. (1896) 2 Q.B., 143; affd. on app., (1897) 1 Q.B., 64.

70. [1906] HCA 94; 4 C.L.R., 488.

71. 117 U.S., at p. 178.

72. 191 U.S., at p. 221.

73. 157 U.S., at p. 584.

74. 17 Wall., at p. 327.

75. 199 U.S., at p. 461.

76. 220 U.S., at pp. 157-158.

77. 220 U.S., at p. 172.

78. 220 U.S., at p. 356.

79. 147 U.S., 49.

80. 153 Mass., 426.

81. 122 Mass., 344.

82. 4 App. Cas., 256.

83. (1895) A.C., 433.

84. [1916] HCA 80; 22 C.L.R., 352.

85. [1911] HCA 31; 12 C.L.R., 398.

86. [1873] USSC 103; 86 U.S., 468, at pp. 475-476.

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99. [1872] USSC 164; 17 Wall., 322.

100. 17 Wall., at p. 334.

101. 17 Wall., at p. 329.

102. 17 Wall., at p. 330.

103. [1903] USSC 192; 191 U.S., 207.

104. 191 U.S., at pp. 220-221.

105. [1898] USSC 81; 170 U.S., 304, at p. 310.

106. 191 U.S., at p. 221.

107. 191 U.S., at p. 222.

108. [1911] USSC 40; 220 U.S., 107.

109. [1905] USSC 184; 199 U.S., 437.

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112. 1 Salk., 192.

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120. [1837] EngR 468; 6 A. & E., 419.

121. [1839] EngR 371; 9 A. & E., 435.

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123. 9 A. & E., at p. 442.

124. (1896) 2 Q.B., 143.

125. (1896) 1 Q.B., at p. 146.

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127. (1897) 1 Q.B., at pp. 70-71.

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130. 12 App. Cas., 643, at p. 649.

131. (1897) 1 Q.B., at p. 71.

132. (1907) A.C., 519, at p. 523.

133. 20 Pa. St. Rep., 398, at p. 411.

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136. 4 Wheat., at p. 431.

137. [1899] USSC 59; 173 U.S., 276, at p. 284.

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141. [1879] USSC 52; 100 U.S., 339, at p. 347.

142. 122 Mass., 344.

143. [1898] USSC 156; 172 U.S., 1, at p. 8.

144. 220 U.S., at p. 356.

145. [1898] USSC 156; 172 U.S., 1.

146. 114 Am. St. Rep., 763, at p. 767.

147. 70 Mo. App., 60.

148. [1906] HCA 94; 4 C.L.R., 488.

149. 10 Ch. D., 595, at p. 601.

150. [1865] EngR 610; 11 H.L.C., 443.

151. L.R. 1 H.L. (Sc.), 348.

152. 17 Q.B.D., 795.

153. (1896) 2 Q.B., 143; affd. on app., (1897) 1 Q.B., 64.

154. [1906] HCA 94; 4 C.L.R., 488.

155. 117 U.S., at p. 178.

156. 191 U.S., at p. 221.

157. 157 U.S., at p. 584.

158. 17 Wall., at p. 327.

159. 199 U.S., at p. 461.

160. 220 U.S., at pp. 157-158.

161. 220 U.S., at p. 172.

162. 220 U.S., at p. 356.

163. 147 U.S., 49.

164. 153 Mass., 426.

165. 122 Mass., 344.

166. 4 App. Cas., 256.

167. (1895) A.C., 433.

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