power to vary the prescribed mode of advertisement, and not to dispense altogether with advertisement prior to the presentation of a petition as required by sec. 84.

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Petition dismissed without costs.

Solicitors for the petitioner, *Sly & Russell*, for *Poole, Johnstone & Hicks*, Adelaide.

Solicitor for the caveator, *E. H. Newman*, for *Barwell, Kelly & Hague*, Adelaide.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND ANOTHER . PLAINTIFFS;

AGAINST

THE HUON CHANNEL AND PENINSULA STEAMSHIP COMPANY LIMITED . DEFENDANTS.

Lighthouses—Light dues—"Sea-going ship"—"Port"—Voyage to or from a port—Ship which "passes a lighthouse"—Lighthouses Act 1911-1915 (*No.* 14 *of* 1911—*No.* 17 *of* 1915), *sec.* 13—*Commonwealth Light Dues Regulations* 1915 (*Statutory Rules* 1915, *No.* 96), *regs.* 2, 3.

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HOBART, *Feb.* 21, 22.

MELBOURNE, *March* 14, 15, 21.

Barton J.

Sec. 13 of the *Lighthouses Act* 1911-1915 provides that "(1) Light dues, in accordance with the prescribed rates or scales, shall be levied and shall be payable with respect to the voyages made by ships or vessels . . . . (2) The regulations may prescribe the rates or scales of light dues to be payable by ships or vessels and all matters necessary or convenient to be prescribed to carry this section into effect."

Reg. 2 of the *Commonwealth Light Dues Regulations* 1915 defines "sea-going ship" as including "every ship which in the course of its voyage to or from an Australian port passes one or more lighthouses or marine marks

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under the control of the Commonwealth." Reg. 3 provides that "Light dues shall be payable in accordance with these Regulations upon all sea-going ships (other than those hereinafter exempted) arriving at any port in Australia after the commencement of these Regulations."

Held, by *Barton* J., that the word "port" in the above regulations is used in its commercial or business sense as meaning a place to which merchant vessels are in the habit of going to load or discharge cargo.

Held, also, that a ship "passes a lighthouse" within the meaning of reg. 2 if it passes within the range of the visibility of the lighthouse.

Held, therefore, on the evidence, that the port of Hobart did not extend beyond the mouth of the River Derwent, that a ship which made a voyage from the ports in D'Entrecasteaux Channel to Sullivan's Cove at Hobart passed the Derwent Light, which is a lighthouse under the control of the Commonwealth at the mouth of the River Derwent, and consequently that under the Act and Regulations light dues were payable in respect of the ship.

HEARING of action.

An action was brought in the High Court by the Commonwealth and William John Bain, Collector of Customs for Tasmania, against the Huon Channel and Peninsula Steamship Co. Ltd. to recover the sum of £1 2s. for light dues alleged to be payable in respect of the steamship *Ronnie* belonging to the defendants under the *Commonwealth Light Dues Regulations* 1915.

The action was heard by *Barton* J., in whose judgment hereunder the facts and the nature of the argument are sufficiently stated.

L. L. Dobson and *Pringle*, for the plaintiffs.

Lodge, for the defendants.

[During argument reference was made to *Sailing-Ship "Garston" Co.* v. *Hickie* (1); *Moore's History and Law of the Foreshore and Seashore*, p. 320; *Devato* v. *Eight hundred and twenty-three Barrels of Plumbago &c.* (2); *The Möwe* (3); *The Belgia* (4); *Muller* v. *Dalgety & Co.* (5); *Hunter* v. *Northern Marine Insurance Co.* (6); *Leonis Steamship Co.* v. *Rank Ltd.* (7).]

Cur. adv. vult.

(1) 15 Q.B.D., 580.
(2) 20 Fed. Rep., 510, at p. 515.
(3) (1915) P., 1.
(4) (1916) 2 A.C., 183.
(5) 9 C.L.R., 693, at p. 703.
(6) 13 App. Cas., 717, at p. 722.
(7) (1908) 1 K.B., 499, at pp. 513, 519.

BARTON J. read the following judgment:—This was an action for light dues payable by the defendants to the plaintiffs under the *Lighthouses Act* 1911-1915 and the *Commonwealth Light Dues Regulations* 1915.

The co-plaintiff with the Commonwealth is the Collector of Customs for Tasmania and the Chief Customs Officer at Hobart. The defendant Company carry on business at Hobart, and own a steamer called the *Ronnie*, which, like several other vessels, trades between Hobart and Port Esperance *viâ* the Derwent River and the D'Entrecasteaux Channel. At the entrance of the River, off the eastern shore, is a lighthouse called the "Derwent Light." It is admittedly under the control of the Commonwealth. The light has a radius of visibility of 12 or 13 miles. On 9th November 1915 the *Ronnie* made a voyage, going from Hobart to Port Esperance and returning from the latter to the former. Admittedly her course was steered in the customary line. In the course of the voyage, and for the first time after the commencement of the *Commonwealth Light Dues Regulations* 1915, she came within the radius of visibility of the light, and arrived at Sullivan's Cove in the Derwent, the usual place for the lading and unlading of ships within what the plaintiffs claim to be the port of Hobart. As to that claim the defendants say that Sullivan's Cove is only one out of many usual places of lading and unlading of ships within what they claim to be the port of Hobart. This contention means that the port of Hobart in the view of the defendants comprises the very large area included in Storm Bay and D'Entrecasteaux Channel, with the many "places of lading and unlading" within that area (see Exhibit D1). If that contention is sound the whole of the voyage from Hobart to Port Esperance and back was made within the port, and the Derwent Light could not therefore be a light passed in the course of the voyage to or from the port of Hobart.

The plaintiffs claim that the *Ronnie* passed the lighthouse, and was and became a "sea-going ship," within the meaning of the Regulations, so that her owners became liable by virtue of them to pay to the Chief Officer of Customs for the port the light dues authorized at the rate of 8d. per ton upon 33 tons, the registered net tonnage of the ship.

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On the other hand the defendants say that the steamship was not on a voyage to any Australian port, and never was or became a sea-going ship, but was wholly engaged in trading within the port of Hobart. The defendants therefore deny the alleged liability in respect of her trading.

The *Lighthouses Act* No. 14 of 1911, a Statute of the Commonwealth, provides in sec. 13 that light dues shall be payable at rates to be prescribed with respect to the voyages made by ships or vessels, and upon that being done State light dues cease to be payable. There is a later *Lighthouses Act*, No. 17 of 1915, which has no provisions affecting the question at issue.

Regulations were duly made (see sec. 20) taking effect on 1st July 1915 (see Statutory Rules 1915, No. 96). I quote two of them:— Reg. 2: "In these Regulations 'sea-going ship' includes every ship which in the course of its voyage to or from an Australian port passes one or more lighthouses or marine marks under the control of the Commonwealth." (By the 1911 Act "marine marks" includes lightships, beacons, buoys, and submarine signal stations.) Reg. 3: "Light dues shall be payable in accordance with these Regulations upon all sea-going ships (other than those hereinafter exempted) arriving at any port in Australia after the commencement of these Regulations."

In the case of the first arrival of a ship at a port in Australia after the commencement of the Regulations the light dues are payable at that port (reg. 4 (1) (*a*)). Payment is to be made to the Collector or other proper officer of Customs (reg. 4 (2)). The rate of the light dues is 8d. a ton for a ship of less than 4,500 tons (reg. 5 (*a*)). Tonnage is to be reckoned by the registered net tonnage of the ship (reg. 6). Then comes a list of exempted vessels (see reg. 8). Shortly, there are exempted naval ships, ships belonging to the Commonwealth or a Territory, non-trading ships belonging to any State, ships in distress, ships putting in to refit or for water or provisions only, steamships calling at a port solely for coal wherewith to complete their current voyages or otherwise not trading at any Commonwealth port, fishing or whaling ships, ships other than tugs wholly and *bonâ fide* in ballast, pleasure yachts under 25 tons, and other ships under 15 tons gross register; and

lastly, mission ships. The endeavour clearly is to confine the operation of the light dues to ships wholly engaged in trading to or from Australian ports. This list of exemptions is to my mind material as throwing some light upon the meaning of a port in the intendment of the Regulations. Neither the word "port" nor the word "ship" is defined anywhere in the Act and Regulations. But it seems that a trading ship under 15 tons gross register would be chargeable with light dues unless exempted, for pains are taken to include such a vessel in the exemptions.

I think the *Ronnie* is a ship within the meaning of reg. 2; but is she a "sea-going ship"? To be one, she must have "passed" at least one Commonwealth lighthouse or marine mark in her voyage to or from an Australian port. The Derwent Light, which appears to be placed at the mouth of the estuary of the Derwent, is of course a "lighthouse," and a "lighthouse," according to the dictionaries, is a structure, surmounted by a light, placed at or near the entrance of a port or on the coast for the guidance of navigators. But the *Ronnie*, to be a "sea-going ship" so as to chargeable in this action, must have passed that lighthouse, and even to have passed it leaves her free unless she did so on a voyage to or from an Australian port, that is, not on a voyage within the port, but in an approach to or departure from the port. It must be her port of destination or her port of departure. Thus the whole question arises whether the great area of water claimed by the defendants is the port within the meaning of the Lighthouse Regulations, or whether that name belongs to some area at the entrance to which, or outside which, the Derwent Light stands.

Evidence was taken on these two questions: (1) What is the port of Hobart? and (2) Does a ship such as the *Ronnie* "pass" the Derwent Light on the voyage to or from that port? If the port of Hobart includes an area which makes the Derwent Light a light within a port and not a light at the entrance of a port or a coastal light, or if the *Ronnie's* course in the voyage in question does not lead to her passing the light, the defendants in either of those cases succeed. That is to say, the plaintiffs must establish their contention as to both questions.

If Storm Bay, as distinguished from the estuary, is outside

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or at the entrance of the port of Hobart, I think the plaintiffs succeed on the first point, and if the lighthouse, being so placed, was "passed" by the ship on her voyage, they succeed on the second also.

Taking the above questions in inverse order, I inquire first, did the ship "pass" the lighthouse? Some of the evidence was directed to the question whether the lighthouse is of any material value to a shipmaster taking his vessel between Hobart and any port in Storm Bay down or up the D'Entrecasteaux Channel. I do not think the case depends to any extent on the degree of the value of the lighthouse to a master in that voyage. The Imperial *Merchant Shipping Act Amendment Act* of 1862, by sec. 46, imposes the liability on ships which "pass" the lighthouse, &c., "*and* derive benefit therefrom." The Act of 1894, by sec. 644, extends the liability to ships which "pass" it "*or* derive benefit therefrom." The Australian regulation says nothing about the ship deriving benefit. It is sufficient if she "passes" the lighthouse. But a ship does not in my view "pass" the lighthouse if she passes outside the range of its visibility. Otherwise there is no line which can well be drawn beyond which she could not be held to pass it. A ship entering or emerging from the Channel is, at about the mouth of the Channel, from 3 to $3\frac{1}{4}$ miles from the lighthouse and well within the distance of visibility. On her outward voyage the lighthouse is visible to those on board for some miles before the Channel is entered, and it is visible on the voyage towards Hobart as soon as she emerges from the Channel. In either of these cases the lighthouse is seen by day and the light is seen by night. When the ship, going outwards from Hobart down the Derwent, approaches the mouth of the Channel, she alters her course to starboard to enter that passage, and when she is going up to Hobart she alters her course to port as she emerges from the Channel. In the latter case the lighthouse by day or the light by night is not actually seen until she is emerging. These matters become clear on reference to the map in evidence. As the change in the course takes place at, or immediately before or after, the ship's entry into or emergence from the Channel, witnesses for the plaintiffs experienced in navigation considered that the *Ronnie* "passed" the Derwent Light notwithstanding the change

of course, while witnesses for the defendants, also experienced, considered that she did not "pass" it. The one set of witnesses apparently took the view that the change of course did not determine the matter, because in any case the Derwent Light was at some moment abeam of the ship. The other set of witnesses thought that because the lighthouse was past the beam almost as soon as it was abreast of the beam, owing to the change of course, being at one moment slightly forward of the beam and a moment or two afterwards abaft the beam, the ship could not in any relevant sense be said to have "passed" it. I do not set much value on these distinctions. The lighthouse, though for some time visible, passed out of vision, it is true, very soon after the ship entered the Channel going outwards, or in her voyage inwards the lighthouse came into vision upon emerging from the Channel and remained in vision for some distance afterwards. That, I think, is sufficient to establish the fact that the ship "passed" the lighthouse within the meaning of the regulation.

But the other question remains, that is to say, whether the ship when she "passed" the lighthouse was going to or from the port of Hobart. There was a large volume of evidence to show that the Derwent Light was at or outside the entrance to the port, and another large volume of evidence to show that it was within the port. The conclusion depends entirely on the sense in which the term is used, and the sense depends largely, perhaps altogether, on the kind of document in which the term is found. Many cases were cited to show what a port is, among them the cases of *Sailing-Ship "Garston" Co.* v. *Hickie* (1); *Hunter* v. *Northern Marine Insurance Co.* (2); *Leonis Steamship Co.* v. *Rank Ltd.* (3); *The Möwe* (4), and *The Belgia* (5). In *Hunter's Case* (6), where the meaning of the word "port" in a certain marine insurance policy was largely discussed, Lord *Halsbury* L.C. said:—"The word 'port' is undoubtedly ambiguous, but dealing with a policy of insurance I have no doubt that what is meant by the word 'port' is what Lord *Esher* in *Sailing-Ship 'Garston' Co.* v. *Hickie* (7)

(1) 15 Q.B.D., 580.
(2) 13 App. Cas., 717.
(3) (1908) 1 K.B., 499.
(4) (1915) P., 1.
(5) (1916) 2 A.C., 183.
(6) 13 App. Cas., at p. 722.
(7) 15 Q.B.D., at p. 588.

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describes as what shippers of goods, charterers of vessels, and shipowners would mean by a port, that is to say, that a legal port might be according to the general understanding of the classes of persons described by Lord *Esher*, either restricted or enlarged by mercantile usage. There are, however, some well recognized elements which, I think, according to any usage one would expect to find. I do not know that those ordinary elements are anywhere more concisely set forth than in the Treatise ascribed to Sir *Matthew Hale* (*Hargraves' Law Tracts*, 46)." His Lordship went on to quote the well known passage. All or nearly all of those elements of a port are to be found in Sullivan's Cove as the area containing the port of Hobart. His Lordship quoted with approval the language of Lord *Esher* in the last cited case (1), where he says that if the port authorities as known in commercial business language exercise authority over ships within a certain space of water, and the shipowners and shippers who have ships within that space are submitting to the jurisdiction which is claimed by those authorities, whether legally or not, their submission to such authority is to be accepted as strong evidence that the shipowners, the shippers and the port authorities have all come to the conclusion to accept that space of water in which that authority is so exercised and submitted to as " the port " of the place. See Lord *Esher's* judgment already alluded to (2). The port discipline appears to have been exercised and submitted to within the area contained in Sullivan's Cove, and within it are the wharves and quays of Hobart, the business places of the town, and the Customs House, and it is there that vessels bound to or from the port of Hobart unload and load. The Marine Board, however, have exercised jurisdiction over the larger area for which the defendants contend. The area over which the commercial transactions proper to a port are carried on is probably confined to Sullivan's Cove, and certainly does not extend beyond the debouchment of the Derwent into Storm Bay. It is interesting, though not very material in this regard, to refer to a *Gazette* notice of 26th June 1894 authorizing pilotage charges for ships entering or leaving the waters northward of an imaginary line from the Derwent Light to Pearson's Point on the opposite side. In the

(1) 15 Q.B.D., at p. 588. (2) 15 Q.B.D., at p. 590.

"*Garston*" *Case* (1) the question was as to the meaning of the word "port" in a charter-party. It was there, as well as in *Hunter's Case* (2), held that in such documents the word "port" is ordinarily understood in its commercial or business sense.

In the sixth Hague Convention of 1907 the word "port" was used in arts. 1, 2 and 3, with reference to the leaving of enemy ports by the merchant ships of belligerents at or after the beginning of hostilities. The articles did not define the word "port." In the case of *The Möwe* (3), already cited, a German merchant vessel was, shortly after the declaration of war between Great Britain and Germany, captured in the Firth of Forth by a British cruiser and taken into Leith. It was contended that she was taken within the port of Leith or within territorial waters, and not on the high seas, and therefore was liable only to detention, not to confiscation. Sir *Samuel Evans* held that the vessel was captured at sea and liable to condemnation as prize, for the word "port," as used in the Hague Conventions, does not mean the "fiscal" port, which may cover a considerable area and include other ports, but must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking, and therefore the vessel was not seized in any "port" so as to limit the right of the captor to detention only, and the question whether the vessel was in territorial waters when seized was not material. Similarly, in the case of *The Belgia* (4), already cited, Lord *Parmoor* speaking for the Privy Council and affirming a judgment of Sir *Samuel Evans*, with regard to that ship, held that arts. 1 and 2 of the same Convention, relating to the status of a belligerent's merchant ship in an enemy port (Newport) at the outbreak of hostilities, are applicable only to vessels within a "port" in the ordinary mercantile sense of the word, and have no application to vessels merely within the limits of a fiscal port. Lord *Parmoor* pointed out that these articles are limited to merchant ships, and refer to commercial transactions, not to fiscal regulations, and that the word "port" is used not only in the collocation "enemy port" but of "a port

(1) 15 Q.B.D., 580.
(2) 13 App. Cas., 717.
(3) (1915) P., 1.
(4) (1916) 2 A.C., 183.

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of destination" and "a port of departure"—well recognized terms in the language of commerce; and he used these words (1):—"To extend the benefit of arts. 1 and 2 of Convention VI. to vessels within a fiscal port would be not only to interpolate a word not used in the articles, but to introduce a new test not relevant to their subject matter and involving different considerations. That the scope of arts. 1 and 2 is commercial and not fiscal is further confirmed by the language of the preamble of the Convention." That is to say, that in construing a document using, but not defining, the word "port" in relation to commercial transactions, the word is to be understood in its commercial or business sense, and that the context may be used for the purpose of confirming the sense. In that connection his Lordship had already said (1): "A port denotes a place to which merchant vessels are in the habit of going to load or discharge cargo, and not a place in an open roadstead at which no cargoes are ever discharged or unloaded."

Looking at these authorities, what is the meaning of the word "port" as used in the Lighthouse Regulations? It was not suggested on either side that it might mean the limits of the fiscal port, and that, I think, is clearly not its meaning. But it was contended with much vigour that it meant the port as understood in pilotage regulations, and a number of *Government Gazettes*, by-laws and other official documents were put in evidence. Whatever the word means in other documents and for other purposes, I think it means in the Regulations a port in the commercial or business sense. In the first place, that is the ordinary sense of the word "port" as used in business documents. It is shown by the two prize cases to be also the meaning of the word "port" in documents which do not define it but which refer to commercial or trading transactions. But the Regulation is such a document, and we find there a careful exemption of ships from liability to the light dues unless engaged in ordinary trading operations on voyages to and from Australian ports. It is in respect of those operations and of the protection afforded to merchant shipping by the lighthouses that the Regulations are framed. It is to the voyages of merchant vessels which carry cargoes to and from our ports that

(1) (1916) 2 A.C., at p. 185.

the lighthouses principally render service, and it is on these vessels that the burden is made to rest. Perhaps it is as well to add in this connection, that ships like the *Ronnie* have their outward terminus within the area claimed by the defendants as the port, but at another place of loading and unloading some 35 or more miles distant, and that they call at minor ports on their voyages, putting ashore and taking on board produce and other merchandise at such ports and at their terminus as well as at Hobart. For present purposes it is of no particular moment to inquire whether the port in its business meaning extends beyond Sullivan's Cove, for in any case it is clear that it does not extend beyond the mouth of the Derwent, if indeed it extends so far. No other port was mentioned during the hearing which is nearer to Sullivan's Cove than is the Derwent Light. I am satisfied that the Derwent Light, being at or about the entrance of the Derwent, is either at the entrance of the port or outside the entrance of the port. In either case it is a lighthouse "passed" by a ship in the course of her voyage to or from the port of Hobart within the meaning of the Regulations; and the ship *Ronnie* becomes within their meaning a "sea-going ship" and is liable to the dues prescribed. I therefore give judgment for the plaintiffs, and as this is stated by the parties to be a test case to determine the question of the liability of several steamers of the defendants, and indeed of all vessels on such voyages, which are admittedly of daily occurrence, I think the judgment should go with costs.

Judgment for the plaintiffs with costs.

Solicitor for the plaintiffs, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Dobson, Mitchell & Allport.*

Solicitors for the defendants, *Perkins & Dear.*

B. L.