[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

POOLE AND ANOTHER;

Ex parte HENRY.

[No. 2.]

H. C. of A. 1939.

SYDNEY, *Mar.* 28.

MELBOURNE, *May* 19.

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

Constitutional Law (Cth.)—Aerial navigation—International Convention—Control of civil aviation throughout Commonwealth—Statute—Regulations—Conformity with Convention—Validity—Air Navigation Act 1920-1936 (*No.* 50 *of* 1920—*No.* 93 *of* 1936), *sec.* 4—*Air Navigation Regulations* (*S.R.* 1937 *No.* 81), *First Schedule, r.* 51 (1)—*Acts Interpretation Act* 1901-1937 (*No.* 2 *of* 1901—*No.* 10 *of* 1937), *sec.* 46 (*b*).

The *Air Navigation Act* 1920-1936 enables the Governor-General to make regulations for the purpose of carrying out and giving effect to the Convention for the Regulation of Air Navigation signed in Paris on 13th October 1919 and for the purposes of providing for the control of air navigation, *inter alia*, in relation to trade and commerce with other countries and among the States. Rule 51 (1) of the First Schedule to the *Air Navigation Regulations* 1937, made in pursuance of the *Air Navigation Act*, provides: "An aerodyne shall not, except when departing or landing, fly over an aerodrome at a lower height than 2,300 feet." An "aerodrome" includes "the landing area, neutral zone, and building area." The Convention provides, by clause 39: "Subject to any special local regulation which may exist: (*a*) Flight over a landing area at a lower height than 700 metres is prohibited, save in the case of a departure or landing." The expression "landing area" as used in the Convention means that part of an aerodrome used for the departures and landings of aircraft.

Held, by *Rich, Starke, Evatt* and *McTiernan* JJ. (*Latham* C.J. dissenting) that rule 51 (1) of the *Air Navigation Regulations* was, notwithstanding that it used the word "aerodrome" whereas clause 39 of the Convention employed the expression "landing area," a valid regulation for the purpose of carrying out and giving effect to the Convention; and by *Dixon* J. (*Latham* C.J. and *Evatt* J.

contra) that, construed pursuant to sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937, rule 51 (1) validly applied to aerodromes used for air navigation with other countries and among the States.

The effect of sec. 15A and sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937 considered.

PROHIBITION.

Upon an information laid by Alfred Alderson Poole, the senior control officer at Mascot aerodrome, Henry Goya Henry was charged at Sydney before a Court of Petty Sessions that at Mascot near Sydney in the State of New South Wales within Australian territory, an aerodyne of which he was "the pilot did fly in contravention of the *Air Navigation Regulations* made under the *Air Navigation Act* 1920-1936 in that at about 12.10 p.m. on 13th April 1938 the said aerodyne did other than when departing or landing fly over the aerodrome known as the Mascot aerodrome at a lower height than 2,300 feet."

The relevant regulation was rule 51 (1) of the First Schedule to the *Air Navigation Regulations* (Statutory Rule No. 81 of 1937). This rule provides: "An aerodyne shall not, except when departing or landing, fly over an aerodrome at a lower height than 2,300 feet." "Aerodrome" is defined in the regulations to include "the landing area, neutral zone and building area" included within any defined ground used for the landing or departure of aircraft.

The magistrate overruled a contention made on behalf of the defendant that rule 51 (1) was not authorized by the *Air Navigation Act* 1920-1936.

Sec. 4 of that Act empowers 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 the provisions of any amendment thereof, and for the purpose of providing for the control of air navigation (*a*) in relation to trade and commerce with other countries and among the States; and (*b*) within any territory of the Commonwealth.

Rule 39 in sec. V. in annex D to the Convention provides: "Subject to any special local regulations which may exist: (*a*) flight over a landing area at a lower height than 700 metres is prohibited for aerodynes, save in the case of a departure or landing." The term

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"landing area" is defined for the purpose of annex D and other annexes as follows: "The expression 'landing area' shall mean the part of an aerodrome reserved for departures and landings of aircraft." Other relevant provisions of the Convention, the *Air Navigation Act* 1920-1936 and the *Air Navigation Regulations* are set forth in the judgments hereunder.

The flight upon which the defendant had been engaged did not extend beyond a short distance from the Mascot aerodrome and was wholly within the boundaries of the State of New South Wales.

The magistrate, who did not accept a submission made on behalf of the defendant that the flying complained of was due to unavoidable cause, found the facts alleged in the information to be proved and convicted the defendant.

Rich 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 upon the grounds, *inter alia*, (i) that rule 51 (1) under which the defendant was convicted was *ultra vires* and did not apply to him; (ii) that the regulations were ineffective within the State of New South Wales; and (iii) that on the evidence the defendant was wrongly convicted, and the matter came on for hearing before the Full Court of the High Court.

Louat (with him *Storey*), for the applicant. Rule 51 (1) of the First Schedule to the *Air Navigation Regulations* is *ultra vires* because it goes beyond the authority of the Convention, which authorizes only the creation of the offence of flying over a "landing area." The area over which the applicant flew on the occasion charged was the "neutral zone," which, as shown by the definition in the Convention, and rules 38 and 39 of annex D to the Convention, is different from a "landing area." The Convention must be followed with substantial exactness (*R.* v. *Burgess*; *Ex parte Henry* (1)). Rule 51 (1) is a substantial departure from the Convention; it seeks to create a different and wider offence. Even if the rule can be read down as validly creating the lesser offence, there is not any evidence that such lesser offence was committed. The effect of rule 64 of the

(1) (1936) 55 C.L.R. 608, at pp. 653, 696.

schedule is that the applicant having given evidence of circumstances that in fact induced the belief that for reasons of safety he should depart from the rules, the magistrate should not have convicted him in the absence of evidence that such belief was either not reasonable or not bona fide. Reg. 135 must be read in conjunction with reg. 6 (1), and, so read, does not apply to intra-State pilots, of which class the applicant is a member; thus there is not any penalty imposed on such pilots for breaches of the schedule. Penalties must be clearly imposed (*London County Council* v. *Aylesbury Dairy Co. Ltd.* (1)). So far as intra-State flying is concerned the schedule imposes a duty of imperfect obligation. The schedule applies to intra-State flying because of reg. 6 (2), but reg. 135 does not apply to intra-State flying because of reg. 6 (1).

E. M. Mitchell K.C. (with him *McIntosh*), for the respondent. The words "in the vicinity of the landing area" in annex D were used interchangeably and as synonymous with the word "aerodrome." The neutral zone is a strip of land contiguous to the perimeter of an aerodrome proper, and consequently is in the "vicinity" of the aerodrome. Rule 51 (1) of the First Schedule to the *Air Navigation Regulations* applies to flights over or in the vicinity of an aerodrome and, it is submitted, is in accord with the Convention. Rule 39 (*a*) in sec. V. of annex D was intended to be capable of being adapted by what are designated special local regulations: See also rule 53. "Local" means to any particular State party to the Convention, and does not necessarily mean or refer to any particular aerodrome. That measure of elasticity was granted in the Convention to the parties thereto so that any such party could as the occasion might require provide for conditions prevailing and arising from time to time and more or less peculiar to such party. Rule 51 (1), even though it purports to affect an area greater than the area expressly mentioned in the Convention, is not inconsistent with the Convention. The authority to enact the rule, assuming, and so far as, it does affect a greater area, is derived from the "external affairs" power. Any regulation or rule which complies substantially with the Convention is not a departure

(1) (1898) 1 Q.B. 106, at p. 109.

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from the Convention (*R.* v. *Burgess*; *Ex parte Henry* (1)). Validity could be preserved under secs. 15A and 46 (*b*) of the *Acts Interpretation Act* 1901-1937 by reading the rule down. The magistrate's decision on the facts was not unreasonable; it was correct (*Peck* v. *Adelaide Steamship Co. Ltd.* (2)). The Commonwealth, under the regulations and the First Schedule, assumed jurisdiction over all air navigation within the Commonwealth, whether intra-State or inter-State, and, by reg. 135, provided penalties for breaches of all regulations and rules made thereunder, including rule 51 (1).

Louat, in reply.

Cur. adv. vult.

May 19.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by Henry Goya Henry by way of statutory prohibition from a conviction for that on 13th April 1938 an aerodyne of which he was pilot did in contravention of the *Air Navigation Regulations* made under the *Air Navigation Act* 1920-1936 other than when departing or landing fly over the Mascot aerodrome at a lower height than 2,300 feet. The appellant contends that the regulation under which he was convicted is invalid because it is not authorized by the statute mentioned. The relevant regulation is rule 51 (1) of the First Schedule to the *Air Navigation Regulations* (Statutory Rule No. 81 of 1937). It is in the following terms :— "An aerodyne shall not, except when departing or landing, fly over an aerodrome at a lower height than 2,300 feet." "Aerodyne" is a term which includes an aeroplane. Reg. 135 provides that where an aircraft flies in contravention of any of the rules contained in the First Schedule the pilot in charge of the aircraft shall be guilty of an offence against the regulations.

"Aerodrome" is defined in the regulations to include "the landing area, neutral zone and building area" included within any defined ground used for the landing or departure of aircraft. The defendant flew over the neutral zone of the aerodrome at Mascot, New South Wales, at a lower height than 2,300 feet, and he was not either

(1) (1936) 55 C.L.R. 608. (2) (1914) 18 C.L.R. 167.

departing or landing. The neutral zone is, by reason of the definition to which I have referred, part of the aerodrome within the meaning of the regulations, including the First Schedule.

The flight which the appellant made on the occasion in question was entirely within the State of New South Wales. It has been contended that the regulation does not apply to any intra-State flight, but reg. 6 (2) plainly provides that the rules in the First Schedule shall apply to all navigation and all aircraft engaged in navigation within Australian territory. Therefore if the regulation is valid the defendant is prima facie guilty of an offence. The question which arises is whether rule 51 (1) of the First Schedule is authorized by the *Air Navigation Act* 1920-1936.

The *Air Navigation Act* 1920 defined "the Convention" as meaning "the Convention for the Regulation of Aerial Navigation signed in Paris" on 13th October 1919. Sec. 4 of the Act (No. 50 of 1920) was as follows: "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 purpose of providing for the control of air navigation in the Commonwealth and the Territories." In *R.* v. *Burgess*; *Ex parte Henry* (1) it was held that the regulations made under the Act of 1920 were invalid because they could not be described as regulations for carrying out and giving effect to the Convention. It was also held that the Commonwealth Parliament had no general power to make laws with respect to air navigation, though it could deal with the subject to an extent under the powers to make laws with respect to foreign and inter-State commerce (Constitution, sec. 51 (i)) and to make laws for the government of territories (Constitution, sec. 122). After this decision the *Air Navigation Act* 1936 was passed. By this Act sec. 4 of the original Act was amended by omitting the words "in the Commonwealth and the Territories" and inserting in their stead the words "(*a*) in relation to trade and commerce with other countries and among the States; and (*b*) within any territory of the Commonwealth."

Since the Act was passed the powers of the Commonwealth Parliament to legislate with respect to air navigation have been

(1) (1936) 55 C.L.R. 608.

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extended by references made by the States under sec. 51 (xxxvii.) of the Commonwealth Constitution. At the time when the alleged offence was committed by the appellant, however, no such reference had been made by the Parliament of New South Wales. This appeal, therefore, must be considered in relation to the constitutional power of the Commonwealth Parliament as it existed in the interim period between the enactment of the *Air Navigation Act* 1936 and the reference of further power to the Commonwealth Parliament by the Parliament of New South Wales.

The appellant attacked rule 51 as not being a regulation for the purpose of carrying out and giving effect to the Convention. Reg. 6 is important for the purpose of this argument. Reg. 6 is as follows:— "(1) The provisions of these regulations, other than those contained in the First Schedule, shall apply to—(*a*) international air navigation within Australian territory, (*b*) air navigation in relation to trade and commerce with other countries and among the States, (*c*) air navigation within the Territories, and to aircraft engaged in such navigation and aerodromes open to public use by such aircraft. (2) The rules contained in the First Schedule to these regulations shall apply to—(*a*) all air navigation within Australian territory, (*b*) all aircraft engaged in such navigation, and (*c*) all aerodromes in Australian territory which are open to public use, and shall apply to Australian aircraft when engaged in air navigation outside Australian territory." In this regulation a careful distinction is drawn between the First Schedule (which contains rule 51) and the other provisions of the regulations. The regulations, other than the First Schedule, apply to international, inter-State and territorial air navigation, and to aircraft engaged therein and public aerodromes used by such aircraft. These regulations are plainly related to the power of the Commonwealth Parliament to legislate with respect to foreign and inter-State trade and commerce (sec. 51 (i)) and with respect to the government of the Territories of the Commonwealth (sec. 122).

But the First Schedule is given a much wider application. It applies to all air navigation in Australia, all aircraft engaged in such navigation, and all public aerodromes in Australian territory. At the time when the alleged offence was committed the legislative

powers of the Commonwealth Parliament were, as already stated, the same as when *Burgess' Case* (1) was decided. In that case it was held that rules with this scope could be validly made only if they were made under the statutory power to carry out and give effect to the Convention. Can rule 51 be described as a regulation made for this purpose ?

The rule prohibits low flying over an aerodrome. In this rule the aerodrome, as already pointed out, includes the neutral area. The provision of the Convention upon which reliance is placed for the purpose of supporting the rule is rule 39 in sec. V of annex D to the Convention. It is as follows : " Subject to any special local regulations which may exist : (*a*) Flight over a landing area at a lower height than 700 metres is prohibited for aerodynes, save in the case of a departure or landing."

The Convention expressly distinguishes between a landing area and a neutral zone. The character of a neutral zone appears from rule 38, which is as follows : " At land aerodromes, a neutral zone, situated along the perimeter of the landing area and at the approaches to the hangars, may be set apart for aerodynes manœuvring on the ground." The term " landing area " is expressly defined for the purpose of annex D and other annexes as follows : " The expression 'landing area' shall mean the part of an aerodrome reserved for departures and landings of aircraft." It is clear, therefore, that, according to the Convention, the landing area is part only of an aerodrome and that it is a different area from the neutral zone. The Convention, for some reason or other, limits the prohibition of low flying in rule 39 to flight over a landing area as distinct from flight over a neutral zone. If rule 51 had been limited to flight over a landing area it would plainly have been a regulation for giving effect to the Convention. But the rule prohibits low flight over " an aerodrome," and " aerodrome " for the purposes of the rule includes a neutral zone. So far as a rule prohibits flight over a neutral zone in addition to prohibiting flight over a landing area it cannot, in my opinion, be described as a regulation for giving effect to the provision of the Convention prohibiting flight over a landing area.

(1) (1936) 55 C.L.R. 608.

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The rule cannot, in my opinion, be supported as a "special local regulation." Rule 39 refers to such regulations as provisions to which the Convention rule may be subject. They, where they exist, create exceptions to the application of the Convention. It cannot be said that the making of a special local regulation would be carrying out and giving effect to the Convention. The power to make such a regulation must be sought in municipal law elsewhere than in a power to carry out and give effect to the Convention. In Australia, as constitutional powers existed at the relevant time, there was no other Commonwealth power to make regulations except in relation to air navigation so far as that subject fell within the subjects of foreign and inter-State commerce or territorial government, and, as already stated, rule 51 does not deal with any aspect of those subjects.

Further, a general rule applicable to all aerodromes within a country cannot be properly described as a "special local regulation" within the meaning of the Convention. This term in the Convention applies, in my opinion, only to special as opposed to general regulations, and only to regulations which apply only in particular localities within a country where for some reason the general rule is thought not to be appropriate. For these reasons rule 51 of the First Schedule cannot, in my opinion, be justified either as a regulation which the Convention gives power to make, or, even if such power were given by the Convention, as being truly a special local regulation.

Accordingly, in my opinion, so far as the rule is supported by reference to the Convention, it must be held to be invalid.

Some reference was made in the course of argument to sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937, though little or no argument was based upon the section. The suggestion is that by virtue of that section the regulation should be construed as being valid to the extent to which it is not in excess of the regulation-making power, and that, therefore, rule 51 should be read as limited to aerodromes used for foreign or inter-State or territorial traffic.

In my opinion this suggestion is answered by the terms of reg. 6, which have already been set out. Reg. 6 (1) provides that the regulations *other than the First Schedule* are to apply to such aerodromes. The First Schedule alone is to have general application—an application which can be justified only in the case of regulations

which carry out and give effect to the Convention. If sec. 46 (*b*) were applied in the manner suggested, the result would be that a rule of the First Schedule would be given the application specified in reg. 6 (1) though the words of that paragraph specifically exclude the First Schedule. Where there are express provisions defining the scope of two sets of regulations it is, in my opinion, impossible to apply such a provision as sec. 46 (*b*) for the purpose of giving to a particular regulation a scope of application which is denied to it by another regulation. In this case the first paragraph of the regulation expressly denies to the First Schedule the application which it is now sought to give to it by utilizing sec. 46 (*b*). I am, therefore, of opinion that the regulation cannot be supported in the manner suggested.

As in my opinion the regulation is invalid, the conviction was wrong and should be set aside.

RICH J. The substantial question raised by this appeal is whether rule 51 (1) of the First Schedule of the Commonwealth *Air Navigation Regulations* is authorized by the provisions of the *Air Navigation Act* 1920-1936. The Act enables 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 the provisions of any amendment of the Convention made under art. 34 thereof and for the purpose of providing for the control of air navigation (*a*) in relation to trade and commerce with other countries and among the States; and (*b*) within any territory of the Commonwealth.

Rule 51 (1) of the First Schedule of the regulations provides that an aerodyne shall not, except when departing or landing, fly over an aerodrome at a lower height than 2,300 feet. This rule is one of a series of special rules for air traffic on and in the vicinity of aerodromes open to public use. Under the regulations "aerodrome" is defined to include the landing area, neutral zone and building area in a defined ground area used or intended to be used either wholly or in part for the landing or departure of aircraft, and in rule 1 of the First Schedule "landing area" is defined to mean that part of the aerodrome which is reserved for the departure and landing of aircraft.

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Rule 51 (1) seeks to carry out and give effect to the Convention, the relevant provisions of which for the present purpose are clause 39 (*a*) of annex D to the Convention, which is one of a set of rules relating to " air traffic on and in the vicinity of aerodromes open to public use." Clause 39 provides that " Subject to any special local regulations which may exist : (*a*) Flight over a landing area at a lower height than 700 metres is prohibited for aerodynes, save in the case of a departure or landing," and in annex A the expression " landing area " means the part of an aerodrome reserved for departures and landings of aircraft. For the applicant it is argued that rule 51 (1) cannot be construed as a regulation for the purpose of carrying out and giving effect to the Convention. Though clause 39 (*a*) of annex D to the Convention to which effect is sought to be given by rule 51 (1) prohibits a flight over a landing area at a height lower than a prescribed height, rule 51 (1) extends the prohibition to a flight over an aerodrome. The regulation prohibits low flying over a whole aerodrome, whereas the Convention rule relates to a prohibition of low flying over a part thereof, namely, the landing area, but despite its extended operation the regulation is not therefore to be considered as not carrying out the Convention. A regulation which prohibits low flying over an aerodrome is, in my opinion, a not improper method of ensuring a prohibition of low flying over that part of the aerodrome reserved for departures and landings of aircraft and described as the landing area. The word " aerodrome " in the regulation has no doubt a wider meaning than the words " landing area," yet, nevertheless, the prohibition of low flying prescribed by the regulation does, in substance, amount to a prohibition of low flying over the landing area. The object of the statute is to provide by regulations for the carrying out and giving effect to the Convention, and this does not mean that the regulations should be a reproduction of the rules contained in annex D to the Convention. That this was not intended by the parties to the Convention is made clear by a reference to the language of rule 39 set out in annex D. The language of this rule indicates that a strict adherence to the rules of the Convention is not required because rule 39 (*a*) is expressed to be subject to any special regulations which may exist : See also rule 41 of annex D. As sec. 4 of the *Air Navigation Act* in so far as it empowers

the Governor-General to make regulations for the purpose of carrying out and giving effect to the Convention was a valid exercise of the "external affairs power" (See *R.* v. *Burgess*; *Ex parte Henry* (1)), rule 51 (1) should for the reasons I have mentioned be considered authorized by the provisions of the *Air Navigation Act*.

The appeal should be dismissed and the order nisi discharged with costs.

STARKE J. Appeal by means of an order nisi for prohibition pursuant to the Appellate Rules of this court, sec. IV.

The appellant, Henry Goya Henry, was charged under the *Air Navigation Regulations* (S.R. 1937 No. 81) made under the *Air Navigation Act* 1920-1936 for that he flew an aerodyne (that is, an aircraft whose support in flying is mainly secured by aerodynamic reactions (regulations, sec. 5)) in contravention of the regulations over the Mascot aerodrome near Sydney at a lower height than 2,300 feet. He was convicted, hence this appeal.

The *Air Navigation Act* 1920-1936 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 the provisions of any amendment thereof made under art. 34, and for the purpose of providing for the control of air navigation (*a*) in relation to trade and commerce with other countries and among the States and (*b*) within any territory of the Commonwealth.

Under this power the regulations were made, and in Part VI. of the First Schedule to these regulations is found the provision under which the appellant was charged. Part VI. contains special rules for air traffic on and in the vicinity of aerodromes open to public use. Div. I. is preliminary and Div. II. relates to flight over or in the vicinity of the landing area. Rule 51 (1) of the schedule provides: "An aerodyne shall not, except when departing or landing, fly over an aerodrome at a lower height than 2,300 feet." An aerodrome (regulations, clause 5) means any definite ground or water area used or intended to be used either wholly or in part for the landing or departure of aircraft and includes the landing area, neutral zone

(1) (1936) 55 C.L.R., at pp. 645, 696.

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and building area included within such ground or water area. "Landing area" means (regulations, the First Schedule, rule 1) that part of an aerodrome which is reserved for the departure and landing of aircraft. The regulations (First Schedule, rule 50) provide that a neutral zone shall be set apart for aircraft manœuvering on the ground and if not marked shall be deemed to extend for a distance of sixty yards from the perimeter of the aerodrome.

The evidence supports that conclusion of the stipendiary magistrate that the appellant contravened the provisions of rule 51 of the First Schedule without any excuse.

Amongst the grounds taken by the order nisi are that the *Air Navigation Act* 1920-1936 is *ultra vires* of the Constitution, and that the regulations issued under the Act are invalid. But these grounds were not developed, and counsel for the appellant confined himself to the third ground of the order nisi, namely, that rule 51 (1) under which the appellant was convicted was *ultra vires* and did not apply to him.

The substance of the argument was that rule 51 is inconsistent with the provisions of the International Convention annex D, sec. V, clause 39, and could not, therefore, be a regulation for the purpose of carrying out and giving effect to the Convention within the power conferred by the *Air Navigation Act* 1920-1936. It is unnecessary to consider how far the regulation might be supported as a regulation for the purpose of providing control of air navigation in relation to trade and commerce with other countries and among the States or within the territories of the Commonwealth for the appellant on the occasion charged was not flying inter-State or in any Territory of the Commonwealth, but in New South Wales.

The Convention provides in annex D, sec. V, "Special Rules for air traffic on and in the vicinity of aerodromes open to public use" and specifically as to flight over or in the vicinity of the landing area: "39. Subject to any special local regulations which may exist: (*a*) Flight over a landing area at a lower height than 700 metres is prohibited for aerodynes, save in the case of a departure or landing." And in annex A, definition clause, it is provided that the expression "landing area" "shall mean the part of an aerodrome reserved for departures and landings of aircraft."

But rule 51 of the First Schedule of the regulations, prohibiting flying "over an aerodrome," is wider, it is contended, than the prohibition of the Convention, and consequently not a regulation for the purpose of carrying out and giving effect to the Convention.

The case of *R.* v. *Burgess*; *Ex parte Henry* (1) was relied upon. But that decision, making, as it does, the task of carrying out the Convention on the part of the Government of Australia more difficult than it ought to be, was rested, as I understand it, upon the view that the basal principles of the regulations were so opposed to the Convention that they could not be supported under the Act: See *R.* v. *Burgess*; *Ex parte Henry* (2). The regulations have been amended and, as already observed, the challenge in this case is not to the validity of the regulations as a whole, but to rule 51 (1) of the First Schedule.

The power to make regulations under the *Air Navigation Act* is, as I said in *R.* v. *Burgess*; *Ex parte Henry* (3), wide in its terms, and I adhere to the view I then expressed that all means which are appropriate and are adapted for 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. Thus art. 25 of the Convention provides that each contracting State undertakes to adopt measures to ensure that every aircraft shall comply with the regulations in annex D. The Convention, as already appears, prohibits flight over a landing area at a lower height than 700 metres, save in the case of a departure or landing. The most effective method of carrying out that stipulation of the Convention will vary, I should suppose, with the area and position of each aerodrome. What is there repugnant to or inconsistent with the rule in extending the prohibition to the whole area of an aerodrome? It does not weaken the stipulation in the Convention. It is well adapted and appropriate to ensure the observance of the rule of the Convention and to prevent accidents owing to the contravention of the rule, whether those contraventions be wilful or

(1) (1936) 55 C.L.R. 608. (2) (1936) 55 C.L.R., at pp. 674, 684.
(3) (1936) 55 C.L.R., at pp. 659, 660.

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accidental. And within reason it is or at least should be for the discretion of the rule-making authority to determine, in the particular case, what are the appropriate and effective means of carrying out and giving effect to the Convention.

In my opinion rule 51 (1) of the First Schedule is within power. No more unpractical tribunal can be imagined than a court of law for determining what regulations are desirable or necessary for carrying out an international air convention, and I can well understand the dismay that the decision in *R.* v. *Burgess*; *Ex parte Henry* (1) must have occasioned to those responsible for the safety of air navigation in Australia, but I cannot accept the contention that the decision compels a meticulous adherence to each provision contained in the annexes to the Convention. Indeed, sec. V of annex D to the Convention itself recognizes that special local regulations may be provided in relation to flight over or in the vicinity of the landing area.

All that need be said of a further contention that the penalty prescribed by clause 135 of the regulations was limited to cases within the provisions of clause 6 (1) of the regulations is that the explicit language of the clauses in question makes the contention quite untenable.

The order nisi should be discharged.

DIXON J. The facts upon which this appeal depends occurred before the enactment by the Parliament of New South Wales of the *Air Navigation Act* 1938 (No. 9 of 1938). By that statute the *Air Navigation Regulations* of the Commonwealth, which are from time to time in force in the territories, are made applicable to air navigation within New South Wales. For the purpose of determining the appeal we must go back to the law as it existed before the New South Wales Act but after the adoption of the present *Air Navigation Regulations*, which were made on 4th August 1937.

The matter was argued as if the validity of the regulations depended upon the power conferred upon the Commonwealth Parliament by sec. 51 (xxix.) to make laws with respect to external affairs. But, since the decision in *R.* v. *Burgess*; *Ex parte Henry* (1), the *Air*

(1) (1936) 55 C.L.R. 608.

Navigation Act 1920 has been amended. That decision rejected the contention that sec. 4 of the Act might be supported wholly or in part as an exercise of the power to make laws with respect to trade and commerce with other countries and among the States. It did so because the section, which provided for the making of regulations generally throughout the Commonwealth, could not be regarded as an exercise of the power with respect to external affairs. But, as the result of an amendment made by Act No. 93 of 1936, which came into force on 7th December 1936, sec. 4 is now expressed as follows: "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 purpose of providing for the control of air navigation—(*a*) in relation to trade and commerce with other countries and among the States; and (*b*) within any Territory of the Commonwealth."

The *Air Navigation Regulations* containing the rule or regulation which the appellant now attacks were made in the exercise of this statutory power. The rule or regulation in question forms part of the First Schedule. It is clause 51, and it governs the movements over an aerodrome of an aerodyne, an expression defined to mean an aircraft whose support in flight is mainly secured by aerodynamic reactions.

Sub-clause 1 provides that an aerodyne shall not, except when departing or landing, fly over an aerodrome at a lower height than 2,300 feet. The justification relied upon in argument for this provision consists in a clause contained in the Air Convention, as amended. The clause, which is 39 (*a*) of sec. V of annex D, says: "subject to any special local regulations which may exist flight over a landing area at a lower height than 700 metres is prohibited for aerodynes, save in the case of a departure or landing."

A landing area forms only part of an aerodrome, which includes the neutral zone and the building area surrounding the landing ground. The Commonwealth rule, therefore, goes beyond the terms of the clause of the Air Convention relied upon as its justification, and it is on this ground that it is attacked. It appears upon the facts that the appellant flew his aeroplane along the neutral zone

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and not over the landing area and his flight over the neutral zone is the basis of the charge against him. But, in relation to aerodromes licensed for the landing and departure of aeroplanes upon journeys to other countries and among the States, there seems to be no reason why, independently of the Air Convention, a Commonwealth law should not validly be made forbidding flying at a low altitude over any part of the aerodrome. To fly low cross wind above the neutral zone is obviously dangerous to aeroplanes taking off or landing. In my opinion Commonwealth law may keep an aerodrome in use for inter-State and oversea flying free of such dangers. Once an aerodrome is licensed for or otherwise devoted to the purposes of air navigation with other countries and among the States, the safety of the aerodrome becomes, I think, a matter falling within the Federal power.

The question, however, remains whether, having regard to the form in which the rule or regulation now in question has been made, or, perhaps, the manner in which it has been attempted to give it the force of law, it can be supported wholly or in part by reference to the commerce power.

The First Schedule is given force by reg. 6 (2), which is as follows: "The rules contained in the First Schedule to these regulations shall apply to—(*a*) all air navigation within Australian territory, (*b*) all aircraft engaged in such navigation, and (*c*) all aerodromes in Australian territory which are open to public use; and shall apply to Australian aircraft when engaged in air navigation outside Australian territory."

It is par. *c* of this regulation that gives effect to those provisions of the schedule which relate to aerodromes. It is expressed to apply to all aerodromes independently of any question whether they are or are not used for inter-State as distinguished from intra-State flying. In fact there must be very few aerodromes in Australia which are not used to some extent for inter-State air navigation. But this consideration does not account for the form in which reg. 6 (2) (*c*) is expressed. The reason why the regulation disregards the distinction between inter-State and intra-State flying is that the schedule is framed in intended reliance on the Air Convention, the provisions of which, according to our decision (*R.* v. *Burgess*;

Ex parte Henry (1)), may be carried into effect independently of the commerce power. In this view, if it were not for the special provisions of the *Acts Interpretation Act* 1901-1937, some difficulty might be felt in giving to clause 51 (1) of the First Schedule an application to aerodromes used for the purpose of inter-State and oversea air navigation, so that in relation to those aerodromes only it would validly prohibit flying below the specified altitude over any part of the aerodrome including the neutral zone. But sec. 46 (*b*) of the Act provides that where an Act confers upon any authority power to make, *inter alia*, regulations, 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."

Provisions of this general character have been much considered in the United States, where possibly the device originated. The authorities are collected in the notes to *Williams* v. *Standard Oil Co. of Louisiana* (2), a case dealing with a clause intended to make the legislation there attacked divisible. (See, further, *Railroad Retirement Board* v. *Alton Railway Co.* (3) and *Carter* v. *Carter Coal Co.* (4).)

The view established in the United States is that such enactments reverse the presumption that the legislature intended its will on any particular matter as expressed in a statute to operate in its entirety and had no intention that something less should be law. The presumption is reversed so that legislation, found partially invalid, must be treated as distributable or divisible, unless it appears affirmatively that it was not part of the legislative intention that so much as might have been validly enacted should become operative without what is bad. If the valid provisions unqualified and unaffected by the invalid provisions would operate in a different

(1) (1936) 55 C.L.R. 608.
(2) (1929) 73 Law. Ed. (U.S.) 287 [278 U.S. 235].
(3) (1935) 295 U.S. 330, at p. 361; 79 Law. Ed. 1468, at 1482 et seq.
(4) (1936) 298 U.S. 238, at p. 312; 80 Law. Ed. 1160, at p. 1189.

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manner upon the persons whom they would govern, or the events or conduct they would regulate, then they are shown to be inseparable.

Sec. 15A of the *Acts Interpretation Act* 1901-1937 is an analogous provision which has been discussed in this court (*Australian Railways Union* v. *Victorian Railways Commissioners* (1); *Huddart Parker Ltd.* v. *The Commonwealth* (2); *New South Wales* v. *The Commonwealth* [*No.* 3] (3)). The provisions now contained in sec. 46 (*b*) were discussed by *Evatt* and *McTiernan* JJ. in *R.* v. *Burgess*; *Ex parte Henry* (4).

Two types of case present themselves under provisions such as secs. 15A and 46 (*b*) of the *Acts Interpretation Act*, provisions which require that an entirely artificial construction shall be placed on a statute found to be invalid in part in order to save so much of it as might have been validly enacted. In one type it is found that particular clauses, provisos or qualifications, which are the subject of distinct or separate expression, are beyond the power of the legislature. In the second type, a provision which, in relation to a limited subject matter or territory, or even class of persons, might validly have been enacted, is expressed to apply generally without the appropriate limitation, or to apply to a larger subject matter, territory or class of persons than the power allows. In the first case, the question usually is whether the operation or effect of the remainder of the Act upon the persons or things to which it would apply would be changed if the clauses, provisos and qualifications held bad were excised. In other words, in such a case the right question to ask may be whether liabilities or rights of a different tenor, measure or nature would result. In the second case, the question may simply be whether the legislature intended the provision to have a distributive operation or effect. That is to say, did it intend that the particular command or requirement expressed in the provision should apply to or be fulfilled by each and every person within the class independently of the application of the provision to the others; or were all to go free unless all were bound?

The rule now under consideration is an instance of the second class. By reg. 6 (2) it is made applicable to a larger subject matter

(1) (1930) 44 C.L.R. 319, at pp. 374, 386.
(2) (1931) 44 C.L.R. 492, at pp. 513, 529.
(3) (1932) 46 C.L.R. 246, at p. 259; cf. p. 272.
(4) (1936) 55 C.L.R., at p. 689; cf. pp. 655, 675.

than the power over trade and commerce with other countries and among the States would allow. If this power alone will support clause 51 (1) of the First Schedule, it is necessary to consider whether the clause was meant to operate distributively and include each and every aerodrome independently. Stated in another way, the question is whether there was any intention that aerodromes used for inter-State air traffic should not be governed by the clause because aerodromes used only for intra-State traffic escaped its operation. If the policy and substance of the provision alone were the test, the answer must surely be that it was intended to apply to the former whether the latter did or did not escape its operation. But the text must be considered too. The text is expressed in a form which causes difficulty, because it would be wrong to place a limitation on reg. 6 (2) itself. For clearly it was not intended to exclude from the whole schedule aerodromes used only for intra-State air traffic, if any such there be. But it is possible to place the restriction upon clause 51 (1) of the schedule itself, and if sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937 really requires that a limitation of meaning as distinguished from a limitation of legal operation shall be ascribed to a provision, this would suffice. But probably the true view is that sec. 46 (*b*) is concerned with the legal operation or effect rather than the imputation of a meaning or intention to the provision for the rescue of which it is invoked.

In my opinion clause 51 (1) of the First Schedule may validly apply to the Mascot aerodrome in virtue of the power to make laws with respect to trade and commerce with other countries and among the States. Without entering upon the more difficult question of the power in respect of external affairs, I think that on this ground the appeal should be dismissed.

EVATT J. On this appeal against a summary conviction, the main question is whether the prohibition contained in clause 51 (1) of the First Schedule to the Commonwealth *Air Navigation Regulations* (made August 4th, 1937, in pursuance of the *Air Navigation Act* 1920-1936) is a regulation made for the purpose of carrying out or giving effect to the International Convention for the Regulation of Aerial Navigation.

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By the *Air Navigation Act* as amended in 1936, the Governor-General is empowered to make air navigation regulations for three distinct purposes, viz.: 1. carrying out the International Convention (and its amendments); 2. controlling air navigation in relation to foreign and inter-State commerce; 3. controlling air navigation within any territory of the Commonwealth.

Reg. 6 (2) of the Commonwealth *Air Navigation Regulations* provides that the rules contained in the First Schedule of the regulations (including rule 51 (1)) shall apply to "all" air navigation within Australia, to "all" aircraft engaged in such navigation, and to "all" aerodromes in Australian territory which are open to public use.

The case of *R.* v. *Burgess*; *Ex parte Henry* (1) shows that when the regulations were passed the Commonwealth Parliament's power to make air regulations having the force of law throughout Australia derived from the "external affairs" power to carry out the International Air Convention. Obviously the statutory authority relied upon for making the rules contained in the First Schedule operate throughout Australia was the Governor-General's power to make regulations for the purpose of carrying out and giving effect to such Air Navigation Convention. In other words, the Governor-General's action in making the First Schedule rules apply to "all" air navigation, "all" aircraft and "all" aerodromes was not a subordinate, but an essential feature of the scheme contained in the regulations.

Although *R.* v. *Burgess*; *Ex parte Henry* (1) decided that the authority to make regulations for carrying out and giving effect to the International Convention was a valid exercise of the "external affairs" power of the Commonwealth under sec. 51 (xxix.) of the Constitution, it also decided that the Commonwealth *Air Navigation Regulations* as then framed did not carry out or give effect to the Convention, and for that reason they were deemed invalid.

There was no substantial difference in the tests suggested by the members of this court for determining whether any particular regulation or series of regulations under the Commonwealth *Air Navigation Act* should be regarded as having been made for the purpose of carrying out or giving effect to the International Air Convention.

(1) (1936) 55 C.L.R. 608.

According to *Latham* C.J., the regulations "must in substance be regulations for carrying out and giving effect to the Convention" (1). There must, according to *Dixon* J. be "a faithful pursuit of the purpose, namely, a carrying out of the external obligation" (2). The regulations must be "sufficiently stamped with the purpose of carrying out the terms of the Convention" (*Evatt* and *McTiernan* JJ. (3)). It is plain that the draftsman of the present regulations was intent upon following the principles enunciated in *R.* v. *Burgess*; *Ex parte Henry* (4), particularly in relation to the rules embodied in the First Schedule. Accordingly, the rules follow very closely corresponding rules in the International Air Convention, and there can be no doubt that there has been a conformity in detail which was entirely absent from the earlier series of regulations.

The appellant does not dispute that, apart from the particular rule for disobedience of which he was convicted, the rules contained in the First Schedule are in substance and effect rules for carrying out or giving effect to the International Air Convention. But he contends that rule 51 (1) does not represent a carrying out of the corresponding provision in the International Air Convention. It becomes necessary to compare the two provisions.

Rule 51 (1) of the First Schedule prohibits the flight of aircraft over the aerodrome at a lower height than 2,300 feet except in the case of landing or departing. The rule in sec. V., rule 39 of annex D of the Convention is a similar prohibition, but its operation is limited to flight over a "landing area." The distances correspond closely, and in each case there is an exception in case of departure and landing.

It is said with truth that, in referring to the area of an aerodrome, the Air Convention distinguishes between the "landing area" properly so called and the remaining area of the aerodrome, consisting of the "neutral zone," which is situated along the perimeter of the landing area and the approaches to the hangars. And it is plain that the Commonwealth regulations distinguish between the landing area, the neutral zone and the building area, all of which are included within the total area of the aerodrome.

The precise point is whether the somewhat more extensive operation of rule 51 (1), prohibiting dangerously low flying not merely over

(1) (1936) 55 C.L.R., at p. 646.
(2) (1936) 55 C.L.R., at p. 674.
(3) (1936) 55 C.L.R., at p. 688.
(4) (1936) 55 C.L.R. 608.

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the landing area but over the remaining portion of the aerodrome, is to be regarded as a rule for giving effect to the prohibition in the Convention against low flying over the landing area proper. On the whole, and not without some hesitation, I have come to the conclusion that rule 51 (1) is " sufficiently stamped with the purpose " of carrying out the prohibition contained in the Convention. True, the rule extends the prohibited area slightly, but the added area is necessarily ancillary to the landing area proper, so that the prohibition imposed may fairly be regarded as incidental to the principle stated in the Convention. Rule 51 (1) has faithfully pursued the Convention in respect both of height and the permitted exceptions; and in practice there could arise only a few cases where a manœuvre involving disobedience of rule 51 (1) would not also involve a disobedience of the prohibition contained in the Air Convention.

For these reasons it seems to me that the only arguable ground upon which the conviction was attacked has failed.

Another question has arisen which was not debated during the hearing; but I think I should say that if, contrary to my opinion, it were held that rule 51 (1), read and construed in its natural meaning, is invalid as being beyond the authority of the Governor-General to make regulations carrying out the Air Convention, I am of opinion that, notwithstanding sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937, it would be impossible to confine the application of the sub-rule to " inter-State " and " overseas " aerodromes. The suggestion is that the sub-rule so confined could be regarded as a valid regulation in relation to trade and commerce with other countries and among the States and that sec. 46 (*b*) permits this rewriting of the rule.

Reg. 6 (1) provides for the application of the Commonwealth *Air Navigation Regulations* " *other than* those contained in the First Schedule " to, *inter alia*, air navigation in relation to trade and commerce with other countries and among the States. Reg. 6 (2), as has already been pointed out, makes all the rules contained in the First Schedule, including rule 51 (1), applicable to *all* air navigation, *all* aircraft and *all* public aerodromes in Australian territory.

Sec. 46 (*b*) of the *Acts Interpretation Act* 1901-1937 embodies a rule of construction, not of law. It can only be applied here if the

court can see its way clear to adopt a secondary construction of the words of the regulations. In order to support the conviction in the present case, it would become necessary either (*a*) to read "all aerodromes" in reg. 6 (2) (*c*) as meaning aerodromes which have some relation—unstated and undefined—to inter-State or oversea commerce, or (2) to read "aerodrome" in rule 51 (1) itself in a similar manner. Resort to either course would be quite opposed to the careful and elaborate scheme laid down in the regulations and the First Schedule.

Reg. 6 (2), relying upon the authority to enforce throughout the whole of the Commonwealth the rules of the International Air Convention, applies those rules to all navigation, all aircraft and all aerodromes. To alter the word "all" in any portion of reg. 6 (2) would defeat that universal operation of the international rules which is not only desired and intended, but is permissible. If, then, all the rules of the First Schedule apply to "all" public aerodromes throughout Australia, it is even more difficult to support the present conviction by altering any word in rule 51 (1). If the word "aerodrome" in rule 51 (1) were read down so as to mean "landing area," the conviction could not be supported, for the appellant did not fly low over the landing area proper. In my opinion it is far more difficult to construe the word "aerodrome" in rule 51 (1) as meaning "inter-State or overseas aerodrome." No doubt by properly framed regulations aerodromes which are used for inter-State or overseas flights can be made as safe for air or ground traffic as the Commonwealth legislative authority thinks fit; and in such cases it could most certainly prohibit low flying over the neutral zone as well as over the landing area. But the rule of interpretation in sec. 46 (*b*) of the *Acts Interpretation Act* cannot be applied to rewrite the precise prohibition in rule 51 (1) so as to defeat the entire plan and scheme of the regulations. It would be equally logical and permissible to construe rule 51 (1) as being limited to aircraft while actually engaged in inter-State and overseas flights by reading down the word "aerodyne." For if the matter were considered in abstraction from the general scheme of the regulations, it is within the Commonwealth authority to regulate the manner of conducting inter-State or overseas flights in the vicinity of aerodromes. But in such case the present

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appellant, who was flying intra-State at the material time, would escape conviction. The truth is that the general scheme and plan of the regulations contradicts any suggested method of reading down or "reconstructing" rule 51 (1).

There is an obvious analogy in the application to Commonwealth regulations of sec. 46 (*b*) of the *Acts Interpretation Act* and sec. 15A, which permits the reading down of Commonwealth enactments. The reasoning which has been adopted in cases where a Commonwealth enactment is deemed invalid notwithstanding sec. 15A is, I think, equally applicable to the present case to answer the contention that the prohibition contained in rule 51 (1) and applicable to "all" aerodromes may be construed as being limited to "inter-State and overseas aerodromes." I had reason to discuss this question recently in *McDonald* v. *Victoria* (1), and one passage seems to be directly applicable :—

> "From *Collins' Case* (2) it appeared that the committee was set up to control the marketing of 'all fruit'. Such a phrase was not capable of being 'read down' so as to exclude from control such fruit as was thought to be protected by sec. 92 of the Constitution. In other words, the Queensland legislature was intent upon a scheme of controlling the marketing of all fruit or none. No *tertium quid* was possible. In the *Australian Railways Union Case* (3) the court held that sec. 33 as well as sec. 34 of the amending Commonwealth *Arbitration Act* of 1930 was invalid because the two sections were regarded as essential portions of one statutory scheme which stood as a whole or, if part of it, fell as a whole. In such a case, sec. 15A of the Commonwealth *Acts Interpretation Act* was thought to be incapable of operation."

(See also *R.* v. *Burgess; Ex parte Henry* (4).)

However, for the reasons already advanced, I think that rule 51 (1) is valid in its entirety so that the appeal fails and should be dismissed.

McTIERNAN J. The applicant makes three contentions: first, that rule 51 (1) of the First Schedule of the Commonwealth *Air Navigation Regulations* is invalid; secondly, that the regulations do not provide any penalty for a breach of this rule in the course of a flight within the limits of a State; and thirdly, that, having given evidence of circumstances which, as he claims, induced him to believe

(1) (1937) 58 C.L.R. 146, at pp. 152, 153.
(2) (1925) 36 C.L.R. 410.
(3) (1930) 44 C.L.R. 319.
(4) (1936) 55 C.L.R., at pp. 689, 690, 695.

that for reasons of safety he should depart, as rule 64 of the First Schedule and reg. 135 (5) permitted, from the provisions of the First Schedule, the magistrate should not have convicted him in the absence of evidence that such belief was either unreasonable or not bona fide.

The second and third contentions may be disposed of at once. The second contention is based on a view of the effect of the provisions of regs. 6 and 135. Reg. 135, by its first sub-section, provides that the owner or hirer and the pilot or commander in charge shall be guilty of an offence "where an aircraft flies in contravention of . . . any of these regulations (including the rules contained in the First Schedule to these regulations)." Sub-sec. 4 provides the penalty for an offence, unless "otherwise expressly provided." Sub-sec. 2 of reg. 6 makes the rules in the First Schedule (under one of which the applicant is charged) applicable to certain classifications of air navigation, aircraft and aerodromes. These classifications cover air navigation wholly within a State, so that the present case falls within this sub-section. Sub-sec. 1 of reg. 6, however, provides that "the provisions of these regulations, other than those in the First Schedule, shall apply to" certain classifications of air navigation, aircraft and aerodromes. These classifications do not cover air navigation wholly within a State, so that the present case does not come within this sub-section. It is argued from this that reg. 135 does not, therefore, apply to the present case. In my opinion, the present case is not excluded from the operation of reg. 135 because it does not come within any of the classifications in sub-sec. 1 of reg. 6. This sub-section enumerates cases to which the regulations shall apply; it does not provide that the regulations shall apply only to those cases. Different cases could, quite consistently with sub-sec. 1 of reg. 6, be brought by other provisions in the regulations within the application of any one or more of the regulations. The present case has been brought within the application of sub-secs. 1 and 4 of reg. 135 in this way. The rules in the First Schedule (and, therefore, rule 51 (1), under which the applicant is charged) are made applicable to the present case by reg. 6 (2). Sub-sec. 1 of reg. 135 is by its express terms (namely, by the words

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in the parenthesis) made applicable to the rules in the First Schedule; and, therefore, sub-sec. 4 is applicable. Therefore, sub-secs. 1 and 4 are applicable to the present case.

The third contention is, I think, met by sec. 14 of the Commonwealth *Crimes Act* 1914-1932. Rule 64 of the First Schedule and reg. 135 (5) permit matters to be raised by way of defence which are, in my opinion, "excuses" within the meaning of sec. 14. The onus of proving such "excuses" rested, by virtue of sec. 14, on the applicant, and the evidence does not show that the onus was discharged.

I come now to the first contention, that rule 51 (1) is invalid. This contention is founded on the view that there is a fatal disconformity between this rule and the relevant part of the Convention for the Regulation of Aerial Navigation signed in Paris on October 13th, 1919, which is the source of the power of the Commonwealth with respect to air navigation within a State: See *R.* v. *Burgess*; *Ex parte Henry* (1). Rule 51 (1) of the First Schedule provides that: "An aerodyne shall not, except when departing or landing, fly over an aerodrome at a lower height than 2,300 feet." An aerodrome is defined by reg. 5 as: "any definite ground . . . used . . . for the landing or departure of aircraft, and includes the landing area, neutral zone, and building area included within such ground."

It is clear that rule 51 (1) of the First Schedule purports to carry into effect in Australia part of clause 39 of annex D of the Convention. This part of clause 39 provides that: "Subject to any special local regulations which may exist—(*a*) Flight over a landing area at a lower height than 700 metres is prohibited for aerodynes, save in the case of a departure or landing." It is stated in annex A that (in annexes A to G): "The expression 'landing area' shall mean the part of an aerodrome reserved for departures and landings of aircraft." It is contended on behalf of the applicant that, because of the words "flight over a landing area" in clause 39 (*a*) of annex D of the Convention and the meaning given to the expression "landing area" in annex A, rule 51 (1) of the First Schedule, in prohibiting flight over an "aerodrome" (as defined by reg. 5), and not merely over a "landing area," has failed to carry out or purported to go

(1) (1936) 55 C.L.R. 608.

beyond the provision of the Convention. It appears that the applicant flew an aeroplane at a height lower than the prescribed height over the neutral zone at the Mascot aerodrome. If rule 51 (1) of the First Schedule is valid, he is liable for flying over any part of the aerodrome; whereas, if it is invalid, the prosecution has been instituted on a false basis.

The applicant's contention makes it necessary to consider whether rule 51 (1) of the First Schedule is in conformity with the terms of the relevant part or parts of clause 39 of annex D of the Convention. The opening words of clause 39, viz.: "Subject to any special local regulations which may exist," indicate that the clause is not meant to fetter in any way the power which any party to the Convention may have had prior to the Convention, or may later acquire, of making regulations relating to the subject matter dealt with in the clause. The clause provides an agreed regulation which should stand in the absence of the exercise of any such power. It could hardly be said that, *vis-a-vis* the other parties to the agreement, the Commonwealth would be violating any right in them arising from the agreement by enacting regulations (extending to intra-State flying) covering the same subject matter as is covered by clause 39, but entirely different in detailed provisions. But whether the introductory part of clause 39 authorizes the Commonwealth to make any local regulations of its own, which would have a different operation from the clause itself, does not require to be decided in this case, unless the narrower question whether rule 51 (1) of the First Schedule is in conformity with the particular terms of clause 39 (*a*) were answered in the applicant's favour. In my opinion, that question should be answered adversely to him. His contention is based on the use of the word "aerodrome" in rule 51 (1) and the expression "landing area" in clause 39 (*a*) of the Convention. The meaning attached to the expression "landing area" in annex A of the Convention is provided, in my opinion, as a definition which distinguishes for relevant purposes of the Convention that part of an aerodrome where aircraft may land from other parts of an aerodrome, namely, the neutral zone (if there be one) and the building area (if there be one). The definition aids the application of provisions which direct that acts be done to, or in respect of, that

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particular part of an aerodrome, which are not to be done to, or in respect of, the other parts. There are certain provisions, as, for example, the provisions relating to ground markings contained in sec. IIB of annex D, in which the definition is clearly relevant and useful. The expression "landing area" is used, however, in other provisions (of which clause 39 (*a*) is one) in which it is not clear, in my opinion, that only the particular limited part specifically known as "landing area" in relation to the whole area is referred to. In such provisions it may well be that, by a natural synechdoche, the reference to the part of the aerodrome known as the landing area, which is the largest and really distinguishing part, was intended to be a reference to the whole of the aerodrome. Such may be the case, for example, in clause 39 (*b*) of annex D, in which "every aerodyne flying outside a landing area at a distance of less than 2,000 metres from the nearest point of such area shall . . . keep the landing area on its left." Such a view of this sub-clause seems to be strengthened by a consideration of it in conjunction with the next following clause (clause 40), which prohibits aerial acrobatics "at a distance of less than 4,000 metres from the nearest point of the perimeter of the aerodrome." It is hard to say with certainty that the parties intended the measurement of the prescribed distances to be made from a different line in each case, particularly as the prescribed distances are large and the intervening space between the two lines, where two exist, would be relatively negligible.

Conversely, in various provisions of the Convention (for example, clauses 35 (*a*), 43, 44 (*a*), 44 (*c*) and 44 (*f*), which relate to landing on or starting from an aerodrome) the word aerodrome is used where the expression "landing area" may have achieved greater literal accuracy. But although the word aerodrome is used in these provisions, it appears that they bear rather upon operations proper to a landing area; and to extract, for example, from the use of the word "aerodrome" in any of such provisions a licence to land on the neutral zone, because actually the word "aerodrome" which includes the neutral zone has been used, would be straining the intention of the provisions by meticulous literalism: See *McDermott* v. *Owners of S.S. Tintoretto* (1), per Lord *Shaw of Dumfermline*; *Burns Philp & Co. Ltd.* v. *Myrhe* (2).

(1) (1911) A.C. 35, at p. 46.

(2) (1934) 51 C.L.R. 463, at p. 471.

Is it certain that the expression "landing area" in clause 39 (*a*) of annex D was used to describe a particular area of an aerodrome as distinguished from the whole aerodrome? It is difficult to see any reason for restricting the prohibition to the particular area and to leave the rest of the aerodrome free from it. On account of the proximity of these parts to the landing area itself (where on any particular aerodrome these parts have been marked off) and their smallness in comparison with it and the great speeds at which aircraft can and do fly, it is difficult to see that any reasonable purpose is served by reading the expression "landing area" in clause 39 (*a*) of annex D to mean an area less than the aerodrome. And if the true object of the clause is to achieve order and safety in the circumstances contemplated in the provision, rather does reason lie on the side of treating the reference to the delineated area as standing, by a natural usage of language, for the whole; for, indeed, the term "landing area" is expressive of the primary function of an aerodrome. Counsel for the respondents advanced a cogent argument in this regard, which I may express in this way: that, if the object of the clause is to avert danger to life and property, why should it be read as permitting flight over the building area and the neutral zone, where, owing to the presence of buildings, equipment and machines, and frequently many people—and sometimes large crowds—two aircraft, having collided and fallen, may cause extensive loss and tragedy, while forbidding it only over that open and clear area where there is no property and seldom any persons? If, of course, the expression "landing area" is absolutely rigid and cannot in reason refer to anything more than the delineated area in any context, then, whatever the consequences, it must be so interpreted; but, in my opinion, the expression has the rigidity of the definition only for relevant and useful purposes, and in the provision now being considered it can have a wider and quite reasonable connotation including all the area which makes up an aerodrome.

But in order to sustain the validity of the Commonwealth regulation it would be enough to show that there are reasonable grounds for doubting that the prohibition in clause 39 (*a*) of annex D was intended to be restricted to an area less than the aerodrome: See

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THE KING v. POOLE; EX PARTE HENRY [No. 2].

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Shell Co. of Australia Ltd. v. *Federal Commissioner of Taxation* (1). There is, in my opinion, as has been shown, at the least, such reasonable doubt. The appellant's contention, therefore, that rule 51 (1) of the First Schedule, upon which the prosecution was based, is invalid, should fail.

For these reasons I think that the appeal should be dismissed and the order nisi discharged.

Appeal dismissed. Order nisi discharged with costs.

Solicitors for the applicant, *A. S. Henry & Slade.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.

(1) (1931) A.C. 275; 44 C.L.R. 530.