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COMMISSIONER OF LAND TAX v. NATHAN.

statutory sum of £5,000, *leaves a taxable value of* £11,935.

Solicitors for the appellant, *Chambers, McNab & McNab*, Brisbane.

Solicitors for the respondent, *O'Shea & O'Shea*, Brisbane.

N. McG.

Appl *Kitano v Commonwealth* (1974) 129 CLR 151

Cons/Appr *R v Foster, Ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256

[HIGH COURT OF AUSTRALIA.]

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

AND

THE COMMONWEALTH STEAMSHIP OWNERS ASSOCIATION AND OTHERS . . . . . } RESPONDENTS.

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MELBOURNE, *May* 19, 20, 21, 22; *June* 4, 5, 6.

SYDNEY, *Sept.* 4.

Barton A.C.J., Isaacs, Higgins, Gavan Duffy and Rich JJ.

Constitutional Law—Extra-territorial operation of laws of Commonwealth—British ships—"First port of clearance"—"Port of destination"—Voyage—Ship's papers—Industrial dispute—"Extending beyond the limits of any one State"—Industries carried on in Australia—Part of employment beyond territorial limits—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Award—Fixing terms to be incorporated in contracts—Commonwealth of Australia Constitution Act 1900 (63 & 64 *Vict. c.* 12), *sec. V.—The Constitution, sec.* 51 (*xxxv.*)

Held, by the Court, that the words "extending beyond the limits of any one State" in sec. 51 (xxxv.) of the Constitution mean extending from one State into another State or other States of the Commonwealth.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Barton* A.C.J. dissenting), (1) that by virtue of sec. V. of the *Commonwealth of Australia Constitution Act* a single and indivisible industrial dispute is none the less an industrial dispute extending beyond the limits of any one State within the meaning of sec. 51 (xxxv.) of the Constitution merely because some of the operations in

respect of which the dispute exists are performed beyond the territorial limits of the Commonwealth; (2) that in such a case, there being a dispute extending beyond the limits of any one State, the Commonwealth Court of Conciliation and Arbitration has power by award compulsorily to fix terms and conditions to be incorporated, or deemed to be incorporated, in agreements of service made between the parties to the dispute.

Held, by *Isaacs* and *Higgins* JJ., and, *semble*, by *Gavan Duffy* and *Rich* JJ., that the words "first port of clearance" and "port of destination" in sec. V. of the *Commonwealth of Australia Constitution Act* indicate the beginning and the end of an actual voyage which is in fact intended at the beginning of the voyage, and the ship's papers are not conclusive as to what the voyage is.

By *Barton* A.C.J.—The "port of destination" intended by the section is the port for which the ship is bound as stated in her entry outwards, shipping bill and content or manifest.

By *Isaacs* J.—The term "British ships" in sec. V. of the *Commonwealth of Australia Constitution Act* indicates the nationality of the ships, and its meaning is not restricted by any particular Statute.

By *Gavan Duffy* and *Rich* JJ.—An industrial dispute extending beyond the limits of any one State, within sec. 51 (xxxv.) of the Constitution, may exist with regard to labour to be performed outside the territorial limits of the Commonwealth, if the disputants reside, the demands and the refusal are made, and the dissidence, dissatisfaction and unrest prevail, within the Commonwealth, and the power to prevent and settle such a dispute implies a power to prescribe terms and conditions with respect to such labour.

CASE stated for the opinion of the High Court.

On the hearing of a plaint in the Commonwealth Court of Conciliation and Arbitration in which the Merchant Service Guild of Australasia were the claimants, and the Commonwealth Steamship Owners Association, the Colonial Sugar Refining Co. Ltd., Charles Crosby and a number of other companies and individuals were the respondents, the President stated a case for the opinion of the High Court, under sec. 31 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1911, which, so far as is material, was as follows:—

1. The claimants are an organization of masters and officers registered as an organization under the Act in or in connection with the shipping industry.

2. The respondents are owners of ships, and employ on the said ships masters and officers who are members of the claimant organization.

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3. The claim herein was filed on 29th September 1911.

4. There is a dispute between the said masters and officers and the said respondents (amongst others) as to the wages, hours and conditions of labour of the masters and officers, and it is urged by the respondents that the Court has no power to settle the dispute.

9. In the case of the respondents the Colonial Sugar Refining Co. Ltd., the crew are always engaged and the articles of agreement signed in Sydney, and in the case of the respondent Charles Crosby, the crew are always engaged and the articles of agreement signed in Melbourne.

In schedules to the special case were set out admissions of fact made by the Colonial Sugar Refining Co. Ltd. and Charles Crosby. Those made by the Colonial Sugar Refining Co. Ltd. were as follow :—

1. That this company is registered in Sydney.

2. That it owns the s.s. *Fiona*, which is registered in Sydney.

3. That the *Fiona* runs from Sydney to Fiji, from Fiji to Auckland, Auckland to Fiji, Fiji to Sydney, but there is no regular itinerary.

4. That the officers are shipped in Sydney and reside in Sydney.

5. That repairs to the *Fiona* are done in Sydney and the bulk of stores shipped in Sydney.

6. That the *Fiona's* regular trade is carrying the materials and goods of the company between Sydney and Fiji and Fiji ports, and Auckland and Fiji and Fiji ports, carrying back sugar belonging to the company from Fiji to Auckland. After voyages between the ports mentioned, varying in number and duration, she returns to Sydney sometimes in ballast and sometimes with sugar, which sugar is discharged in Sydney.

7. That the *Fiona* does not carry passengers or freight goods for other persons.

The admissions made by Charles Crosby were as follow :—

1. That the s.s. *Wonganella* is owned by Charles Crosby, who resides and carries on business in Australia, and the said ship is registered in Australia.

2. That the ship is under charter of the Pacific Phosphate Co. Ltd. . . .

3. That since the date of the charter party the ship has usually

cleared from a port within the Commonwealth for Ocean Island or some other Pacific Island outside the Commonwealth.

4. That, having loaded a cargo of phosphates at such island, the ship is cleared at Ocean Island for Sydney Heads for orders.

5. That Ocean Island is leased to the Pacific Phosphate Co. Ltd. by the British Government and is a port of entry for the Western Pacific having a Customs House of the Western Pacific Protectorate, which is under the jurisdiction of the High Commissioner of the Western Pacific.

6. That the articles of the ship are opened in the Commonwealth and the crew is originally shipped in Melbourne, but, whenever necessary, men are engaged elsewhere to fill vacancies in the crew. The articles contain no provision for the engagement of the crew outside the Commonwealth.

7. The officers are engaged in the Commonwealth in the first instance and for the most part live in Australia excepting so far as may be necessary for filling vacancies.

8. That before the date of the said charter party the ship traded between Australia and South Africa clearing from an Australian port for South Africa and from a South African port for an Australian port.

9. That when the ship is cleared from an Australian port for Ocean Island the port for which she will be cleared from Ocean Island is not known.

10. That the necessary repairs to the ship are done at any port where the occasion arises.

The charter party of the *Wonganella* and the President's notes of the evidence taken on the hearing of the plaint also formed part of the case.

The questions originally asked, and which the President stated in the case were questions which arose in the proceeding and in his opinion were questions of law, were as follow :—

(1) On the facts stated are the disputes, or is either and which of them, a dispute "extending beyond the limits of any one State" within the meaning of the Act and of the Constitution ?

(2) On the facts stated has the Court power (if the dispute is one "extending beyond the limits of any one State") to settle the dis-

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pute, in view of sec. V. of the *Commonwealth of Australia Constitution Act*?

During the arguments the President asked the High Court to answer the following questions in lieu of the second of the foregoing questions :—

(2) Assuming question 1 to be answered in the affirmative, and if the Court should see fit to impose duties to be observed on board the said ships when outside Australia, are the conditions enforceable by penalty (whether by virtue of sec. V. of the *Commonwealth of Australia Constitution Act* or otherwise)?

(3) Assuming the first question to be answered in the affirmative, and if the Court cannot procure an amicable agreement under sec. 23 of the *Commonwealth Conciliation and Arbitration Act*, has the Court power by award compulsorily to fix terms and conditions to be incorporated (or deemed to be incorporated) in agreements of service made by the respondents with members of the claimant organization?

The case stated was amended accordingly.

Other facts are stated in the judgments hereunder.

The case was first argued on 21st, 22nd, 25th, 26th and 27th March 1912, before *Griffith* C.J., and *Barton*, *Isaacs* and *Higgins* JJ., and, the Court being equally divided in opinion, the case was ordered to be re-argued. The second argument took place on 3rd, 4th, 5th and 6th March 1913, before *Griffith* C.J., and *Barton*, *Isaacs*, *Higgins* and *Gavan Duffy* JJ., when, owing to the operation of sec. 23 (1) of the *Judiciary Act* 1903-1912, requiring a majority of all the Justices to concur in a decision on a question affecting the constitutional powers of the Commonwealth, no decision was given. The case was now argued for the third time.

Bavin, for the claimants. A ship is within sec. V. of the *Commonwealth of Australia Constitution Act* if she is engaged in a class of trade which may include a voyage beginning and ending in the Commonwealth, no matter where that voyage takes the ship. The voyage must be a single enterprise. What is the particular voyage on which a ship is engaged at a particular time cannot be determined by looking at the ship's official papers, such as the Customs clearance,

but is a question of fact to be determined on all the circumstances. It is a question of intention at the time the voyage began: *The Scarsdale*; *Board of Trade* v. *Baxter* (1); and includes a round voyage: *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Proprietary Ltd.* (2). The statements in the clearance cannot have been intended to be the test of whether a vessel comes within sec. V. The clearance is nothing more than a permission by the Customs authorities for the ship to leave port. The English *Customs Laws Consolidation Act* 1876 does not require the port to which the ship is bound, to be stated in the clearance: See secs. 127, 128. Nor does the Commonwealth *Customs Act* 1901 require it: See sec. 118. [He referred to *Stroud's Judicial Dictionary*, 2nd ed., vol. I., p. 323; *Encyclopædia of the Laws of England*, vol. IV., p. 84; *Wollaston's Customs Law*, p. 253; *Hall's International Law*, 6th ed., p. 785.] The term "voyage" is used in the *Merchant Shipping Act* as meaning a round voyage: See secs. 114 (2) (*a*), 115 (5), 120, 127. The ship's papers in the most general sense are not the exclusive test of what is the ship's voyage. Sec. V. is not limited to ships engaged in the coastal trade. It was intended by sec. V. to give something more than already existed, having regard to the English *Merchant Shipping Act*. The section covers what are known as round voyages: *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Proprietary Ltd.* (3). [He also referred to *Abbott on Shipping*, 14th ed., p. 317.] Apart from sec. V. of the *Constitution Act* the power given by sec. 51 (xxxv.) of the Constitution includes a power to regulate acts and things outside the territorial limits of the Commonwealth so far as that is necessary to the peace, order and good government of the Commonwealth. It is incidental to the power to settle disputes by arbitration that an award made should extend to ships which, as an incident of their trading within the Commonwealth, sometimes go outside its territorial limits. The fact that there is an industrial dispute extending to more than one State of the Commonwealth is all that is necessary to give jurisdiction to the Arbitration Court. There being such an industrial dispute between persons in Australia, the fact that some of the work of

(1) (1906) P., 103, at p. 105; (1907) A.C., 373.

(2) 5 C.L.R., 737.

(3) 5 C.L.R., 737, at pp. 743, 745.

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the particular industry is carried on outside Australia does not take away the jurisdiction to settle the dispute. For the purpose of settling the dispute in Australia the Arbitration Court may by award lay down rules of conduct to be observed outside the territorial limits. The power conferred by sec. 51 (xxxv.) of the Constitution cannot be effectively used in respect of the shipping industry unless it extends to persons carrying on such a business as that of the respondents. Their business is an Australian industry, and is not rendered any the less an Australian industry by reason of the greater part of the work done by members of the claimant organization being done outside the territorial limits. The going outside the territorial limits is incidental to the carrying on of that Australian industry. If it is necessary for the effective exercise of any of the powers conferred by sec. 51 of the Constitution that the Parliament of the Commonwealth should regulate the conduct of persons beyond the territorial limits, the power to so regulate conduct is granted by the Imperial Parliament. [He referred to *Harrison Moore's Commonwealth of Australia*, 2nd ed., p. 270; *Keith's Responsible Government in the Dominions*, 2nd ed., vol. I., p. 398; *R.* v. *Lesley* (1); *Attorney-General for Canada* v. *Cain and Gilhula* (2); *Robtelmes v. Brenan* (3); *Hazelton* v. *Potter* (4); *In re Wellington Cooks and Stewards Award* (5)].

[RICH J. referred to *Trial of Earl Russell* (6).]

Even if sec. 51 of the Constitution is not sufficient to enable the Court of Arbitration to deal with this dispute, sec. V. of the *Constitution Act* enables that Court to make an award which will apply to ships included in sec. V. The Arbitration Court may, by award, prescribe the terms of contracts to be entered into between persons carrying on industries in Australia and their employés which will be binding on the employers in the Courts of Australia even if part of the employment is beyond the territorial limits. The Constitution itself is one of the laws of the Commonwealth which by sec. V. is to be in force on the ships there mentioned: See *Quick and Garran's Constitution of the Australian Commonwealth*, pp. 357, 809.

(1) 29 L.J.M.C., 97; 1 Bell C.C., 220.
(2) (1906) A.C., 542.
(3) 4 C.L.R., 395.
(4) 5 C.L.R., 445.
(5) 26 N.Z.L.R., 394.
(6) (1901) A.C., 446.

If there is a breach of such an award outside the territorial limits which may be said to be a continuing breach, it may be said to extend into the territorial limits: See *Sea-Carriage of Goods Act* 1904.

H. I. Cohen and *Latham*, for the Commonwealth intervening. Sec. V. of the *Constitution Act* was intended to cover more than the coasting trade, and to include round voyages: *Quick and Garran's Constitution of the Australian Commonwealth*, pp. 361, 363; *Merchant Service Guild* v. *Commonwealth Steamship Owners Association*, (1); *The Mary Adelaide Randall* (2). Apart from sec. V, the Arbitration Court in making an award in regard to an industrial dispute extending beyond the limits of any one State may, under sec. 51 (xxxv.) of the Constitution, order the parties before it to do all such matters or things, whether within or without the territorial limits of the Commonwealth, as it deems necessary and expedient for settling the dispute, and such order can be enforced in the Courts of the Commonwealth: See *Commonwealth Conciliation and Arbitration Act*, secs. 2 (II.), (IV.), 29, 38. If the dispute is in fact wholly or partly in the Commonwealth and extends beyond the limits of one State, the Court has jurisdiction: See *Baxter* v. *Commissioners of Taxation (N.S.W.)* (3). The whole power of the Arbitration Court, once it is created, is derived from the Constitution. Whether the exercise of the power is necessary to the effective settlement of a dispute is for the President to decide. That Court has the power which a Court of equity has to act in *personam*.

Irvine K.C. and *Lewers* (*Harrison Moore* with them), for the Colonial Sugar Refining Co. Ltd. The words "first port of clearance" and "port of destination" had a well recognized meaning at the date of federation, and they were intended to have that meaning in sec. V. of the *Constitution Act*. They mean the beginning and the end of a voyage, and the word voyage means a direct trip from one port to another. Although in some sections of the *Merchant Shipping Act* 1894 the word "voyage" is used as meaning or including a round trip, in other sections, *e.g.*, secs. 268, 269, 270,

(1) 1 C.A.R., 1, at p. 36. (2) 93 Fed. Rep., 222, at p. 225.
(3) 4 C.L.R., 1087, at p. 1121.

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297 and 440, and in secs. 101, 111, 126, 128, 134, 144, 145 of the *Customs Laws Consolidation Act* 1876 it means a direct voyage from one port to another, and wherever it is used in connection with the words " port of clearance " or " port of destination " they mean a direct voyage. In *The Scarsdale*; *Board of Trade* v. *Baxter* (1), the word " voyage " was interpreted with reference to sec. 114 of the *Merchant Shipping Act* 1894 as meaning an adventure for which the seamen were engaged. That case can throw no light on the meaning of sec. V. of the *Constitution Act*, where the word " voyage " is not used, but other words are used which are applicable to a " voyage " with one meaning only. An " industrial dispute " within sec. 51 (xxxv.) of the Constitution means something which tends towards the interruption of industrial relations in the Commonwealth, that is, the carrying on of the industry in the Commonwealth. It does not mean a dispute in Australia as to industrial matters in some place outside the Commonwealth.

[RICH J. referred to *Harrison Moore's Commonwealth of Australia*, 2nd ed., p. 269.]

An " industrial dispute " within sec. 51 (xxxv.) cannot exist unless it involves an interruption, actual or threatened, of industrial operations carried on in Australia. Though there may be an interruption, existing or threatened, of industrial operations both within and without the Commonwealth, yet, unless some dispute or a severable part of the general dispute relates to Australian conditions solely, there is not an industrial dispute within the meaning of the Constitution. Thus, where a company employ Orientals in their ships all over the world, and the white seamen strike, and the ships of the company both at Sydney and Melbourne are laid up and there is a joint claim by the white seamen that black labour shall not be employed, there is not an industrial dispute within the meaning of the Constitution. [They referred to *Conciliation Act* 1896 (59 & 60 Vict. c. 30); *Conspiracy and Protection of Property Act* 1875 (38 & 39 Vict. c. 86), sec. 3; *Trade Disputes Act* 1906 (6 Ed. VII. c. 47), sec. 1].

[HIGGINS J. referred to *Hodge* v. *The Queen* (2).]

(1) (1906) P., 103; (1907) A.C., 370. (2) 9 App. Cas., 117.

[ISAACS J. referred to *Golden Horseshoe Estates Co. Ltd.* v. *The Crown* (1).]

Bavin, in reply, referred to *Peninsular and Oriental Steam Navigation Co.* v. *Kingston* (2).]

Cur. adv. vult.

The following judgments were read :—

BARTON A.C.J. This matter arises on a case stated for the opinion of this Court by the learned President of the Commonwealth Court of Conciliation and Arbitration under the provisions of sec. 31, sub-secs. 2 and 3, of the *Commonwealth Conciliation and Arbitration Act*. The case stated consists of a statement of fact, which incorporates certain admissions by the respondents the Colonial Sugar Refining Company and Charles Crosby, and also certain documents. In addition, there are appended the notes of the evidence given at the hearing of the plaint by two witnesses. One of them is in charge of the shipping department of the Colonial Sugar Refining Company ; and his evidence relates to the usual voyages of the *Fiona*, a steamship belonging to that company. The other witness is the master of the steamship *Wonganella*, owned by the respondent Charles Crosby, and at the material time under charter to the Pacific Phosphates Company ; and his evidence relates to the usual voyages of that vessel.

The questions that arise in respect of each of the respondents named relate to the voyages of the *Fiona* and the *Wonganella* respectively. The statements in the evidence of the two witnesses mentioned are not laid before us as facts ; and, if they were so, it would be necessary for us, before we could determine the matter, to draw inferences of fact therefrom. I am of opinion that we are not entitled to treat these notes of evidence as facts, and that if we could do so we are not at liberty to draw such inferences for the purposes of this special case. The Statute under which it is stated does not give us any authority to do so. See *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [No. 1] (3), just decided by this Court ; *Burgess* v. *Morton* (4) ; *Doe dem. Taylor* v. *Crisp* (5) ; *Latter*

(1) (1911) A.C., 480, at p. 488.
(2) (1903) A.C., 471.
(3) 16 C.L.R., 591.
(4) (1896) A.C., 136.
(5) 8 Ad. & E., 779.

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v. *White* (1), *per* Lord *Hatherley* L.C. It is therefore necessary to eliminate from consideration the notes of the evidence referred to.

His Honor's statement and the admissions place the Court in possession of the following facts :—There is a dispute between the claimant organization of shipmasters and officers and a number of respondents, of whom the Colonial Sugar Refining Company and Mr. Crosby are two. The dispute relates to the wages, hours and conditions of labour of the masters and officers. Taking first the instance of the *Fiona*, it appears from the admissions that that steamship, which is registered in Sydney, " runs " from Sydney to Fiji, from Fiji to Auckland, from Auckland to Fiji and from Fiji to Sydney, but there is no regular itinerary. Her officers are shipped in Sydney and reside there, her crew are engaged and her ships' articles are signed there. Her repairs are done, and the bulk of her stores are shipped, in that port. She does not carry passengers, nor does she carry goods for shippers other than the company. In her regular trade she carries the material and goods of the company between Sydney and Fiji ports, and Auckland and Fiji ports, and she carries back sugar belonging to the company from Fiji to Auckland. After voyages between the ports mentioned, varying in number and duration, she returns to Sydney, sometimes in ballast and sometimes with sugar, which sugar is discharged in Sydney. The available material does not contain any further finding or admission as to the actual practice of the *Fiona* with respect to her clearances and her ports of destination. By law she cannot leave for Auckland or Fiji without a clearance, and she must be entered outwards for some destination, as will appear. Beyond that, we cannot say what happens.

Now, as to the *Wonganella*. This ship is registered in Australia. Her voyages material to this case have been made since the date of the charter party. In these she has usually cleared from a port within the Commonwealth for Ocean Island or some other Pacific Island outside the Commonwealth. She takes in a cargo of phosphates at such island, and clears at Ocean Island for Sydney Heads for orders. Ocean Island, which is leased to the Pacific Phosphates Company by the Government of the United Kingdom, is a port of entry for the Western Pacific, having a Customs House of the

(1) L.R. 5 H.L., 578, at pp. 586, 587.

Western Pacific Protectorate, which is under the jurisdiction of the High Commissioner of the Western Pacific. The articles of this ship are opened at Melbourne, where the crew is originally shipped, but, whenever necessary, men are engaged elsewhere to fill vacancies in the crew, though the articles contain no provision for the engagement of the crew outside the Commonwealth. The officers are engaged in the Commonwealth in the first instance, and for the most part live in Australia. When the *Wonganella* is cleared from an Australian port for Ocean Island, the port for which she will be cleared from Ocean Island is not known. No further information is available by way of finding or admission of fact as to the actual practice of the *Wonganella* with respect to her clearances and her ports of destination, with the exception of two documents which were granted to the *Wonganella* on 24th November 1911 at Nauru in the Pacific, one of the Marshall Islands. One of these is a certificate that the clearance of that ship had been made thence on the day stated, and the other is a health certificate of the same date describing her as "laden with phosphate, destined to sail from here to Sydney *via* Ocean Island." Both documents purport to have been issued at the Imperial Government Station, Nauru.

It is urged by the respondents that the Arbitration Court has no power to settle the dispute.

Originally the learned President stated the following as questions arising in the proceeding which in his opinion were questions of law :—

(1) On the facts stated is the dispute a dispute extending beyond the limits of any one State within the meaning of the Act and the Constitution ?

(2) On the facts stated has the Arbitration Court power (if the dispute is one extending beyond &c.) to settle the dispute, in view of sec. V. of the *Commonwealth of Australia Constitution Act* ?

These were the questions debated on the first two arguments. During that which lately concluded his Honor asked the Court to answer the following questions in lieu of the second of the foregoing questions :—

(2) Assuming question 1 to be answered in the affirmative, and if the Court should see fit to impose duties to be observed on board

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the said ships when outside Australia, are the conditions enforceable by penalty (whether by virtue of sec. V. of the *Commonwealth of Australia Constitution Act* or otherwise)?

(3) Assuming the first question to be answered in the affirmative, and if the Court cannot procure an amicable agreement under sec. 23, has the Court power by award compulsorily to fix terms and conditions to be incorporated (or deemed to be incorporated) in agreements of service made by the respondents with members of the claimant organization?

It is to be taken that the case stated has been amended accordingly.

The questions as they now stand involve in the first instance the consideration of the same points as were raised in the original questions 1 and 2. In view of the argument for the claimants, I take question 1 to ask whether the dispute between members of the claimant organization and the owners of the *Fiona* and *Wonganella* respectively is an industrial dispute extending beyond the limits of any one State within the meaning of sec. 51 (xxxv.) of the Constitution, in the sense that the Commonwealth Court of Conciliation and Arbitration has jurisdiction under that provision to make an award as to industrial operations on board these vessels in places beyond the limits of the territorial jurisdiction of the Commonwealth. It is clear that the "extension" of the dispute referred to by sub-sec. xxxv. is an extension from one State into another or other States of the Commonwealth. An extension from one State to extra-territorial waters, or to some country extraneous to the Commonwealth, cannot be intended, and as to this I think all parties are agreed. The power given in sec. 51 to make laws may be taken to mean power to make effective or enforceable laws. Now, a law is not effective or enforceable if there is no power to compel its observance. We cannot read sec. 51 as meaning a power to make laws which any one may break with impunity. The legislative authority of a country extends only to persons within its territory. That its penal laws cannot have any extra-territorial operation is made clear by such cases as *Macleod* v. *Attorney-General for New South Wales* (1), and *Tomalin* v. *S. Pearson & Son Ltd.* (2).

(1) (1891) A.C., 455.

(2) (1909) 2 K.B., 61.

Each of the powers of sec. 51 of the Constitution must be taken as authorizing the making of rules of conduct to be observed within the territorial jurisdiction of the Commonwealth. Sub-sec. XXXV. is therefore a power to the Parliament to make rules of conduct to be observed within that territory in respect of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. As industrial disputes are disputes as to the conditions of industrial employment, the employment must be within the territorial jurisdiction of the Commonwealth. For a breach, occurring outside the jurisdiction, of any condition imposed by an award is not justiciable by Commonwealth law, so that any law which purported to command such a condition would be ineffective; and it has been pointed out that the sub-section must be read as authorizing the making of effective laws.

I think, then, that a dispute as to the conditions of employment outside the territorial jurisdiction of the Commonwealth is not within sub-sec. XXXV. In this case the dispute is, as it affects the two respondents now concerned, a dispute as to the terms of employment of masters and officers of certain British ships when on the high seas, outside the territorial limits of the Commonwealth except as to a three-mile fringe of the coast. The Imperial Parliament, up to the passing of the *Commonwealth Constitution Act*, had itself regulated by Statute, as for instance in 1894, the conditions of British ships on the high seas. It had, in the *Merchant Shipping Act* of that year, sec. 736, provided that the legislature of a British possession might regulate its own coasting trade, but subject, *inter alia*, to a suspending clause providing that the Act should not come into operation until the Royal Assent, if given, had been made publicly known in the possession. It had therefore to be reserved for assent. I do not think it likely, having regard to this provision, with its limitation both as to subject matter and operation, that the Parliament which passed the *Constitution Act* empowered the grant of authority to a Commonwealth Court or Commonwealth officers to regulate such matters upon the high seas. Yet, if the argument addressed to us is sound, such a power must exist as to the conditions of employment on a large

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number of British ships, even on a voyage from Australia to England and back.

It was argued that it is not necessary that the dispute should be as to industrial operations within the limits of the Commonwealth if the disputants are to be found within them. I think what has been said is an answer to that proposition, but even if the argument were accepted, the authority of a Commonwealth tribunal would be limited to prescribing what should be done within the Commonwealth jurisdiction in respect of such matters, which at the most would mean the requiring of the making of an agreement within the Commonwealth to do or not to do some act outside it. But if such an agreement as that were broken outside the jurisdiction, it is plain that the only remedy would be an action for breach of contract; for a penal sanction for such a breach would be inoperative. It was suggested, however, that as there are respondents carrying on these industrial operations in different States at the ports and for three miles outside them, this can be held, even as to the part of the subject matter not within the limits of the Commonwealth, to be an industrial dispute extending beyond the limits of any one State. I do not agree. It is true that if the dispute were separable the part of it relating to Australian subject matter could be dealt with by the Australian arbitration tribunal as a separate dispute. But the extra-territorial part would still be beyond the jurisdiction of the Court to deal with by way of penalty for breach of award. Here, however, the operations are all parts of the same subject of dispute, and counsel for the claimants warmly contended that the dispute was indivisible. I think that upon the facts and arguments it must be taken to be so. But, to be within the power in sub-sec. xxxv., the dispute must be confined to Australia. Otherwise, if it is inseparable, there is an award reconcilable only with a law which assumes to operate extra-territorially, which it cannot do, and that objection is fatal where a dispute extending outside of Australia is single and inseparable.

I therefore think that on the facts before us the dispute is not an industrial dispute extending, &c., within the meaning of sec. 51, sub-sec. xxxv., and also and consequently is not within the powers conferred by the Act on the Arbitration Court. If the dispute

were divisible, and could be, and were, treated separately, this answer would of course only apply to the portion affecting the present respondents.

In this answer I have read question 1 as referring only to the Constitution itself, and not to sec. V. of the *Constitution Act*, or "covering sec. V.," as it has been called. But I will also consider that question in relation to sec. V. It reads 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."

Before giving my view of the construction of this provision, I would point out that in strictness the second and third questions are not asked of one who answers the first in the negative, for they both begin with the assumption that question 1 is answered in the affirmative. I take it, however, that I am not absolved from the duty of stating what I think is the meaning and the operation of sec. V. which is now in controversy. The laws of the Commonwealth are to be enforceable "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." In the first place, it is clear that this provision is not an additional power of legislation ; it does not authorize the Parliament to make any law which it could not make under the powers granted in the Constitution. It merely extends the operation of those laws when validly made, or of such of them as can be applied. If they satisfy the conditions of validity and applicability they are in force, not only within the territorial limits of the Commonwealth, but on British ships whose first port of clearance and port of destination are in the Commonwealth.

The words clearly apply to what are known as coasting voyages. But the contention is that they also include every case in which, when the first port of clearance is in the Commonwealth, the ship is intended to return to the Commonwealth, at some time however distant, and wherever the ship may go in the meantime. Whether

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this contention is correct is a question that depends upon the meaning of the words "port of destination" viewed in connection with the words "port of clearance." The "first port of clearance" is obviously the port from which the vessel clears at the outset of the voyage which the section contemplates. The provision is one that deals with shipping, and it is not contested that the "port of clearance," which conveys no meaning apart from shipping and Customs law and practice, is perfectly well understood in relation to that law and practice. It is, in short, a technical term. The term "port of destination," used in connection with it in such a provision, will be read, like its neighbour, in its technical meaning, if it has one, unless the context shows that it was evidently meant in some other sense. In *Laird* v. *Briggs* (1), *Jessel* M.R. said :— "*Primâ facie* it appears to me that the rule applies that technical words must have their technical meaning given to them unless you can find something in the context to overrule them." In *Burton* v. *Reevell* (2), *Parke* B. said :—"When the legislature uses technical language in its Statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears. This is the rule of construction of technical expressions, even when occurring in a will."

The provision is *primâ facie* to be read in relation to the practice of trading ships, since that is the character of vessels voyaging from port to port, with very few exceptions. Trading ships have to make a clearance at the Customs. There are some vessels, such as ships of war, which have not to do so. The meaning of a clearance as applied to trading vessels is made very plain by the Imperial *Customs Laws Consolidation Act* 1876, which has been in force since that year. As to the port of destination, sec. 101 provides that the master of every ship in which goods are to be exported to parts beyond the seas shall, before any goods be taken on board, deliver to the collector a certificate from the proper officer of the due clearance inwards (that is, if she comes from beyond the seas) or coastwise, of the ship on her last voyage, and shall also deliver therewith an "entry outwards" of the ship in the form No. 6 in Schedule B., and if the ship has begun her loading at some other port, shall deliver to the

(1) 19 Ch. D., 22, at p. 34.

(2) 16 M. & W., 307, at p. 309.

proper officer a clearance of such goods from such other port. The particulars required by form No. 6 include the ship's name and port of register, her nationality if foreign, her tonnage, the name of the master, and the "port of destination." Subsequent sections prescribe the conditions to be observed, and forms to be used, with respect to the entry and clearance of goods for exportation. In the case of drawback goods (sec. 105) the exporter is to deliver to the Customs officer a shipping bill in the form No. 7, which requires "the port or place of destination" to be stated. In the case of free goods (sec. 110) the alternative forms are Nos. 8 and 9. They begin with a statement of the port at which the form is delivered to the officer, the ship's name, the master's name, and the "port or place of destination." Before the ship is cleared outwards (secs. 127, 128) the master or his authorized agent is to attend before the officer and answer questions concerning the ship, cargo, and voyage, and to deliver to him a "content" of the ship, (commonly called the "manifest") in form No. 10. This document begins with a statement of "ship's name and destination," and contains a list of all goods on board, with particulars. When all the prescribed conditions have been performed, the necessary documents are before clearance to be delivered to the proper officer and attached to a sealed label called the "clearance label," which, when filled up and signed by the proper officer, "shall be the clearance and authority for the departure of the ship" (sec. 128). The label does not itself mention the port of destination, which is, however, named in the content or manifest attached to it. The clearance label with its affixes is carried on the voyage. Form No. 11, which is used in the case of coasting ships, and is called a "transire," is used in place of the entry outwards; the transire uses the words "whither bound" in place of the words "port of destination" in form No. 6.

The Commonwealth *Customs Act* 1901 provides by sec. 118 that the master of a ship shall not depart with his ship from any port without receiving from the Collector a certificate of clearance. The regulations made under this Act prescribe a form for this document certifying that the master of a ship "bound for" a place

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named in it has entered and cleared the ship according to law. Thus it appears that the masters of the *Fiona* and *Wonganella* were obliged to have on board, in addition to the manifest, another document showing the port of destination of the ship.

The Customs Acts of the several States, in force before the *Constitution Act* became law, contain nothing to suggest that the terms in question should be read otherwise than as I have indicated. In the New South Wales *Customs Regulation Act* of 1879 the Schedules do not give forms of the shipping documents required, which are prescribed under regulations. The terms "clearance" and "entry outwards" of course occur, with other technical terms, in the sections, but I have not found the words "port of destination" there, nor have we been supplied with the forms prescribed by regulation. But the information to be gathered from the other Customs Acts is plentiful. In the Victorian *Customs Act* 1890 there are a number of sections corresponding with provisions of the Imperial Act of 1876. I desist from repetition as to the use of the words "clearance" or "port of clearance" in this and the similar Acts of other States, but I refer to sec. 134, Schedule 9, for the use of the words "port of destination" in the entry outwards; to sec. 137, Schedule 10, Form A, for the use of the same term in the shipping bill, and to sec. 145 and Schedule 11 for the term "port or place of destination" in the bill of entry. For the use of the same terms in the Queensland *Customs Act* 1873, I refer to secs. 121, 125 and 137, and the Forms embodied therein. The same terms are used for the like purposes in the South Australian *Customs Act* 1864 and the West Australian *Customs Consolidation Act* 1892. In the Tasmanian *Customs Act* 1897 the words "port of destination" are not used, but in the heading of the entry outwards, the manifest or content, the shipping bill, and the bill of entry for free goods, spaces are left for (*inter alia*) the name of the vessel and the name of the master, and then comes the word "for," followed by a blank evidently left for the name of the port to which the ship is bound. By section 170 the manifest is to be attached to the clearance document, so that the completed document shows the port for which the ship is bound. And that document has to be carried on board. Taking all these Statutes together as evidences of shipping practice, I cannot enter-

tain any doubt as to the meaning of the controverted terms of sec. V.

Some clearances actually issued were produced to us. In one, issued at Sydney, the ship is described as bound for Hamburg *via* Melbourne, Hobart, Adelaide and Fremantle. In another, produced on the second argument, the clearance, issued at Sydney, described the ship as bound for Durban *via* Melbourne and Adelaide. The third, produced at the same time, was issued at Hobart, and the ship is described as bound for London *via* Australasian ports. A fourth, shown us on the same occasion and issued at Capetown, describes the ship as bound for Melbourne "having on board original cargo." (From the case cited, *Thalmann* v. *Texas Star Flour Mills* (1), it appears that the form of clearance used in the United States, like that used in the Commonwealth, shows the destination of the ship. In the instance in question the document described her as "bound for Havre *via* Newport, Virginia.")

It appears that when a vessel arrives at the port named in her entry outwards, or her shipping bill, or her manifest, all of which name the same port, she gives up her original clearance certificate, and on leaving takes out another, but there is always a document in existence, and in official custody, in a known place, showing her first port of clearance on that voyage, and there is always on board a document showing her port of destination. It is not easy to avoid the conclusion that the Imperial Parliament, in prescribing the tests for determining the character of a voyage, used the terms "port of clearance" and "port of destination" in the sense in which they are used in the ports in which the character of the voyage is officially declared. It is argued that the words "port of destination" have in this case a different meaning; that the port to which the owner intends the ship shall ultimately go is the port of destination, and if it is shown by extraneous evidence in contradiction of the shipping documents that he intends that she shall wind up a lengthy voyage of many calls, including, for instance, a port at the other end of the world, by coming back to the port at which she began her enterprise, that starting place is her port of destination. Her destination, then, is to be ascertained by evidence at

(1) 82 L.T., 833.

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large as to the intention of her owner, and not from the documents which the authorities, whose directions he is bound to regard, exact from him, and those which they deliver to him. Mr. *Bavin* maintained when pressed that if a ship is despatched from Sydney to London or Liverpool with the intention that she shall then turn round and come back to Sydney, her port of destination as soon as she leaves Sydney is Sydney. That contention seems to me to refute itself. It was further contended that to read the term "port of destination" as the declared port of destination would enable the owner to say whether the voyage was to be under Commonwealth law or not. It does not prevent him from saying whither he means his ship to go; the rest is a legal consequence. I see nothing strange in that unless fraud is to be presumed, for the owner enters outwards for the port to which his trading interests direct him. It seems to me that it is a reasonable position that in respect of each voyage the port of destination should be the declared *terminus ad quem*; if it is outside the Commonwealth, then a British ship on her way thither would be under the law of the United Kingdom, and if it is within the Commonwealth, then on her way thither the British ship would be under Australian law. If the ship goes to several ports successively in the Commonwealth, clearing afresh from each to the next, she is under the laws of the Commonwealth up to the last of such ports, whether she is at any particular moment within the territorial waters or beyond them, and so equally on her return. On her outward voyage the first port of clearance is the starting point, and on her return she clears back to her starting point with or without intermediate calls and clearances, and both going and returning the first port of clearance is completely identifiable. Take the case then of a ship clearing from Sydney for Suva in Fiji and no other port. Is it unreasonable to think that on her arrival there the ship has reached her port of destination? But we are told that if she clears from Suva for some other port or ports they are not, nor was Suva, her port of destination, but some other port to which her owner intends to send her ultimately, so only that it be within the Commonwealth, and her starting point. This seems to be an attempt to apply to shipping purposes the law of domicil, which does not happen to be the rule laid down by the enactment.

Some arguments were based on the question what is a voyage, but I do not think they are material to this case. A voyage has different meanings according to the different conditions in which the term is used. Sometimes it is the voyage described in the ship's articles; sometimes the voyage described in a charter party; sometimes a "round voyage"; sometimes the voyage from each successive port to its successor: but none of these uses of the term help us in the construction of the section.

Being of opinion that the terms "first port of clearance" and "port of destination" are both to be read in the sense in which they are used in shipping transactions, as instanced in the Customs laws, and the meaning of the first port of clearance being then self-evident, I am also of opinion that the port named as the destination of the ship in her entry outwards, her shipping bill, and her content or manifest, is her port of destination within the meaning of the section. The consideration of sec. V. of the *Constitution Act* in relation to question 1 does not help me to give an affirmative answer to that question.

Question 2 does not arise out of any concrete state of facts, and, having regard to the views I have expressed in my judgment in the case immediately preceding this (*Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [No. 1] (1)), and also to the answer of the majority of the Court given on 29th August in the course of the case in which judgment will next be given (*Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [No. 2] (2)), I am of opinion that we cannot answer it. I understand that this opinion is held by the majority of the Court.

Question 3 is put only in the event of question 1 being answered in the affirmative. In conformity with my individual opinion on question 1, my answer to it is in the negative, but I understand that my learned brethren, giving an affirmative answer to question 1, hold that the Court of Arbitration has power to require that any of the terms and conditions which it lawfully determines should be in operation between the organization and these respondents shall be embodied in a written agreement between them. I take this

(1) 16 C.L.R., 591. (2) 16 C.L.R., 705.

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conclusion to be arrived at in consequence of our opinion on question 1 that the dispute is not the less an industrial dispute extending beyond the limits of any one State because some of the operations in respect of which the dispute exists are performed beyond the territorial limits of the Commonwealth.

ISAACS J. Having regard to the requirements of sec. 31 of the *Conciliation and Arbitration Act* as laid down in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [No. 1] (1), I proceed to deal with the questions submitted.

Question 1.—The facts disclose—and they have been treated as disclosing—a dispute in the shipping industry which includes a great number of shipowners and their employés in various States of Australia, so that the dispute as a whole is one which, in the ordinary sense, extends beyond the limits of any one State within the meaning both of the Constitution and the Act.

And it appears the respondents, the Colonial Sugar Refining Co. Ltd. and Charles Crosby, are in fact parties to that dispute.

But the question seeks to ascertain whether, in view of the nature of the claim as it affects those two respondents, they can in law be said to be parties to a dispute "extending beyond the limits of any one State."

The facts found and admitted enable us to answer the question so far as it involves the law necessary to give a direction to the learned President guiding him, after he finds further facts necessary to decide the application of the law to these particular respondents.

The precise nature of the voyages of the vessels *Fiona* and *Wonganella*, respectively, is neither found nor admitted, or otherwise "stated," and, consequently, I am not in a position to say whether as to these particular vessels there is such a dispute as is referred to, or jurisdiction to settle it.

I entirely disregard the notes of evidence attached, because for the purpose of these questions they are only evidentiary and subsidiary facts, and not ultimate facts. But apart from them enough appears to show that these vessels go respectively far beyond the three-mile limit, and as far as islands in the Pacific, such as Fiji

(1) 16 C.L.R., 591.

and Ocean Island. Therefore the point of the question may be met.

The claims in controversy are as to wages, hours and other conditions of labour both within ordinary territorial jurisdiction, and on the high seas, and while in extra-territorial ports.

If they are treated as distributive or separable, so as to make one distinct dispute as to operations carried on within territorial limits only, and another distinct dispute as to extra-territorial operations, the claimants' case as to the latter would be obviously hopeless for more reasons than one. First, the latter part would not, when severed from the rest, come within the terms of the Constitution; and in any case if only severable so that the settlement of the latter was not insisted upon by the claimants, as a condition to the settlement of the first part, then their argument as to the necessary and incidental character of the latter demands in relation to the settlement of an Australian dispute would, confessedly, lack foundation in fact. The case depends on the whole claim being one inseparable claim, to be settled as a whole, however the Arbitration Court might award with respect to the various parts of it. And, if so regarded, the question is this: Is a combined claim for improved industrial conditions applying not merely to Australian limits of jurisdiction, but to them and extra-territorial areas, a claim which comes within an "industrial dispute extending beyond the limits of any one State," as understood in the Constitution and the Act?

The case has been argued, following the questions, as raising the distinct issues as to how the matter stands, (1) on sub-sec. xxxv. of section 51 of the Constitution, apart from covering sec. V.; and (2) on covering sec. V.

There is some difficulty in treating the two provisions as separate —that is, as if covering sec. V. were not there. It is there, and its presence necessarily affects the whole Constitution, and it must be taken into account when construing any part of the Constitution.

But its effect depends on its true interpretation, and, as that is in dispute, it is convenient to consider the two enactments as far as possible on their own respective bases.

It is contended for the claimants, and denied for the respondents, that the 35th sub-section of sec. 51, of its own force, and unaided by covering sec. V., enables the Court of Arbitration to impose

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conditions as to wages, hours, &c., with direct reference to operations performed on the high seas and even in other jurisdictions.

It is said, first, that the power claimed is incidental to the power to determine Australian conditions, because the latter could not otherwise be effectively settled. For instance, any addition to wages for work done in Australia could be deducted from the rates paid for work done outside. Next, it is said the power is not merely incidental but is included in the main power, inasmuch as the dispute itself is in Australia, includes demands both as to local and outside operations, if not settled would interrupt local industry, and cannot possibly be settled without determining the whole demand.

The first point is the same as was urged in support of the common rule, and ineffectively, in *Australian Boot Trade Employés' Federation* v. *Whybrow & Co.* (1). There, as here, the case of the *Attorney-General for Canada* v. *Cain* (2) was cited, and distinguished.

The distinction between the incidental means for effectively exercising a granted power, and the extension of that power so as to make it an effective one, is lost sight of in the contention. The matter is so important that I venture to repeat what I said on this head, in the case mentioned (3) :—" It is true that the grant of a power carries with it the grant of all proper means not expressly prohibited to effectuate the power itself. See the cases cited in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (4). No instance of this principle could be stronger than the case of the *Attorney-General for Canada* v. *Cain* (2) where the Privy Council held that the legislative power to exclude aliens connoted the power to expel, as a necessary complement of the power of exclusion. But that was because the power of exclusion could not otherwise, even within its own admitted limits, be effectually exercised and enforced.

" The case is quite different when it is found that a given power, though fully and completely exercised and enforced, is not effectual to attain all the results desired or expected. The matter is then one for the consideration of the authority in whom resides the right of granting a power more extensive. It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called,

(1) 11 C.L.R., 311.
(2) (1906) A.C., 542.
(3) 11 C.L.R., 311, at pp. 337, 338.
(4) 4 C.L.R., 1087, at p. 1157.

by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met.

"Where an instrument of expressly limited length or nature is designated for use, but found in practice insufficient to reach the point intended, then, however just or desirable such a course may appear to those whose duty it is to employ that instrument, there is no legal principle which warrants its lengthening or transformation merely because the expected result has not been achieved. Where both end and means are strictly marked out, there is no right either to use other means to attain the specified end, or to use the specified means for unauthorized ends. See *per* Lord *Davey* in *Rossi* v. *Edinburgh Corporation* (1).

"The authority must be taken as it is created, taken to the full, but not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power."

The principle I have enunciated found illustration and application in the judgment of Lord *Macnaghten* in *Amalgamated Society of Railway Servants* v. *Osborne* (2).

If, however, on a proper interpretation of the sub-section the authority claimed falls within it—as is asserted in the second branch of the argument,—there is an end of the matter. The two matters may be conveniently dealt with together.

"English legislation is primarily territorial," said Lord *Halsbury* L.C. in *Cooke* v. *Charles A. Vogeler Co.* (3), adopting what was said by *Brett* L.J. in *Ex parte Blain*; *In re Sawers* (4), and followed in *In re Pearson*; *Ex parte Pearson* (5). This *primâ facie* presumption may be displaced by clear intention to extend the legislation, and in that case, if the legislature is sovereign, the Courts within the jurisdiction are bound: *Trial of Earl Russell* (6).

There are no express words in sub-sec. xxxv. by which its operation is extended beyond Australia and the three-mile limit.

Further, it is a case of legislation within the Empire, which follows a well-established system of practical distribution of powers of

(1) (1905) A.C., 21, at p. 29.
(2) (1910) A.C., 87, at p. 97.
(3) (1901) A.C., 102, at p. 107.
(4) 12 Ch. D., 522, at p. 528.
(5) (1892) 2 Q.B., 263.
(6) (1901) A.C., 446.

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self-government among the principal constituent portions of the Empire.

Imperial Parliamentary intervention after such a grant, would be unconstitutional in the British sense—See *May's Parliamentary Practice*, 10th ed., ch. 2, p. 36, citing Lord *Glenelg* (*Parliamentary Papers* 1839 (118), p. 7)—unless in exceptional cases there suggested. Compare also *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (1) and *In re R.* v. *Marais*; *Ex parte Marais* (2).

But the grant of powers of self-government to a component portion of the Empire connotes, primarily, restriction of their exercise to the limits of the local territory and its adjacent sea limit as recognized universally and by Statute. (*Territorial Waters Jurisdiction Act* 1878, 41 & 42 Vict. c. 73). In accordance with this, see *Piggott's Foreign Judgments*, Part III, p. 90; and note the reference to "territorial limits" in sub-sec. x. of sec. 51 of the Constitution.

It is difficult to see how the practical constitutional arrangement observed by the Imperial authorities could work harmoniously unless this were so. And therefore to the grant of powers to the self-governing communities of the Empire the maxim *Extra territorium jus dicenti impune haud paretur* primarily applies (see *Macleod* v. *Attorney-General for New South Wales* (3)) as it does to other Acts of British legislation, and to extend the effect something must appear either from the express language or the necessary scope and intent of its operation as apparent on the face of the Statute. Whatever is necessarily incident to the proper exercise of a power passes with it as an implication: *Kielley* v. *Carson* (4); *Barton* v. *Taylor* (5); *Baxter* v. *Commissioners of Taxation (N.S.W.)* (6); *Attorney-General for Canada* v. *Cain* (7); *Hudson* v. *Guestier* (8); *The Ship "North"* v. *The King* (9). These cases are examples of accessory incidents attached by necessary implication to main powers, even where the accessory powers require extra-territorial application; but they are clearly to be distinguished from any authority to claim additional main powers.

(1) (1898) A.C., 349, at p. 357.
(2) (1902) A.C., 51, at p. 54.
(3) (1891) A.C., 455, at p. 458.
(4) 4 Moo. P.C.C., 63.
(5) 11 App. Cas., 197.
(6) 4 C.L.R., 1087, at pp. 1157, 1158.
(7) (1906) A.C., 542.
(8) 6 Cranch, 281.
(9) 37 Can. S.C.R., 385.

Then we have to consider the second branch relating to sub-sec. xxxv., the branch which takes the existence of the dispute on Australian territory as the controlling and all sufficient fact. Repeatedly I put in various forms this problem to learned counsel who urged it: Suppose all the Australian employés in an industry carried on here demanded that their employers should pay higher wages to their employés working in branch or principal factories in England and America, and threatened to dislocate Australian industry unless the demands were complied with, could such a dispute be taken to be within sub-sec. xxxv. of sec. 51, and settled by the Court of Arbitration? After much hesitation, learned counsel did not insist on pressing the matter so far. But if not, it demonstrates that some element other than the mere presence on Australian soil of disputants and dislocation of industry, is necessary. What is that element? In my opinion, that element is, even in respect of the particular sub-section of the Constitution now under consideration, that the dispute must be about the terms on which the Australian industry is conducted; in other words, the subject matter of dispute is territorial, just as the dispute itself is. That is so far as sub-sec. xxxv. is concerned—supposing the covering sec. V. were non-existent. And, if that be so, it seems to me to follow that if the dispute be a composite dispute, that is, if it be concerned with conditions partly in Australia and partly in America or India or partly in Australia and partly on the high seas, then, if it be separable, the Court can deal with the Australian part, and ignore the foreign part; but if the parties claiming the demands insist that they are not making separable but inseparable claims, then, in my opinion, they are insisting upon something that stretches beyond the ambit of jurisdiction contained in sub-sec. xxxv. so far as it is unaided by any further provision in the *Constitution Act*.

One of the objections which the Privy Council found to the wider construction in *Macleod's Case* (1) was that the Statute would "comprehend a great deal more than Her Majesty's subjects," that is, when absent from the country.

Similarly here, shipowners who may, by reason of their temporarily trading in territorial limits, be subject to our laws, and their

(1) (1891) A.C., 455, at p. 459.

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employés, would, by the suggested construction, notwithstanding their foreign nationality be also liable in respect of acts done and omissions observed while on the high seas, and when they return would be subject to penal consequences merely for what happened outside the whole area of recognized jurisdiction. It would not be a "composite act," part of it being committed within territorial limits, as in *Peninsular and Oriental Steam Navigation Co.* v. *Kingston* (1), but an event happening entirely outside Australian territory. That, in my opinion, is entirely beyond the contemplation of the sub-section; but it contains no limitation to British ships, or to the case where both *termini* of the voyage are in Australia, as does covering sec. V. If that sub-section were intended to extend beyond territorial limits at all, it seems to me quite improbable that the Imperial Parliament would have left to implication there what they took care to insert expressly in covering sec. V., namely, a restriction to British ships, and to ships for the time being connected, so to speak, at both ends of their enterprise with Australia, and all the more because of that express insertion in another part of the same enactment.

When the *Commonwealth Conciliation and Arbitration Act* itself is looked at, there are several indications that, unless aided by some general statutory provision such as covering sec. V., it would be understood to be confined to Australian territory. See, for instance, the concluding words of the definition of "industrial matters" (sec. 4) and the provisions of secs. 6, 7, 16A and 38 (*k*) and (*m*).

As to covering sec. V.—Whatever power the Commonwealth possesses to declare by award of the Arbitration Court rights as between shipowners and their employés on the high seas, must, in my opinion, rest upon covering sec. V., and its effect upon sub-sec. xxxv. of sec. 51.

After the fullest consideration I have been able to give to it, the provision does not seem to me either obscure or difficult.

Recognizing the *primâ facie* correspondence of powers with Commonwealth territory, including, of course, the marine league—at all events for most purposes—and recognizing too that in the Constitution that *primâ facie* correspondence is expressly extended

(1) (1903) A.C., 471.

in sub-sec. x., and sometimes impliedly extended, as in sub-sec. xxviii., "influx of criminals," which necessarily involves everything essential to effective exclusion, the Imperial Parliament proceeded to expressly enact a general extension of jurisdiction. First of all, in the earlier part of the section it affirmatively made the Commonwealth Constitution and laws binding on all Commonwealth territory notwithstanding "State laws," and whether these include State Constitutions I offer no opinion. Then it went on to the contemplated extension beyond the territory by enacting that "the laws of the Commonwealth" (not "the laws made by the Parliament of the Commonwealth" as in the earlier part of the section, and, therefore, I again offer no opinion as to whether the phrase includes the Constitution itself as its organic law) shall be in force on certain "British ships." I stop there for a moment to say what I understand by "British ships," because, as I think, that will materially assist us to understand the rest of the section. The term "British ship" is used in what *Cockburn* C.J., in *Union Bank of London* v. *Lenanton* (1), called "the larger sense of the term," because, as *Brett* L.J. (2) observed of the ship there in question, "she belonged solely to British owners." "British ship" means either a public ship, or a private ship belonging to British subjects, including in that term a British corporation. (See *R.* v. *Arnaud* (3); *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (4); *R.* v. *Bjornsen* (5); *R.* v. *Allen* (6). The breadth of the expression "all British ships" is shown by the exception of "the Queen's ships of war."

It is therefore not a mere exception from the *Merchant Shipping Act* 1894, and the provision stands on a wholly different plane from secs. 735 and 736 of that Act, both by reason of what I have already pointed out and by reason of the reference to "the laws," that is, *all* applicable laws, of the Commonwealth. The reference to "British ships" was to indicate that the authority was not conferred beyond the jurisdiction of the Imperial Parliament itself, which cannot exercise jurisdiction over foreign vessels on the high

(1) 3 C.P.D., 243, at p. 247.
(2) 3 C.P.D., 243, at p. 249.
(3) 9 Q.B., 806.
(4) 10 Q.B.D., 521, at pp. 535-536.
(5) 16 Cox C.C., 74; 34 L.J.M.C., 180.
(6) 10 Cox C.C., 405.

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seas. The term indicates, therefore, the nationality of the vessels, and not any meaning restricted to some particular enactment.

But the following words introduce a limitation, and the only limitation, on the universality of "all British ships." They restrict them to British vessels "whose first port of clearance and whose port of destination are in the Commonwealth."

The section has a history. It is a modification of sec. 20 of the *Federal Council of Australasia Act* 1885 (48 & 49 Vict. c. 60), in which the final words were "and on board all British ships, other than Her Majesty's ships of war, whose *last* port of clearance *or* port of destination *is* in any such *possession or colony*." Those words were unmistakable. A ship of war, if it cannot have a port of "clearance" in the mercantile or Customs-house sense—though I do not say it could not have one in a more general sense—can and does have a "port of destination." The reference to public ships of war not only therefore proves how general is the term "British ship," but shows also how general is the term "destination." There was a suggestion in argument that the "or" should be read as "and"; but there is not the least support for that in the section, and there is much against it. First of all, "or" is not "and," and there must be some overwhelming reason discoverable in the Act itself as applied to the subject matter, and consistent with the language of the Statute, to justify the Court in altering the words of the legislature. See *per* Lord *Halsbury* L.C. in *Mersey Docks and Harbour Board* v. *Henderson Brothers* (1). Now, to alter "or" to "and" we should have to alter the word "is" to "are"; and, further, we should have to use "possession" and "colony" in the plural, otherwise both "last port of clearance" and "port of destination" would have to be in the same possession or colony. Now, if the word "or" is to stand, it shows beyond question, to my mind, that the Imperial Parliament intended that the section should be applied according to the actual facts. And in covering sec. V., the change from "or" to "and," while imposing the double condition does not change the meaning of its two constituent parts.

Now, of necessity, the two sets of words represent *termini*, and the question is *termini* of what?

(1) 13 App. Cas., 595, at p. 603.

I reject the suggestion of a series of voyages connected by a time charter under which various jurisdictions might be visited.

In a series of voyages, there is not one, but there are many destinations.

The only reasonable thing of which the words in question indicate the *termini* is a voyage. And I follow the reasoning in the *Scarsdale Case* (1), and take the voyage to be that which is *intended at the commencement.* The intention is all important. The evidence of that intention may be more or less difficult to collect. It may consist of ship's papers, master's declarations, or the various circumstances mentioned in the judgment of Lord *Loreburn* L.C. See also *Lord* v. *Robinson*, and note thereto (2); *Wooldridge* v. *Boydell* (3), and *Phillips* v. *Born* (4). In other words, the *termini* are those of an actual voyage; one in fact and reality; not a fictional or a paper voyage. By the latter expression I refer to a voyage which the master, perhaps by design, perhaps by mistake, has stated to the Customs authorities, and is more or less distinctly indicated in the ship's papers. It is one thing to bind a ship by a false statement; it is another to bind other people; and still another to enable the ship to escape by a false statement the operation of a law, which the actual voyage of the vessel if properly described would, by virtue of covering sec. V., attract. If the ship's papers are conclusive *positively*, they are conclusive *negatively.* If conclusive to avoid Commonwealth laws notwithstanding the ship's real voyage; then conclusive also to subject those on board to Commonwealth laws though the true voyage were outside sec. V. But ship's papers, including clearances, have never been held conclusive as to the voyage, either in peace (see, for instance, *Marshall on Insurance* (1856), p. 264—passage beginning "But though there be a previous design") or in war (*Seymour* v. *London and Provincial Marine Insurance Co.* (5); *The Sarah* (6); *The Imina* (7)).

There is no mention in the section of ship's papers or other documents. Nor can these be drawn in by the words "port of clearance." Clearances are granted under Customs Acts in respect

(1) (1907) A.C., 373.
(2) Dan. & Ll., 11, 14.
(3) 1 Doug., 16.
(4) 93 L.T., 634, at p. 637.
(5) 41 L.J.C.P., 193.
(6) 3 Rob. Adm., 330.
(7) 3 Rob. Adm., 167.

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of goods, and under the *Merchant Shipping Act* 1894 (sec. 314) in respect of the requirements of that Statute with reference to emigration. But there is no more reason for fastening the English Customs Acts to sec. V. than for linking it to sec. 314 of the *Merchant Shipping Act*; much less indeed, because the former do not apply in Australia. Sec. 314 speaks of "intended voyage" just as Customs Acts invariably do. (See English *Customs Laws Consolidation Act* 1876 (39 & 40 Vict. c. 36), ss. 134, 148 and 158; New South Wales *Customs Regulation Act* 1879 (42 Vict. No. 19), sec. 118; Queensland *Customs Act* 1873 (37 Vict. No. 1), sec. 140; South Australian *Customs Act* 1864 (No. 19 of 1864), sec. 100; Tasmanian *Customs Act* 1897 (61 Vict. No. 6), sec. 170; Victorian *Customs Act* 1890 (No. 1081), sec. 161; Western Australian *Customs Consolidation Act* 1892 (55 Vict. No. 31), sec. 192).

"Clearance" is variously used. In the more general sense it indicates the ship's satisfying the proper local authorities that the law of the port has been complied with—so as to entitle the vessel to depart. Sometimes it is employed to denote the authorization for departure; and, again, it sometimes designates the documents, such as a certificate or other papers under the seal of the Customs or the signature of some officer, which evidence the right to depart. See *Thalmann* v. *Texas Star Flour Mills* (1), and the various Acts mentioned.

Then, as to the word "destination." The ship's destination is never inserted in her official papers for the purpose of *creating or authorizing the voyage*; but for the purpose of recording what the master asserts respecting his intended actual voyage, and then, assuming his representations to be true, of authorizing the ship's departure from the port. Penalties are always provided for mis-statements as to that; but if the asserted and recorded voyage were to be conclusively deemed to be the real voyage, there never could be penalties, for there never could be mis-statements.

It was suggested that you cannot tell where a ship is "bound for" until you see its clearance papers. That is not accurate, as I understand the matter. A ship is "bound for" any destination that is intended. See, for instance, the South Australian Act, sec. 100,

(1) 4 Com. Cas., at pp. 266, 267; 82 L.T., 833.

and the Western Australian Act, sec. 192, where a vessel is referred to as "bound" outwards prior to clearance. And see, *inter alia*, *Marshall on Insurance* (1856), p. 263, and *The Anna* (1). "Destination" also means the intended place where the voyage is to terminate, the place for which the vessel is "destined." See *Marshall*, p. 263; *Peel v. Price* (2); *The Jonge Margaretha* (3); *The Anna* (4); *Seymour* v. *London and Provincial Marine Insurance Co.* (5), and cases there referred to.

"Port of destination" is a well known phrase, with a natural, not a technical, meaning, and always indicates the port where the voyage *qua* the subject matter is in reality intended to terminate. See, for instance, *Parsons on Maritime Law*, pp. 323-377, &c.; *Marshall* (*ubi supra*).

It was strenuously argued by Mr. *Irvine* that as the voyage is at the discretion of the owners or others having control of the ship, whatever they declare to the Customs authorities to be the intended voyage of the ship—not merely the destination of the goods—is an election as to the actual voyage. The answer to that is: "Yes; if the declaration is true." It would be manifestly absurd to presume conclusively, in favour of a fraudulent owner or master, that the declared voyage was the real one, if the question arose (say) as to the ship's voyage in contravention of laws against illicit conduct in time of war, or of laws against exportation at any time. If so, there can be no principle of conclusiveness. The words of Sir *William Grant* in *The William* (6) are, in my opinion, in all cases applicable to covering sec. V. His Honor says:—"The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended."

There is often a difficulty in ascertaining the real voyage of a ship, particularly before it is ended. For example, under sec. 736 of the *Merchant Shipping Act* a Colonial law may (under certain conditions)

(1) 5 Rob. Adm., 373.
(2) 4 Camp., 243, at p. 244.
(3) 1 Rob. Adm., 189, at p. 191.
(4) 5 Rob. Adm., 373.
(5) 41 L.J.C.P., 193.
(6) 5 Rob. Adm., 385, at p. 396.

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be passed regulating the local coasting trade. But whether a particular voyage would fall under such a law might be a very difficult question of fact. (See *Phillips* v. *Born* (1)). That, however, arises from the nature of the circumstances, and cannot alter the law, which looks to the real voyage, and the real first port of clearance and the real destination as these may be found to be.

Even the ship's papers, supposing them to be conclusive as to destination, could not determine whether the voyage came within sec. V., because they could never settle what is the "first port of clearance." That first port might be the one named in the papers, or the immediately previous port, or a prior port in some foreign country, and that at once breaks the possibility of ship's papers —past or present, for they are all open to the same difficulty— being the absolute legal test of the voyage. There remains then no test but that of actuality—of which, of course, papers may be some evidence.

The respondents' argument went as far as this. A British ship leaves London *en route* for Australia, intending to visit, in turn, Fremantle, Adelaide, Melbourne, Sydney and Brisbane, and having passengers and goods on board for each of those ports. If the master clears in the form "London to Fremantle," then Fremantle, says learned counsel, is the end of the voyage. A new voyage begins at Fremantle, and, if the clearance there is for Adelaide, that marks another completed voyage, and so on, making five complete and separate voyages in all; and Fremantle is the first port of clearance for the second voyage, Adelaide for the third, Melbourne for the fourth, and Sydney for the fifth. For all but the first voyage it is conceded covering sec. V. applies, unless the coasting trade only is within it. But if only the London clearance were for Brisbane *via* Fremantle, Adelaide, Melbourne and Sydney, then, it is said, there is only one voyage, of which London is the first port of clearance, and the ship is entirely outside covering sec. V. The only point of difference, it is observed, is on paper: the realities are identical; and yet it is claimed the one word *via* works this magical transformation. I am utterly unable to subscribe to the argument. It would subject many ships to our laws,

(1) 93 L.T., 634.

that were never intended to be subject to them. And, on the other hand, it would enable Australian ships to elude the laws they were intended to obey. The destination of a ship marks the complete accomplishment of the voyage as intended when she started; and in each of the two cases supposed, I take London as the first port of clearance and Brisbane as the termination.

But further, said learned counsel for the respondents, in any case the voyages intended by covering sec. V. are limited to what we know as coasting voyages, and do not extend to so wide a range as the South Sea trade. I am of the opposite opinion. We can only judge of the meaning of an Act by its language as applied to the subject matter. One standard is set, and one only—"the first port of clearance" at one end, the "port of destination" at the other; these words are used in relation to an Australian Constitution, and necessarily apply to something extending beyond the territorial limits, otherwise they are useless. If beyond those limits, how far? I am quite of the opinion expressed by *O'Connor* J. in *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Proprietary Ltd.* (1), and that the "round voyages" referred to, which were a distinct feature of Australian trade in and before 1900, were among the subject matters contemplated by covering sec. V. Otherwise there would be utter confusion of laws.

Besides the notoriety of such trade, there was, as far back as 1879 at all events, in the New South Wales legislation a distinct reference to "the Intercolonial" and "South Sea Island trade" as on the same footing (42 Vic. No. 19, secs. 118, 119).

A British ship within the covering sec. V. would be practically as to Australian Commonwealth laws in the same position as was the *Palmyra* with respect to English law in *Marshall* v. *Murgatroyd* (2). Covering section V. does not add to the subject matters upon which Parliament may legislate, but it does enlarge the area over which the legislative authority of the Parliament extends in respect of subject matters admittedly within its competency.

I therefore answer the first question by saying that by virtue of covering sec. V. the dispute is not the less a dispute extending beyond the limits of any one State, merely because some of the

(1) 5 C.L.R., 737, pp. 745, 746. (2) L.R. 6 Q.B., 31.

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operations in respect of which the dispute exists are performed extra-territorially.

But as to whether the particular vessels the *Fiona* and the *Wonganella* come within the words of covering sec. V., the result depends upon the conclusions of fact arrived at by the proper tribunal as to any given voyage or voyages.

The second question asks practically for a direction in law as to whether penalties may be imposed for breach of the terms of an award applying to operations beyond territorial limits.

As to this, I think the case sufficiently states the facts to support the question, and am of opinion it should be answered. But, as a majority of the Court think otherwise, I leave it unanswered.

As to the third question, I answer: The Court has power to require that any of the terms and conditions which it decides should be in operation between the parties shall be incorporated in a written agreement between them. That is, in my opinion, a legitimate industrial condition, tending to make certain and effective the mutual rights and relations of the parties.

HIGGINS J. 1.—As amended, the first question is: On the facts stated is the dispute a dispute "extending beyond the limits of any one State" within the meaning of the Act and of the Constitution? It must be taken, on the case stated, that "there is a dispute" (par. 4); and the question is as to the extension beyond one State. When that question is answered, there may arise further questions —(*a*) Is it an industrial dispute? (*b*) Is an industrial dispute as to an industry whose operations extend beyond Australia excepted, by implication, from the power conferred by sec. 51 (xxxv.) of the Constitution?

Now, there is a dispute between masters and officers and their employers, the Colonial Sugar Company and Crosby (amongst others). Inasmuch as Sydney is "always" (par. 9) the port of hiring, and is the port of payment and discharge, for the officers of the Sugar Company's s.s. *Fiona*, and Melbourne is "always" (par. 9) the port of hiring, and is the port of payment and discharge, for Mr. Crosby's s.s. *Wonganella*; as the dispute relates to the hiring, payment and discharge; and as the dispute relates to the same

demands made in both States by the same union of employés; it seems obvious that the dispute "extends" to New South Wales and Victoria—two States— at the least. It may be that the dispute extends to the Pacific Ocean as well; but that is not the question at present.

But I concur in the view that if the dispute extends from Sydney to Fiji, or from Melbourne to Nauru, that fact would not satisfy the meaning of the words "extending beyond the limits of any one State." In my opinion, these words can only mean extending from one State into another. For these reasons, I have no difficulty in concurring with my brother *Isaacs* in his answer to question 1. That answer indicates, as I understand, the limits of the concurrence of four Justices in the answer to this question; and in order to frame the formal answer to the case stated, and to satisfy the amending *Judiciary Act*, it is essential that my concurrence should be expressly stated. But I should not like to be taken as accepting the view that the question ought not to be answered in the form in which it has been asked (even if all the notes of evidence be excluded from consideration). The agreements with the crews, charter party, &c., are included in the case stated; these show the voyages. My views as to the interpretation of sec. 31 (2) appear in my judgment already delivered in the case against the Newcastle and Hunter River Company. I must add that I inserted the notes of evidence in the case stated at the desire of counsel on both sides; for they contained no conflict of evidence, and were treated as true. If, as appears from the judgments of my learned colleagues, the admissions can be used, why not the uncontradicted evidence? However, I bow to the opinion of the statutory majority of Justices.

From my point of view, as above expressed, it becomes unnecessary on this question, to examine the effect of sec. V. of the *Constitution Act*. I had reserved this matter, and also the effect of sec. 51 (xxxv.), for my answer to question 2. But, assuming that the effect of sec. V. has to be considered under question 1, I concur with my brother *Isaacs* in his conclusion with respect thereto. I had prepared an elaborate statement of my reasons; but, as they seem to me to fall under question 2, which is not to be answered, I think it proper to withhold the statement.

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2.—The next question is as to the power of the Court to impose duties to be observed on these vessels when outside Australia—duties enforceable by penalty in Australian Courts. This question—the most important and difficult of all—the question to which by far the greatest part of each of three long arguments was addressed—cannot be answered. For it turns out that, according to the view of the majority of my colleagues, sec. 31 (2), properly interpreted, forbids any answer to be given. This result is all the more unfortunate, inasmuch as such a view of sec. 31 was not suggested by counsel on either side, or from the Bench, during the argument.

3.—I concur in the third answer as stated by my brother *Isaacs*. It is argued that if an officer, engaged in Australia, be forced to work sometimes for 48 hours consecutively, without any break for sleep, &c., the Australian Court of Conciliation cannot forbid such conduct, cannot make it a punishable offence, if it take place in the Pacific. I can see no legal objection, however, to the Court when settling a dispute as to overtime work directing that a certain clause for overtime payment be inserted, or deemed to be inserted, in all articles of engagement made in Australia between officers of the Guild and any respondent employer. This seems to be clear, at all events, where the dispute expressly includes a claim for such a clause; and, as I think, even where the dispute does not expressly include such a claim. (See sec. 38 (*b*) and (*u*), *inter alia*).

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. In order that we may answer the first question submitted for our determination in this case, it is proper to consider the powers of the Court of Conciliation and Arbitration with respect to disputes having reference to industrial operations either wholly or in part outside the territorial limits of the Commonwealth. It is conceded that, so far as it lawfully can, the Commonwealth Parliament has conferred jurisdiction on the Court to deal with such disputes; the question, then, is whether the Constitution permits Parliament to confer such jurisdiction. Let us assume that the expression "industrial disputes" in sec. 51 (xxxv.) of the Constitution means industrial disputes existing within the Commonwealth. When does such a dispute exist within the Com-

monwealth? We think it exists within the Commonwealth when the disputants reside, the demands and the refusal are made, and the dissidence, dissatisfaction and unrest prevail, within the Commonwealth, although the dispute itself may have relation, as in this case, to labour to be performed outside the territorial limits by the employés who are parties to the dispute. If the Court of Conciliation and Arbitration can have cognizance of such a dispute, it can, of course, control the parties to the dispute so far as their conduct within the territorial limits of the Commonwealth is concerned; but can it control their conduct in places outside these limits? We think it can. In English law it is not a universally true proposition that subordinate legislatures have no extra-territorial jurisdiction. The Imperial Parliament may itself assume the right to bind British subjects, or even foreigners, whether within or without the territorial limits of Great Britain, with respect to acts done in any part of the world; and may in whole or in part confer the same right on any subordinate legislature. If it is clear that Parliament intended to assume, or to confer, any such power, the British Courts will recognize and enforce its exercise, although in foreign Courts such exercise may be deemed inconsistent with the principles of international law. The true rule with respect to subordinate legislatures is that they will not be held to possess any extra-territorial jurisdiction unless it is conferred on them expressly or by necessary implication. We are disposed to think that the power to prevent and settle disputes with respect to labour to be performed outside the territorial limits, necessarily implies a power to prescribe terms and conditions with respect to such labour, for without such power it would ordinarily be impossible to either prevent or settle such disputes. But it is unnecessary to pronounce any final opinion on this question, because it seems clear to us that if it is conceded that the Court of Conciliation and Arbitration has cognizance of a dispute, then covering sec. V. of the *Constitution Act* enables the Court to settle that dispute by imposing obligations with respect to duties to be performed on British ships engaged in voyages coming within the terms of that section. We are disposed to agree with our brother *Isaacs* in the view he takes of the meaning of the section; but, as we are not at liberty to answer questions that do not arise

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Gavan Duffy J. Rich J.

in the proceeding in the Court of Conciliation and Arbitration, we abstain from pronouncing any judicial opinion on the subject, and confine ourselves to saying, in answer to the first question, that the dispute is not necessarily less a dispute extending beyond the limits of any one State merely because some of the operations in respect of which the dispute exists are performed extra-territorially, inasmuch as some such operations must be within the ambit of covering sec. V. whatever the meaning of that section may be. Question 2 we are not at liberty to answer. To question 3 we answer Yes; the suggested power is, in our opinion, clearly *intra vires* the Constitution and the *Commonwealth Conciliation and Arbitration Act*.

BARTON A.C.J. The answers of the Court to questions 1 and 3 (question 2 not being answered) are as follows:—

1. The dispute is not the less a dispute extending beyond the limits of any one State merely because some of the operations in respect of which the dispute exists are performed beyond the territorial limits of the Commonwealth.

3. The Court has power to require that any of the terms and conditions which it lawfully determines should be in operation between the organization and the respondents to the plaint, including those represented on the argument of the special case, shall be incorporated in a written agreement between them.

We order that the case be remitted to the President with this opinion.

Questions answered accordingly.

Solicitor, for the claimants, *G. E. Loughrey* for *Sullivan Brothers*, Sydney.

Solicitors, for the Colonial Sugar Refining Co. Ltd., *Malleson, Stewart, Stawell & Nankivell.*

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

B. L.