[HIGH COURT OF AUSTRALIA.]

KIDMAN AND OTHERS . . . . . APPELLANTS;
RESPONDENTS,

AND

THE COMMONWEALTH OF AUSTRALIA . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 13, 16, 17; *Dec.* 18.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Arbitration—Award—Application for leave to enforce award—Matters of defence—Validity of award—Agreement to submit to arbitration matters in dispute in action—Validity of contract in respect of which action brought—Authority of Attorney-General of Commonwealth—Estoppel—Arbitration Act 1902 (*N.S.W.*) (*No.* 29 *of* 1902), *sec.* 14—*Naval Defence Act* 1910-1918 (*No.* 30 *of* 1910—*No.* 45 of 1918), *sec.* 41—*Defence Act* 1903-1918 (*No.* 20 *of* 1903—*No.* 47 *of* 1918), *sec.* 63.

The appellants brought an action in the High Court against the Commonwealth to recover a certain sum as money due under two contracts for the building of certain ships by the appellants, and alternatively as damages for their breach. Notice had been previously served on the appellants of certain claims against them by the Commonwealth. While the action was pending the Attorney-General of the Commonwealth agreed with the appellants to submit to arbitration under the *Arbitration Act* 1902 (N.S.W.) the matters in dispute between the parties. This agreement recited the making of the two contracts. The questions submitted were whether the Commonwealth was entitled to refuse to accept delivery of certain vessels, and what sums of money (if any) were due by either of the parties to the other in respect of the contracts. The arbitrator having made his award in favour of the Commonwealth for a certain sum of money, the appellants moved the Supreme Court of New South Wales to set aside the award or to remit it to the arbitrator on certain grounds, none of which related to the validity of either of the contracts. That motion was dismissed. On an application by the Commonwealth to the Supreme Court for leave to enforce the award in the same manner as a judgment of that Court,

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Held, that, in the circumstances, the appellants were not entitled to challenge the validity of the two contracts or the authority of the Attorney-General to make the agreement for arbitration on behalf of the Commonwealth.

Decision of the Supreme Court of New South Wales (Full Court): *Commonwealth* v. *Kidman*, (1923) 23 S.R. (N.S.W.) 590, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 6th July 1918 an agreement was entered into between the Honourable William Alexander Watt, the Acting Prime Minister of the Commonwealth, purporting to act for and on behalf of the Commonwealth, of the one part, and Sidney Kidman, Joseph Mayoh and Arthur Mayoh, trading as Kidman & Mayoh (hereinafter called "the contractors"), of the other part, whereby the contractors agreed to build six ships for the Commonwealth. On 4th August 1919 a further contract was made between the same parties whereby it was provided that the number of ships to be built should be two instead of six. On 2nd April 1922, by notice served on the contractors, the Commonwealth purported to cancel the two contracts of 6th July 1918 and 4th August 1919, on the grounds that the time for delivery of the first of the vessels had long since expired, time being of the essence of the contract; that the construction of that vessel had not been in accordance with the terms of the contracts, and that it was then considered impossible for the contractors to carry out the contracts. By the notice the Commonwealth also claimed repayment of the sum of £114,320 7s. 9d., being the moneys which had been paid to the contractors by the Commonwealth under the contracts. On 29th November 1921 the contractors instituted an action in the Supreme Court of New South Wales against the Commonwealth, claiming £88,000 as money due by the Commonwealth to the contractors for work and labour done and material for the same provided, and alternatively for £88,000 as damages for breach of the two contracts of 6th July 1918 and 4th August 1919. On 12th June 1922 an agreement in writing was entered into, purporting to be between the Commonwealth and the contractors and reciting the matters above set out, whereby it was agreed that all proceedings in the action should be stayed pending the determination of the matters to be submitted to arbitration pursuant to the agreement; that the matters in dispute between the parties should be referred

to the award and final determination of Sir Mark Sheldon; that the matters in dispute were (a) whether the Commonwealth was entitled to refuse to accept delivery of the *Braeside* and the *Burnside*, and (b) what sums of money (if any) were due by either of the parties to the other in respect of the two contracts of 6th July 1918 and 4th August 1919 whether by way of damages for breach or non-performance of the said contracts or return of money paid thereunder or otherwise; that the *Arbitration Act* 1902 (N.S.W.) should apply to proceedings in the arbitration, but that either party should be at liberty to apply to the High Court in accordance with the provisions of sec. 33A of the *Judiciary Act* 1903-1920 for an order directing that the award should be a rule of that Court; that the arbitrator should have power (a) to admit such evidence as he should deem fit without having regard to the rules of evidence, and (b) to inform his mind in any way in which in his absolute discretion he might deem it most advisable so to do; and that the arbitrator should not be bound to state a case for the opinion of the Court at the request of the parties thereto. On 30th June 1920 the arbitrator made his award, by which he awarded and determined that the Commonwealth was entitled to refuse to accept delivery of the *Braeside* and the *Burnside*, and that the sum of £75,665 was due by the contractors to the Commonwealth; and he directed that the contractors should pay such sum to the Commonwealth. He also awarded that the contractors should pay the costs of the award. On 31st May 1923 the contractors moved before the Full Court of the Supreme Court of New South Wales that the award be set aside or in the alternative that the award be remitted to the arbitrator, on a number of grounds, none of which related to the validity of either of the contracts of 6th July 1918 and 4th August 1919 or of the agreement for submission to arbitration. On 1st June 1923 the Full Court dismissed the application with costs: *Kidman* v. *Commonwealth* (1). On 8th June 1923 the Commonwealth applied on summons to the Supreme Court for leave under sec. 14 of the *Arbitration Act* 1902 (N.S.W.) to enforce the award in the same manner as a judgment of the Supreme Court to the same effect. The summons coming on for hearing before *Ralston* A.J. was by

(1) (1923) 23 S.R. (N.S.W.) 329.

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him referred to the Full Court, which made an order granting the leave asked with costs: *Commonwealth* v. *Kidman* (1).

From that decision the contractors now appealed to the High Court.

Maughan K.C. (with him *Betts*), for the appellants. The contracts of 6th July 1918 and 4th August 1919 were both invalid, for the Commonwealth had no power under the Constitution to enter into them without authority being given by Federal legislation, and there was no such legislation. Those contracts being invalid, the award which is founded on them is a nullity.

[STARKE J. referred to sec. 41 of the *Naval Defence Act* 1910-1918.]

Neither that section nor sec. 63 of the *Defence Act* 1903-1918 gives the Commonwealth power to build cargo ships. The present proceeding is quite independent of that to set aside the award, and on the motion to set aside the award the validity of the contracts could not have been raised (*Doe d. Turnbull* v. *Brown* (2); *In re Arbitration between Stone and Hastie* (3)). The appellants, therefore, may now challenge their validity. The fact that money has been appropriated by Parliament to the building of the ships is not sufficient in itself to validate the contracts, since the Commonwealth had no power to make them (*Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (4); *Commonwealth* v. *Colonial Ammunition Co.* (5)). The discretion given by sec. 14 of the *Arbitration Act* 1902 (N.S.W.) to allow the award to be enforced should not be exercised, but the Commonwealth should be left to its remedy by action so that the question of the validity of the contracts may be raised (*In re Boks & Co. and Peters, Rushton & Co.* (6)). The fact that the appellants applied to set aside the award does not raise an estoppel against their now contending that the contracts are invalid (*Duff Development Co.* v. *Government of Kelantan* (7); *Bradshaw* v. *M'Mullan* (8)). [Counsel also referred to *Great North-West Central Railway Co.* v. *Charlebois* (9).]

(1) (1923) 23 S.R. (N.S.W.) 590.
(2) (1826) 5 B. & C. 384.
(3) (1903) 2 K.B. 463.
(4) (1922) 31 C.L.R. 421, at pp. 432, 447-448, 450-451.
(5) (1923-24) 34 C.L.R. 198.
(6) (1919) 1 K.B. 491.
(7) (1924) A.C. 797, at p. 810.
(8) (1920) 2 I.R. 412, at p. 415.
(9) (1899) A.C. 114.

Brissenden K.C. and *E. M. Mitchell* K.C. (with them *Badham*), for the respondent. On an application to enforce an award, only objections which are apparent on the face of the award can be raised (*Attorney-General for Manitoba* v. *Kelly* (1); *In re Butler and Masters* (2); *Grech* v. *Board of Trade* (3)).

[KNOX C.J. referred to *Davies* v. *Pratt* (4).]

It is for the appellants to show that the matter is doubtful, and it is too late for them to raise objections which might have been raised before the arbitrator or at some other time (*In re Arbitration between Stone and Hastie* (5)).

[ISAACS J. referred to *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (6).

[HIGGINS J. referred to *Bruce* v. *Sturt* (7).]

The arbitration was not under the terms of the agreement of July 1918, but was validly entered into on behalf of the Commonwealth by the Attorney-General. It was entered into in the ordinary course of the administration of his department and did not need any specific authority from Parliament (*Faviell* v. *Eastern Counties Railway Co.* (8)). At least the Attorney-General could have been authorized to represent and bind the Commonwealth. By reason of their conduct before and throughout the proceedings, the appellants should not be allowed to attack the validity of the contracts for the first time before the Supreme Court on the hearing of the application (*R.* v. *Taylor* (9); *The Tasmania* (10); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (11); *John Edwards & Co.* v. *Motor Union Insurance Co.* (12)). There is nothing in any of the public documents to suggest that the contracts were not authorized, and it is for the appellants to show facts which suggest that they were not.

Betts, in reply, referred to *Mackay* v. *Attorney-General for British Columbia* (13).

Cur. adv. vult.

(1) (1922) 1 A.C. 268.
(2) (1849) 13 Q.B. 341
(3) (1923) 130 L.T. 15.
(4) (1855) 16 C.B. 586.
(5) (1903) 2 K.B., at p. 464.
(6) (1923) A.C. 480.
(7) (1889) 15 V.L.R. 370; 11 A.L.T. 25.
(8) (1848) 2 Ex. 344.
(9) (1915) 2 K.B. 593, at p. 603.
(10) (1890) 15 App. Cas. 223, at p. 225.
(11) (1922-23) 32 C.L.R. 413, at p. 426.
(12) (1922) 2 K.B. 249, at p. 257.
(13) (1922) 1 A.C. 457.

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Dec. 18.

The following written judgments were delivered :—

KNOX C.J. This is an appeal from an order of the Supreme Court giving leave to the respondent to enforce as a judgment of that Court an award made on a submission to arbitration between the parties.

The relevant facts are as follows :—In July 1918 the appellants entered into an agreement with the Acting Prime Minister, acting for and on behalf of the Commonwealth, to build six ships. In August 1919 a further agreement in writing was signed by the parties varying the former agreement. Disputes having arisen between the appellants and the Commonwealth, a notice signed by the Minister in charge of the Ship Construction Branch was, in the month of April 1921, served on the appellants. This notice was to the effect that the Commonwealth had decided to treat the contracts referred to above as having been discharged by breaches committed by the appellants, and that the Commonwealth claimed as damages for the failure of the appellants to perform the contracts the sum of £114,320 7s. 9d. alleged to have been paid to the appellants by the Commonwealth under the contracts. In November 1921 the appellants brought an action in the High Court against the Commonwealth to recover £88,000 as money due under the contracts, and alternatively as damages for their breach. In June 1922, while that action was pending, the Attorney-General of the Commonwealth, acting for and on behalf of the Commonwealth, entered into an agreement with the appellants for the submission of the matters in dispute to arbitration under the New South Wales *Arbitration Act* 1902. On 30th June 1922 the arbitrator made his award in favour of the Commonwealth for £75,665 and certain costs. In May 1923 the appellants moved the Supreme Court to set aside the award or remit it back to the arbitrator on a number of grounds, none of which related to the validity of either agreement. In June 1923 this application was dismissed. In November 1923, on the application of the respondent, the Supreme Court gave leave to enforce the award in the same manner as a judgment of the Supreme Court; and it is from this order that the present appeal is brought.

The question for consideration is not whether on the evidence before this Court an action could be maintained on both or either

of the agreements of July 1918 and August 1919, but whether the award of the arbitrator made on the submission of the parties is binding on them and ought to be enforced. For the appellants it was said that the agreements were invalid and unenforceable for two reasons, namely, (a) that no authority to make them had been given by Parliament and (b) that, even if parliamentary authority had been given, it was not shown that the Governor-General in Council had authorized the Acting Prime Minister to make the agreements on behalf of the Commonwealth. It was said further that, if the agreements were invalid for either reason, the award could have no effect.

It is clear that a bona fide dispute existed between the parties to those agreements as to the rights and liabilities under them and that, while legal proceedings were pending for the determination of such disputes, the parties entered into an independent agreement by way of compromise of their legal rights to abide by the decision of the arbitrator on the matters in dispute. Neither of the original agreements was illegal in the sense of being prohibited by law. Under the *Naval Defence Act* the Governor-General has power to contract for the building of ships for naval defence or for services auxiliary thereto. The question whether these ships were ordered for any of those purposes was a question of fact to be decided on evidence. The further question whether the Acting Prime Minister was authorized by Order in Council to enter into the contracts was also a question to be decided on evidence. No question was raised as to the validity of either agreement until the application was made for leave to enforce the award. It is clear beyond doubt that the parties to the agreements believed them to be valid and binding and acted on that belief in doing work, in paying large sums of money and in instituting and defending legal proceedings. There is not and cannot be any suggestion that the submission to arbitration was a collusive arrangement or a device to enable agreements which could not be enforced in a Court of law to be treated as creating legal rights and obligations. The submission to arbitration was agreed to by the Attorney-General for the Commonwealth on its behalf. I entertain no doubt that the Attorney-General has full authority to represent the Commonwealth and to act on its behalf

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in all legal proceedings to which the Commonwealth is a party. By virtue of his office he is the legal adviser of the Crown in right of the Commonwealth and the proper person to conduct or defend legal proceedings on behalf of the Crown in that right, and, apart from the powers inherent in the office, he is, by Order in Council made on 18th July 1918, entrusted with the administration of, among other matters, "causes"—an expression which includes every proceeding competently brought before and litigated in a Court (per Lord *Selborne* L.C. in *Green* v. *Lord Penzance* (1)). It follows from what I have said that in this case the Attorney-General had full power to make a binding agreement on behalf of the Commonwealth to submit the disputes which existed between the appellants and the Commonwealth to arbitration. The effect of that submission was to constitute the arbitrator the judge of law and of fact. The facts necessary to establish the validity in law of the agreements might, and for aught that appears may, have been proved before the arbitrator, and in these circumstances there is no ground for refusing to enforce his award.

In my opinion the appeal should be dismissed.

ISAACS J. This is an appeal against an order of the Full Court of New South Wales made on 23rd November 1923, under sec. 14 of the State Act of 1902, whereby leave was given to the Commonwealth to enforce an award made by an arbitrator against the appellants for £75,665. The appellants contended that the award is a nullity, because the submission to arbitration was made in respect of agreements between the parties which were entered into on behalf of the Commonwealth without legal authority. The defects relied on were that the agreements purported to bind the Commonwealth to the expenditure of public moneys for shipbuilding, whereas no parliamentary authorization existed for making such contracts or for the expenditure of necessary moneys, and that the necessary executive authority to the then Prime Minister to enter into the contract had not been proved. Without entering into details, there can be no moral doubt that the contracts were for the purpose of aiding the naval defence of Australia. If there were any evidence

(1) (1881) 6 App. Cas. 657, at p. 671.

that that was the actual purpose of the Government, no doubt could exist that sec. 41 of the *Naval Defence Act* 1910 and sec. 63 of the *Defence Act* amply covered the power of the Governor-General—that is, the Crown—to make the contract. Moral certainty, however, is not synonymous with legal evidence; and in some circumstances the want of formal proof might have had to be remedied.

Similarly as to the Order in Council empowering the Prime Minister to act for the Commonwealth in relation to the matter. Learned counsel for the Commonwealth offered to supply both, and, if it had been necessary to do so, some opportunity would have been given. But it is not necessary, for reasons which have importance. As has been stated, there was no lack of legislative authority to the Commonwealth to make such contracts, provided the ships were for defence purposes. And there was no lack of authority in the Governor-General acting through a designated channel in the recognized constitutional manner to make the formal bargain. Further, there is, and at the date of the submission there was, the necessary parliamentary appropriation by Act No. 29 of 1920, which appropriated £3,000,000 for construction of ships to be paid to the Trust Fund for Commonwealth Government Ships Account and placed under the control of the Treasury Department. So far, therefore, as parliamentary sanction is concerned, the authority is complete. The only question is one of fact, namely, the actual purpose of the Government and the existence of a formal Order in Council. All possible controversy as to the legal effect of the submission, if made under clause 21 of the impeached contracts, is avoided by the circumstance that the submission was made quite independently of that provision, and indeed in different terms. Disputes had arisen with reference to the two contracts of 6th July 1918 and 4th August 1919; and these culminated on 2nd April 1921 in a formal notice by Mr. Poynton, then Minister in charge of the Ship Construction Branch, to the appellants, claiming from them damages and also a return of £114,320 7s. 9d. paid to them under the contracts. On 29th November 1921 the appellants commenced an action in this Court against the Commonwealth, claiming £88,000 under the contracts. There were thus claims on both sides in respect of the contracts, both sides treating the agreements as valid, binding

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and enforceable. On 12th June 1922 the Attorney-General of the Commonwealth, acting in this regard for the Commonwealth and in its name, entered into an agreement with the appellants for the submission of the matters in dispute to "the award and final determination" of Sir Mark Sheldon. The agreement recited the making of the agreements now challenged, the notice of 2nd April 1921 and the institution of the action. It stipulated for the stay of the action and the submission to arbitration. It stated the two matters in dispute, the second of which was "what sums of money (if any) are due by either of the parties to the other in respect of the said original and further contracts whether by way of damages for breach or non-performance of the said contracts or return of money paid thereunder or otherwise." Obviously that involved both facts and law. It went on to apply the *Arbitration Act* 1902 of New South Wales. Par. 5 said: "The arbitrator shall have power—(a) to admit such evidence as he deems fit without having regard to the rules of evidence; (b) to inform his mind in any way in which in his absolute discretion he deems it most advisable so to do." Par. 6 declared: "The arbitrator shall not be bound to state a case for the opinion of the Court at the request of the parties thereto." Consequently it is clear that (1) the submission was in the course of an action already instituted; (2) cross-claims were made between the parties; (3) the submission was new, voluntary, and independent of any prior agreement to arbitrate; (4) the questions submitted involved the law as well as the facts of the case; (5) the decision was to be absolutely final and conclusive and without even intermediate interference by the Court. Finally, the submission was made by the Commonwealth through the Attorney-General. No misconduct of the arbitrator is suggested nor any reason for disputing his award except those already stated. The argument for the appellants rested on the want of any enforceable obligation arising out of the two agreements of 1918 and 1919, and on the inability of any person to preclude the Court from holding those contracts invalid. It is unquestionably true that where upon facts properly before the Court a transaction is in law invalid or void or without legal effect, the Court cannot declare it lawful or treat it as binding or effective in any way. To my mind,

that is so whatever attitude is taken by the parties themselves: otherwise the Court would be declaring the law as the parties choose to make it, and not as the State wills it.

The case of *Great North-West Central Railway Co.* v. *Charlebois* (1) is only one of several instances where the Court has so declared and *Yorkshire Insurance Co.* v. *Craine* (2) shows that in the opinion of the Privy Council a Court is bound to act on that principle even at the last moment, where the facts fully appear. As specially applicable to such a case as the present, that principle is centuries old. The Attorney-General's confession and judgment thereon does not bind the King as to matter of law, but as to matter of fact it does (see *Attorney-General* v. *Bagg* (3); *Wall* v. *Pennington* (4), and the earlier cases there cited). Where, as here, there is a binding contract on the hypothesis of necessary facts, there is no reason why parties, including the Crown, cannot be held to the facts as acted upon or as found by competent authority. The starting-point for this purpose is the agreement of submission. The Commonwealth, that is, the King in right of the Commonwealth, was the defendant to the appellants' action to enforce the contract. By making the Commonwealth a party the appellants asserted that all facts necessary to bind the Crown had occurred. The King himself is supposed to be present in Court (see *R.* v. *Gregory* (5) and *Bradlaugh* v. *Clarke* (6)), but he cannot constitutionally plead his own cause before his Judges. For that purpose the Attorney-General represents him, notwithstanding the King is fictionally present. This function of the Attorney-General is quite distinct from his political functions (see *R.* v. *Austen* (7); *Attorney-General* v. *Brown* (8)). Mr. *Leach* in his argument states the position very clearly (9), and Lord *Eldon* in effect adopts it, and as to part quite literally (10). Mr. *Leach* says: "In civil Courts, the rights of the Crown are under his protection." It is part of the common law of England and is not altered in Australia. What is to prevent the Attorney-General, as representing the King, from agreeing to submit the disputed

(1) (1899) A.C. 114.
(2) (1922) 2 A.C. 541; 31 C.L.R. 27.
(3) (1658) Hard. 125.
(4) (1660) Hard. 170.
(5) (1672) 2 Lev. 82.
(6) (1883) 8 App. Cas. 354, at p. 375.
(7) (1821) 9 Price 142 (n.).
(8) (1818) 1 Swans. 265, at pp. 290, 294.
(9) (1818) 1 Swans., at p. 290.
(10) (1818) 1 Swans., at p. 294.

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claims to arbitration in the way described ? There is no confession of law. Arbitration is a well-known method of settling disputed claims. Its ordinary meaning is established. Lord *Halsbury* in *Stewart* v. *Williamson* (1) said : " I think it means something which is submitted to the arbitrament—to the adjudication of private persons—agreed upon by the parties, as distinguished from the ordinary Courts of law." It is no objection that the arbitrator has to determine questions of law including, it may be, the validity of the agreements. Lord *Hobhouse* in *Charlebois' Case* (2) said : " If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in Court like any other disputed matter." If so, it follows that the reference itself, not being a surrender, but a contest in which the tribunal only is chosen and given unfettered powers of decision, is perfectly lawful. When pursued to the end, as if in Court, as a genuinely hostile conflict, then, there being no inherent illegality, no misconduct of the arbitrator, and no error in law appearing on the face of the award, the arbitrator's decision is final and binding. Lord *Dunedin*, for the Judicial Committee, in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (3) said :—" The law on the subject has never been more clearly stated than by *Williams* J. in the case of *Hodgkinson* v. *Fernie* (4) :—' The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. . . . The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, namely, where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.' This view has been adhered to in many subsequent cases, and in particular in the House of Lords in *British Westinghouse Co.* v. *Underground Electric Railways Co.* (5)." The two elements of fact

(1) (1910) A.C. 455, at p. 462.
(2) (1899) A.C., at p. 124.
(3) (1923) A.C., at p. 486.
(4) (1857) 3 C.B. (N.S.) 189, at p. 202.
(5) (1912) A.C. 673.

adverted to are therefore covered in two ways:—First, by the tacit admissions in the recitals of the agreement for submission to arbitration, because the recitals are that the "Commonwealth" made the agreements and that the appellants assert its responsibility in the contracts. Next, and perhaps more decisively, because the arbitrator was empowered to decide and did decide all necessary questions of fact as well as of law.

The appeal therefore fails.

HIGGINS J. This was an application in Chambers by the Commonwealth for enforcement of an award. The award was made in an action brought by the appellants against the Commonwealth in respect of two alleged contracts as to the building of ships—merchant vessels—for the Commonwealth. The application is made under sec. 14 of the New South Wales *Arbitration Act* 1902. I need not repeat at much length the facts which have been already stated. The contract of 7th July 1918 was made, during the Great War, for the building of six cargo barquentines; and the further contract of 4th August 1919, made after the War, reduced the number to two. Both the original and the further contract were expressed as made between the contractors and the acting Prime Minister of the Commonwealth (Mr. Watt), for and on behalf of the said Commonwealth and not so as to incur any personal liability. By the second contract, in consideration of the variation of the first, the Commonwealth purported to agree to pay to the contractors (the appellants) the sum of £52,000 in respect of *each* of the four barquentines "not now required by the Commonwealth." On 29th November 1921 the contractors instituted an action in this Court against the Commonwealth, claiming £88,000 as for work and labour done and materials provided and as for breaches of the contracts; but by agreement purporting to be made between the Commonwealth and the contractors, signed by the Attorney-General and dated 12th June 1922, it was agreed that all proceedings in the action be stayed pending the determination of the matters in dispute by award. The matters were "(a) whether the Commonwealth is entitled to refuse to accept delivery of the *Braeside* and *Burnside*" (the two barquentines), and "(b) what sums of money (if any) are due by

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either of the parties to the other in respect of the said original and further contracts whether by way of damages for breach or non-performance of the said contracts or return of money paid thereunder or otherwise." The arbitrator on 30th June 1922 awarded (a) that the Commonwealth is entitled to refuse to accept delivery of the two vessels, and (b) that the sum of £75,665 is due by the contractors to the Commonwealth; and the contractors were ordered to pay that sum. On 6th June 1923 a motion was made by the contractors to the Full Supreme Court of New South Wales to set aside the award or to have it remitted to the arbitrator on many grounds; but all the grounds stated assumed the validity of the two contracts and of the agreement for arbitration. The Full Supreme Court dismissed the motion with costs. When the present application for the enforcement of the award as a judgment came before *Ralston* A.J. in Chambers, 8th June 1923, it was referred to the Supreme Court for determination; and the application was granted on 23rd November 1923. This is an appeal from an order of the Supreme Court.

Until the argument before the Supreme Court on this application to enforce the award, it was not suggested by the contractors that the contracts were not valid and binding on the Commonwealth and the contractors; and the question of validity was not raised before the arbitrator, although it could have been raised under the two matters referred to him. Nor was any question raised as to the validity of the agreement for arbitration. But the contractors urged before the Supreme Court on this application that the contracts were void and that the agreement for arbitration and the award are void. They contended that the contracts were invalid as being made without legislative sanction, and because they dealt with expenditure of moneys of the Commonwealth without the authority of the Commonwealth Parliament. Notwithstanding this contention, the Supreme Court (*Gordon*, *Ferguson* and *Campbell* JJ.) made the order for enforcement. In my opinion, the order was right.

It was held in this Court, in the recent case of *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (1), that the Federal Government has no general power of binding the Commonwealth

(1) (1922) 31 C.L.R. 421.

by agreements made without the authority of Parliament; and even if a contract is binding on the Commonwealth there is no way of getting payment from the Commonwealth unless under an appropriation by Parliament (*Churchward* v. *The Queen* (1); *Attorney-General* v. *Great Southern and Western Railway Co.* (2)). I shall also assume, as found by the Full Supreme Court, that the invalidity would extend to an agreement to submit the claims under the contracts to arbitration (*Mackay* v. *Attorney-General for British Columbia* (3)). But it does not follow that such a defence is available to the contractors under the circumstances of this case. The alleged faults of these contracts are, in substance, (1) that the Government had no authority to make a contract for these ships, and (2) that, even if the Government had authority, these contracts were signed, not by the Governor-General, but by an acting Prime Minister. But, as was pointed out by my brother *Starke* early in the argument, neither sec. 41 of the *Naval Defence Act* 1910 nor sec. 63 of the *Defence Act* 1903-1918 was referred to by the Full Court. Under sec. 41 of the former Act, "(1) in addition to any powers contained in section sixty-three of the *Defence Act*, the Governor-General may—(*a*) acquire or build and maintain ships, vessels, or boats, for Naval Defence, or for services auxiliary to Naval Defence."

The guaranteed speed of these barquentines, each 2,600 tons dead-weight capacity, was only seven miles per hour; and I see no reason for saying that they could be treated as auxiliary ships within the meaning of sec. 41. No doubt naval training ships would be auxiliary; and probably tenders bringing coal, food, ammunition, &c., to the ships of war. The interpretation section (sec. 3) shows by the words it uses that auxiliary ships are such as would come within a "naval establishment." But the authority given by the *Naval Defence Act*, sec. 41, is merely "in addition to" any authority given by the earlier Act (the *Defence Act* 1903-1919); and, under sec. 63 of the *Defence Act* the Governor-General may construct and maintain forts, defence works, &c., &c., and also (*f*) "subject to the provisions of this Act do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection

(1) (1865) L.R. 1 Q.B. 173.
(2) (1925) 41 T.L.R. 576.
(3) (1922) 1 A.C. 457.

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of the Commonwealth." I cannot find any limit to this authority other than the practical difficulty due to the fact that the Governor-General cannot get the money to do what he deems necessary and desirable unless Parliament appropriate money for the purpose. The contract would be valid, but it would be conditioned practically on Parliament finding the money.

But then it is contended that these barquentines were not for defence at all; and that the Governor-General did not contract, but a Minister purporting to contract on behalf of the Commonwealth (see *Commercial Cable Co.* v. *Government of Newfoundland* (1)). The obvious answer is that these contentions, if raised at an appropriate time, might possibly have been cured by evidence; but that the contractors by their conduct throughout the action and the arbitration —in treating the contracts as valid and binding on the Commonwealth and themselves, in getting large payments from time to time on account, in procuring the provision of the second contract for payment of more than £200,000 in consideration of the variation of the principal contract—are precluded from objecting that the Commonwealth has failed to show that the contracts were valid, and executed by an authorized person. It is sufficient to say that the Governor-General (acting, of course, on the advice of his Ministers) might have thought during the War that it was necessary and desirable for defence to build the barquentines, in order that the trade from and to Australia might be continued, and that the resources of Australia for defence might be preserved and increased. That the defence power has a very wide scope, and may be applied to very commonplace subjects if Parliament, or the Governor-General acting under an Act of Parliament, decide that defence may be aided by legislation (direct or indirect), is shown by *Farey* v. *Burvett* (2). In that case it was held by this Court, where Parliament had passed an Act purporting to enable the Governor-General in Council (*inter alia*) to fix the price of bread in districts of the Commonwealth for the purpose of efficient defence of the Commonwealth, that a regulation made under the Act was effective in law. All I need say is that the contracts in this case *may* have been for defence or some other legitimate object, and that by their

(1) (1916) 2 A.C. 610.

(2) (1916) 21 C.L.R. 433.

conduct throughout the contractors have relieved the Commonwealth of the necessity of proving the object of the contracts, or establishing their validity. The same principle applies to the fact that the contracts were signed by the Acting Prime Minister, and not by the Governor-General. No authority has been produced for such a signature; there is no evidence that the Governor-General even knew of the contract; but the contractors cannot at this stage take advantage of the deficiency in proof of facts which *may* justify the contracts including the signatures. They cannot take all the advantages of the contracts, and then say that the contracts are not shown by the evidence to be valid. They cannot both blow hot and blow cold. There is no principle more firmly established than that parties must take the consequences of their conduct of proceedings in litigation. The principle is well stated in *The Tasmania* (1). It was a case of collision; and at the trial it was found that one vessel was to blame; but on the appeal, for the first time, it was contended that the other vessel was also to blame —that she did not take early enough the step of putting her helm down and so coming to the wind. Lord *Herschell* said:—"My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them. It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box." Now, to apply these words to the case before us, we are not satisfied that we have before us all the facts bearing on this new contention. We are assured by counsel for the Commonwealth that an order of

(1) (1890) 15 App. Cas., at p. 225.

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the Governor-General in Council has been found that authorizes the original contract, at least. But even if there were no such assurance, I am of opinion that it is not open to the contractors at this stage, in view of their conduct of this case, and the advantages which they have gained on the basis of treating these contracts as valid, to contest now their validity; "it does not lie in their mouths to say so" (see *John Edwards & Co.* v. *Motor Union Insurance Co.* (1); *R.* v. *Taylor* (2); *Geo. Hudson Ltd.* v. *Australian Timber Workers' Union* (3)).

The case of *Duff Development Co.* v. *Government of Kelantan* (4) has been cited as showing that the contractors can now rely on the want of proof that the contracts were authorized by Parliament. But that was not a case of estoppel by conduct at all, or of anything of a like nature. It was merely a decision that a sovereign independent State does not lose its right to object to the jurisdiction of a British Court to enforce an award against that State by assenting to the arbitration, or even by applying to the Court to set aside the award. The case of *In re Boks & Co. and Peters, Rushton & Co.* (5) has been cited as showing that the order to enforce the award ought not to be affirmed by this Court—that the proper course was to leave the Commonwealth to proceed by action on the award, because the validity of the award is a matter of doubt. But the doubt there was that under the *Defence of the Realm Regulations* the contract on which the award was founded was illegal, in the strict sense—a thing prohibited by law; and the Courts will do nothing to aid that which is illegal (see *Gedge* v. *Royal Exchange Assurance Corporation* (6); *Auckland Harbour Board* v. *The King* (7)). In the present case, there is no such illegality. There is, at most, a deficiency of proof of facts which the contractors admitted, and on the basis of which the contractors derived advantages from the Commonwealth; and the Commonwealth cannot, at this stage, be called on to prove matters which were not in issue between the parties to the contracts. It would be illegal to draw money from the Commonwealth public account unless the money

(1) (1922) 2 K.B. 249.
(2) (1915) 2 K.B. 593.
(3) (1922-23) 32 C.L.R., at p. 426.
(4) (1924) A.C. 797.
(5) (1919) 1 K.B. 491.
(6) (1900) 2 Q.B. 214, at p. 219.
(7) (1924) A.C. 318, at p. 326.

be legally available by appropriation of Parliament, and the draft or a cheque be approved by the Governor-General and countersigned, and on the prescribed warrant (*Audit Act* 1901, secs. 21, 31, 32, 33 (7), 69). But to make a contract that can be enforced if there was authority to make it, is not an illegality in this sense.

As for the signature of the Attorney-General to the agreement for arbitration, the Attorney-General has, as a Minister, to take charge of suits in which the Commonwealth is concerned; and it may be that he has a right to refer matters in dispute to arbitration. But this point it is unnecessary to decide; as he may have been authorized by the Governor-General to sign, and the contractors are estopped from denying that he was authorized.

It ought to be observed, also, that the contentions as to the invalidity of the contract *could* have been raised by the contractors in the arbitration. Such a contention would have been relevant to both the matters referred to the arbitrator; but it was not even suggested by the contractors. It may be that, as the issue *could* have been raised, the finding of the arbitrator estops, in itself, the contractors from raising the point of invalidity on these proceedings. It may be that the refusal of the Court to set aside the award should be treated as supporting an estoppel on the ground of *res judicata* (see cases cited in *Hoysted* v. *Federal Commissioner of Taxation* (1)). But I need not express an opinion on these difficult points, as counsel for the Commonwealth has not argued on this basis; and I do not like to come to a conclusion on such a subject except after full debate.

In my opinion, the appeal should be dismissed with costs.

RICH J. I agree that the appeal should be dismissed. The contract in question was within the constitutional powers of the Commonwealth, although, if a direct action had been brought on the contract, proof might have been necessary to show that the subject matter of the contract was within the *Defence Act* and that the Prime Minister was authorized to enter into it. But this is not a direct action on the contract. Independently of any provision in the contract, the parties competently submitted all their disputes including matters of law to arbitration. The arbitration itself was

(1) (1921) 29 C.L.R. 537.

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regular and both parties are concluded by the award as to both facts and law; and that ends the matter.

STARKE J. The appeal, I agree, must be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *A. J. McLachlan & Co.*

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

B. L.

Dist *C J Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400

[HIGH COURT OF AUSTRALIA.]

JONES . . . . . APPELLANT;
PLAINTIFF,

AND

THE METROPOLITAN MEAT INDUSTRY BOARD . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1925. SYDNEY, *Nov.* 18-20; *Dec.* 18. KNOX C.J., ISAACS, HIGGINS, RICH AND STARKE JJ.

By-law—Ultra vires—Reasonableness—Maintenance and control of abattoirs—Disposal of offal—Taking portions of slaughtered animals without payment—Meat Industry Act 1915 (*N.S.W.*) (*No.* 69 *of* 1915), *secs.* 6, 7, 11, 13, 14, 21, 28, 30.

By the *Meat Industry Act* 1915 (N.S.W.) a board was created to manage and maintain certain abattoirs and to do all things that might be expedient and in accordance with the Act to prevent diseased or unwholesome meat from passing into consumption (sec. 13). By sub-sec. 1 of sec. 30 power was given to make by-laws providing (*inter alia*) for the management and control of all