[HIGH COURT OF AUSTRALIA.]

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

AND

ARCHIBALD CURRIE & CO., AND ARCHIBALD CURRIE & CO. PROPRIETARY LIMITED . . . . . } RESPONDENTS.

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SYDNEY, *April* 13, 14, 15.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Operation of the Constitution and laws of the Commonwealth—Commonwealth Conciliation and Arbitration Act 1904 (*No.* 13 *of* 1904)—*Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Industrial dispute—"Ships whose first port of clearance and whose port of destination are in the Commonwealth"—Commonwealth of Australia Constitution Act* (63 & 64 *Vict. c.* 12), *sec.* V.

A joint stock company registered in Victoria were owners of a line of ships registered in Melbourne and engaged in trade between Australia, Calcutta, and South Africa. The officers of the company's ships resided in Australia and were engaged there, but the ships' articles were filled in and signed in Calcutta. The officers, though not entitled to be discharged in Australian ports, were allowed to leave at such ports if they wished, with the consent of the master. The ships did no inter-state trade, but occasionally made short trips from Calcutta to other Indian ports.

The organization of employés to which the officers belonged filed a claim in the Commonwealth Court of Conciliation and Arbitration for the settlement of a dispute between the officers and their employers as to the wages, hours and conditions of labour during the voyages of their ships.

Held, that the Court had no jurisdiction to settle the dispute. Ships engaged in such a trade are not ships "whose first port of clearance and whose port of destination are in the Commonwealth" within the meaning of sec. V. of the *Commonwealth of Australia Constitution Act*.

SPECIAL case stated by *Higgins* J., President of the Commonwealth Court of Conciliation and Arbitration, for the opinion of

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the High Court, under sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904.

This was an industrial dispute filed in the Commonwealth Court of Conciliation and Arbitration by the claimants, an organization of employés registered under the Act, against the respondents Archibald Currie & Co., as to the wages, hours and conditions of labour of the officers employed on the respondents' ships. At the hearing *Higgins* J., President of the Court, added the respondent proprietary company as respondents, on it appearing that before the initiation of the dispute in the Court that company had acquired the property in the line of ships in question from the other respondents.

The learned President, after hearing evidence to establish jurisdiction, stated a special case for the opinion of the High Court on the question whether:—"Having regard to sec. V. (covering section) of the *Constitution Act*, has this Court of Conciliation and Arbitration jurisdiction to settle the dispute?"

The facts sufficiently appear in the judgment of *Griffith* C.J.

D. F. Ferguson and *Flannery*, for the claimants. All that it is necessary to show in order to establish jurisdiction is that there is a dispute within the Commonwealth extending beyond the limits of any one State.

[HIGGINS J.—The question whether the dispute extends beyond the limits of any one State was not intended to be raised on this special case.]

Assuming that requirement to be satisfied, the Court has, in any view, jurisdiction as to a certain part of the relationship between the parties. A large portion of the work of the employés is performed within the Commonwealth. As to the conditions of that labour an award may be made, and it will not be presumed that the Court will exceed its jurisdiction. Such an award, if made, would not only be valid, but could be effectively enforced. But further than that, there is evidence upon which the President could find that the respondents' ships come within the meaning of the second part of sec. V. of the *Constitution Act*, so that the Court would have power to make an award extending to the whole voyage. The first port of clearance is in Australia. That

is a question of fact, not of law. The port of clearance is the port at which a ship gets authority from the Customs to leave on a voyage. The first port of clearance, therefore, is the beginning of the voyage. It must be admitted that it would be open to the Court to find that the voyage began at Calcutta, but the evidence points more strongly the other way. The proper inference is that the ships take a round voyage from Australia through Calcutta back to Australia. The port of destination means the end of the voyage, not necessarily the most distant port on the voyage. As far as the freight is concerned, the voyage may be shown by the bill of lading to be from Australia to Calcutta, or *vice versâ*, but the ship's voyage is to be determined upon other considerations. The test is: Where is she owned, in whose interests is she sailed, and where are her movements directed? The ship's articles are not conclusive one way or the other. It should be assumed, unless the contrary is shown, that the ship's vogage begins and ends at her "home." [They referred to *Chartered Mercantile Bank of India, London, and China* v. *Netherlands India Steam Navigation Co. Ltd.* (1)]. The articles are signed at Calcutta merely for the purpose of getting the benefit of sec. 125 of the *Merchant Shipping Act*.

In construing the words of the latter part of sec. V. regard should be had to the provision as it originally appeared in sec. 20 of the *Federal Council Act*. They should be construed so as to include all British ships doing the round voyage from Australia to Calcutta and back. Otherwise they are restricted to Australian ships engaged in coasting trade. Secs. 735 and 736 of the *Merchant Shipping Act* had already given power to a Colony to regulate that trade; it should, therefore, be inferred that sec. V. was intended to go further.

But the first part of the section is wide enough to include the case, even if the latter part is not sufficient of itself. The laws of the Commonwealth govern the people of the Commonwealth, and may be enforced against them here in respect of things done on these ships beyond the territorial jurisdiction. The award would be made against persons who are citizens of the Commonwealth. Both employer and employé are resident here. The

(1) 10 Q.B.D., 521, at p. 534.

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difficulty of enforcing the law in foreign parts is no objection to the validity of the award.

[GRIFFITH C.J.—But the contention of the respondents is that the whole award would be in such a form as to extend beyond the jurisdiction of the Court. If that were so, the award would be bad unless it were severable.]

It is open to Parliament to provide that disputes that arise between the people of the Commonwealth in the Commonwealth as to the terms and conditions of labour are to be dealt with according to the law of the Commonwealth, not only in Australia, but wherever the parties may be. They are subject to the legislative jurisdiction of the Commonwealth. Parliament may control all their contracts. The contracts may only be enforceable while the parties are here, but breaches of them committed abroad might be dealt with here by means of some provision similar to that in the *Customs Act* 1901, which imposes a penalty for entering port with broken seals. [They referred to *Ashbury* v. *Ellis* (1).]

[GRIFFITH C.J.—The State or Commonwealth could prescribe a rule of duty to be observed within its territory, but not beyond it. A sovereign State has a jurisdiction extending to its subjects in every part of the world, but a subordinate State has never been considered to have such power.]

That is as regards criminal matters, but it does not apply to civil jurisdiction. If the question arose in a foreign Court it would be for that Court to say whether it would apply the law of the Commonwealth or not.

[HIGGINS J. referred to *Peillon* v. *Brooking* (2).]

Knox K.C. (*Piddington* with him), for the respondents, reserving the right to either of the respondents to object to the jurisdiction of *Higgins* J. to add the respondent proprietary company as a respondent in the arbitration proceedings.

The objects of the *Commonwealth Conciliation and Arbitration Act* 1904 as stated in sec. 2, sub-secs. V., VI., and VII., and the definitions in sec. 4 must be read subject to the ordinary rule of construction that they refer only to matters within the

(1) (1893) A.C., 339.

(2) 25 Beav., 218.

territorial limits of the legislature: *Jefferys* v. *Boosey* (1); *D'Emden* v. *Pedder* (2); *Macleod* v. *Attorney-General for New South Wales* (3). That rule applies, except so far as it is cut down by sec. V. of the covering Act. An award can only apply to an industry carried on in the Commonwealth, or so far as it is carried on in the Commonwealth.

[HIGGINS J.—But the meaning of "industry" must be extended as far as sec. V. allows, if that section applies.]

Sec. V. was only intended to make Commonwealth laws prevail over all the States, notwithstanding the laws of the States.

[BARTON J.—And to prevent conflict with English law.]

Clearly the first part of the section has that object only, and does not purport to make the people of the Commonwealth subject to Commonwealth laws when they are beyond its limits. As to the latter part of the section, first port of clearance and port of destination must relate to one voyage. The first port of clearance is that port on a particular voyage at which the ship is empty and takes in passengers and cargo and gets a clearance. The port of destination is the last port on the particular voyage, whether it is a round voyage or a voyage outwards to some port from which a return journey may or may not be made. Assuming, without conceding, that a round voyage from Sydney to Calcutta and back is within sec. V., the claimants have not shown that the voyages of these ships come within that description. They must show that when the ships leave the first port of clearance, assuming that to be in the Commonwealth, there is some binding agreement, arrangement, understanding or intention that that voyage is to end in the Commonwealth. There must be some way of determining at the beginning of the voyage whether the ship's destination is in the Commonwealth or not, in order to know what law governs it on the voyage. The claimants have failed to establish any such case. There is more reason for regarding Calcutta than any Commonwealth port as the first port of clearance on a round voyage, if it is such a voyage. When a ship leaves the Commonwealth it cannot be said that she is on her way to the Commonwealth *via* Calcutta.

(1) 4 H.L.C., 815, at p. 939. (2) 1 C.L.R., 91, at p. 119.
(3) (1891) A.C., 455.

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Primâ facie, the voyage, if it is a round voyage, begins and ends at Calcutta.

This Court has not to consider whether upon some claim properly made an award could validly be made to bind those ships in Commonwealth waters. The claim is general, applying to the whole trade, and there is no question of splitting the claim or limiting the award.

[ISAACS J.—But supposing that the President has jurisdiction to make an award as to work in Commonwealth waters, and, that being all that was claimed, made such an award, would sec. V. apply it of itself to this industry ?]

No, because it is not a Commonwealth industry.

The *Commonwealth Conciliation and Arbitration Act* being highly penal, the jurisdiction of the Court should be jealously scrutinized in every case that comes before it.

[O'CONNOR J. referred to *In re Wellington Cooks and Stewards Award* (1).]

Ferguson, in reply, referred to *Merchant Shipping Act* 1894, sec. 265.

April 15.

GRIFFITH C.J. This is a case which has been referred for the opinion of this Court by the President of the Commonwealth Court of Conciliation and Arbitration. The claim is preferred by the Merchant Service Guild of Australasia, an organization of employés registered under the *Commonwealth Conciliation and Arbitration Act* 1904, claiming an award as between themselves and the respondents as to the wages, hours and conditions of labour of the respondents' officers at sea. The respondents are Archibald Currie & Co., individuals residing in Melbourne, and Archibald Currie and Co. Proprietary Limited, a joint stock company registered in Victoria. The ships in question are registered in Victoria, and are engaged in trade between Calcutta and the neighbouring ports and Australia, sometimes going to South Africa. They carry cargo and passengers to and from Asia, Australia and South Africa.

The ships' articles are always signed in Calcutta, not in Aus-

(1) 26 N.Z.L.R., 394.

tralia. The officers are all domiciled in Australia and are always engaged in Australia, although, as I have said, the articles are signed in Calcutta; and, although not entitled to be discharged at Australian ports, they are usually allowed to leave at such ports if they wish, with the consent of the master. The ships often make short trips from Calcutta to other Indian ports, but do no inter-State trade in Australia.

The claimants claim that under these circumstances the Commonwealth Court has jurisdiction to make an award which will govern the wages, hours and conditions of labour of the officers on those ships engaged in that trade.

Of course, the jurisdiction of the Commonwealth Courts and the operation of the Commonwealth laws extend only to places within the Commonwealth, except so far as a larger jurisdiction or operation is given to them by law. Sec. V. of the covering Act of the Constitution of the Commonwealth is as follows:—"This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British Ships, the Queen's Ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth." If reliance is placed on that provision, as, indeed, it must be, when the jurisdiction of the Commonwealth Court of Arbitration is invoked in this case, the question is whether these ships, while engaged in the trade I have described, are ships whose first port of clearance and whose port of destination are in the Commonwealth. The terms "first port of clearance" and "port of destination" are terms well known in shipping law. Every ship, before starting on a voyage, must obtain a clearance. The first port of clearance is the port where she gets her clearance on beginning a voyage. The port of destination obviously means the end of that voyage. So that the Act applies only to cases where the beginning and the end of a voyage are both in the Commonwealth.

Under these circumstances, it seems to me impossible to say that these ships, while engaged in the trade I have described, are

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ships "whose first port of clearance and whose port of destination are in the Commonwealth." The most favourable view that can be taken in favour of the claimants is to assume that their port of departure or first port of clearance is an Australian port, which is extremely doubtful. Regarding the case from that point of view, it is impossible to say that the port of destination is also in the Commonwealth. The question, therefore, must, in my opinion, be answered in the negative.

Numerous other questions were raised incidentally in the course of the argument as to what may be a voyage within the words of section 5, but on these I express no opinion.

BARTON J. I concur.

O'CONNOR J. read the following judgment:—I shall confine my judgment to the one really substantial question upon which the opinion of this Court is sought, and I take it to be this:—Has the Commonwealth Court of Conciliation and Arbitration jurisdiction to settle this dispute, involving, as it does, the fixing of rates of wages and conditions of employment on the respondents' ships whilst voyaging on the High Seas to ports outside Australia?

The jurisdiction of that Court, as of any other Commonwealth Court, must, of course, be confined within the territorial limits over which the laws of the Commonwealth extend, and it is conceded that, apart from the provisions of section V. of the covering clauses of the Constitution, those laws can have no operation beyond the three miles sea limit around Commonwealth territory. The matter, therefore, for consideration is whether, under the circumstances set forth in the case, the voyage of the respondents' ships is such as to bring them within the meaning of the latter part of section V. That involves two questions. In the first place, what is the true interpretation of the words "whose first port of clearance and whose port of destination are in the Commonwealth?" Secondly, is there sufficient evidence before the Court that the voyage in which the ships are engaged is of the class to which the section, when rightly interpreted, applies?

The expressions "first port of clearance" and "port of destination" are clearly intended to describe the beginning and the end of one continuous voyage. There is no difficulty about the expression "first port of clearance." The Merchant Shipping Acts, all Custom Acts, and many Port Acts, require compliance with various requirements before a ship is permitted to go to sea. The certificate of the officer authorized by law to determine that the requirements have been complied with, is known as the "clearance certificate" or the "clearance." The first port of clearance would, therefore, ordinarily be the port from which the voyage begins. The expression "port of destination," which describes the other terminal point is not so free from ambiguity. It might be said, although Mr. *Knox* did not raise that contention, that the voyage intended to be described was merely from port to port within the Commonwealth. But that interpretation is not consistent with the whole provision. There can be only one "first port of clearance" on each voyage, and, in the case of a ship making an inter-State voyage round Australia, if the words "port of destination" were read as meaning the first port of call the section would apply only between the commencement of the voyage and that port, for the rest of the voyage it would have no operation. The only interpretation which will give any effective operation to the section is to take the port of destination as meaning port of "final destination" or last port of the voyage. The words of sec. V. would then be taken to describe a round voyage beginning and ending within the Commonwealth. That is the class of voyage to which, in my opinion, the section was intended to apply.

In coming to that conclusion I have, in accordance with a well known rule applicable to the interpretation of ambiguous expressions in a Statute, considered the state of facts which must be taken to have been within the knowledge of the British legislature at the time these covering clauses were passed. It was well known that a shipping trade carried on by ships owned and registered in Australia, and manned and officered by Australian citizens, had for many years existed in Australia and was rapidly increasing, and that it extended to New Zealand and the Islands of the Pacific and Indian ports, and that in the natural

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expansion of that trade Australia was destined to be the home port of a very extensive shipping trade with the East and the Islands of the Pacific. It was in recognition of the requirements of Australia in that respect that sec. 20 of the *Federal Council Act* 1885 was enacted, giving a much more extended operation to Australian laws passed under the authority of that Statute than is given to Commonwealth laws by the section now under consideration in its widest interpretation.

Under these circumstances it would appear not unreasonable to impute to the British legislature an intention to place the ships engaged on round voyages in such a trade in the same position as regards Australian laws as the ordinary British ship holds in regard to British laws, namely, that, while on a voyage coming within the meaning of the section, the Australian ship should be for the purposes of Commonwealth laws a floating portion of Commonwealth territory. That being the meaning of the section, it appears to me that, when once it is established that the voyage is of that description, it is immaterial to what part of the world it may extend. So that, if it were established that the voyage of the respondents' ships was a round voyage beginning at an Australian port, calling at Calcutta or any other foreign port, and ending in an Australian port, the ships during the whole of the voyage would be under the Commonwealth laws and under the jurisdiction of Commonwealth Courts. In the interpretation of the section, therefore, I see no reason to depart from the conclusion at which I arrived in delivering my award in the case of the *Merchant Service Guild of Australasia* v. *The Commonwealth Steamship Owners' Association* (1). Whether, however, a voyage does or does not come within the section must always be a question of fact. It is upon this part of the case that the claimants must fail.

The proof of any fact necessary for jurisdiction must be on the claimants, and where jurisdiction depends upon the fact of the respondents' ships being engaged in a particular class of voyage, they must establish that fact before they can claim that jurisdiction exists. On the documents and evidence before us I can see nothing to show that the first port of clearance of the voyages

(1) 1 Commonwealth Arbitration Rep., 1.

of these ships is a port in Australia. The facts upon which Mr. *Ferguson* has relied, that the ships are owned, registered, repaired, and, as far as the officers are concerned, manned, by persons domiciled in Australia, are at most as consistent with the first port of clearance being in India as being in Australia. Indeed, the ship's articles, although in no way conclusive, would, in the absence of other evidence, appear to indicate that the commencement and end of the voyage was Calcutta rather than some Australian port. But even if the articles are to be left out of consideration in determining that question, it is clear to my mind that the claimants have not brought before the Court any evidence to show what are the terminal points of the voyage in which their ships are engaged, and have failed, therefore, to establish that their voyage is such as to bring them within that class in respect of which a specially extended jurisdiction is given to the laws and Courts of the Commonwealth under the section now under consideration.

I agree, therefore, that our answer to the question submitted in this case must be that the Commonwealth Court of Conciliation and Arbitration has, under the circumstances, no jurisdiction to settle the dispute.

ISAACS J. I agree, on the ground that there are no facts upon which the learned President could conclude that there was an industrial dispute extending beyond the limits of any one State, or that the first port of clearance and port of destination of any of these voyages are both in the Commonwealth.

HIGGINS J. I agree in the judgment pronounced by the Chief Justice, and desire to withhold all opinion as to the other matters that have been discussed, as they are matters which, in my opinion, do not really arise for decision in this case. I advisedly confined my question to the effect of sec. V. of the Constitution, and stopped all evidence as to the nature of the industrial dispute until that question should be settled. It was to be assumed for the purpose of this special case, that the claimants could show that the dispute extended beyond the limits of any one State. When the case came before me I could not see any evidence upon which

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I could find that these ships had their first port of clearance and port of destination in the Commonwealth. But I thought that some principle might possibly be found which would enable me to bind employers and employés as to wages, hours and conditions of labour beyond the limits mentioned, if, as here, the parties were resident in Australia and the employés were engaged in Australia; and I did not wish to preclude the claimants from establishing such a principle if they could do so. After the parties had had full opportunity for consideration of the matter, the claimants have failed to show me that there is any jurisdiction to settle the dispute.

Knox K.C., for the respondents, asked for costs of the special case in the High Court: *Commonwealth Conciliation and Arbitration Act* 1904, sec. 31 (3). If such costs are not allowed in this case there is no reason why they should ever be allowed in a special case, as the reference is always by the President. The claimants are responsible for the litigation, having invoked a Court which had no jurisdiction.

Ferguson, for the claimants. The claimants are not responsible for the High Court proceedings. They invoked a Court in which costs are not usually allowed, and which was not intended by Parliament to entail heavy costs: sec. 38 (1).

GRIFFITH C.J. There will be no order as to costs.

Question answered in the negative.

Solicitors, for the claimants, *W. C. Moseley.*
Solicitors, for the respondents, *Sly & Russell.*

C. A. W.