[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

BURGESS;

EX PARTE HENRY.

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *April* 16, 17, 20-22.

MELBOURNE, *Nov.* 10.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law (Cth.)—Legislative power—Aerial navigation—International convention—Treaty obligations—External affairs—Control of civil aviation throughout Commonwealth—Statute—Regulations—Validity—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (*i.*), (*xxix.*)—*Air Navigation Act* 1920 (*No.* 50 *of* 1920), *sec.* 4—*Air Navigation Regulations* (*S.R.* 1921 *No.* 33).

Sec. 4 of the *Air Navigation Act* 1920 authorized the Governor-General to make regulations for the purpose of carrying out and giving effect to the convention for the regulation of aerial navigation signed in Paris on 13th October 1919 and any amendment thereof, and for the purpose of providing for the control of air navigation in the Commonwealth and the territories. The convention was made between heads of States of the allied and associated Powers, including the Commonwealth of Australia, and was ratified by His Majesty King George V., on behalf of the British Empire, on 1st June 1922.

Held:—

(1) So much of sec. 4 of the *Air Navigation Act* 1920 as empowered the Governor-General to make regulations for carrying out and giving effect to the convention was a valid exercise of the "external affairs" power conferred upon the Commonwealth by sec. 51 (xxix.) of the Constitution.

(2) The Commonwealth Parliament has no general control over the subject matter of civil aviation in the Commonwealth; therefore, so much of sec. 4 as

authorized the making of regulations for the purpose of controlling air navigation in the Commonwealth was invalid.

The *Air Navigation Regulations* made under sec. 4 of the *Air Navigation Act* 1920 were made to apply to all civil aviation throughout the Commonwealth. Although the regulations largely followed the convention they did not embody all its provisions, and in some respects differed therefrom.

Held, by *Latham* C.J., *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the regulations were invalid because they did not carry out and give effect to the convention.

In re Regulation and Control of Aeronautics in Canada, (1932) A.C. 54, referred to.

APPEAL, by order for prohibition, from a Court of Petty Sessions of New South Wales.

Upon an information laid by Vernon William Burgess, an officer of the Civil Aviation Branch, Department of Defence, and the District Superintendent of Civil Aviation in Sydney, Henry Goya Henry was charged before a Court of Petty Sessions of New South Wales that on 30th September 1934 an aircraft of which he was "then the pilot and personnel did fly in contravention of the *Air Navigation Regulations* made under the *Air Navigation Act* 1920, within the limits of the Commonwealth, namely near Mascot in the State of New South Wales, without the personnel of the said aircraft being licensed in the prescribed manner." The defendant, whose pilot's licence had been suspended for fourteen days from 28th September 1934, admitted that on the date charged in the information he, as pilot, made several flights in an aircraft. None of the flights extended beyond a short distance from the Mascot Aerodrome, Sydney, nor beyond the boundaries of the State of New South Wales. The defendant was convicted.

The *Air Navigation Act* 1920 received the Royal assent on 2nd December 1920, and was proclaimed to commence on 28th March 1921. By sec. 4 the Governor-General was authorized to make regulations for the purpose of carrying out and giving effect to the convention for the regulation of aerial navigation signed in Paris on 13th October 1919, and any amendment thereof, and for the purpose of providing for the control of air navigation in the Commonwealth and the territories.

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The convention referred to was drawn up in Paris at the Peace Conference, and dated 13th October 1919; it was subsequently signed by representatives of the allied and associated Powers, including the Commonwealth of Australia, and was ratified by His Majesty King George V. on behalf of the British Empire on 1st June 1922. It consisted of forty-three articles and sixteen annexes of an elaborate character.

The nature of the matters dealt with in the convention, and also the provisions of the *Air Navigation Act* 1920 and of the *Air Navigation Regulations* made thereunder, sufficiently appear from the judgments hereunder. The *Air Navigation Regulations*, which were made and came into operation on 11th February 1921, differed in some respects from the provisions of the convention, and some provisions were omitted therefrom.

The States of Victoria, Queensland, South Australia and Tasmania passed statutes—not absolutely identical in terms—referring powers to the Commonwealth to deal with aviation subject to limitations preserving an unimpeded right in each respective State Government to own and use State aircraft operating within the State and also preserving what are described as the police powers of the State. The Tasmanian statute came into operation, but the respective statutes of the other three States were to come into operation upon days to be proclaimed, and no proclamations to that end have ever been made. Neither the State of New South Wales nor the State of Western Australia passed any statute referring to the Commonwealth, powers to deal with aviation.

Evatt J. granted to the defendant an order nisi for a writ of prohibition directed to the informant and the magistrate to restrain them from further proceeding upon the conviction on the grounds that the *Air Navigation Act* 1920 and the *Air Navigation Regulations* made thereunder were invalid, and the matter came on for hearing before the Full Court of the High Court.

Pitt K.C. (with him *Evatt* and *Paterson*), for the applicant. The applicant is not concerned to establish that the Commonwealth has no rights in respect of international and inter-State aviation. The Commonwealth has no power to deal with intra-State aviation

operations. The court is not concerned with the advisability or with the expediency of any legislation; that is, as to whether it is expedient that aviation so far as it affects the whole or any part of the Commonwealth should be under the sole control of the Commonwealth (*R.* v. *Barger*; *The Commonwealth* v. *McKay* (1); *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (2)). Full recognition must be accorded to the rights, powers and privileges of the States, as well as to those of the Commonwealth (*R.* v. *Barger* (3); *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (4); *In re Regulation and Control of Aeronautics in Canada* (5)). The right retained by each State at the time of federation to control its internal and private affairs and operations still exists (*Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (6); *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (7)). The *Air Navigation Act* 1920 must come directly within the powers of the Commonwealth. The *Air Navigation Regulations* can only be justified, if at all, under the power relating to external affairs conferred upon the Commonwealth by sec. 51 (xxix.) of the Constitution. Those regulations are not authorized or justified under the defence, trade and commerce, or quarantine powers of the Commonwealth. There is no power in the Commonwealth to regulate aeronautics in any single State. The regulations do not give effect to the convention relating to the regulation of aerial navigation, and in several respects greatly exceed the requirements set forth in the convention. Substantial differences between the convention and the regulations exist in respect of the medical examination of candidates for, and holders of, a pilot's licence, the limitations imposed upon the use of land as aerodromes and landing places, the registration of aircraft, the system of measurement, and colours of signal flags. The Commonwealth is not entitled to exceed what was agreed to by the parties to the convention, even though certain clauses may

(1) (1908) 6 C.L.R. 41, at pp. 64, 67.
(2) (1908) 6 C.L.R. 469, at p. 500.
(3) (1908) 6 C.L.R., at pp. 71, 72.
(4) (1909) 8 C.L.R. 330, at pp. 350-353.
(5) (1932) A.C. 54, at p. 70.
(6) (1908) 6 C.L.R., at pp. 502, 503, 532.
(7) (1921) 29 C.L.R. 357.

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have to be added to those provisions in order to give effect to them. Anything incidental to the purpose is within the power, but it is for this court to determine whether in fact it is incidental. The regulations go far beyond the convention and are not necessary as ancillary thereto or otherwise. In any event the regulations are invalid to the extent that they exceed or are inconsistent with the convention, and, as that invalidity taints the regulations as a whole, they are invalid *in toto*. The various articles in the convention show that it was directed to international flying, and certainly not to intra-State flying. Each sovereign State has a right to control aviation within its own borders. The onus of proving the power is on the Commonwealth. The Commonwealth is not the party to give full effect to the convention. In so far as it might be said to come within "external affairs" the Commonwealth would be the party to carry out so much of it as was its duty to carry out, leaving the States to carry out so much as was within their province. By adopting that construction there would be preserved the sanctity of the contract entered into as between the Commonwealth and the States. If there are two or more possible interpretations, that interpretation should be adopted which will preserve to the Commonwealth and to the States their respective rights. The power to give effect to international arrangements is limited to matters which *in se* concern external relations. A matter in itself purely domestic to a State does not come within the range of Commonwealth power merely because some arrangement has been made for uniform national action (*Harrison Moore's Commonwealth of Australia*, 2nd ed. (1910), pp. 462, 463). The Commonwealth cannot do indirectly something which it cannot do directly, that is by direct legislation. The expression "external affairs" should be limited to (*a*) the external representation of the Commonwealth by accredited agents where required, (*b*) the conduct of the business and promotion of the interests of the Commonwealth in outside countries, and (*c*) the extradition of fugitive offenders from outside countries (*Quick and Garran's Annotated Constitution of the Australian Commonwealth* (1901), pp. 631, 632). Unless it be so limited any field of exclusive State activity can be brought under the external affairs power. That power was not intended to increase the powers expressly given to

the Commonwealth by the States. A State is not bound by a treaty made by the Commonwealth. The external affairs power has no relation to treaties. A treaty is made by the King. The international duty rests upon the King, and it then devolves upon the various legislative units within the Empire to take appropriate action. What constitutes appropriate action depends not merely upon geographical situation, but upon subject matter also. Ancillary powers were dealt with in *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1), *Le Mesurier* v. *Connor* (2), *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (3) and *New South Wales* v. *The Commonwealth* [*No.* 1] (4). The decision of the Privy Council in *In re Regulation and Control of Aeronautics in Canada* (5) was in respect of the Canadian Constitution, and, in particular, sec. 132 of the *British North America Act* 1867; it does not assist in the solution of the problem before this court. Even if it were competent for the Commonwealth legislature to make the regulations, it had no authority to make them prior to the ratification of the convention, that is, before the treaty existed. Having been so made, the regulations fail. The defects are not cured by sec. 9A of the *Acts Interpretation Act* 1904-1932 or by sec. 15A of the *Acts Interpretation Act* 1901-1934.

Flannery K.C. (with him *Jelbart*), for the State of New South Wales, intervening by leave. The *Air Navigation Act* 1920 is not a due exercise of the legislative powers of the Commonwealth. The power purported to be given to the Governor-General in sec. 4 of that Act to make regulations for the purpose of providing for the control of air navigation in the Commonwealth is an attempt on the part of the Commonwealth Parliament to give to the Executive the power to regulate all matters connected with air navigation in any part of the Commonwealth. Prima facie that is *ultra vires*. The convention does not relate to anything other than international air navigation. It aims at prescribing rules for every aircraft engaged in international air navigation in respect of a certificate of registration, a certificate of airworthiness, and certificates of competency

(1) (1914) A.C. 237, at p. 255: 17 C.L.R. 644, at pp. 653, 654.
(2) (1929) 42 C.L.R. 481, at pp. 497, 522.
(3) (1910) 11 C.L.R. 311, at p. 337.
(4) (1932) 46 C.L.R. 155, at pp. 212, 213.
(5) (1932) A.C. 54.

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on the part of the personnel. Rules of construction applicable to conventions of this description are shown in *The Blonde* (1). So far as the convention purports to regulate intra-State matters, that is, matters relating to aviation solely within the boundaries of any particular State, it is not within the powers of the Commonwealth legislature. Legislation which purports to give full authority to carry out the convention in full is invalid if in fact the convention as a whole contains matter outside the legislative power of the Commonwealth. Sec. 15A of the *Acts Interpretation Act* 1901-1934 does not operate to have it read down. The convention, the implementing of which is enjoined on the Executive, is a single entity, and if any of it is beyond the powers of the legislature then the whole grant of power to the Executive fails. "External affairs" referred to in sec. 51 (xxix.) of the Constitution are those affairs of the Commonwealth as a political entity which are external in the sense that they cannot be wholly completed within the territory of the Commonwealth. To ascertain what is the connotation of "external affairs" one begins with the affair and finds out what is the business of the Commonwealth by reference to the Constitution; then if it is shown that the affair is business which is external to the territory, that affair is an "external affair." Implementing a treaty or convention, if it can be completed within the Commonwealth, is not an external affair of the Commonwealth. The word "treaty" was in 1898 removed from the draft Constitution. The general words "external affairs" are used and these must be construed without reference to the word "treaty." There should not be read into the words "external affairs" a treaty, and then applied to the word "treaty" certain implications which arise from its use as a term of art. Entering into agreements is a power possessed by every government. If the word "treaty" is used in that sense, then in the business of the external affairs of the Commonwealth would be included the executive power to enter into those agreements, whilst to the legislative power would be granted certain legislative functions, but not of necessity the power to implement those agreements. The power to implement an agreement must be found to flow from the use of certain words in the Constitution.

(1) (1922) 1 A.C. 313, at pp. 325 et seq.

The general law in respect to treaties is stated in *Halsbury's Laws of England*, 2nd ed., vol. 6, pp. 519, 520. If a State has sovereign power the plenipotentiary may bind it subject to ratification; if it has not sovereign power, he binds it so far as he is able and no more. The executive power is limited by the legislative power. The place where an agreement is effected cannot be the criterion of whether the subject matter thereof is external or not. The only criterion of whether it is external is whether in fact some person other than the Commonwealth and the Commonwealth's subjects is concerned in the affair. The fact that an international obligation is involved does not of itself determine the question; regard must be had to the subject matter of the obligation. If an agreement in excess of its powers has been entered into by the Commonwealth with other nations or nationals, its performance by the Commonwealth is not, and cannot be made, an "external affair" within the meaning of sec. 51 (xxix.) (See *Roche* v. *Kronheimer* (1)). Such an agreement does not confer any rights upon the foreign party except in international law, and then those rights must be ascertained and established. No obligation is imposed on the subject unless sanctioned by the legislature. A convention of this description must be ratified by the legislature before it can have international validity (*Halsbury's Laws of England*, 2nd ed., vol. 6, p. 520, par. 645). The fact that a treaty has been entered into in no way gives any person any rights in municipal law.

[EVATT J. There are particular difficulties depending upon the actual terms of the obligation entered into. If the obligation is entered into unconditionally, whatever its nature, it is an international obligation, and the Permanent Court has held that the absence of internal constitutional power to carry out the obligation is no answer in international law.]

States which are only partly sovereign may make treaties only so far as is within their competence (*Wheaton's International Law*, 6th ed. (1929), vol. 1., pp. 487, 497, 498). It is a matter of municipal law as to who is the person who can enter into a contract in respect of the particular thing contracted for. It is assumed in international law that each party to an agreement, whatever form it may take and whatever

(1) (1921) 29 C.L.R. 329.

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may be its subject matter, is fully aware of the exact competence of the other party or parties. The competency of the contracting parties, and the rights and obligations which flow from agreements made within and without the powers of those parties, are discussed in *Oppenheim* on *International Law*, 3rd ed. (1920), vol. 1, pp. 263, 656-659, and *Hall's International Law*, 8th ed. (1924), pp. 415, 416. A further question for consideration is: What was the competency of the particular contracting party, at the time when (*a*) the agreement was entered into? and (*b*) it was sought to be implemented? Even though there be authority to make a treaty, it does not follow that there is also a power to implement it. A treaty does not of itself impose obligations and confer rights. Statutory authority is necessary before private rights can be affected. Assuming that the implementing of an agreement is a matter within the competence of the Commonwealth Parliament, being one of the powers enumerated otherwise than in placitum xxix. of sec. 51, when the Commonwealth does implement it, it performs internal business. The question of the legislative power of the Commonwealth is one which should be ascertainable by reference to some criterion. That criterion may be found in the word "external". The matter must be "external" to the Commonwealth and an "affair" of the Commonwealth. The Commonwealth has no power to extend its legislation or control in respect of an internal affair, even though the internal affair be definitely attached to an obligation undertaken with a foreign nation or person. The expression "foreign affairs," that is, "external affairs," is of a general nature, and can be applied generally or specifically to a particular matter (*Halsbury's Laws of England*, 2nd ed., vol. 6, p. 683). In determining whether any matter is an external affair, it is necessary to examine closely the thing itself in order to ascertain what there is in it which gives to it its external character so as to bring it within placitum xxix. International obligations entered into by one portion of a federal union, the head union of the political organization, according to the general principle would be limited in that it would first be necessary to ascertain whether giving effect to the treaty would have the effect of an added grant of power. If there were a power of implementing, within the words of the Constitution, no question

would arise, but, in the absence of words giving power to implement, the alteration of the practice would not be effective to add any particular power to the federated State. On the assumption that the regulation requiring that the personnel of aircraft be licensed is a regulation relating to trade and commerce and navigation within the meaning of the Constitution, a set limit is placed on the power which the Commonwealth has over trade and commerce; the set limit is that trade must have an international or an inter-State character before legislation in respect of it is within the competency of the Commonwealth Parliament. The Commonwealth cannot under the trade and commerce power introduce into an international convention a matter which is a matter of State trade only. The introduction of that matter would rest on the external affairs power as it was in existence in law at the foundation of the Commonwealth. The prerogative with regard to trade and commerce in England, in respect to external commerce was general; in respect of internal commerce it was limited, and limited in particular ways (*Chitty* on *The Prerogatives of the Crown* (1820), pp. 163, 170, 176). Guidance as to the Crown's prerogative is obtained by ascertaining the legislative powers of the central Parliament. The treaty-making power is the only prerogative power which remains unaffected by the Constitution. In the absence of any exclusive power in the Constitution for the Commonwealth to enter into negotiations with foreign nations, the States have external or foreign affairs as well as the Commonwealth. All the States—and the Commonwealth, quite apart from placitum xxix. —have power to enter into external relations. Unless a foreign character can be given to a matter it does not come within the competence of the Commonwealth Parliament, and it is particularly not competent to that Parliament, when, upon an examination of the subject matter itself, it is found that it is a matter which wholly concerns the internal affairs of Australia and has no relation except that of interest to the foreigner. If it is found that into the convention have crept matters which have no relation to the other parties to the convention, but were introduced either by accident or at the suggestion of one of the parties—the Commonwealth—it cannot be

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said that it therefore comes within the competence of the Commonwealth Parliament. It is the duty of the court to find some meaning of the words "external affairs" which has some relation to the words themselves, and not to the fact that Australia has become a party to international obligations. Those words should be given the meaning they had at the commencement of the Commonwealth; they have not acquired a new meaning merely because the Commonwealth has been admitted to the family of nations. Foreign affairs will not extend and cannot be amplified to mean that the obligation which has been undertaken on our behalf by Britain is a foreign affair. If Britain has agreed on our behalf, that is foreign to us, but we are bound in law by it, according to the original theory of the prerogative. External affairs relate to actions between one country and another, and not to undertakings between one government and another government. The power of a State to regulate its own internal affairs in regard to the actions of its people can only be a matter of mutual action. No grant was made in 1901 to Australia of the treaty-making powers of England, either in practice or in law. Subsequently, in practice, the power to make treaties was conceded, but it was not given by placitum xxix. There is no positive grant to the Commonwealth which impinges on the prerogative. The subject matter of arts. 12 and 25 of the convention is not necessarily foreign affairs; thus the Commonwealth delegation is bad. In regard to making regulations for the purpose of giving effect to the convention, if the convention is beyond the powers, it would be impossible to read it down, and the whole power would go. The Commonwealth does not possess treaty-making powers. Even if it has, those powers are always subordinate to the general rule that the first consideration is whether it has any powers of implementation. It cannot, by virtue of an agreement with a foreign country, receive powers to implement, not merely the external matter of the treaty, but anything that it can reasonably legislate upon. Under sec. 4 of the *Air Navigation Act* the Commonwealth has purported to take power to control all air matters, irrespective of the convention. So far as that section and the regulations provide for the control of civil aviation within the Commonwealth, they are invalid.

E. M. Mitchell K.C. (with him *A. R. Taylor*), for the respondents. It is important to ascertain what kind of a treaty the convention is. An outstanding matter is that it is a treaty which purports to be binding on the Commonwealth as a whole, as a part of the British Empire, and not a treaty which is made in respect of the separate States. It purports to be binding on the Commonwealth as a whole because it was so made, and because the Commonwealth as a whole is treated in art. 40 as one of the States for the purpose of the convention. The Commonwealth has a duty, as well as a right, to implement the provisions of the convention (*In re Regulation and Control of Aeronautics in Canada* (1)). In this case the facts as to the making of the treaty are identical, both with regard to Canada and with regard to Australia. The obligation of the Commonwealth as a whole necessitates Commonwealth legislation to carry out the agreement as a whole (*Halsbury's Laws of England*, 2nd ed., vol. 11, pp. 102, 103). Individual States were not parties, and were not consulted, and the convention was not made by the Government on behalf of the individual States, except in so far as they were part of the British Empire and part of the Commonwealth. So far as Australia or any part of it is concerned, only the Commonwealth has power to carry out the convention. The judgment of the Privy Council in *In re Regulation and Control of Aeronautics in Canada* (2) is conclusive that the convention deals not only with international aircraft but also with national aircraft. The convention is an exercise of the treaty-making power and is binding on the Commonwealth as a whole as a part of the British Empire (*In re Regulation and Control of Radio Communication in Canada* (3): See also *Todd* on *Parliamentary Government in the British Colonies*, 2nd ed. (1894), p. 257; *Halsbury's Laws of England*, 2nd ed., vol. 6, p. 503). That proposition having been established, the next position is that unless the Commonwealth, under its power to make laws for the peace, order and good government of the Commonwealth in respect of external affairs, has power to legislate for the performance of its obligations under the treaty there is no legislature available anywhere to legislate for the performance of

(1) (1932) A.C., at pp. 73-77. (2) (1932) A.C. 54.
(3) (1932) A.C. 304, at pp. 311 313.

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those obligations. The States, individually, are not recognized, nor are they competent to carry out the obligations of the Commonwealth as a whole. If a treaty-making power exists, then the power to implement a treaty made thereunder exists also. Here that power lies in the central government, that is, the Government of the Commonwealth (*Attorney-General for Ontario* v. *Attorney-General for Canada* (1)). The proper interpretation of placitum xxix. is that it refers and applies to the execution of treaties made with foreign powers (*Quick and Garran's Annotated Constitution of the Australian Commonwealth* (1901), p. 770; *Harrison Moore's Commonwealth of Australia*, 1st ed. (1902), p. 143). It is no explanation of placitum xxix. to suggest that it gives power to implement arrangements with respect to the other enumerated powers, because, according to *Croft* v. *Dunphy* (2), such a power is implicit in the other enumerated powers. The external affairs power includes power to legislate as to the observance of treaties between Great Britain and foreign countries (*McKelvey* v. *Meagher* (3)), and vests in the Commonwealth the power of controlling in every respect Australia's relations with the outside world (*Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (4); *Roche* v. *Kronheimer* (5); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (6); *Jolley* v. *Mainka* (7)). A matter which is not properly the subject matter for an international agreement might very well come within the external affairs power. The limits of a treaty were discussed in *Geofroy* v. *Riggs* (8) and also in *Willoughby* on *The Constitutional Law of the United States*, 2nd ed. (1929), vol. I., p. 569.

[McTIERNAN J. referred to *Hauenstein* v. *Lynham* (9).]

The number of nations parties to the convention indicates with greater force that the subject matter was considered, by general consensus, a matter of international concern. By practice and consent of the nations the subject of aviation has become recognized as a proper subject for international regulation. In view of the

(1) (1912) A.C. 571, at p. 583.
(2) (1931) 46 C.L.R. 73, at p. 122.
(3) (1933) A.C. 156.
(4) (1906) 4 C.L.R. 265, at p. 286.
(5) (1908) 5 C.L.R. 818, at p. 842.
(6) (1921) 29 C.L.R., at p. 339.
(7) (1933) 49 C.L.R. 242, at pp. 284 et seq.
(8) (1889) 133 U.S. 258; 33 Law. Ed. 642.
(9) (1879) 100 U.S. 483, at p. 490; 25 Law. Ed. 628, at p. 630.

decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1), the observations made in *Harrison Moore's Commonwealth of Australia*, 2nd ed. (1910), pp. 461, 462, must be read with caution. The execution of treaties is the most obvious subject matter for placitum xxix. (Professor *Bailey*, *Proceedings of the Australian Society of International Law*, vol. 2, pp. 100-121). That power is not limited to legislation with respect to which the Commonwealth is empowered to legislate under the other enumerated powers, but includes power to legislate in respect of matters which if not connected with external affairs would otherwise be reserved; that is, the mere fact that the legislation affects domestic matters does not take it out of the external affairs power. The power to legislate in respect of external affairs is not an infringement on the reserve powers of a State. It is an express power which embraces all such powers in relation to external affairs as would have belonged to the States if the Constitution had not been adopted. When a matter becomes an international one, it comes within the meaning of "external affairs" and is within the Commonwealth power. Although the States have control over matters purely domestic, when any matter becomes inter-State in character it is left to the Commonwealth to deal with. So, when it is a matter between the Commonwealth and a foreign country which may possibly involve action with people outside of Australia, it is a matter which comes within the Commonwealth power. The new unit, that is, the Commonwealth, is an aggregation of former individual States, and was selected as the authority to deal with matters which might be matters between foreign countries and the Commonwealth. An "external affair" of any part of the Commonwealth is an "external affair" of the Commonwealth. The observations in *Wheaton's International Law*, 6th ed. (1929), vol. I., pp. 487 et seq., *Oppenheim* on *International Law*, 3rd ed. (1920), vol. I., pp. 263, 656 et seq. and *Hall's International Law*, 8th ed. (1924), pp. 415, 416, particularly those passages which indicate that there might be some limits to the treaty-making power of semi-sovereign States, are inapplicable for three reasons: firstly, this is a treaty made by a sovereign State, the head of the British Empire; secondly, the illustrations

(1) (1920) 28 C.L.R. 129.

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there given throw no light upon the powers of a nation like the Commonwealth, which has an express power to legislate with respect to external affairs, a plenary power subject only to the inherent limitations previously referred to; thirdly, the illustrations given are of States in the United States of America which by their Constitutions were expressly debarred from entering into international agreements. The legislative powers do not operate as a guide to the extent of the executive power. If, as suggested on behalf of the intervenant, a test as to whether a matter is an external affair is whether it is something in which a foreign government as well as the Commonwealth Government is concerned and not merely interested, then arts. 12 and 25 of the convention are within the category. The provision in sec. 4 of the *Air Navigation Act* authorizing the making of regulations for the purpose of controlling air navigation in the Commonwealth is a good exercise of the trade and commerce power conferred by sec. 51 (i.) of the Constitution. Ancillary measures which must be observed by all may be taken by the Commonwealth for the purpose of securing the safety of commerce which the Commonwealth has the right to control (*R.* v. *Turner*; *Ex parte Marine Board of Hobart* (1); *American Journal of International Law*, vol. 25, p. 242). The regulations made under sec. 4 are for the purpose of ensuring safety in respect of air navigation; hence, for example, the requirement that holders of licences shall be reasonably competent. Those regulations apply to all engaged in air navigation. The Commonwealth is entitled to regulate the carriage intra-State of passengers and goods for the purpose of securing the safety of those passengers and goods on their inter-State flight. The right to legislate must necessarily include the right to legislate for the preservation of the passengers who are carried by aeroplane in the course of inter-State trade. There is a plenary power over inter-State trade and commerce, and a limited power over intra-State trade and commerce. In order to have effective control over inter-State traffic, there must be control over intra-State traffic. The convention made it a condition of the bargain that all the traffic should

(1) (1927) 39 C.L.R. 411.

be controlled. [Counsel referred to *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Co.* (1).] Air navigation in the Commonwealth is subject to Commonwealth control in so far as it forms part of inter-State trade. If the provisions of the *Air Navigation Act* are too wide, then in any event, applying sec. 15A of the *Acts Interpretation Act* 1901-1932, they are good *qua* air navigation in the course of inter-State trade. The Commonwealth has power under the trade and commerce power to make regulations in relation to aircraft engaged in inter-State trade and commerce, and, to ensure the safety of inter-State commerce the Commonwealth can make its air-navigation regulations applicable also to aircraft flying intra-State. The right to make air-navigation regulations carries with it incidentally the right to exact licences for the personnel and certificates of airworthiness for the craft (*Re Aerial Navigation* (2)). Although the operation of the *Air Navigation Act* was to commence on a date to be proclaimed, it is clear that the power in sec. 4 to make regulations was to commence immediately. The fact that the Act commenced before the convention was ratified is immaterial. There was no subject matter to operate on until the convention came into existence. Then the regulations, the machinery which enabled the Act to function, operated on the convention. Prior to the ratification of the convention the regulations operated so far as was within the powers of the Commonwealth under the second part of sec. 4, and, after ratification operated also under the first part of sec. 4. The regulations are regulations for the purpose of carrying out the convention. They deal with the same subject matter and follow almost exactly the different headings and chapters of the convention. The administrative discretion was entrusted to the Minister to meet any special case that might arise. Even if a regulation does exceed the convention, the remainder of the regulations is not thereby invalidated (See sec. 9A of the *Acts Interpretation Act* 1904-1932). The question is: Are the regulations substantially in the whole scheme following the convention? If a regulation goes too far in one respect and not far enough in another respect, that does not detract from the general power of carrying out the provisions of the

(1) (1922) 257 U.S. 563; 66 Law. Ed. 371.
(2) (1931) 1 D.L.R. 13, at p. 26.

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convention. The various matters dealt with in reg. 6 are in accordance with the convention. The disparities between the regulations and the convention are minor and unimportant. The fact that something has been omitted from the regulations does not render what is in the regulations invalid or bad. There is no Australian national, but every British subject who resides in Australia is for the time being a national of Australia. The *Air Navigation Act* and the regulations thereunder were made in pursuance of all the powers vested in the Commonwealth in reference to the regulation of this subject.

[DIXON J. referred to *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (1).]

The question as to the applicability and availability of the various powers of the Commonwealth was considered in *Ex parte Walsh and Johnson*; *In re Yates* (2). The recognition of sovereignty over the air space and the provisions of the convention are intertwined.

Flannery K.C., in reply (at the invitation of the court). Although the admission as to sovereignty of the air space in art. 1 of the convention, in regard to each of the contracting parties, is an external affair, the high contracting party is the British Empire, so that it is an external affair of the British Empire. The State of New South Wales has not lost its competence to deal with its own external affairs. Nothing in the Constitution has made the Commonwealth the sole repository of the legislative power to deal with the external affairs both of itself and of the States, and there is no equivalent here of sec. 132 of the *British North America Act* 1867 (*In re Regulation and Control of Aeronautics in Canada* (3)). Nothing was added to the convention in its legal force and effect by the fact that there was an Australian representative there, and in any event the political power is unaffected. The external affairs power is concurrent.

Pitt K.C., in reply.

Cur. adv. vult.

(1) (1912) 15 C.L.R. 182.
(2) (1925) 37 C.L.R. 36.
(3) (1932) A.C. 54.

The following written judgments were delivered :—

LATHAM C.J. This appeal raises the question whether the Commonwealth Parliament has power to legislate with respect to flying operations carried on within the limits of a single State. It was proved in the court below that the appellant was the pilot of an aeroplane which he flew at Mascot in the State of New South Wales on 30th September 1934. The *Air Navigation Regulations* (S.R. No. 33 of 1921) provide in reg. 6 that "no aircraft shall fly within the limits of the Commonwealth or the territories or the territorial waters adjacent to the Commonwealth or the territories unless . . . (*c*) the personnel of the aircraft is licensed in the prescribed manner."

Reg. 3 defines personnel to include the pilot of any aircraft. The applicant did not possess a current licence as required by the regulations. He was convicted of an offence against reg. 6 (*c*) and now moves for an order absolute to prohibit further proceedings on the conviction on the grounds that the *Air Navigation Act* 1920 and the regulations thereunder are beyond the powers of the Commonwealth Parliament.

2. No question directly arises in this case as to the power of the Commonwealth Parliament to enact legislation for the purpose of controlling aircraft travelling inter-State or between Australia and other countries under the trade and commerce power (Constitution, sec. 51 (i.)), or to control military and naval aircraft in every particular (Constitution, sec. 51 (vi.)), or to subject aircraft to quarantine (Constitution, sec. 51 (ix.)), or to use aircraft in the postal or other public services (secs. 51 (vi.) and 51 (xxxix.)), or to legislate, in any way thought proper by the Commonwealth Parliament, as to aircraft in the territories of the Commonwealth (sec. 122).

The trade and commerce power has, however, been prayed in aid of the power to control intra-State aviation which the respondent claims to exist in the Commonwealth Parliament. No question with respect to sec. 92 of the Constitution has been discussed.

3. The *Air Navigation Act* 1920, in sec. 3, defines "the convention" as meaning "the convention for the regulation of aerial navigation

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signed in Paris on the thirteenth day of October, One thousand nine hundred and nineteen."

Sec. 4 is in the following terms:

"4. The Governor-General may make regulations for the purpose of carrying out and giving effect to the convention and the provisions of any amendment of the convention made under article thirty-four thereof and for the purposes of providing for the control of air navigation in the Commonwealth and the territories."

The Act itself does not contain any rules for the regulation of air navigation. Sec. 4 confers power to make regulations for two separate purposes, which must be separately considered. These purposes are—(1) the purpose of carrying out and giving effect to the convention and any amendment thereof duly made; and (2) the purpose of providing for the control of air navigation in the Commonwealth and in the territories.

The specification of the second purpose (with which I propose to deal in the first place) is based upon the assumption that the Commonwealth Parliament has power to legislate for the control of air navigation generally throughout the Commonwealth as well as in the territories.

Sec. 2 provides that the Act shall commence in relation to the several States and territories on such days as are respectively fixed by proclamation. This section provides therefore for possibly different dates of commencement of the Act in the several States. When the Act was passed it was apparently intended that the States should refer to the Commonwealth Parliament under sec. 51 (xxxvii.) of the Constitution powers to deal with aviation. Four States passed statutes (not absolutely identical) referring powers to the Commonwealth to deal with aviation subject to limitations preserving an unimpeded right in any State Government to own and use State aircraft operating within the State and also preserving what are referred to as "the Police powers of the State." The Tasmanian Act came into operation but the other three Acts, passed by Victoria, Queensland and South Australia, were to come into operation upon days to be proclaimed and no proclamations have ever been made. New South Wales did not pass any Act referring powers to the Commonwealth Parliament.

The Commonwealth proclaimed the Act to commence in relation to the "several States and territories" on 28th March 1921. The subject now has to be considered upon the basis that the State of New South Wales, in which the flight of the appellant took place, has not referred to the Commonwealth any powers to deal with air navigation and that under the second part of sec. 4 the Commonwealth Parliament claims to exercise a general power of providing for the control of air navigation throughout the Commonwealth, including the State of New South Wales.

The subject of aviation is not mentioned in express terms in the Commonwealth Constitution. Aeroplanes and other power-driven aircraft did not exist in the year 1900 when the Constitution Act was passed. The provisions of the Constitution, however, are not to be limited by the denotation in 1900 of the terms used in its various sections. It is well established that any statute may properly be applied to new facts and new conditions if the words of the statute properly construed are such as to include such facts and conditions. If the Constitution had vested in the Commonwealth Parliament the power to legislate with respect to "transport" there is no doubt that air transport as well as methods of transport known in 1900 would have been included within the scope of the power.

If the Commonwealth Parliament has a general power to legislate with respect to air navigation there is no doubt as to the validity of reg. 6. In order to establish that the Commonwealth Parliament has such a power it is necessary to find it somewhere in the Constitution. The only substantial argument advanced in favour of the affirmative proposition was that if, as was not denied, the Commonwealth Parliament had power to legislate with respect to aviation in so far as it fell within the subject of trade and commerce with other countries and among the States (Constitution, sec. 51 (i.)), the Parliament must also have power to protect what may be called inter-State and foreign aviation from interference and to secure the safety of those taking part in it. Uniform rules designed to secure the airworthiness of aircraft and the competency of pilots, and uniform flying rules as to flight, the passing of aircraft in flight, and in particular ascent from and descent to aerodromes, are clearly

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desirable in the interests of all who use the air for flying. If the rules, e.g., for landing upon an aerodrome, are not uniform, so that one pilot lands in a clockwise direction while another pilot, in the same place, obeying another set of rules, lands in an anti-clockwise direction, there is very grave risk of serious accident. Upon these and similar considerations the argument is based that in order to deal effectively with the subject of aircraft flying between the States or between Australia and other countries the Commonwealth Parliament must also have the power to deal with aircraft flying only within the limits of one State which use, as a matter of absolute necessity, the same air, and as a matter of practical necessity, the same aerodromes.

The illustrations which have been given indicate the difficulties of any double control of aviation and might well be used to support the contention that it is wise or expedient that there should be a single control of this subject matter. Considerations of wisdom or expediency cannot, however, control the natural construction of statutory language. The Constitution gives to the Commonwealth Parliament power over inter-State and foreign trade and commerce and does not give to it power over intra-State trade and commerce, although these subjects are obviously in many respects very difficult to separate from each other. On several occasions the argument has been pressed upon this court that, where inter-State or foreign and intra-State maritime trade and commerce are so intermingled that it is practically essential to control all of them as one subject matter, the Commonwealth Parliament has power under sec. 51 (i.) and sec. 98 of the Constitution to deal with intra-State navigation and shipping. A similar argument could be applied to railways the property of any State with respect to which the Commonwealth has power to legislate under the trade and commerce power (See Constitution, sec. 98). This argument, however, has always been rejected by the court. Although foreign and inter-State trade and commerce may be closely associated with intra-State trade and commerce, the court has uniformly held that the distinction drawn by the Constitution must be fully recognized, and that the power to deal with the former subject does not involve an incidental

power to deal with the latter subject (See *Owners of s.s. Kalibia* v. *Wilson* (1); *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (2); *R.* v. *Turner*; *Ex parte Marine Board of Hobart* (3)). It is true that in the United States of America a similar contention has been approved by the Supreme Court in such cases as *Southern Railway Co.* v. *United States* (4), where the court found that there was such a close or direct relation or connection between the inter-State and intra-State traffic when moving over the same railroad "as to make it certain that the safety of the inter-State traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these (Federal) acts (which required the installation of certain safety appliances) to vehicles used in moving the traffic which is intra-State as well as to those used in moving that which is inter-State" (5). The decisions of this court, however, have definitely declined to adopt such a principle, and have therefore left the problem which is indicated by the illustrations above given and the quotation above made to be solved by some form of co-operation between the Commonwealth and the States. A new problem would be raised if in any given case it were established by evidence in respect of a particular subject matter that the intermingling of foreign and inter-State trade and commerce with intra-State trade and commerce was such that it was impossible for the Commonwealth Parliament to regulate the former without also directly regulating the latter. No such evidence, however, has been presented in this case, and it will be necessary to deal with such a question only when it is directly raised.

Applying the decisions of this court to which I have referred, and in the absence of any evidence of the character which I have just mentioned, I find myself compelled to reject the contention that if the Commonwealth Parliament has power to legislate with respect to inter-State and foreign aviation, it must therefore also have power to regulate intra-State aviation.

(1) (1910) 11 C.L.R. 689.
(2) (1921) 29 C.L.R. 357.
(3) (1927) 39 C.L.R. 411.
(4) (1911) 222 U.S. 20; 56 Law. Ed. 72.
(5) (1911) 222 U.S., at p. 26; 56 Law. Ed., at p. 74.

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If all the States had passed and brought into operation legislation referring powers to deal with aviation generally to the Commonwealth Parliament, the Commonwealth Parliament would have possessed the powers referred. In the absence of such action I am unable to support the validity of the second part of sec. 4 of the *Air Navigation Act* 1920, which provides for the making of regulations for the control of air navigation generally throughout the Commonwealth. This conclusion does not affect the power of the Commonwealth to control aviation in the territories, or in Tasmania within the limits of the Tasmanian statute.

5. It is now necessary to deal with the first part of sec. 4 of the *Air Navigation Act* 1920, which provides that the Governor-General may make regulations for the purpose of carrying out and giving effect to the convention for the regulation of aerial navigation signed in Paris on 13th October 1919, and the provisions of any amendment of the convention made under art. 34 thereof.

The convention deals generally with aerial navigation and the obligations which it imposes are very conveniently summarized in the report of *In re Regulation and Control of Aeronautics in Canada* (1). I think it necessary to draw attention to the following features of the convention, to which I refer in the form in which it stood when the regulations under the *Air Navigation Act* 1920 were made :—

(*a*) The convention is made between heads of States among which are the British Empire, the Dominions and India, and the formal parts of it are similar to those of the Treaty of Versailles 1919. The convention begins by reciting that His Majesty the King of the United Kingdom and of Ireland and the British Dominions beyond the Seas Emperor of India has appointed as his plentipotentiary Mr. Lloyd George and for the Dominion of Canada the Honourable Sir Albert Edward Kemp, K.C.M.G., for the Commonwealth of Australia the Honourable George Foster Pearce, and other persons for South Africa, New Zealand and India. The treaty is therefore in the form which is described in the report of the Imperial Conference of 1926 as a treaty between heads of States as distinct from an agreement between Governments.

(1) (1932) A.C., at pp. 74-76.

The treaty was ratified by His Majesty the King on 1st June 1922, there being separate signatures for each Dominion as in the case of the Treaty of Versailles. According to the information placed before the court, the number of Powers ratifying the treaty included the British Empire, the Dominions and India, and seventeen other countries.

(*b*) Art. 1 of the convention provides that the high contracting parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory. This article recognizes national sovereignty over the air and establishes as between the Powers which are parties to it a highly important principle which had been a subject of great controversy. The doctrine which had been described as the freedom of the air was by this article excluded as between the convention Powers. By this article the Commonwealth gains a most important benefit in that, under conditions of reciprocity, there is an international recognition of the complete sovereignty of Australia over the air space above the Commonwealth and its territories.

(*c*) Art. 2 provides that "each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present convention are observed." The article also provides that regulations as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

Under this article Australia obtains the benefit of freedom of passage for Australian aircraft over the territory of the other contracting States.

(*d*) Arts. 3 and 4 provide for prohibited areas—once again under conditions of reciprocity.

(*e*) Art. 5 is as follows:

"No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State."

This article prevents the flight over the territory of a State of any aircraft which does not possess the nationality of some contracting State. Accordingly, if Australian aircraft could not obtain an

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Australian nationality within the meaning of the convention they would not be at liberty to fly over the territory of any other contracting State, and, further, it would be a breach of the convention to allow them to fly in Australia.

(*f*) Art. 6 provides that aircraft possess the nationality of the State on the register of which they are entered in accordance with the provisions of sec. 1 (*c*) of annex A. Art. 7 provides that no aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such States, with a special provision regarding the nationality of aircraft owned by companies.

Art. 8 provides that an aircraft cannot be validly registered in more than one State.

(*g*) Art. 11 is limited to aircraft engaged in international navigation, which are required to be provided with a certificate of airworthiness according to annex B issued or rendered valid by a State whose nationality the aircraft possesses. Art. 12 applies to all aircraft whether engaged in international navigation or not. It is in the following terms :—

" The commanding officer, pilots, engineers and other members of the operating crew of every aircraft shall, in accordance with the conditions laid down in annex E, be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses."

This article is important in relation to reg. 6, under which the appellant was convicted.

(*h*) Art. 13 provides for reciprocal recognition of certificates of airworthiness or competency and of licences. Art. 14 deals with the carrying of wireless apparatus by aircraft.

(*i*) Chapter IV., containing arts. 15 to 18 inclusive, deals with the subject of admission to air navigation above foreign territory. These articles confer the right of passage without landing, but also make provision that any aircraft passing from one State into another may be required to land in one of the aerodromes fixed by the latter State. Another provision in this chapter (art. 18) confers a very practical advantage on the contracting States by providing that no aircraft shall be liable to be seized on the ground of infringement of

patent, design, or model, subject to the deposit of security, the amount of which in default of amicable agreement, is to be fixed with the least possible delay by the competent authority of the place of seizure.

(*j*) Art. 19 provides that every aircraft engaged in international navigation shall be provided with certain certificates and licences, a list of passengers, bills of lading and manifest where it carries freight, and log books.

(*k*) Art. 25 is in the following terms :—

" Each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of its territory, and that every aircraft wherever it may be, carrying its nationality mark, shall comply with the regulations contained in annex D. Each of the contracting States undertakes to ensure the prosecution and punishment of all persons contravening these regulations."

This article applies to all aircraft, and is not limited to international aircraft. In the case of Australia it applies to all aircraft flying in Australia whether they confine their flying to a single State or not. Annex D contains rules as to lights and signals, and rules for flying.

(*l*) Chapter VI. (containing arts. 26 to 29 inclusive) deals with prohibited transport and provides that certain restrictions of carriage on certain objects shall be applied equally to national and foreign craft. Thus the convention requires that these restrictions shall be applied to any aircraft flying in Australia.

(*m*) Art. 30 is as follows :—

" The following shall be deemed to be State aircraft : (*a*) Military aircraft ; (*b*) aircraft exclusively employed in State service, such as posts, customs, police. Every other aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present convention."

It will be necessary hereafter to compare this article of the convention carefully with reg. 4 of the regulations made under the *Air Navigation Act* 1920.

(*n*) Art. 34 authorizes an international commission for air navigation to amend the annexes A-G.

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(o) Art. 40 provides that the British Dominions and India shall be deemed to be States for the purposes of the convention.

Annex A deals in detail with the marking of aircraft so as to indicate the nationality of the aircraft, the identity of the particular aircraft, the name and residence of the owner, the name of the maker, etc. Annex A also provides for the method of registration of aircraft and, as already stated, the convention requires aircraft to be registered in order to possess a nationality so as to be lawfully flown under the convention.

Annex B provides for the main conditions which are to govern the issue of the certificates of airworthiness which are required in the case of aircraft engaged in international navigation by art. 11.

Annex C provides in detail for the log books to be carried.

Annex D contains very detailed provisions as to the lights and signals to be used on aircraft and on aerodromes. It also provides for rules of the air in order to prevent collision, once again in a detailed manner. Special rules are also prescribed for air traffic on and in the vicinity of aerodromes. The effect of art. 25 is that every aircraft flying in Australia shall comply with the provisions of annex D.

Annex E deals with the minimum qualifications necessary for obtaining certificates and licences as pilots and navigators. Practical tests and theoretical examinations are prescribed for the different classes of certificates. This annex also provides that every candidate before obtaining a licence as a pilot navigator or engineer of aircraft engaged in public transport shall pass a medical test, and that he shall be re-examined periodically, at least every six months.

Annexes F and G deal with international aeronautical maps, ground markings, and the collection and dissemination of meteorological information.

Annex H deals with customs matters.

This outline of the contents of the convention is sufficient to show that, as their Lordships of the Privy Council state in *In re Regulation and Control of Aeronautics in Canada* (1), " the terms of the convention include almost every conceivable matter relating to aerial navigation."

(1) (1932) A.C., at p. 77.

6. The first question which arises in relation to the convention is whether the Commonwealth Government could become bound internationally by the convention.

The treaty making power is vested in the Crown (1 *Blackstone's Commentaries*, 14th ed., p. 256, c. XVII., sec. 2, and see *Encyclopædia of Laws of England*, 2nd ed., vol. 14. p. 236). This convention was made by His Majesty the King, and, as I have already said, it is the same in form as the Treaty of Versailles, which it was held, in *Roche* v. *Kronheimer* (1), enabled the Commonwealth Parliament to legislate so as to affect certain private rights. In the case of this convention, therefore, it is unnecessary to consider the constitutional developments which have taken place since the Imperial Conference of 1926. The *Air Navigation Act* was passed in 1920, and if the Commonwealth Parliament then had no power to enact certain of its provisions, those provisions would not become valid because at a later date the same Parliament or another Parliament could validly have passed them. At the same time it should be remembered that before 1926 the international position of the Dominions had developed by virtue of international recognition and constitutional convention. See the observations of *Isaacs* J. in *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (2).

It is perhaps also not out of place to mention that the preamble of the *Statute of Westminster* 1931 (22 Geo. V. c. 4) refers to a certain constitutional position as "established," namely, the facts that the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, that they are united by common allegiance to the Crown and that laws thereafter made by the Parliament of the United Kingdom should not extend to any part of the Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion. This "established position" is recognized rather than created by the *Statute of Westminster*. The fact that the Commonwealth has not availed itself of the provisions of sec. 10 by adopting secs. 2, 3, 4, 5 or 6 does not prevent the rest of the Act, including the preamble, from being legislation which extends to the Commonwealth of Australia. However, it is not necessary for the purposes of this decision to consider

(1) (1921) 29 C.L.R. 329.

(2) (1922) 31 C.L.R. 421, at pp. 438, 439.

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whether the legal result would have been different if the convention had been made after the Imperial Conference of 1926 or after the passing of the *Statute of Westminster* in 1931. The important question is whether or not His Majesty the King could bind the Commonwealth of Australia as part of the British Empire by a treaty made between His Majesty and heads of other Powers, the Commonwealth being separately represented in the negotiations for the treaty and signing and ratifying the treaty by its own representative. To this question, in my opinion, the answer is not doubtful. The Commonwealth is bound internationally by such a treaty as made in accordance with the law and the constitutional conventions which existed at the time when it was made.

7. The next question may be put in the following form:

"The Commonwealth being bound by the convention, can the Commonwealth Parliament legislate to carry out and give effect to the convention and the provisions of any amendment of the convention which has been duly made?"

This question makes it necessary to consider the meaning of the provision in sec. 51 (xxix.) of the Constitution, which empowers the Commonwealth Parliament to make laws with respect to "external affairs." This subject has been mentioned in *McKelvey* v. *Meagher* (1) by *Barton* J.; in *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (2) by *O'Connor* J.; in *Roche* v. *Kronheimer* (3) by *Higgins* J.; in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (4) by *Evatt* J.; and in *Jolley* v. *Mainka* (5), also by *Evatt* J. It cannot be said, however, that there is any decision of the Full Court on the subject.

In approaching the consideration of this matter I first emphasize the fact that the power to legislate with respect to external affairs is a power expressly conferred upon the Commonwealth Parliament by the Constitution. No question of interference with the rights of the States arises. The Commonwealth Parliament constitutionally possesses the power to legislate as it thinks proper with respect to external affairs, and, if any State legislation is inconsistent with

(1) (1906) 4 C.L.R., at p. 286.
(2) (1908) 5 C.L.R., at p. 842.
(3) (1921) 29 C.L.R., at pp. 338, 339.
(4) (1931) 46 C.L.R., at p. 122.
(5) (1933) 49 C.L.R., at pp. 284-288.

Federal legislation on this subject, the State legislation is, to the extent of the inconsistency, invalid under sec. 109 of the Constitution.

The paramount nature of the power to make and carry out treaties has been established under the Constitutions of the Dominion of Canada and the United States of America. The constitutional provisions are different from those to be found in the Commonwealth Constitution, but some guidance can, I think, be found in the decisions of the Privy Council in respect to Canada. In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1) it was held that the Dominion power to perform obligations under treaties enabled the Dominion Parliament to override provincial legislation which would otherwise be valid. In the case of *In re Regulation and Control of Aeronautics in Canada* (2) the Privy Council decided that the whole field of legislation in relation to aerial navigation in Canada belongs to the Dominion, though of course no reference is made to aviation in the *British North America Act*, which was passed in 1867. The decision was based principally upon sec. 132 of that Act, which is in the following terms :

" The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries."

The Dominion of Canada is a party to the convention now under consideration in exactly the same way as Australia is a party. It was held that the section authorized legislation to carry out the convention, the Privy Council stating in the subsequent case of *In re Regulation and Control of Radio Communication in Canada* (3) that the idea pervading the judgment in the case dealing with the regulation and control of aeronautics was " that the whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations, that there is not enough left to give a separate field to the Provinces as regards the subject." It was also held that further powers in relation to aviation would reside

(1) (1924) A.C. 203. (2) (1932) A.C. 54.
(3) (1932) A.C., at p. 313.

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in the Parliament of Canada by virtue of sec. 91 of the *British North America Act* 1867 under heads (2) trade and commerce, (5) postal services, and (7) military and naval services. The decision was also supported by reference to the residuary powers of the Dominion Parliament and the power of the Dominion Parliament to legislate with respect to matters of national interest and importance. As the quotation from the *Radio Control Case* (1) shows, these latter provisions were referred to as auxiliary only, and the main ground of the decision is to be found in sec. 132. If the power conferred upon the Parliament of Australia to legislate with respect to external affairs includes the power to legislate to give effect to treaties to which the Empire is a party which is conferred upon the Parliament of Canada by sec. 132, then this case is an authority for the proposition that the Parliament of Australia has the same power under sec. 51 (xxix.) of the Constitution with respect to the convention for air navigation as the Parliament of Canada was held to possess under sec. 132 of the *British North America Act.* For the reasons which I shall state I am of opinion that the power to legislate with respect to external affairs does at least include the power mentioned.

In the United States of America the Constitution declares that the President shall have power to make treaties (art. ii. (2)) and also provides that " this Constitution, and the laws of the United States . . . made in pursuance thereof; and all treaties made . . . under the authority of the United States shall be the supreme law of the land " (art. vi.). In *Geofroy* v. *Riggs* (2) it was held that under the treaty between the United States and France it was possible to control inheritance of real property, although apart from such a treaty the control of such a subject would be beyond the power of Congress and would be within the power of the legislatures of the States. In the case of *Missouri* v. *Holland* (3) the Supreme Court of the United States considered the constitutionality of the Migratory Birds Treaty of 1919 made between the United States and Great Britain and of an Act of Congress which gave effect to the treaty. It had formerly been held that an earlier Act of Congress, directed to the same purpose, but not made for the purpose of carrying out any treaty,

(1) (1932) A.C., at p. 313.
(2) (1889) 133 U.S. 258 33 Law. Ed. 642.
(3) (1920) 252 U.S. 416; 64 Law. Ed. 641.

was unconstitutional (*United States* v. *McCullough* (1)), but in *Missouri* v. *Holland* (2) it was decided that the Act passed to carry out the treaty was valid and that the objections based upon the limits of power of Congress which had been successfully raised before the treaty had no force or effect after the treaty had been made.

Thus, in both Canada and the United States the making of a treaty is effective to bring within the scope of the powers of the Federal legislature subjects which, without a treaty, would be beyond those powers. Owing to the differences between the Australian Constitution and the Constitution of the United States the American decisions cannot be regarded as authority in Australia, and the decisions upon the Canadian Constitution can, as already stated, be regarded as authority only if sec. 51 (xxix.) includes the legislative powers conferred upon the Parliament of Canada by sec. 132 of the *British North America Act*.

It has been argued that sec. 51 (xxix.) should be construed as giving power to make laws only with respect to some external aspect of the other subjects mentioned in sec. 51. Prima facie it would be as reasonable to argue that any other single power conferred by sec. 51 is limited by reference to all the other powers conferred by that section—which is really an unintelligible proposition. There is no reason whatever why placitum xxix. should not be given its natural and proper meaning, whatever that may be, as an independent express legislative power.

The suggestion which has sometimes been made that placitum xxix. is intended to give power to pass extra-territorial legislation in respect of the other subjects specified in sec. 51 is, it seems to me, answered by more than one argument. In the first place placitum xxix. cannot be construed to give a general power of extra-territorial legislation in respect of all the subject matters in sec. 51 in view of the express provisions contained in governing clause 5 of the Constitution Act. This clause provides that the laws made by the Parliament 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. The clause is evidently intended

(1) (1915) 221 Federal Reporter 288.
(2) (1920) 252 U.S. 416; 64 Law. Ed. 641.

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to extend what, apart from the clause, would have been the ordinary sphere of application of Commonwealth laws. Such a provision would have been meaningless if sec. 51 (xxix.) meant what has been suggested. Further, it is well established that the grant of a power in a Dominion Constitution to legislate upon a particular subject matter will justify extra-territorial legislation which is necessary to give effective operation to the power (*Attorney-General for Canada* v. *Cain and Gilhula* (1); *Croft* v. *Dunphy* (2)). To say that the meaning of the phrase "external affairs" is limited to the external or extra-territorial aspect of the other subjects mentioned in sec. 51 is to give no meaning whatever to placitum xxix.

Then it is argued that the power to legislate with regard to external affairs is limited to matters which *in se* concern external relations or to matters which may properly be the subject matter of international agreement. No criterion has been suggested which can result in designating certain matters as *in se* concerning external relations and excluding all other matters from such a class. It is very difficult to say that any matter is incapable of affecting international relations so as properly to become the subject matter of an international agreement. It appears to me that no absolute rule can be laid down upon this subject. No one would to-day be inclined to deny that the production and sale of recently invented narcotic drugs is a matter of international interest and concern. Fifty years ago it is unlikely that many persons would have thought that such subjects would be dealt with by international treaties. Modern invention has almost abolished the effects of distance in time and space which enabled most States to be indifferent to what happened elsewhere. To-day all peoples are neighbours, whether they like it or not, and the endeavour to discover means of living together upon practicable terms—or at least to minimise quarrels—has greatly increased the number of subjects to be dealt with, in some measure, by international action.

The Department of External Affairs of the Commonwealth published on 15th August 1935 a "List of International Agreements (Treaties, Conventions, &c.) to which Australia is a party, or which affect Australia, together with prefatory notes." The list of bilateral

(1) (1906) A.C. 542.

(2) (1933) A.C. 156.

international agreements extends over eighteen pages and the list of general and multilateral international agreements extends over eleven pages. The subjects are so various that it is impossible to classify them. They include matters affecting extradition, trade and commerce, navigation, legal proceedings, joint stock companies, war graves, commercial arbitration, international arbitration, tariffs, trade marks and other industrial property, friendship and amity, postal matters, medical practitioners, lunatics, submarine telegraph cables, maritime and land warfare, sanitation, white slave traffic, use of white phosphorous in manufacturing matches, copyright, obscene publications, peace after the Great War, labour matters, contagious diseases, dangerous drugs, economic statistics, limitation and reduction of armaments, and other subjects. It will be seen therefore that the possible subjects of international agreement are infinitely various. It is, in my opinion, impossible to say *a priori* that any subject is necessarily such that it could never properly be dealt with by international agreement. The decision in *Roche* v. *Kronheimer* (1) upheld the legislation which gave the Governor-General power to make regulations on many economic subjects in order to carry out the Treaty of Versailles. This legislation was upheld under the defence power—in my opinion it could also have been fully justified under the power to legislate with respect to external affairs. That treaty was made after a victory. It is interesting to reflect that the defence power, and in my opinion, the power as to external affairs, would also have supported legislation made under a treaty after a defeat—in which case other aspects of these subjects would have come into prominence.

If, however, it should be thought that before a subject can legitimately be dealt with under this heading it should possess some characteristics which make it specially proper to be dealt with on an international basis, there can be little room for doubt that aviation is such a subject. Aircraft pass rapidly from one country to another, and the subject of their regulation and control not only is suitable for international agreement but almost imperatively demands it. The type and character of the aircraft itself, the qualifications of its pilots, navigators and engineers, the traffic rules for aircraft in the

(1) (1921) 29 C.L.R. 329.

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air and when ascending from or descending to an aerodrome, and the provision and control of aerodromes to which landing shall normally be limited, are all matters which require regulation and control, and the form of regulation and control adopted by one country is plainly a matter of great interest and concern to other countries. Thus it appears to me that even if the most limited criterion be applied this convention falls within the subjects which may properly be dealt with by international agreement and which in themselves have an external aspect. This conclusion is supported by the fact that a large number of other countries agreed that an international convention should be made upon this subject. The suggestion that a Commonwealth Government might make an international agreement in bad faith simply with the object of extending Federal powers cannot be applied in this case. If such a case should ever arise it can then be considered.

There are, however, limitations upon the power of the Commonwealth to make and give effect to international agreements. The Executive Government of the Commonwealth and the Parliament of the Commonwealth are alike bound by the Constitution and the Constitution cannot be indirectly amended by means of an international agreement made by the Executive Government and subsequently adopted by Parliament. Examples can readily be given. Sec. 116 of the Constitution provides that the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion. Sec. 113 provides that all fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale or storage, shall be subject to the laws of the State as if such liquids had been produced in the State. If the Commonwealth Parliament were to pass a law in pursuance of a treaty establishing a form of religion such a law would be simply invalid. Similarly, if the Commonwealth Parliament were in pursuance of a treaty to prohibit the use, consumption, sale or storage of intoxicating liquor within a State, that law would be simply invalid. The Power with which the Commonwealth had made such a treaty would, if the treaty had been ratified, have cause for complaint against the Commonwealth and might be entitled to charge

the Commonwealth with breach of the treaty which it had in fact though not lawfully made—a question upon which there has been much discussion among authorities on international law. See, e.g., *Oppenheim's International Law*, 4th ed. (1928), vol. I., p. 709, and authorities there cited; and the rather vague statement in *Wheaton's International Law*, 6th ed. (1929), vol. I., p. 499. But these considerations would be irrelevant to the question of the validity of such Commonwealth statutes as those which I have supposed.

I now proceed to express in a more positive form my opinion as to the meaning of the phrase "external affairs."

The establishment of a political community involves the possibility, indeed the practical certainty in the world as it exists to-day, of the establishment of relations between that community and other political communities. Such relations are necessarily established by governments, which act for their people in relation to other peoples, rather than by legislatures which make laws for them. This fact of international intercourse is unaffected by the fact that a government may think it wise or (as in the United States of America) be bound, to obtain legislative approval of certain of its international acts. The regulation of relations between Australia and other countries, including other countries within the Empire, is the substantial subject matter of external affairs. Such regulation includes negotiations which may lead to an agreement binding the Commonwealth in relation to other countries, the actual making of such an agreement as a treaty or convention or in some other form, and the carrying out of such an agreement. The Government and Parliament of the Commonwealth have, in relation to Australia, the powers mentioned in sec. 132 of the *British North America Act* 1867. Consideration of the cases of States which are limited in their powers by reason of an arrangement under which the control of their foreign relations is committed to another government will show that it must be recognized that no more limited meaning than that which I have stated can be given to such phrases as external or foreign affairs or relations—terms between which I can draw no distinction.

This view is, I think, supported by a consideration of the object which must have been in contemplation when the Constitution was enacted. Australia was established as a new political entity and

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Australia was to be given control of her own external affairs. Under sec. 61 of the Constitution the Executive Government of the Commonwealth can deal administratively with the external affairs of the Commonwealth. Sec. 61 provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution and the laws of the Commonwealth. See also sec. 2 of the Constitution. The execution and maintenance of the Constitution, particularly when considered in relation to other countries, involves not only the defence of Australia in time of war but also the establishment of relations at any time with other countries, including the acquisition of rights and obligations upon the international plane. The most obvious example of such action is to be found in the negotiation and making of treaties with foreign countries. The action, when taken, is the action of the King (sec. 61).

The plan of giving Australia full control of her external affairs is further carried out by the provisions in sec. 51 (xxix.) that the Commonwealth Parliament can make laws with respect to external affairs. The Commonwealth Parliament was given power to legislate to give effect to international obligations binding the Commonwealth or to protect national rights internationally obtained by the Commonwealth whenever legislation was necessary or deemed to be desirable for this purpose. (See *Walker* v. *Baird* (1), which settles the principle that, at least as a general rule, a treaty cannot affect the private rights under municipal law of British subjects, so that often legislation is required to implement a treaty.)

Questions may arise under treaties with other countries, and accordingly the plan is completed by a provision in sec. 75 of the Constitution that the High Court shall have original jurisdiction in all matters arising under a treaty. Thus in the provisions of the Constitution dealing with the three functions of government, executive, legislative and judicial, the same principle is found. *O'Connor* J. said in 1908 that the provisions of the Constitution "vest in the Commonwealth the power of controlling in every respect Australia's relations with the outside world" (*Attorney-*

(1) (1892) A.C. 491.

General of New South Wales v. *Collector of Customs for New South Wales* (1)). I respectfully agree, and I would only add that in my opinion sec. 51 (xxix.) is in itself sufficient to justify this statement.

These provisions contemplate not the relations of the States of Australia with other countries but the relations of Australia, including all the States, with other countries. All the State Governments together could not create a truly Australian right or a truly Australian obligation. When the Executive Government of the Commonwealth acts under sec. 61 it acts for the political entity, the Commonwealth of Australia which was created by the Constitution, and not for all or any of the six States or for all or any of the several territories which are in the Commonwealth.

In fact other countries deal with Australia and not with the States of the Commonwealth and this practice follows the evident intention of the Constitution. The convention for air navigation which is now under consideration may be taken as an example. What is contemplated is that there shall be one national registration in Australia, not six registrations, that there shall be one certificate, an Australian certificate, not six State certificates. The States could not possibly perform the obligations undertaken by Australia under the convention.

For all these reasons I am of opinion that the first part of sec. 4 of the *Air Navigation Act* 1920 is valid, so that the Commonwealth Parliament has power to provide that the Governor-General may make regulations for the purpose of carrying out and giving effect to the convention.

8. The next question is whether, there being power in the Commonwealth Parliament to pass a law to carry the convention into effect, the regulations purporting to be made under that power and particularly reg. 6 are valid. Are these regulations really regulations for carrying out and giving effect to the convention ?

It may be argued that the regulations should have simply repeated the convention and that the making of any regulation which did not reproduce the actual terms of the convention would be beyond the Commonwealth power. A consideration of the form of the convention will show that a repetition in the form of regulations of

(1) (1908) 5 C.L.R., at p. 842.

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the actual provisions of the convention would, in many cases, not really carry it into effect. Take for example art. 6: "Aircraft possess the nationality of the State on the register of which they are entered in accordance with the provisions of sec. 1 (*c*) of annex A." The repetition of this article as a Commonwealth regulation would have been interesting to note, but would have done little to carry the convention into effect. Effect is given to the article by the establishment under the regulations of a system of registration for Australia.

Another example may be found in regs. 13, 14 and 15 providing for the licensing of aerodromes subject to such conditions as the Minister thinks fit. There are no such provisions in the convention except (in different terms) in relation to customs matters. But, apart from considerations affecting customs, it is obvious that many of the provisions in the convention could not be effective unless regulations existed which made it possible to identify and inspect aeroplanes and pilots on the ground. These objects can be secured only by some provision restricting the places from or to which journeys can be undertaken. Thus the provisions for licensing aerodromes are legitimate and proper for giving effect to the convention even though they do not appear in the convention itself.

Again, the convention may be more effectively carried out in British countries by expressing measurements and distances in feet and inches rather than in metres and kilometres, using practical, if not absolutely precise, equivalents. This has been done both in Great Britain and in Australia. Such variations may legitimately be regarded as variations in form rather than in substance.

The examples which I have given illustrate the governing principle that the regulations, in order to be justified under the *Air Navigation Act*, must in substance be regulations for carrying out and giving effect to the convention.

It is at this point, in my opinion, that the respondent's case breaks down. The regulations largely follow the convention —most of them being taken verbatim from the convention—but some of the regulations are in conflict with fundamental principles of the convention. The regulations have been drafted mainly to carry the convention into effect, but variations have been introduced

upon the wrong assumption that the Commonwealth Parliament has full power to legislate with respect to air navigation. In some cases these variations are in the same terms as the Imperial Order in Council which was made to give effect to the *Air Navigation Act* 1920 of Great Britain. See Order in Council of 20th June 1922, *Statutory Rules and Orders* 1922, pp. 8 et seq.

I propose to refer to three matters of principle which are at the root of the convention but which are disregarded in the regulations. There are other divergences from the convention but they are not of such obvious importance.

(*a*) The application of the convention depends upon all aircraft having a nationality. Nationality is determined by registration and registration is limited to aircraft which belong to the nationals of the registering State (arts. 5, 6, 7 and 8). " Nationals " in relation to aircraft seeking registration in Australia must mean " Australian nationals " (art. 40).

The regulation dealing with this matter is reg. 17, which is as follows:

" Unless the Minister otherwise directs, a certificate of registration shall not be granted in respect of any aircraft unless it is owned wholly either—(*a*) by British subjects or persons under His Majesty's protection; or (*b*) by a company organized and incorporated under the laws of a part of His Majesty's dominions and having its principal place of business within His Majesty's dominions and which is registered within the Commonwealth or within a State or territory of the Commonwealth and of which all the directors and shareholders are British subjects or persons under His Majesty's protection; or (*c*) by the Government of the Commonwealth or of a State or of a territory of the Commonwealth or of any authority constituted by or under an Act of the Commonwealth or of a State or an ordinance of any such territory."

It is objected that this regulation is inconsistent with the convention because any British subject or person under His Majesty's protection may be registered as owner of an aircraft and that therefore the possible ownership of a registered aircraft is not limited to " Australian nationals " as art. 7 of the convention requires. There is not yet any established legal category of " Australian nationals "

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corresponding to the categories of Dominion nationals established by statute in Canada, South Africa and the Irish Free State. (See *Halsbury's Laws of England*, 2nd ed., vol. 11, pp. 118, 119.) The Commonwealth Parliament has not passed legislation of this character. In the absence of such legislation it is difficult to form a clear conception of the meaning of the term "Australian nationals." In *Pitt Cobbett's Leading Cases on International Law*, 4th ed. (1922), vol. I., p. 179, the meaning of the term "national" is discussed and it is identified with "subject" in the strict sense as distinguished from the looser sense in which all persons who for the time being are subject to the laws of a State may be described as "subjects" of that State. The latter wider class is divided by the learned author into three classes. As to the first class he says: "First, there is a class of persons who may be described as 'citizens' or 'nationals' comprising those who are politically and internationally members of the organized community represented by the State, and who share the national character, whether 'domiciled' within its territory or not, and whether they enjoy full civic privileges or not." Further: "The 'nationals' of a State comprise, as we have seen, all persons who are politically members of the organized community which the State represents; all those, in fact, who share in that political relationship which exists between the individual and the State to which he owes allegiance" (p. 180). In the absence of specific legislation there are difficulties in applying this conception to Australia for the purposes of a treaty which draws a distinction between Australia as one State and Canada and other parts of the Empire as other States. It is difficult, for example, to take the view that a person who would ordinarily be described as a "Canadian," and who has no relation to Australia other than the possession of British nationality in common with "Australians," may yet be an "Australian national" for the purposes of the convention. But reg. 17 (*a*) would appear to treat him as an Australian national for the purposes of the convention. So also persons in other parts of the world who are under His Majesty's protection, as well as such persons in Australian territory, are, it is said, included in reg. 17 (*a*).

Possibly the objection might be met by reading down the words of reg. 17 (*a*) in accordance with the principle of territorial limitation

of legislation for which *Macleod* v. *Attorney-General for New South Wales* (1) is generally cited as authority. But, even if this limitation is introduced, the objection could still be made that the persons mentioned in reg. 17 (*a*) are not "Australian nationals" even if they are in Australia at the relevant time. I think it necessary therefore to deal with the matter upon a broader principle.

Reg. 17 (*a*) is in the same terms as those which appear in Schedule I. to the Order in Council made in Great Britain on 20th June 1922 under the *Air Navigation Act* 1920 (See *Statutory Rules and Orders* 1922, p. 20). The Order in Council was made under sec. 1 of the Act, which is as follows :—

"His Majesty may make such Orders in Council as appear to him necessary for carrying out the convention and for giving effect thereto or to any of the provisions thereof, or to any amendment which may be made under article thirty-four thereof."

The schedule thus assumes that all British subjects and persons under His Majesty's protection may be regarded as "nationals" for the purposes of the convention.

At first glance it may be surprising to suggest that the Commonwealth Parliament has a similarly extensive power of definition. But nationality is a matter of municipal law. There is no international test of nationality—except by reference to municipal law. See *Oppenheim, International Law*, 4th ed. (1928), vol. I., p. 524, par. 293 :—"Nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen. It is not for international, but for municipal law to determine who is, and who is not, to be considered a subject." See *Stoeck* v. *Public Trustee* (2) : "Whether a person is a national of a country must be determined by the municipal law of that country." Compare *In re Chamberlain's Settlement* (3) ; *Kramer* v. *Attorney-General* (4).

The position therefore is that it is for Australian law to determine what persons shall be regarded as Australian nationals for the purposes of the convention. The general rule as to nationality in Australia is the same as that in Great Britain. Any person who is a British subject in Great Britain would be regarded as a British

(1) (1891) A.C. 455.
(2) (1921) 2 Ch. 67, at p. 82.
(3) (1921) 2 Ch. 533.
(4) (1923) A.C. 528.

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subject in Australia. Within the class of British subjects recognized as such in Australia there are in Australia no distinctions. The Canadian-born British subject in Australia, so far as nationality is concerned, is upon precisely the same footing as the Australian-born or English-born British subject. As to natural-born British subjects, see *Nationality Act* 1920, sec. 6. As to naturalized persons, see secs. 7, 11 and 15. Sec. 8 deals with the case of persons naturalized in an Australian colony or in the Commonwealth before the *Nationality Act* 1920. *Markwald* v. *Attorney-General* (1) shows that the Commonwealth Parliament may, if it chooses, confer, within the Commonwealth, the quality of being a British subject upon terms and conditions deemed appropriate by the Parliament, and that this local and limited naturalization is effective in Australia, though not in Great Britain. This is an exception to the general rule. *Oppenheim* is of opinion that even such a limited naturalization brings about the result that the naturalized person is, for all international purposes, a British subject (*International Law*, 3rd ed. (1920), par. 293), though Professor *McNair*, the editor of the 7th edition of this work (note 5 to par. 293), indicates that the entry of the Dominions into the field of international relations may necessitate the formal identification of those British subjects who possess the citizenship of a Dominion—the very problem which arises at this point in this case. Whatever may be the ultimate solution of this problem, it is at least clear, in my opinion, that it is within the province of Australian law to determine who are to be regarded in Australia as "Australian nationals." Thus the Commonwealth Parliament has the power to determine that all British subjects shall be so regarded. The Parliament has the power, if it elects so to do, to accept as Australian nationals in Australia all persons who are under His Majesty's protection. Not only alien friends resident within the jurisdiction, but even alien enemies so resident and enjoying His Majesty's protection, possess the same civil rights as British subjects unless special legislation (as in the case of the war of 1914-1918) deprives them of this position. See the summary of the law in *Halsbury's Laws of England*, 2nd ed., vol. 1, par. 756.

(1) (1920) 1 Ch. 348.

The question then is whether reg. 17 (*a*) can be read as a legislative declaration that the persons therein mentioned are "Australian nationals." The *Air Navigation Act* 1920, however, does not authorize the making of a regulation defining nationality. The convention assumes the existence of nationality in relation to each of the contracting States. I have considered whether the regulation can be construed as creating an Australian nationality for the purposes of the convention. There appear to be at least two difficulties in the way of such a view. In the first place, the regulation does not profess to deal with the subject of nationality at all. In the second place, the creation of an Australian nationality limited to the purposes of the convention is not a method of carrying out the convention. There is no foundation for a conception which would permit a man to be a national of one State for one purpose and of another State for another purpose.

The Commonwealth Parliament could, in my opinion, provide that British subjects who are associated with Australia by reason of birth or domicil or residence shall be deemed to be Australian nationals. The Parliament could, if it thought proper to do so, having regard to the provisions of the legislation of Great Britain and other Dominions, make the class of Australian nationals even wider, and could also decide to recognize persons under His Majesty's protection as Australian nationals, though in this case also some actual connection with Australia would probably be required. The Parliament, however, has not passed such legislation, and, in these circumstances, the question is whether reg. 17 (*a*) can be regarded as carrying out the requirement of the convention that only Australian nationals can be registered in Australia as owners of aircraft. After careful consideration I find it impossible either to identify the class of "British subjects and persons under His Majesty's protection" with "Australian nationals" or to hold that the former class is included within the latter class. Thus, in my opinion, reg. 17 (*a*) is not a regulation for carrying out or giving effect to the convention and is therefore invalid.

There is a further objection to reg. 17. The initial words of the regulation give to the Minister power to direct a grant of registration in respect of any aircraft whether it fulfils (so far as ownership is

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concerned) the conditions of the regulations (or of the convention) or not. This general dispensing power is absolutely inconsistent with the convention.

Thus, in two important particulars at least, reg. 17 cannot be regarded as a regulation for the purpose of carrying out and giving effect to the convention.

(*b*) Reg. 4 is a regulation which first limits the application of the convention in a manner which is expressly excluded by the convention, and then permits the Minister to dispense with the application of the convention to any aircraft or person, subject only to conditions which are not mentioned in the convention at all.

Reg. 4 is as follows :—

" 4.—(1) Nothing in these regulations shall be deemed to affect or restrict the right of any State Government in respect to—(*a*) the right to own and/or use for the purposes of the Government of the State aircraft operating within the State, and (*b*) the police powers of the State. (2) These regulations or such part or regulation thereof as the Minister directs, shall not apply to any aircraft or person to which or whom the Minister, on the recommendation of a department of the Government of the Commonwealth, directs these regulations or such part or regulation shall not apply."

In this regulation the reference to a State is a reference to a State of the Commonwealth.

Sub-reg. 1 (*a*) may be compared with art. 30 of the convention, which is as follows :—

" The following shall be deemed to be State aircraft :—(*a*) Military aircraft ; (*b*) aircraft exclusively employed in the State service, such as posts, customs, police. Every other aircraft shall be deemed to be a private aircraft. All State aircraft other than military, customs, and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present convention."

The Commonwealth is the State for the purposes of the convention (art. 40). Thus, in relation to Australia, " State aircraft " in art. 30 means " Commonwealth aircraft " and " State service " means " Commonwealth service."

The inconsistency between art. 30 and reg. 4 is very obvious. Art. 30 is designed to prevent the practical evasion of the convention by what from the point of view of the convention would be an illegitimate use of aircraft which were in some way connected with governments. Under art. 30 all aircraft except military aircraft and certain Commonwealth Government aircraft are to be deemed private aircraft. Thus, aircraft owned or used by any of the States of the Commonwealth for State Government purposes are to be treated as private aircraft subject in all respects to the provisions of the convention. Reg. 4 has the effect of excluding them from all these provisions. This exclusion is not authorized by the convention, and is quite inconsistent with it. The exception is very far-reaching, especially when it is remembered that the provision of public transport by the State itself is, in every State of the Commonwealth, recognized as one of "the purposes of the Government of the State."

Further, reg. 4 (1) (*b*) provides that the regulations shall not affect or restrict the rights of any State Government in respect of "the police powers of the State." Whatever this phrase may mean, such an exemption is not authorized by the convention and is inconsistent with carrying it into effect.

Finally, reg. 4 (2) permits the Minister upon the recommendation of a department of the Commonwealth to exempt any aircraft or person from the whole or any part of the regulations. This again is plainly inconsistent with giving effect to the convention according to its terms.

(*c*) The licensing of personnel is obviously a most important matter. The convention in art. 12 provides that the commanding officer, pilots, engineers, and other members of the operating crew of every aircraft shall be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses. These certificates and licences are to be in accordance with annex E. Annex E contains very detailed provisions for tests and examinations to be passed by pilots and others. Let us now consider the regulations.

Reg. 6 provides that the personnel of aircraft shall be licensed in the prescribed manner. Regs. 30 et seq. prescribe the manner.

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The pilot's licence may be taken as an illustration. Reg. 30 provides that "an applicant for a pilot's licence shall be required—(*a*) to pass a medical examination carried out under the control of the Minister; (*b*) to produce a certificate of competency issued by the Minister after examination held by or in accordance with the direction of the Minister or to be qualified as a pilot of the Royal Air Force or the Australian Air Force; and (*c*) to submit proof of recent reasonable flying experience on the class of aircraft for which the licence is required, or, in default of such proof, to undergo practical tests as to his knowledge of flying."

As to (*a*), the provision of the convention relating to the medical examination, which applies to pilots of aircraft engaged in public transport, allows a large measure of liberty to each contracting State. But it also provides for re-examination at least every six months. There is no such provision in the regulations. As to sub-pars. (*b*) and (*c*) of reg. 30, the examination and practical experience or practical tests required by the regulations are left to the decision of the Minister and no attention whatever is paid in the regulations to the specific requirements of annex E. It may be true that the requirements actually made by the Minister under the regulations are more exacting than those mentioned in the convention, but, even if this be so, it does not alter the fact that the requirements specified in the regulations for the licensing of pilots do not agree in any respect with the convention.

This brings me to the crucial matter for the decision of this appeal. For the reasons given I am of opinion that reg. 6 (*c*), relating to the licensing of pilots and being the regulation under which the pilot was convicted, is invalid, and that therefore the conviction should be set aside.

9. The matters to which I have specially referred—the registration of aircraft, the extent of the application of the convention to aircraft in Australia, and the licensing of personnel—govern the convention to such an extent that in my opinion the regulations as a whole must be held to be invalid. Sec. 9A of the *Acts Interpretation Act* 1904-1932 provides that regulations made under an Act shall be read and construed so as not to exceed the powers conferred by the Act upon the regulation-making authority and so that they shall be valid to the extent to which they are not in excess of the

power to make them. But in this case it is not possible to regard any of the regulations, even those which in detail conform to the convention, apart from the important matters mentioned which determine the scope and applicability of the regulations as a whole. Sec. 9A does not authorize this or any other court to redraft a set of regulations. The particular invalid regulations to which I have referred cannot, in my opinion, be separated from the rest of the regulations and simply struck out, leaving standing such other regulations or parts thereof as might upon a minute analysis be discovered to be within some Federal power. If reg. 17, for example, with respect to the registration of aircraft were struck out, the court has no authority to draft and insert a new regulation to conform with the provisions of the convention. Similar considerations apply to the other regulations which I have specially mentioned. Accordingly, in my opinion, the whole of the regulations are invalid because they are not regulations made, as required by sec. 4 of the *Air Navigation Act*, for the purpose of carrying out and giving effect to the convention or any amendment thereof.

This conclusion makes it unnecessary to consider the objection based upon the fact that the Act was proclaimed and the regulations made before the convention was ratified.

The appeal should be allowed with costs.

STARKE J. Henry Goya Henry was charged before a stipendiary magistrate of the State of New South Wales with flying an aircraft without being licensed, contrary to the *Air Navigation Regulations* made under the *Air Navigation Act* 1920, and he was convicted of that offence. He has brought an appeal to this court by means of an order for a writ of prohibition, pursuant to sec. 39 of the *Judiciary Act* 1903-1933. He challenges the validity of both the *Air Navigation Act* 1920 and the regulations made under it.

A convention for the regulation of aerial navigation was agreed upon by the plenipotentiaries of several countries. The British Empire, including Australia, was a party to the convention. It was signed in Paris on 13th October 1919. The *Air Navigation Act* 1920 empowers the Governor-General of the Commonwealth to "make regulations for the purpose of carrying out and giving effect

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to the convention and the provisions of any amendment of the convention made under article thirty-four thereof and for the purpose of providing for the control of air navigation in the Commonwealth and the territories." The Constitution gives no express power to the Commonwealth to regulate or control the air space over Australia. But it has authority to make laws for the peace, order and good government of the Commonwealth with respect to external affairs. It is substantially upon this power that the authority of the Governor-General to make regulations for carrying out and giving effect to the convention is supported.

"The development of aerial navigation in the early years of the present century gave rise to much speculation as to the juridical nature of the air space and the extent of rights in it. That the air space over the open sea and over unoccupied territory is free and in the former case incapable of appropriation may be taken as almost universally admitted. With regard, however, to the air space over occupied land and waters, both national and territorial, there have been a number of competing theories, which may be summarized as follows: (1) That the air space is entirely free; (2) that upon the analogy of the maritime belt there is a lower zone of territorial air space and a higher unlimited zone of free air space; (3) that the air space to an unlimited height is entirely within the sovereignty of the subjacent State . . . (4) that the air space is within the sovereignty of the subjacent State subject to a servitude of innocent passage for foreign civil but not military aircraft" (See *Oppenheim's International Law*, 4th ed. (1928), vol. I., "Peace," pp. 417 et seq.). But the existence of these competing theories of national rights and obligations indicates how easily disputes of a grave nature may arise between States as to the rights and obligations of their nationals in respect of the use of the air space over their territories. The matter was necessarily one for international co-operation and agreement, and it was the subject of agreement in the convention already mentioned. The convention recognizes that every Power has complete and exclusive sovereignty over the air space above its territory. The Imperial *Air Navigation Act* 1920 (10 & 11 Geo. V. c. 80), despite the competing theories already mentioned, recites that "the full and absolute

sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto." And the United States *Air Commerce Act* 1926 makes a similar assertion. But each contracting State, under art. 2 of the convention, undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of other contracting States, provided that the conditions laid down in the convention are observed. The stipulations of the convention have been stated at some length by the Judicial Committee, in *In re Regulation and Control of Aeronautics in Canada* (1), and in the opinion of the Chief Justice in the present case, and I shall not repeat them. But it is plain that the stipulations cannot be carried out and given effect to in Australia without legislation upon a great variety of matters. The question is whether the power of the Commonwealth to make laws with respect to external affairs authorizes it to pass the necessary laws.

The form of legislation adopted in the *Air Navigation Act* 1920 is within the powers and discretion of the Commonwealth Parliament (*Roche* v. *Kronheimer* (2); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3)). But is the Act a law with respect to external affairs? The Constitution, in the legislative power to make laws with respect to external affairs, recognizes that the Commonwealth will have political relations with other Powers and States, and legislative power is conferred upon it in comprehensive terms, so that it may control those foreign or external relations, and implement obligations that may have been assumed in the course of those relations. Again, this fact is recognized in the jurisdiction conferred by the Constitution, sec. 75, upon the High Court in all matters arising under any treaty or affecting consuls or other representatives of other countries. The *Air Navigation Act* enables the Governor-General to carry out and give effect to a convention made with other Powers and States. The convention for the regulation of aerial navigation concerns the relations of those Powers and States with Australia, and the intercourse of their nationals with Australia's nationals by means of

(1) (1932) A.C. 54.
(2) (1921) 29 C.L.R. 329.
(3) (1931) 46 C.L.R. 73.

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aerial navigation. Its stipulations recognize the sovereignty of every State in the air space above its territories, and control and regulate the rights and obligations of the contracting Powers and States, and their nationals, in respect of the use of the air superincumbent on those territories. The convention is made with Powers and States external to Australia, and involves international obligations. But what else are external affairs of a State—or, to use the more common expression, the foreign affairs or foreign relations of a State—but matters which concern its relations and intercourse with other Powers or States and the consequent rights and obligations? The power conferred by the Constitution upon the Commonwealth to make laws with respect to external affairs must be exercised with regard to the various constitutional limitations expressed or implied in the Constitution, which restrain generally the exercise of Federal powers. The Commonwealth cannot do what the Constitution forbids. But otherwise the power is comprehensive in terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States. It is impossible, I think, to define more accurately, at the present time, the precise limits of the power. It may be, as *Willoughby* suggests in connection with the treaty-making power in the Constitution of the United States, that the laws will be within power only if the matter is " of sufficient international significance to make it a legitimate subject for international co-operation and agreement " (*Willoughby* on *The Constitutional Law of the United States*, 2nd ed. (1929), p. 519). While neither the Constitution of the United States nor the *British North America Act* is a very safe guide to the construction of the Constitution Act of Australia, the decisions under those Acts are not opposed to the construction of the Australian Constitution that I adopt (See *Missouri* v. *Holland* (1) and the *Aeronautics Case* (2)). However the limits of the external affairs power may hereafter be defined or restricted, that power does, in my judgment, authorize the Parliament to confer upon the Governor-General power to make laws to carry out and give effect to the aerial navigation convention of 1919, because that convention recognizes sovereignty of the

(1) (1920) 252 U.S. 416; 64 Law. Ed. 641. (2) (1932) A.C. 54.

contracting parties in the air space above their territories, confers rights upon Australia and her citizens and assumes obligations in respect of the air space above Australia towards foreign powers or States and their nationals. A law providing for the carrying out and giving effect to an international convention of this character concerns Australia's relations and intercourse with other Powers or States and the rights and obligations which result, and is thus a law for the peace, order and good government of the Commonwealth with respect to external affairs.

Reliance was also placed upon the provision in the *Air Navigation Act* enabling the Governor-General to make regulations for the purpose of providing for the control of air navigation in the Commonwealth and the territories. The Constitution, in sec. 122, gives the Commonwealth plenary power to make laws for the government of the territories, but that is immaterial in this case. There is not, as I have said, any express power enabling the Commonwealth to control air navigation in Australia. It was contended, however, that the trade and commerce power, the postal power, and the defence power, warranted the provision. But the provision is not on its face related to any of these powers, and goes far beyond any of them. It assumes a complete and plenary power on the part of the Commonwealth to control air navigation throughout Australia. Such a power cannot be found in the Constitution, either in express terms or by any necessary implication. This provision in the *Air Navigation Act* is invalid, and the *Acts Interpretation Act* 1904-1932, sec. 9A, cannot save any part of it (See also sec. 15A of the *Acts Interpretation Act* 1901-1934 and the cases of *Australian Railways Union* v. *Victorian Railways Commissioners* (1) and *Railroad Retirement Board* v. *Alton Railrod Co.* (2)).

The validity of the regulation under which the appellant was charged remains for consideration. It must find its authority in the power to make regulations for the purpose of carrying out and giving effect to the convention, inasmuch as the more extended power given by the *Air Navigation Act* cannot be sustained. The power is wide in terms, but its limits cannot be transcended. All means which

(1) (1930) 44 C.L.R. 319, at pp. 385, 386.

(2) (1935) 295 U.S. 330, at p. 361; 79 Law. Ed. 1468, at p. 1482.

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are appropriate, and are adopted to the enforcement of the convention and are not prohibited, or are not repugnant to or inconsistent with it, are within the power. The power must be construed liberally, and much must necessarily be left to the discretion of the contracting States in framing legislation, or otherwise giving effect to the convention. For instance, general safety and other regulations may be necessary for supplementing the convention, and probably exemptions are legitimate where it appears unnecessary or undesirable that the provisions of the convention should apply. (Cf. *Air Navigation Act* 1920 (10 & 11 Geo. V. c. 80) sec. 3 (*g*), (*f*); *New South Wales* v. *The Commonwealth* [*No.* 1] (1).) A construction of the power that enables a ready application of the convention to various circumstances and conditions is preferable to one that insists upon an inflexible and rigid adherence to the stipulations of the convention. After all, we should remember that the power is conferred for the purpose of carrying out an international and not a mere local agreement.

The appellant was charged under reg. 6, which provides: "No aircraft shall fly within the limits of the Commonwealth . . . unless . . . (*c*) the personnel of the aircraft is licensed in the prescribed manner."

There is nothing on the face of this regulation which makes it invalid. The registration of aircraft and the licensing of personnel are dealt with in Parts IV. and V. of the regulation. The Minister may grant to the owner of any aircraft a certificate of registration in respect of the aircraft, and shall assign to it a certificate of registration. Reg. 17 provides: "Unless the Minister otherwise directs, a certificate of registration shall not be granted in respect of any aircraft unless it is owned wholly either—(*a*) by British subjects or persons under His Majesty's protection; or (*b*) by a company organized and incorporated under the laws of a part of His Majesty's dominions and having its principal place of business within His Majesty's dominions and which is registered within the Commonwealth or within a State or territory of the Commonwealth and of which all the directors and shareholders are British subjects or persons under His Majesty's protection; or (*c*) by the Government

(1) (1932) 46 C.L.R. 155.

of the Commonwealth or of a State or of a territory of the Commonwealth or of any authority constituted by or under an Act of the Commonwealth or of a State or an ordinance of any such territory." The Minister may grant licences to the personnel of aircraft, who shall be required to pass a medical examination, carried out under the control of the Minister, and produce a certificate of competency issued by the Minister, and so forth. But these regulations or such part or regulation thereof as the Minister directs shall not apply to any aircraft or person to which or to whom the Minister on the recommendation of a department of the Commonwealth directs these regulations or such part or regulation shall not apply.

The convention requires that aircraft must be registered in the State in which their owners are nationals and in that State alone. Their nationality is that of the State in which they are registered, and they must bear their nationality and registration marks and the name and residence of the owner, when engaged in international navigation (Convention, arts. 5-10; *Oppenheim, International Law*, 4th ed. (1928), vol. I., "Peace," p. 420; *McNair, The Law of the Air* (1932), pp. 133-168). The national character of a person differs greatly in different countries. The "nationals of a State" is not a very precise expression. The British *Nationality and Status of Aliens Act* 1914-1933 prescribes rules which govern the question whether a person is or is not a British subject. But the question here is who may be regarded as a national for the purposes of the air convention (See *Kramer* v. *Attorney-General* (1)). At this point, the French text of the convention, which is equally authentic with the English, lends some assistance: "*Les aeronefs ne seront immatriculés dans un des États contractants que s'ils appartiennent en entier á des ressortissants de cet État.*" "*Ressortissants*," I take it, are persons belonging to or lying under the jurisdiction of a court or a State. Alien residents within British territory are entitled to the protection of and owe obedience to the laws whilst they remain within the territory. They are persons under His Majesty's protection, and owe him temporary allegiance at all events: they are, I should say, "*ressortissants*" within the terms of the French text, and "nationals" within the terms of the English text of the convention. (See *Pitt Cobbett*,

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Leading Cases on International Law, 4th ed. (1922), vol. I., "Peace," pp. 178 et seq.) Consequently, the provision of art. 17 (*a*) of the regulations enabling a certificate of registration in respect of an aircraft to be granted to British subjects and persons under His Majesty's protection is not, in my judgment, repugnant to or inconsistent with the provisions of the convention. Clauses (*b*) and (*c*) of that article are equally within power. (See Convention, arts. 7 and 30.)

It is worthy of observation that the Imperial Parliament, by the *Air Navigation Act* 1920 (10 & 11 Geo. V. c. 80) enacted that His Majesty may make such Orders in Council as appear to him necessary for carrying out the convention, and for giving effect thereto or to any of the provisions thereof, or to any amendment which may be made under art. 34 thereof, and without prejudice to the generality of the power so conferred it was enacted that an Order in Council might make provision for certain specified matters. The Air Navigation Order of 1922 (consolidated in 1923) was made under this power, and provides that an aircraft shall not be registered in the British Islands unless it is owned wholly either (*a*) by British subjects or persons under His Majesty's protection; or (*b*) by a company or corporation registered and having its principal place of business in His Majesty's dominions or in a territory which is under His Majesty's protection, or in respect of which a mandate is being exercised by the Government of any part of His Majesty's dominions, and whereof the chairman and at least two-thirds of the directors are British subjects or persons under His Majesty's protection. Clearly the Imperial authorities have taken much the same view of carrying out the convention as have the Australian authorities; which is impressive, though not of course decisive of the power to make the regulations in question.

There is one important difference between the Australian regulation and the Imperial Order in Council. The regulation (17) provides "unless the Minister otherwise directs," whereas the Order in Council allows no such discretion. But this difference does not, I think, invalidate the regulation. Abuse of the power is not likely, but, likely or not, the possible abuse of a power affords no ground for denying its validity. The convention itself does not prescribe the

means by which the contracting States should give effect to it. Each State is free to adopt its own methods for that purpose, and in case of disagreement relating to the interpretation of the convention, art. 37 of the convention provides for the determination of the disagreement. But the question here is whether the discretionary power given to the Minister is incompatible with carrying out and giving effect to the convention. It enables the Minister to adapt the convention to the various circumstances and conditions of persons owning aircraft. It may be proper to allow some persons under His Majesty's protection, and not proper to allow others, to obtain a certificate of registration. Thus it may be legitimate to grant a certificate of registration to persons who, though aliens, have been long resident in the Commonwealth, and undesirable to grant it to others, who have little or no connection with the Commonwealth though nevertheless under His Majesty's protection. The discretion given to the Minister is not for the purpose of setting aside the convention, but for the purpose of carrying it out and rendering it effective in all circumstances and conditions. It is from this point of view that the power should be regarded, and not from the point of view of some possible but improbable abuse conjured up by unreasonable and destructive critics. The power is, in my judgment, compatible with the convention, and, if exercised bona fide and for the purpose of carrying out international obligations—as must be assumed—gives that flexibility in administration that is desirable and even necessary in relation to an international agreement.

The regulations empowering the Minister to grant licences to the personnel of aircraft are also attacked. They substantially follow the Imperial regulations (See Statutory Rules 1922, Schedule V., and the Consolidated Rules of 1923). But it is argued that they set aside, or enable the Minister to set aside, the minimum qualifications necessary for obtaining certificates as pilots or navigators according to annex E of the convention. On the contrary, in my opinion, the authority given to the Minister enables him to insist upon the international obligations assumed under the convention, and even to supplement those obligations. The argument is really directed to

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the possibility of abuse of the power, but that, as I have said, affords no ground for denying the validity of the regulations. The regulations relating to personnel strike me as a convenient and appropriate means of enforcing the convention, and in no wise incompatible with it.

A meticulous examination of the regulations also disclosed that the units of measurement stated in both the Imperial and the Australian regulations differ from those specified in the convention. But the difference is simply that in the regulations the unit is stated according to the British system, instead of according to the metrical system as in the convention. Thus, the convention prescribes that a flying machine when in the air or manœuvring on land or water under its own power shall carry forward a white light of such a character as to be visible at a distance of at least 8 kilometres, whereas the regulations prescribe 5 miles, which is substantially the equivalent of 8 kilometres. Again, in the rules for air traffic on and in the vicinity of aerodromes (annex D., sec. V.) the convention prescribes that at every aerodrome there shall be a flag hoisted in a prominent position which shall indicate that if an aircraft about to land or leave finds it necessary to make a circuit or partial circuit such circuit shall be left-handed (anti-clockwise) or right-handed (clockwise) according to the colour of the flag; a white flag shall indicate a right-handed circuit, and a red flag shall indicate a left-handed circuit. The Imperial regulations adopt these colours, but the Australian regulations substitute a blue flag for a white one to indicate a right-handed circuit. No doubt there are other differences of much the same character, but I do not find it necessary to enter into a minute examination of these minor details. The substitution in the regulations of the equivalent British unit of measurement for that used in the convention is an appropriate method of expressing its provisions, as that unit would be better understood in British countries than that adopted in the convention. The provisions in the convention as to the colour of flags used in the vicinity of aerodromes are directory in character, as is recognized, I think, in art. 51 of annex D. They are not essential provisions of the convention, and the disregard of a non-essential or directory provision

cannot invalidate the whole regulations, and particularly reg. 6 under which the appellant is charged.

Lastly, I must refer to an argument based upon sec. 2 of the *Air Navigation Act* 1920. The Act was assented to on 2nd December 1920, but sec. 2 provides: "This Act shall commence in relation to the several States and territories on such days as are respectively fixed by proclamation." The Governor-General by a proclamation under his hand and seal fixed Monday, 28th March 1921, as the day upon which the *Air Navigation Act* 1920 should commence in relation to the several States and territories (*Government Gazette* 1921, p. 480). The *Air Navigation Regulations* were made on 11th February 1921, to come into operation forthwith. It is contended that the regulations were made on a day antecedent to the commencement of the Act, and therefore without any legal authority. The form of sec. 2 is probably attributable to the doubts that existed in Australia as to Commonwealth power in respect of air navigation. At a conference of the Premiers of the States in 1920, it was resolved that each of the Parliaments of the States should refer to the Parliament of the Commonwealth the matter of the control of air navigation, subject to the retention by each of the States of certain rights and powers specified in the resolutions. Some States passed Acts in this direction and others did not. (See Victoria, 1928, No. 3658, South Australia, 1921, No. 1469, Queensland, 12 Geo. V. No. 30, Tasmania, 11 Geo. V. No. 42.) It was desirable that the operation of the *Air Navigation Act* 1920 in the various States should coincide with the passing of such legislation—hence sec. 2. But the commencement of the *Air Navigation Act* did not depend on the passing of these Acts. It commenced on the day on which it received Royal assent, but its provisions were not to operate in the several States and territories until "such days as are respectively fixed by proclamation." In my opinion, therefore, the regulations were lawfully made in February 1921, but their provisions did not commence to operate in the several States until the day fixed, namely, 28th March 1921. See also *Acts Interpretation Act* 1901-1934, sec. 4.

The result, in my judgment, is that the order nisi for a prohibition should be discharged.

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DIXON J. In this appeal, which is brought under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1933 from a court of summary jurisdiction exercising Federal jurisdiction, the appellant complains of a conviction under clause 6 (*c*) of the *Air Navigation Regulations*, which prohibits the flight of an aircraft within the limits of the Commonwealth and the territorial waters adjacent thereto and the territories unless the personnel of the aircraft is licensed in the prescribed manner.

The appellant, a pilot whose licence had been suspended, persisted in making a flight during the period of suspension. The flight was confined to the State of New South Wales and he contends that no power of the Commonwealth Parliament enables it to authorize a regulation which forbids such a flight. On this ground he says that the regulation under which he was convicted must either be construed as not including such a case or be held void.

The *Air Navigation Regulations* were made by the Governor-General in Council as in the exercise of the power which sec. 4 of the *Air Navigation Act* 1920 is expressed to confer. This section provides that he may make regulations for the purpose of carrying out and giving effect to the convention for the regulation of aerial navigation signed in Paris on the thirteenth day of October 1919 and the provisions of any amendment of the convention made under article thirty-four thereof and for the purpose of providing for the control of air navigation in the Commonwealth and in the territories.

The convention to which the statute refers was drawn up at the Peace Conference and on the date given it was signed on behalf of fifteen powers including Great Britain and the Dominions. It is apparently the convention referred to in art. 319 of the Treaty of Versailles, which imposes upon Germany the obligation of conforming to the rules comprised in it. The convention contains very elaborate provisions for the regulation of air navigation. The attempt by this means to obtain uniformity among nations in the rules governing the use of the air is based upon the adoption by the parties to the convention of certain jurisdictional principles. The first principle formulated is that each Power has complete and

exclusive sovereignty over the air space above its territory and the territorial waters adjacent thereto. Next, in peace time, freedom of innocent passage is to be accorded aircraft of the parties to the convention, subject to their observance of the conditions laid down by the convention. Every State must apply its regulations without distinction. As a general rule, no State is to permit the flight above its territory of an aircraft belonging to a nationality not party to the convention. No aircraft is to be registered in a country unless it belongs wholly to nationals of that country. No aircraft can be registered in more than one country. Every aircraft engaging in international navigation shall bear nationality and registration marks and the name and residence of the owner shown in a prescribed manner. It must have a certificate of registration, of airworthiness, and of competence and licences for each member of the operating crew, and a special licence for any wireless operators. Wireless must be carried by any aircraft used in public transport and capable of carrying ten or more persons. Every aircraft of a country, party to the convention, has the right to cross the air space of any other such country without landing but it must follow the routes fixed by the latter country. These provisions are subject to special conditions and reservations. The convention then carries out in detail its policy of prescribing uniform regulations for the conduct of flying. Annexes deal elaborately with the marking of aircraft, airworthiness, log books, lights and signals, the rules of the air and rules for traffic on and near aerodromes. Another annex is devoted to a close regulation of the grant of certificates to pilots, navigators and engineers. An International Air Commission is set up and placed under the direction of the League of Nations. It is empowered to amend the provisions of any annex to the convention. It may also receive and make proposals for amendments to the convention. It has besides many less important duties arising out of the registration of aircraft, the collection and communication of information and the like.

Upon the text of the convention it appears to me to be open to doubt whether it obliges the contracting governments to prevent flying within their territories otherwise than in accordance with its

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requirements if the aircraft are not engaged in international navigation. But the convention was before the Privy Council in *In re Regulation and Control of Aeronautics in Canada* (1), and upon the decision of that appeal such an interpretation of this convention would have had a bearing. In stating some of the chief obligations imposed by the convention Lord *Sankey* L.C. included the following :— " 1. The obligation not to permit (except by special and temporary authorization or under a special convention) the flight above its territory of an aircraft which does not possess the nationality of a contracting State, and indirectly, registration being the only means by which nationality is acquired, the obligation to require registration of any aircraft owned by a Canadian national and intended to be flown. . . . 5. The obligation to require the commanding officer, pilots, engineers and other members of the operating crew of every aircraft to be provided, in accordance with the conditions laid down in annex E, with certificates of competency and licences issued by the State whose nationality the aircraft possesses, i.e., in the case of Canadian aircraft by the Dominion " (2).

These passages, particularly when read with the fourth question submitted, to which their Lordships gave an affirmative answer, seem to establish that the convention requires the signatory nations to regulate according to its provisions all aircraft and air navigation, domestic as well as international.

The first question which arises is whether, having regard to the convention, the power conferred upon the Commonwealth Parliament by sec. 51 (xxix.) to make laws with respect to external affairs enables it to authorize the regulation forbidding a flight within a State unless the personnel be licensed. It is not easy to interpret and apply the power to make laws with respect to external affairs. Although it may enable the Parliament to make laws operating outside the limits of the Commonwealth, it cannot be supposed that its primary purpose was to regulate conduct occurring abroad. Prima facie, legislation confers rights and imposes duties to be enjoyed and fulfilled within the territory. In the case of such a power as that at present under consideration the presumption

(1) (1932) A.C. 54.

(2) (1932) A.C., at pp. 74, 75.

cannot confine the legislation to the Commonwealth in the same way as in the case of other powers. But the presumption cannot be reversed so that the power prima facie does not affect conduct within the Commonwealth and only that outside. I think it is evident that its purpose was to authorize the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external relations of the Commonwealth. The Commonwealth might under this power legislate to ensure that its citizens did nothing inside the Commonwealth preparatory to or in aid of some action outside the Commonwealth which might be considered a violation of international comity, as, for instance, a failure on the part of private persons to behave as subjects of a neutral power during a war between foreign countries. If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs. The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example. We are here concerned with a convention adopted under the full authority of the Crown and internationally binding in relation to this country. The matters with which it deals include the international recognition of sovereignty over the air and the relations of governments to the aircraft of other governments. It is, perhaps, wise to leave less formal arrangements with other countries and international agreements relating only to matters otherwise only of internal concern until questions arise under them. For, in my opinion, air navigation cannot be regarded as of this description. Even in the case of Australia, distant as she is from other countries, the aeroplane defies territorial boundaries.

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In international law it was a question how far sovereignty extends upwards, and, in 1919, it was one of practical importance in need of settlement by a convention among the nations. In conceding, as was done by the convention in question, that a country was entitled to control the use of the air above it for navigation by aeroplanes and airships, the nations raised problems concerning the terms and conditions upon which each would allow nationals of the others to enter into the air space it controlled. All these matters constituted international affairs. Elaborate and minute as the regulation of aeronautics agreed to by the convention undoubtedly is, it was in my opinion all relevant to the solution of these questions.

The contention made on behalf of the intervenant that so much of the convention as did or might be considered to control the domestic use of aircraft went beyond the scope of external affairs adopts too narrow and rigid a view of the matter. The regulation of air navigation may well be regarded as an entire subject no part of which could be considered as necessarily of no concern to other countries. In my opinion legislation to enforce and carry out the convention falls within the power to make laws with respect to external affairs. I, therefore, think that so much of sec. 4 of the *Air Navigation Act* 1920 as empowers the Governor-General to make regulations for carrying out and giving effect to the convention is valid.

The concluding words of sec. 4 purport to enable the Governor-General to make regulations for the purpose of providing for the control of air navigation in the Commonwealth. This part of the section is not expressed as in any way relating to trade and commerce with other countries and among the States. It refers to air navigation as an entire subject; it contains no indication of any intention on the part of the legislature to deal with transportation by air as trade and commerce with other countries and among the States. It makes no distinction between air carriage of goods and passengers and all the matters preparatory to flying by air, incidental thereto or consequent thereon, which are comprehended under the expression "air navigation." It makes no distinction between flying across and flying within the boundaries of a State.

In reference to air navigation, as to broadcasting, the suggestion has

been made that its control does not admit of the distinction between what is inter-State and what is confined to one State; that to regulate inter-State flying effectively air navigation must be controlled as a whole. The inconvenience and difficulty of maintaining the distinction needs no demonstration. But the legislative power is to make laws with respect to inter-State commerce, and, under the power, the domestic commerce of a State can be affected only to the extent necessary to make effectual its exercise in relation to commerce among the States.

In the United States it seems to be regarded as a sufficient ground for including commerce confined to a State in a Federal regulation of inter-State commerce if it appears that the measures taken in reference to the latter would not achieve their purpose unless the former were also controlled. The application of the principle depends on the extent to which the desired regulation of inter-State commerce would be prejudiced if the domestic commerce of the States remained free. In *Schechter Poultry Corporation* v. *United States* (1) *Hughes* C.J. said :— "In determining how far the Federal Government may go in controlling intra-State transactions upon the ground that they 'affect' inter-State commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle." *Cardozo* J. (2) said this clear distinction is a matter of degree. Is the relation of intra-State transactions to inter-State commerce such that for the protection of the latter there is need to regulate the former? He says the law cannot be indifferent to considerations of degree without an expansion of the commerce clause that would absorb or imperil the reserved powers of the States. "What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain." (*Carter* v. *Carter Coal Co.* (3)). "But the authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and

(1) (1935) 295 U.S., at p. 546; 79 Law. Ed., at pp. 1588, 1589.
(2) (1935) 295 U.S., at p. 554; 79 Law. Ed., at p. 1593.
(3) (1936) 80 Law. Ed. (U.S.) (Advance Opinions) 749.

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the internal concerns of a State" (per *Hughes* C.J., *Schechter Poultry Corporation* v. *United States* (1)).

No one doubts that, like every other legislative power expressly conferred, the power to make laws with respect to trade and commerce with other countries and among the States carries with it legislative authority over whatever is incidental to the subject matter to which the power is addressed. Everything that is incidental to the main purpose of a power is contained within the grant. But I think it would be a matter of regret if the application of this principle to sec. 51 (i.) of the Commonwealth Constitution led to the adoption of so indefinite a standard of validity as that enunciated in these passages. The express limitation of the subject matter of the power to commerce with other countries and among the States compels a distinction however artificial it may appear and whatever interdependence may be discovered between the branches into which the Constitution divides trade and commerce. This express limitation must be maintained no less steadily in determining what is incidental to the power than in defining its main purpose. But, in any case, the second limb of sec. 4 of the *Air Navigation Act* 1920 does not appear to me to be based at all on the commerce power. "Air navigation" is an indefinite expression and might be used to describe transport by air. But its association in the Act with the convention for the regulation of aerial navigation shows that it is intended to cover a much wider field. The legislature has not addressed itself to the use of aircraft as instruments of inter-State commerce and then, in order to ensure the effectiveness of the regulations adopted for that purpose, gone on to take or authorize consequential measures in relation to aircraft not so used. The second limb of the section might have been capable of support if it had been expressly confined to inter-State air navigation. Possibly it may be proper to read it as if it were so restricted in view of sec. 15A of the *Acts Interpretation Act* 1901-1932. But, even so, the regulations in their natural meaning would not be authorized by the limb of sec. 4 in question and, if restricted to navigation between the States, the regulations would not apply to the present case.

(1) (1935) 295 U.S., at p. 550; 79 Law. Ed., at p. 1591.

The case was argued before the decision of the Privy Council in *James* v. *The Commonwealth* (1) and the question how sec. 92 might affect the regulations was not discussed. The earlier portion of sec. 4 appears to me to be valid and to require no restrictive construction.

The question remains whether, apart from sec. 92, the regulations are justified by this portion. To be so, they must be reasonably incidental to carrying out and giving effect to the convention. Now the whole basis of the convention is that each contracting State shall register the aircraft of its own nationals, accord freedom of innocent passage to the aircraft of the other contracting States and deny it to aircraft which do not possess the nationality of a contracting State (arts. 2 and 5). Art. 7 provides that no aircraft shall be entered in the register of one of the contracting States unless it belongs wholly to nationals of such State.

The *Air Navigation Regulations* appear to me to run counter to these provisions. They contain no prohibition of aircraft which do not possess the nationality of a contracting State. The result of the second proviso to reg. 5 is that if a foreign aircraft belongs to any country which issues certificates, licences and log books substantially the same as those of the Commonwealth, it may land and continue its flight. Australian registration is not restricted to persons having any special connection with Australia by birth, domicil, residence and otherwise, although under art. 40 Australia is a distinct State for the purpose of the convention. Australian registration is not restricted even to British nationals. Clause 17 (*a*) extends it to "persons under His Majesty's protection." This includes alien friends resident in any British territory. "The subject of a State at peace with His Majesty, while permitted to reside in this country, is under the King's protection and allegiance" (per Viscount *Finlay*, *Johnstone* v. *Pedlar* (2)). No doubt it is for a State by its nationality laws to define what are its nationals. But the convention requires that only those who come within the definition it adopts shall be registered by a State party to the convention. The State cannot define nationals for general purposes and then for the purpose of registering aircraft disregard its own

(1) (1936) A.C. 578; 55 C.L.R. 1. (2) (1921) 2 A.C. 262, at p. 273.

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criteria of nationality. As between the parts of the British Empire Australian law does not define what British subjects are to be considered Australian nationals. Art. 40 of the convention appears to regard British subjects who are connected with Australia, whether by domicil, residence, or in some other manner, as Australian nationals. The nature of the connection presupposed is uncertain and vague and to reduce it to definition may be considered a step reasonably incidental to carrying out the convention. But this has not been done. The relation of Australia to the owners registered has been disregarded and they need not even be British subjects. Then again the requirements are not of uniform application to aircraft. For the Minister may direct that they shall not apply to any aircraft or person. The regulations depart also in many less important respects from the convention. It happens that at the point which directly concerns this case there is a failure to pursue the convention. A comparison of regs. 31 and 32 with annex E of the convention will show how far the requirements laid down by the regulations for ascertaining the fitness of pilots and navigators depart from those contained in the annex. There is much reason to suppose that they were not drawn for the sole purpose of carrying them into effect. At the time when the Act was passed, it was expected that States would proceed under pl. xxxvii. of sec. 51 of the Constitution (See Report of Royal Commission on the Constitution 1929, p. 183). However this may be, I think the basal principle of the regulations contains so important a departure from the requirements of the convention that they cannot be supported under so much of the Act as can be referred to the power to make laws with respect to external affairs. It is apparent that the nature of this power necessitates a faithful pursuit of the purpose, namely, a carrying out of the external obligation, before it can support the imposition upon citizens of duties and disabilities which otherwise would be outside the power of the Commonwealth. No doubt the power includes the doing of anything reasonably incidental to the execution of the purpose. But wide departure from the purpose is not permissible, because under colour of carrying out an external obligation the Commonwealth cannot undertake the general regulation of the subject matter to which it

relates. Having regard to the nature of this departure in the present regulations, sec. 9A of the *Acts Interpretation Act* 1904-1932 can, in my opinion, have no application.

This view makes it unnecessary to consider the point made against their validity because of the date at which they were promulgated.

In my opinion the conviction should be quashed.

EVATT AND MCTIERNAN JJ. The appellant was convicted in respect of an alleged breach of clause 6 of the Commonwealth *Air Navigation Regulations*. In support of his appeal he challenges the validity of sec. 4 of the *Air Navigation Act* 1920. He also contends that, if sec. 4 is valid in part, the *Air Navigation Regulations* are *ultra vires* that portion of the section which is valid.

Sec. 4 purports to give the Governor-General power to make regulations for three distinct purposes. The first purpose is the "carrying out and giving effect" to the convention for the regulation of aerial navigation signed at Paris on October 13th, 1919, or any amendment of such convention (Cmd. 670). The second purpose is the "providing for the control of air navigation in the Commonwealth." The third purpose is the "providing for the control of air navigation in the territories."

Under sec. 122 of the Commonwealth Constitution, the Parliament of the Commonwealth possesses a general authority to make laws in respect of its territories. Accordingly the third purpose specified in sec. 4 is not outside the lawful functions of the Commonwealth Parliament. But the Constitution has not granted to the Parliament any general authority to legislate in respect of transport by land, sea, or air within the total area of the Commonwealth. Accordingly the attempt in sec. 4 to assume such general control over air navigation throughout the Commonwealth, being quite unauthorized by any provision of the Constitution, reveals itself immediately as a mere usurpation of the legislative powers of the States.

It follows that it is impossible for sec. 4 of the Act to operate according to its original tenor therefore resort is had to sec. 15A of the *Acts Interpretation Act* 1901-1934, which provides that all

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Commonwealth legislation shall be read subject to the Constitution, the intent being that if part only of a Commonwealth enactment is beyond power, the residue of the law shall not, on that account, be deemed invalid, but shall be construed so as to bring it within power. But it is not always possible to apply the provisions of sec. 15A and save the " residue " of an enactment after part of it has to be deemed invalid (*Australian Railways Union* v. *Victorian Railways Commissioners* (1)). If it is sought by virtue of sec. 15A to preserve some only of a number of provisions which are found to be interrelated in one legislative scheme, such preservation might easily result in something differing in essentials from the one legislative scheme. On the other hand, there are occasions when sec. 15A may properly be applied, as, for instance, in relation to words which, merely because they describe too widely certain classes of persons, places or things, extend beyond the limits of Commonwealth power, but which are readily capable of being " read down " so as not to trespass beyond such limits (*Huddart Parker Ltd.* v. *The Commonwealth* (2)).

The difficulty which sometimes attends the attempt to apply sec. 15A of the *Acts Interpretation Act* is illustrated by mentioning the argument, advanced on behalf of the Commonwealth on the present appeal, that, inasmuch as sec. 51 (i.) of the Constitution enables the Commonwealth to regulate those portions of transport which are bound up with trade and commerce, both inter-State and overseas (*Huddart Parker Ltd.* v. *The Commonwealth* (2); *R.* v. *Vizzard Ex parte Hill* (3); *James* v. *The Commonwealth* (4)), the second purpose specified in sec. 4 of the *Air Navigation Act* may be construed as though it had been confined to " the control of air navigation so far as air navigation is relevant to trade and commerce either inter-State or overseas." In our opinion sec. 15A cannot be applied so as to perform this feat which is in essence legislative not judicial. The object of this portion of sec. 4, as it was passed, was clearly to give control to the Commonwealth Executive over air navigation regarding such navigation as a unit, constituting one general system of administration of civil aviation including the regulation of aircraft, of conditions of flying and of personnel. There is no reason to

(1) (1930) 44 C.L.R. 319.
(2) (1931) 44 C.L.R. 492.
(3) (1933) 50 C.L.R. 30.
(4) (1936) A.C. 578; 55 C.L.R. 1.

suppose that the Commonwealth Parliament was ever addressing itself to the very important but very different subject matter specified in sec. 51 (i.) of the Constitution. In relation to such subject matter the Commonwealth Parliament could only lawfully regulate aircraft and personnel so far as they would be engaged in or sufficiently connected with trade or communication inter-State or overseas, the State Parliament being still left with a very large and important residue of authority.

It is impossible to accept the theory of the Commonwealth that its power to legislate with respect to inter-State trade necessarily extends to all aircraft engaged solely in intra-State trade, by reason of the possible " commingling," in air routes and air ports, of the aircraft proceeding intra-State with the aircraft proceeding inter-State. No doubt, by virtue of sec. 109 of the Constitution, State laws or regulations of transport may be invalidated by valid Commonwealth laws or regulations dealing with the subject matter of transport. Moreover, the rejection of the " commingling " theory does not deny that there may be occasions when parts of intra-State aviation will be seen to occupy so direct and proximate a relationship to inter-State aviation that the agents and instruments of the former will be drawn within the ambit of the Federal power, for otherwise the particular Commonwealth regulation of inter-State commerce would be entirely frustrated and nullified. But this does not mean that the Commonwealth Parliament is legislating with respect to intra-State trade but only that legislation with respect to inter-State trade may operate in respect of or against persons, matters and things which, though not themselves directly involved in inter-State trade, are brought into a sufficiently proximate relationship with such trade.

In the circumstances it is not possible for the court to " read down " in the manner suggested the second purpose specified in sec. 4 of the *Air Navigation Act*.

On the other hand, the form of sec. 4 of the *Air Navigation Act* lessens the difficulty usually involved in rescuing valid from invalid provisions. For it has been framed so as to confer on the Executive Government a power to regulate several distinct subject matters. In such a case, the fact that one of the subject matters, or a portion

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thereof, may not lawfully be regulated by the Commonwealth cannot be allowed to prevent the operation of the power to regulate the separate and distinct subject matter which *ex hypothesi* lies within the field of Commonwealth legislative jurisdiction. In the present case, such a consideration, as well as the general rule of construction laid down in sec. 15A, requires the conclusion that, if there is constitutional power in the Commonwealth Parliament to authorize the Executive Government to make regulations for the purpose specified first or third in sec. 4, such an authorization must be deemed valid, despite the obvious invalidity of the attempt to authorize regulations for the general control of air navigation throughout the Commonwealth.

The question which next arises is of outstanding importance not only in this case but generally. It is whether the Parliament has power to provide for the carrying out, and giving effect to, the Aerial Navigation Convention of 1919 and its amendments. It is necessary for the Commonwealth, which affirms the existence of the power, to point to an affirmative grant in the Constitution, and the only relevant power is that to legislate "with respect to . . . external affairs" (sec. 51 (xxix.)).

The question is not concluded by any of the decisions of this court. In *Jolley* v. *Mainka* (1), *Evatt* J. made an analysis of the constitutional basis of the authority of the Commonwealth Parliament over the Mandated Territory of New Guinea and held that the laws passed in respect of the mandated territory were in respect of "external affairs." But the judgment emphasized that no competition of constitutional powers between Commonwealth and State was involved, because the mandated territory was outside the territorial limits of Commonwealth and State alike, so that of necessity the legislation of the territory was in respect of matters geographically external to the Commonwealth.

On the other hand, the judgment in question also stressed the importance of the fact that the legislation put into force in the territory was directed solely towards the performance of Australia's international obligations in its capacity as mandatory of the League of Nations, it being for the fulfilment of such purpose, and for such

(1) (1933) 49 C.L.R. 242.

purpose alone, that powers of administration and control of the mandated territory were assumed and exercised by the Commonwealth Parliament.

The main argument advanced in denial of the competence of the Commonwealth Parliament to authorize the making of regulations to secure the execution of the Aerial Navigation Convention, was that a perusal of the convention shows that there is nothing " outside " Australia, but only matters, things and persons " within " Australia, which are to be regulated by the Governor-General, and that the inevitable result is to invade the domestic jurisdiction of the States. A very similar argument was advanced in Canada by the late *J. S. Ewart* in criticism of part of the judgment of the Privy Council in the *Radio Communication Case* (1). *Ewart* said :— " Nobody imagined that the Dominion Government had any such authority " (i.e., to trench upon provincial jurisdiction). " But the Judicial Committee has held that by agreeing with a foreign State that the Dominion Parliament will trench, the trenching can be done " (*J. S. Ewart, Canadian Bar Review* 1932, pp. 301, 302).

At a much earlier point of time Professor *Harrison Moore* argued that the existence of an international convention did not, of itself, bring the subject matter of the convention within the Commonwealth's legislative jurisdiction over " external affairs." He said :—" The power to give effect to international arrangements must, it would seem, be limited to matters which *in se* concern external relations ; a matter in itself purely domestic, and therefore within the exclusive power of the States, cannot be drawn within the range of Federal power merely because some arrangement has been made for uniform national action. Thus, there is at the present time an international movement for the amelioration of labour conditions, and the International Union has arrived at some agreements for uniformity of legislation. It is submitted that the Commonwealth could not by adhering to an international agreement for the regulation of factories and workshops, proceed to legislate upon that subject in supersession of the laws of the States " (*Harrison Moore : Commonwealth of Australia*, 2nd ed. (1910), pp. 461, 462).

(1) (1932) A.C. 304.

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It will be noticed that *Harrison Moore's* comment was made at a time when it was not fully appreciated that the Commonwealth's powers under secs. 51 and 52 of the Constitution must first be recognized and interpreted *before* it is possible to determine the extent of " the exclusive power of the States." In this respect the Commonwealth Constitution differs essentially from that of Canada (*Huddart Parker Ltd.* v. *The Commonwealth* (1)). That this is the proper method of approach to the construction of the Constitution was recognized in portion of the judgment in the much discussed *Engineers' Case* (2). Accordingly it is wrong to prejudice the examination of the content of the subject " external affairs " by assuming or asserting *in advance* that there are certain matters such as conditions and terms of employment which are necessarily excluded from Commonwealth legislation in exercise of the power.

The second point made by *Harrison Moore* is that there exists, and somehow it is possible to write down, a list of matters " which *in se* concern external relations." This point of view, which modern developments in the field of international relations render it increasingly difficult to maintain, had been suggested in some United States decisions. Thus *Field* J. in *Geofroy* v. *Riggs* (3) said of the United States treaty power :—

" The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, and those arising from the nature of the Government itself and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted *touching any matter which is properly the subject of negotiation with a foreign country.*" (Italics are ours).

But it is a consequence of the closer connection between the nations of the world (which has been partly brought about by the

(1) (1931) 44 C.L.R., at pp. 526-528.
(2) (1920) 28 C.L.R. 129.
(3) (1890) 133 U.S. 258, at p. 267; 33 Law. Ed. 642, at p. 645.

modern revolutions in communication) and of the recognition by the nations of a common interest in many matters affecting the social welfare of their peoples and of the necessity of co-operation among them in dealing with such matters, that it is no longer possible to assert that there is any subject matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute or international agreement. By way of illustration, let us note that Part XIII. of the Treaty of Versailles declares that universal peace can be established only if it is based upon social justice and that labour unrest caused by unsatisfactory conditions of labour imperils the peace of the world. In face of these declarations and the setting up (under the treaty) of the International Labour Organization it must now be recognized that the maintenance or improvement of conditions of labour can (as it does) form a proper subject of international agreement, for differences in labour standards may increase the friction between nations which arises even when trade competition takes place under conditions of reasonable equality.

In relation to the Commonwealth Constitution very much the same argument as was presented by *Harrison Moore* in 1910 in relation to the "external affairs" power is repeated by those who contend that under art. 405 of the Treaty of Versailles, Australia is "a federal State, the power of which to enter into conventions on labour matters is subject to limitations." It is true that such subject matters as air navigation, the manufacture of munitions, the suppression of the drug traffic and standard hours of work in industry are not made express or separate subject matters of Commonwealth legislative power. But there is, in our view, an undoubted capacity in His Majesty to enter into international conventions dealing with any of these subject matters and necessarily binding upon and in respect of the Commonwealth. In truth, the King's power to enter into international conventions cannot be limited in advance of the international situations which may from time to time arise. And in our view the fact of an international convention having been duly made about a subject brings that subject within the field of international relations so far as such subject is dealt with by the agreement. Accordingly (to pursue the illustration) Australia is

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not "a federal State the power of which to enter into conventions on labour matters is subject to limitations." A contrary view has apparently governed the practice of the Commonwealth authorities in relation to the ratification of the draft conventions of the International Labour Office. In our opinion such view is wrong. Our opinion to that effect is in substantial accord with the views of the following publicists: *C. W. Jenks* (*Journal of Comparative Legislation*, November 1934, February 1935); Professor *Manley O. Hudson* (*International Conciliation* 1935, at pp. 129, 130); *J. G. Starke*, *Australia and the Constitution of the International Labour Organization* (*International Labour Review*, November 1935); Professor *K. H. Bailey*, vol. 1, Proceedings A.N.Z.S. 1 Law.

The following quotation from Professor *Hudson's* article may be treated as fairly expository of the constitutional position in Australia also:—

"Hence, federal legislation to implement a treaty may be constitutional even though, independently of the treaty, federal legislation as to the same subject matter would be unconstitutional; this is a consequence of the position of treaties in our national law. There may be a general limitation on the treaty-making power which would prevent its exercise in such a way as to change the nature of the government, but there can be no general limitation that treaties may deal only with those matters as to which general legislative power has been delegated to the Federal Government. American participation in recent attempts to draft a treaty relating to the manufacture of arms is now clearly based upon this principle, and the United States has recently become a party to the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs of July 13th, 1931, which limits the manufacture of drugs within the States. It should be clear, therefore, that the power of the United States to enter into such labour conventions as have been adopted by the International Labour Conference to date, is not subject to any special limitations" (*International Conciliation* 1934, p. 130).

In our opinion, the King's Executive Government of the Commonwealth had power to enter into the Aerial Navigation Convention. As the Privy Council through Viscount *Dunedin* said in the *Radio Communication Case*, "This idea of Canada as a Dominion being

bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada *vis-à-vis* to the mother country Great Britain, which is found in these later days expressed in the *Statute of Westminster*" (1).

Fortunately there is to-day an almost universal consensus of opinion amongst the leading exponents of constitutional and international law that, with whatever limitations the status of the Commonwealth of Australia in international law may still be hedged, its Executive Government was possessed of sufficient authority to become a party to, and be bound by, the Treaty of Versailles, 1919, in pursuance of which both the mandates system and the International Labour Organization were set up. Professor *Keith* (*Wheaton's International Law*, 6th ed. (1929), vol. I., p. 130) says: "In the League of Nations the Dominions have an international personality, and for League purposes cannot be denied the character of States." See, to the same general effect, *Pearce Higgins* (*Hall's International Law*, 8th ed. (1924), Preface).

At one time possible difficulties were said to flow from the form of the signatures to the Treaty of Versailles, where the Dominions were accorded what Sir *Robert Borden* described as the "doubtful advantage of a double signature" (*Noel Baker: Juridical Status of the British Dominions in International Law*, p. 73). It is to be noted that precisely the same form of signature was adopted in the Aerial Navigation Convention, which bears internal evidence of a close relationship to the post war settlements of Versailles, and to the organization of the new international community known as the League of Nations (see Arts. 41, 42).

But the difficulties arising from such formal matters have long since disappeared. Professor *Noel Baker's* critical analysis of the international status of the self-governing Dominions has been substantiated by the report of the 1929 Conference on the Operation of Dominion Legislation, convened in pursuance of a decision of the Imperial Conference of 1926, and of the Imperial Conference of 1930, as well as by the passing of the *Statute of Westminster*, in 1931. The fundamental declaration of 1926 dealing with the status

(1) (1932) A.C., at p. 312.

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both of Great Britain and the self-governing Dominions included the assertion that they were " equal in status, in no way subordinate one to another in any respect of their domestic or *external affairs* " (Cmd. 2768, sec. 11). It would be a complete derogation from such status if this court were to hold that the Commonwealth was not competent to assume the obligations imposed, and accept the rights conferred, by the convention of 1919 (*Jolley* v. *Mainka* (1)).

The answer to the question of the Executive's power to enter into the convention goes far to answering also the question as to the Commonwealth's legislative power, i.e., whether the law contained in the first part of sec. 4 of the *Air Navigation Act* 1920 is a law with respect to " external affairs." As a reference to the convention shows, it is true that the Commonwealth law relates to acts, matters, things and persons within the Commonwealth. But there is no necessary antithesis between that and a valid law with respect to " external affairs." So long as a Commonwealth enactment truly relates to a matter specified in sec. 51 of the Constitution, it is nothing to the point that it relates also to matters not therein specified. Therefore the real question is—what is comprehended by the expression " external affairs." It is an expression of wide import. It is frequently used to denote the whole series of relationships which may exist between States in times of peace or war. It may also include measures designed to promote friendly relations with all or any of the nations. Its importance is not to be measured by the output of domestic legislation on the topic because this sphere of government is characterized mainly by executive or prerogative action, diplomatic or consular. As has already been noted, the phrase " external affairs " occurs, and is used in the very widest sense, in the Imperial Conference declaration of 1926. It would seem that, in sec. 51 of the Constitution, the phrase " external affairs " was adopted in preference to " foreign affairs," so as to make it clear that the relationship between the Commonwealth and other parts of the British Empire, as well as the relationship between the Commonwealth and foreign countries, was to be comprehended.

Several illustrations may be given. In 1887 Sir *Charles Dilke* used the phrase " external affairs " as inclusive, from the British

(1) (1933) 49 C.L.R., at pp. 281-284.

standpoint, both of foreign and of "colonial affairs" (*Life of Dilke, Gwynn and Tuckwell*, vol. II., p. 244). Sir *Henry Jenkyns* had also ascribed a sufficiently wide meaning to the expression "external affairs" in relation to a colony to include the execution of treaties affecting the colony, though, of course, he regarded the appropriate legislative and executive authority as being vested in the Imperial Parliament (*British Rule and Jurisdiction*, pp. 26-31). In 1902, after a dispute had arisen between the Government of South Australia and the Commonwealth Government in relation to the Dutch vessel the *Vondel*, Mr. Joseph Chamberlain, then Colonial Secretary, ruled that "by the Act (the Constitution) a new State or nation was created, armed with paramount power not only to settle the more important internal affairs relating to the common interest of the united peoples, but also to deal with all political matters arising between them and any other part of the Empire or (through His Majesty's Government) with any foreign power" (Cmd. 1903, No. 1587).

In 1907 after there had arisen a question as to the right of the States to be represented at the Imperial Conference, Mr. Deakin stated:—

"Federation did much more than merely establish a central administrative body. It created an entirely new government provided with legislative and judicial as well as executive powers. The nature of these latter has been the subject of much discussion, but it is now settled that they include the right to act on behalf of Australia as a whole in all matters that relate to the interests of Australians as a united community. Indeed, one of the principal reasons that induced Australians to federate was that as regards all places outside this continent they should speak with one voice, that as the interests of Australians in relation to external affairs were common to all it was desirable to have one spokesman with one set of views instead of as formerly six spokesmen with six possible divergent sets of views" (Cmd. 1907, No. 3340).

In the following year, 1908, the British Government stated authoritatively that "His Majesty's Government are pledged to the view that, so far as the relations of Australia with foreign nations are concerned, the Government of the Commonwealth alone can speak, and that for everything affecting external communities the

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Government of the Commonwealth alone are responsible to the Crown" (*The British Dominions as Mandatories*, p. 25).

A similar reference may be added. At the 1930 Conference at the Hague for the Codification of International Law nearly every State accepted almost without qualification the doctrine attributing exclusive responsibility in the domain of international law to that authority in a federal State which was entrusted with the control of external affairs. For instance, Great Britain's declaration of the position was :—

"Where a State is responsible for the conduct of the foreign relations of another political unit (e.g., the colonies, protectorates or protected States), or where the constitutional arrangements prevailing in a State vest the responsibility for external affairs in a common or central government while vesting the responsibility for other matters in the government of a subordinate unit (e.g., unions of States or federal States), responsibility for the fulfilment of the obligations prescribed by international law rests upon the government conducting the foreign or external affairs of the State. It is with that government alone that foreign States maintain relations. The distribution of powers between itself and the other or subordinate units on whose behalf it is entitled to speak is a domestic matter with which foreign States are not concerned. A government which is the appointed organ for the conduct of the foreign affairs of other units cannot evade responsibility by alleging that constitutionally its powers of control over these units are inadequate to enable it to enforce compliance with international obligations" (*League of Nations Papers*, C. 75, M. 69, 1929 V. p. 205).

Previous expressions of opinion of individual Justices of this court as well as discussions of the subject by learned publicists, justify a broad interpretation of the legislative power in relation to "external affairs" (See *McKelvey* v. *Meagher* (1), per *Barton* J.; *Lefroy*, *Law Quarterly Review*, vol. 15, p. 291; *Jethro Brown*, *Law Quarterly Review*, vol. 16, p. 26; *Roche* v. *Kronheimer* (2), per *Higgins* J.; *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3), per *Evatt* J.).

(1) (1906) 4 C.L.R., at p. 286. (2) (1921) 29 C.L.R., at pp. 338, 339.
(3) (1931) 46 C.L.R., at p. 122.

It would seem clear, therefore, that the legislative power of the Commonwealth over " external affairs " certainly includes the power to execute within the Commonwealth treaties and conventions entered into with foreign powers. The legislative power in sec. 51 is granted " subject to this Constitution " so that such treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained, such, for instance, as secs. 6, 28, 41, 80, 92, 99, 100, 116, or 117. But it is not to be assumed that the legislative power over " external affairs " is limited to the execution of treaties or conventions ; and, to pursue the illustration previously referred to, the Parliament may well be deemed competent to legislate for the carrying out of " recommendations " as well as the " draft international conventions " resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations. The power is a great and important one. Having regard to the statement of the Privy Council in *British Coal Corporation* v. *The King* (1), recently repeated in *James' Case* (2), it would not be in accordance with established canons of construction to attempt to assign precise limits to its content. It is certain that the power includes, but also extends further than, the power assigned to the Parliament of the Dominion of Canada by sec. 132 of the *British North America Act*. Consequently the decisions of the Privy Council both in the *Radio Communication Case* (3) and the *Aeronautics Case* (4) support the validity of the power first specified in sec. 4 of the *Air Navigation Act*, viz., the power conferred upon the Governor-General to carry out and give effect to the air convention. No suggestion has been made that the entry into the convention was merely a device to procure for the Commonwealth an additional domestic jurisdiction and that suggestion could easily be refuted by referring to the setting up under chapter VIII. of the Convention of the Permanent International Commission for Air Navigation.

But it is a necessary corollary of our analysis of the constitutional power of Parliament to secure the performance of an international

(1) (1935) A.C. 500, at p. 518.
(2) (1936) A.C. 578 ; 55 C.L.R. 1.
(3) (1932) A.C. 304.
(4) (1932) A.C. 54.

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convention that the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing. In other words, it must be possible to assert of any law which is, *ex hypothesi*, passed solely in pursuance of this head of the "external affairs" power, that it represents the fulfilment, so far as that is possible in the case of laws operating locally, of all the obligations assumed under the convention. Any departure from such a requirement would be completely destructive of the general scheme of the Commonwealth Constitution, for, as we are assuming for the moment, it is only because, and precisely so far as, the Commonwealth statute or regulations represent the carrying into local operation of the relevant portion of the international convention, that the Commonwealth Parliament or Executive can deal at all with the subject matters of the convention. Doubtless this requirement does not necessarily preclude the exercise of wide powers and discretions by the Parliament or the Executive of the Commonwealth, for the international convention may itself contemplate that such powers and discretions should be exercisable by the appropriate authority of each party to the convention. Everything must depend upon the terms of the convention, and upon the rights and duties it confers and imposes. But the general requirement must be fulfilled or the Commonwealth will be exceeding its lawful domain.

In the present case the requirement discussed is sufficiently carried out by the first part of sec. 4 of the Act: but that part of sec. 4, as well as the constitutional considerations mentioned above, makes it obligatory upon us to examine closely the actual regulations passed by the Governor-General, in order to find out whether or not they are sufficiently stamped with the purpose of carrying out the terms of the convention. In other words, if it appears that the scheme embodied in the regulations cannot fairly be regarded as bearing the stamp of such a purpose, the regulations, in their present form, cannot be *intra vires* the first part of sec. 4, which insists that the regulations shall be made only for the purpose of carrying out, and giving effect to, the convention, and which, because of such insistence, is deemed a valid law with respect to "external affairs."

Before attempting an analysis of the regulations, another matter should be adumbrated. Having regard to the form of the regulation-making power in sec. 4, it is *a priori* improbable that those responsible for the form and content of the present regulations would make any sharp distinction between the three purposes specified in sec. 4 itself. Accordingly, it is likely that regulations deriving from such a source will be found attempting to control aerial navigation in the Commonwealth generally (which Parliament is unable to do) rather than be confining their function to that of performing the international convention (which Parliament is enabled to do).

Here a reference may be made to sec. 9A (*b*) of the *Acts Interpretation Act* 1904-1932, which provides that " where an Act confers upon any authority power to make, grant or issue any instrument (including any rules, regulations or by-laws), then . . . any instrument so made, granted or issued shall be read and construed subject to the Act under which it was made, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power."

This enactment is an analogue of that embodied in sec. 15A of the *Acts Interpretation Act* 1901-1934. But sec. 9A (*b*) rather assumes that a fixed charter of authority is at once discoverable in the Act which authorizes the making of the regulations, and that, to the charter so fixed, may at once be referred any regulation which is challenged as being *ultra vires* the Act, but which is said to be susceptible of a construction which would bring it within power. If the Act contains so fixed a standard of authority, it may often or even usually be possible to construe the challenged regulations so as to bring them within the terms of the statutory charter to make the regulations. But the position is much more complicated where, as in the present case, the Act itself offends against the Constitution by conferring too extensive a power to regulate. *Ex hypothesi*, the court has become seized of the matter *after* the regulations have been made. Yet it is required, first, to " read down " sec. 4 of the Act, so as to confine the Governor-General's power to regulate for the purposes which are *intra vires* the Parliament; and, second, if

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possible, to construe the regulations as having been made in execution only of the purposes which are *intra vires*. The first part of the task has been performed, but its very performance makes it more difficult to perform the second, for that involves the duty, not merely of construing regulations so as to bring them within the bounds of a fixed and known power, but of construing them so as to bring them within the bounds of a power, the limits of which are fixed by the court for the first time, and have not been known or appreciated by the regulation-making authority. In this class of case the improbability of a successful application of sec. 9A (*b*) is enormously increased.

We now proceed to the examination of the regulations for as we have already indicated it is essential to see whether they are impressed with the first purpose specified in sec. 4 of the Act. In the first place we shall deal with the convention in its original form, prior to certain amendments to be mentioned later.

Chapter II. of the convention dealt with the "Nationality of Aircraft." Art. 5 prescribed the general rule that no contracting State should permit the flight over its territory of an aircraft which does not possess the nationality of the State on the register of which it is entered. Art. 7 then prescribed rules as to the condition of registration. In the first place, no aircraft was to be registered by a contracting State unless it belonged wholly to the nationals of such State. In the case of an incorporated company it could be registered as owner only if the company possessed the nationality of the State of registration, or the chairman of the company and at least two-thirds of the directors possessed such nationality.

The provisions in arts. 5, 6 and 7 of the convention linked themselves with other articles. For instance, art. 12 provided that all members of the operating crew of every aircraft should, in accordance with the conditions of annex E, be provided with certificates of competency and licences issued by "the State whose nationality the aircraft possesses." Art. 16 enabled each contracting State to establish reservations and restrictions in favour of its own national aircraft in connection with the carriage of persons and goods for hire between two points on its territory. Art. 17 provided that, where

reservations and restrictions were imposed in accordance with art. 16, the aircraft of the State which established such reservations and restrictions might be subjected to the same reservations and restrictions by any other contracting State. Art. 22 provided that aircraft of the contracting States were to be entitled to the same measures of assistance for landing as national aircraft. Art. 24 provided that every aerodrome in a contracting State which upon payment of charges was open to public use by its national aircraft, should likewise be open to the aircraft of all the contracting States.

These illustrations show that many important provisions of the convention were founded upon the rules governing the nationality and registration of aircraft.

When we turn to the *Air Navigation Regulations* passed by the Governor-General, we find the law as to registration laid down by reg. 17. It provides that, unless the Minister otherwise directs, a certificate of registration shall not be granted to an aircraft unless it is owned wholly by British subjects or persons under His Majesty's protection. In other words, reg. 17 expressly contemplates that a certificate of registration may be granted to aircraft, although owned wholly or in part by persons under His Majesty's protection, a class which, in the Commonwealth of Australia, may include not only alien friends resident here, but also alien enemies so resident. Reg. 17 also contemplates that the Minister may grant a certificate of registration although none of the conditions of ownership set forth in the convention are complied with. It is obvious that reg. 17 not only failed to carry out or give effect to art. 7 of the convention, but was inconsistent with it.

We next turn to art. 13 of the convention. It provided for the recognition by all parties to the convention of certificates of competency, and for licences issued by the State whose nationality the aircraft possesses, " in accordance with the regulations established " by (*inter alia*) annex E. Annex E prescribed the minimum qualifications necessary for obtaining certificates as pilots and navigators. Elaborate rules were laid down as to practical tests, technical examinations, theoretical tests and special requirements. For instance, in the case of the certificate for navigators, both theoretical and practical examinations were to be conducted in astronomy,

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navigation and general knowledge, including knowledge of international and maritime legislation. In the case of pilots, the examination requirements were even more detailed. In the case of medical certificates, it was specially provided in sec. V., reg. 7, that "each contracting State may raise the conditions set forth above, as it deems fit, but these minimal requirements shall be maintained internationally."

How were these provisions given effect to by the Commonwealth Air Regulations? We find in Part V., reg. 29, that the Minister is empowered to grant licences to the personnel of aircraft. By reg. 30 the applicant for a pilot's licence is required to pass a medical examination carried out under the control of the Minister, to produce a certificate of competency issued by the Minister after examination, and also to submit proof of recent "reasonable flying experience on the class of aircraft for which the licence is required or, in default of such proof, to undergo practical tests as to his knowledge of flying." This provision is in conflict with that portion of annex E which dealt with the qualifications necessary for obtaining pilots' certificates. Under the convention, practical tests were mandatory, whereas under the regulation they are not necessarily required at all. Moreover, under reg. 32, which deals with the navigator's licence, neither the medical examination nor the certificate of competency need be based upon the standard which was required by the convention.

Another part of the convention provided that every aeronaut should be subjected to medical re-examination periodically, at least every six months, and that, in case of illness or accident, he was to be re-examined before resuming air duties. All that is done in the Commonwealth regulations is to empower the Minister to require medical examinations as and when he thinks fit.

Art. 25 of the convention provided that each contracting State undertakes that every aircraft flying over the limits of its territory, and every aircraft, wherever it be, carrying its nationality mark, shall comply with the regulations contained in annex D. Annex D prescribes uniform rules as to lights and signals and rules of the air. Parts VIII. and IX. of the regulations deal with this subject matter. Speaking generally, the regulations are based upon the provisions of

annex D, and they give substantial effect to most of the rules contained therein. But, even here, it is to be noted that the language and framework of Parts VIII. and IX. depart frequently from the arrangement and the language of the English text of the convention. The regulations substitute language which is never so clear as, and in some cases conflicts with, the provisions of annex D. By way of illustration, the distances given in the annex are expressed invariably in terms of the metrical system, but those responsible for the Commonwealth regulations have thought it sufficient to venture upon approximations to the prescribed distances, expressing such approximations in our own system of measurement. For instance, the rule as to lights contained in rule 5 (*a*) of sec. 1 of annex D required a flying machine when on the surface of the water, and not under control, to carry lights "not less than two metres apart one over the other"; but reg. 50 substitutes the distance of six feet, which is, of course, less than two metres. A comparison of the measurement references in Parts VIII. and IX. of the Commonwealth regulations shows similar discrepancies. Some of these may be less important than others. But, when the matter is regarded as a whole, it provides cogent evidence that those responsible for the Commonwealth regulations were not so much addressing their minds to the duty or obligation of performing and carrying out the terms of the convention contained in annex D, as adopting the annex merely as a working basis, reserving the right to make any modification or variation which was considered desirable. Such an attitude would be incredibly fatuous except upon the hypothesis that the regulation-making authority considered that it possessed a complete and unrestricted power to make general rules on the subject matter of civil aviation, and that it was not bound to confine its attention to the purpose of carrying out the convention.

In certain respects, this comment appears to understate the position. Sec. III. of annex D of the convention prescribed the rules of the air. Rules 23 and 24 of this part of the convention laid down very important provisions as to the ascertainment of "risk of collision," including the provision that every aircraft which is required by the rules to give way to another to avoid collision, shall keep a safe distance. But neither rule 23 nor 24 is included

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in the rules of the air prescribed by Part IX. of the Commonwealth regulations. Sec. V. of annex D dealt with the rules for air traffic on and in the vicinity of aerodromes. Rule 36 of this section provided for the hoisting at every aerodrome of a flag to indicate to an aircraft about to land or leave, and finding it necessary to make a circuit or partial circuit, whether the circuit should be anti-clockwise or clockwise. In the former case a red flag, and in the latter case a white flag, is required to be used. Reg. 74 of the Commonwealth regulations retains the use of the red flag for the anti-clockwise circuit, but, instead of a white flag, prescribes a blue flag to indicate a right-handed or clockwise circuit. Except upon the hypothesis that the Executive Government was *not* carrying out the convention, this departure from international rule is inexplicable because art. 34 of the convention clearly postulates that annexes A to G of the convention are to be amended only by the international commission for air navigation, and in accordance with the method prescribed in art. 34.

Other instances of a failure to perform the convention may be mentioned. Art. 8 of the convention provided that an aircraft cannot be validly registered in more than one State. There is nothing in the regulations to prevent the registration in the Commonwealth of an aircraft registered in another State. Art. 26 of the convention provided that the carriage by aircraft of explosives and of arms and munitions of war is forbidden in international aviation. There is nothing in the regulations which carries into effect this provision as to prohibited transport. Art. 30 of the convention provided that all State aircraft, other than military customs and police aircraft, shall be treated as private aircraft, and, as such, shall be subject to all the provisions of the Convention. But in reg. 4 of the Commonwealth regulations it is provided that nothing in the regulations is to restrict the right of any State Government in respect of its use for governmental purposes of State aircraft operating within the State, and it is also provided that the Minister may, on the recommendation of any Commonwealth Government Department, direct the regulations, or any part of them, not to apply to any aircraft or person. These provisions are in direct conflict with art. 30 of the convention.

Annex H of the convention laid down important provisions in the nature of customs regulations. Nothing whatever about such a subject is to be discovered in the Commonwealth regulations.

The failure of the regulations to conform to the convention in respect of such subjects as navigator's qualifications and customs, rather suggests that local flights within the boundaries of a State rather than international or even inter-State aviation, was the matter with which the framers of the regulations were chiefly concerned.

Annex A of the convention laid down careful rules as to the form of registration and nationality marks (see annex A, sec. 1 (*a*) and sec. VIII.). But reg. 41 of the Commonwealth regulations enables the registration and nationality marks to be such as the Minister may direct.

Since 1920 the convention has been amended in several important respects. But it is unnecessary to consider the amendment because the amendments to the Commonwealth regulations were never made in reference to or as a consequence of any alterations in the convention. In our opinion the conclusion is inevitable—it is impossible to regard the Commonwealth regulations as being regulations made " for the purpose of carrying out and giving effect " to the convention. There are other important provisions in the convention which obviously require legislation to effectuate and aid enforcement, but the regulations do nothing in the way of providing for such enforcement. On the other hand, there are matters dealt with in the regulations which do not give effect to any terms of the convention.

Under these circumstances all reasonable possibility of applying sec. 9A (*b*) of the *Acts Interpretation Act* 1904-1932 (which provides that regulations are to be read and construed so as not to exceed the power conferred upon the regulation-making authority) is excluded. The present regulations constitute a scheme and carry out a purpose which is different and distinct from the only purpose lawfully committed to the Executive—that of carrying out the convention. The departures from the purpose and scheme permitted of carrying out the convention are so numerous that they evidence a different purpose. It is clear that the Commonwealth authorities not only believed that they possessed a general authority to control civil aviation in the Commonwealth, but, in the regulations, acted upon such belief and produced a scheme carrying out such illegitimate purpose and that alone.

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On the whole case the conclusions to which we have come are that :—

(1) The Commonwealth Parliament has no general control over the subject matter of civil aviation in the Commonwealth.

(2) The Commonwealth has power both to enter into international agreements and to pass legislation to secure the carrying out of such agreements according to their tenor even although the subject matter of the agreement is not otherwise within Commonwealth legislative jurisdiction.

(3) The subject matters of these agreements may properly include such matters as, e.g., suppression of traffic in drugs, control of armament, regulation of labour conditions and control of air navigation.

(4) It is an essential condition of the power to carry out such international agreements that the local legislation should be in conformity with the terms of the agreement.

(5) Sec. 4 of the *Air Navigation Act* is invalid so far as it purports to authorize the Executive to control civil aviation in the Commonwealth, but is valid so far as it authorizes the Executive to carry out within Australia the international air convention.

(6) In their present form, the regulations made by the Commonwealth Executive are invalid because they are not stamped with the purpose of executing the air convention but are stamped with the unauthorized purpose of controlling civil aviation throughout the Commonwealth.

We therefore hold that the regulations in their present form are *ultra vires* the first part of sec. 4 of the *Air Navigation Act* and are void. Even if they could be regarded as having some application to the territories, the present conviction had no relation to the territories and cannot be supported.

The result is that the appeal should be allowed and the conviction quashed.

Order nisi for prohibition made absolute. Conviction quashed.

Solicitor for the applicant, *A. S. Henry*.

Solicitor for the intervenant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitor for the respondents, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.