[HIGH COURT OF AUSTRALIA.]

SHAW SAVILL AND ALBION COMPANY LIMITED . . . . . } PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1940.

MELBOURNE, *Oct.* 30, 31.

SYDNEY, *Dec.* 5.

Rich A.C.J., Starke, Dixon, McTiernan and Williams JJ.

Tort—Negligence—Acts done in course of war-like operations—Activities of combatant services in time of war—Liability of Crown or member of forces—Evidence—Statement of First Naval Member—Whether conclusive.

An action for negligence brought against the Crown for acts done in the course of active naval or military operations against the enemy must fail: *per Rich* A.C.J., *Dixon, McTiernan* and *Williams* JJ., on the ground that while in the course of actual operations against the enemy the forces of the Crown are under no duty of care to avoid loss or damage to private individuals; *per Starke* J., on the ground that such acts are not justiciable *durante bello*. No such immunity from action attaches, however, to activities of the combatant forces in time of war other than actual operations against the enemy.

Where an action for negligence is brought in respect of a collision with a warship, the question whether at the time of the collision the warship was engaged in active operations against the enemy is an issue which a court may decide for itself and whereon it is not bound to accept a statement of the First Naval Member of the Naval Board as conclusive.

DEMURRERS and MOTION.

Shaw Savill & Albion Co. Ltd. sued the Commonwealth of Australia in the High Court of Australia in Admiralty for damages in consequence of a collision which occurred between H.M.A.S. *Adelaide* and the motor vessel *Coptic*.

The statement of claim delivered by the plaintiff was substantially as follows:—1. The plaintiff company is a company duly incorporated in the United Kingdom of Great Britain and registered in the State of New South Wales as a foreign company. The company

carries on business both within the Commonwealth of Australia and overseas. 2. The company is and was at all material times the owner of the motor vessel *Coptic* which on 3rd September 1940 was southerly bound off the coast of New South Wales on a voyage from Brisbane in the State of Queensland to Sydney in the State of New South Wales. 3. Whilst on that voyage at about ten minutes past one on the morning of 3rd September 1940, the *Coptic* came into collision with His Majesty's Australian Ship *Adelaide* which at all material times was under the command of Captain H. A. Showers an officer of the Naval Forces of the Commonwealth and duly appointed to that position in pursuance of the *Naval Defence Act* 1910-1934. At the time of the collision the officer in immediate control of the *Adelaide* was the officer of the watch Lieutenant R. E. Morley who is and was at all material times an officer of the Naval Forces of the Commonwealth appointed in pursuance of the Act. 4. Immediately before proceeding upon the voyage the Commonwealth Naval Control Officer at Brisbane, who was also an officer of the Naval Forces of the Commonwealth duly appointed under the Act, lawfully directed the master of the *Coptic* to pursue a certain course upon the voyage and at all material times the *Coptic* pursued that course and at the time of the collision was proceeding upon that course. 5. At and before the time of the collision the *Coptic* was, in accordance with lawful instructions, proceeding upon the course as a darkened ship and without illuminated navigation lights or any other lights. 6. At and before the time of the collision the night was dark with a clear atmosphere and the wind was westerly and of moderate force. 7. About ten minutes past one o'clock on the morning of 3rd September 1940 and whilst the *Coptic* was proceeding upon the voyage in accordance with the instructions and directions the look-out on the fo'c'sle head of the *Coptic* sighted the *Adelaide* dead ahead. The *Adelaide* was then proceeding on a general northerly course and was proceeding also as a darkened ship without illuminated navigation lights or any other lights. By reason of the circumstances prevailing it was impossible for those on the *Coptic* to determine the course or speed of the *Adelaide* or at all to observe her in the vicinity of the *Coptic* until it was too late to avoid collision. The *Adelaide* was proceeding at a high speed and within a very short period after she was first sighted by the look-out of the *Coptic* the starboard bow of the *Adelaide* came into collision with the starboard bow and the starboard side of the *Coptic*. 8. The company says that the collision was brought about by the negligence of the defendant its officers and servants as aforesaid and in particular says that the defendant its officers and servants were negligent in respect of

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the following matters :—(*a*) that a proper and sufficient look-out was not kept having regard to all the circumstances ; (*b*) that having regard to all the circumstances, the *Adelaide* was navigated at an excessive speed ; (*c*) that having regard to the fact that the *Coptic* was pursuing a course directed by the naval authorities of the Commonwealth, those in charge of the *Adelaide* should have been informed thereon and realized the presence of the *Coptic* in the vicinity and in the circumstances prevailing should have taken steps to avoid her course ; (*d*) that in the circumstances prevailing, the defendant and those in charge of the *Adelaide* should have taken steps to indicate clearly to those in charge of the *Coptic* the presence of the former vessel in the vicinity ; (*e*) that in all the circumstances, the *Adelaide* was not navigated in a proper and seamanlike manner. 9. As a result of the collision the *Coptic* was damaged and the company as the owner thereof has incurred and will be compelled to incur expense in and about the repair of that ship and by reason of the collision was put to great expense in connection with moving the vessel from place to place and making arrangements concerning the transport and disposition of her cargo and further as a result of the collision the company was delayed and damaged in its business.

The company claimed :—(i) Judgment against the defendant for the damage caused by reason of the collision and for costs. (ii) A reference to the Registrar to assess the amount of the damage. (iii) That such further or other order should be made as the nature of the case should require.

The statement of defence and demurrer delivered by the Commonwealth was substantially as follows :—1. In answer to par. 6 of the statement of claim the defendant says that the night was clear with a north wind of force 1–2. 2. In answer to par. 7 of the statement of claim the defendant does not know and cannot admit that about ten minutes past one o'clock on the morning of 3rd September 1940 or at any time and whilst the *Coptic* was proceeding upon the voyage referred to in the statement of claim in accordance with the said instructions the look-out on the fore-castle head of the *Coptic* or any person sighted H.M.A.S. *Adelaide* dead ahead or at all. 3. In further answer to par. 7 of the statement of claim the defendant does not know and cannot admit that by reason of the circumstances prevailing or for any reason it was impossible for those on the *Coptic* to determine the course or speed of the *Adelaide* or at all to observe her in the vicinity of the *Coptic* until it was too late to avoid collision. 4. In further answer to par. 7 of the statement of claim the defendant denies that the *Adelaide* was proceeding at a high speed and further denies that within a very short period

after she was first sighted by the look-out or any other person the starboard bow of the *Adelaide* came into collision with the starboard bow and the starboard side of the *Coptic*. 5. In answer to par. 8 of the statement of claim the defendant denies the various allegations made therein. 6. In answer to par. 9 of the statement of claim the defendant does not know and cannot admit the various matters alleged in that paragraph. 7. The defendant says that the collision referred to in the statement of claim was caused solely by the negligent and improper navigation of the *Coptic* as hereinafter appears. 8. On 3rd September 1940, the *Adelaide* one of His Majesty's Australian Ships of War was proceeding from Sydney on a northerly course. In pursuance of Admiralty instructions in time of war the ship was completely darkened and no navigation or other lights were exhibited. A good look-out was being kept on board of her. The weather was clear with a light northerly wind and no moon. 9. About one o'clock on the morning of 3rd September 1940 the *Adelaide* was steaming at about twenty knots on a course 012° true and those on board the *Adelaide* observed the *Coptic* at a distance estimated at about two miles right ahead of the *Adelaide*. 10. The *Coptic* when first observed was proceeding in a southerly direction on a course 192° true. 11. The *Coptic* was proceeding on that course at a speed of about fourteen knots and was completely darkened and was exhibiting no navigation or other lights. 12. The *Coptic* continued on her course without any alteration of her course or speed and the starboard bow of the *Coptic* and the starboard bow of the *Adelaide* came into collision and considerable damage was caused to the *Adelaide*. 13. Prior to the collision the wheel of the *Adelaide* was put to starboard and the ship was turning to starboard when the collision occurred. 14. At the time when the *Coptic* was meeting the *Adelaide* end on or nearly end on there was a risk of collision but the *Coptic* failed to alter her course to starboard thereby failing to comply with art. 18 of the *Navigation (Collision) Regulations*. 15. The *Coptic* failed to slacken her speed or to stop or to reverse when the risk of collision must have been apparent to those on board her. 16. A proper look-out was not kept on board the *Coptic*. 17. The *Coptic* at all material times was navigated in neglect of the precautions required by the ordinary practice of seamen. 18. The collision was caused solely by the improper and negligent navigation of the *Coptic*. 19. At the time of the collision and at all material times there existed a state of war in which the Commonwealth of Australia was engaged. 20. At the time of the collision the *Adelaide* was part of the Naval Forces of the Commonwealth of Australia and was under the control of the

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Naval Board of Administration for the Naval Forces of the Commonwealth constituted under the *Naval Defence Act* 1910-1934. 21. At the time of the collision and at all material times the *Adelaide* was engaged in active naval operations against the enemy in the present state of war which operations were being carried out by the Government of the Commonwealth for the benefit of the nation as a whole and under the prerogative right of His Majesty and such operations were urgently required and necessary for the safety of the realm. 22. The voyage the extinguishment of lights and the speed of the *Adelaide* were necessary for the proper carrying out of those operations and were necessary for the public safety and the defence of the realm and the national emergency called for the taking of the measures adopted by the *Adelaide*. 23. The plaintiff's supposed cause of action consisted solely in acts, matters and things done or occurring in the course of active naval operations against the King's enemies by the armed forces of the Commonwealth. 24. The defendant demurs to the whole of the statement of claim upon the following amongst other grounds :—As the plaintiff's supposed cause of action consists solely in acts, matters and things done or occurring in the course of active naval operations against the King's enemies by the armed forces of the Commonwealth the plaintiff has no cause of action against the defendant.

The plaintiff delivered a reply and defence to the counterclaim, the relevant portions of which were substantially as follows :— 2. The plaintiff submits that the matters set forth in pars. 19, 20, 21, 22 and 23 of the statement of defence do not disclose or constitute any defence to the cause of action in the statement of claim sued upon and the plaintiff demurs to these paragraphs on this ground. 3. In further answer to par. 21 of the statement of defence the plaintiff says that the matters complained of in the statement of claim in so far as they constituted operations in which the *Adelaide* was engaged did not constitute any part of active naval operations against the enemy in the present state of war nor were those matters done, performed or executed by the Government of the Commonwealth or at all for the benefit of the nation as a whole nor were the same done, performed or executed under the prerogative right of His Majesty nor were the same urgently or at all required or necessary for the safety of the nation. 16. In answer to the defendant's demurrer set forth in par. 24 of the statement of defence, the plaintiff says that the same is bad in substance and denies the facts alleged therein as if in support of the demurrer.

The demurrer by the Commonwealth to the statement of claim and the demurrer by the plaintiff to pars. 19 to 23 inclusive of the

statement of defence were heard together by the Full Court of the High Court.

At the hearing it was moved on behalf of the Commonwealth that the service of the writ be set aside on the ground that the plaintiff's alleged cause of action consisted solely in acts, matters and things done or occurring in the course of active naval operations against the King's enemies by the armed forces of the Commonwealth. In the alternative, it was prayed on behalf of the Commonwealth that all proceedings be stayed permanently. In support of this motion the Commonwealth filed an affidavit, sworn by Sir Ragnar Musgrave Colvin, K.B.E., C.B., the First Naval Member, who deposed that proceedings in the action would involve inquiries into matters which in the interests of the safety of the Commonwealth in the present state of war should be kept secret. He further deposed that the collision, the subject matter of the action, took place when the *Adelaide* was engaged in active naval operations against the enemy in the present state of war which operations were being carried out by the Government of the Commonwealth for the benefit of the nation as a whole, and under the prerogative right of His Majesty, and which operations were urgently required and necessary for the safety of the realm. He also deposed that the voyage, the extinguishment of lights and the speed of the warship were necessary for the proper carrying out of the operations and were necessary for the public safety and the defence of the realm and the national emergency called for the taking of the measures adopted by the warship.

Windeyer K.C. (with him *A. R. Taylor*), for the plaintiff. The question raised on the demurrer is : What immunity, if any, attaches to the Commonwealth in time of war from exercising a duty of care towards its citizens ? The state of war is no answer to the statement of claim. If the language used in the pleadings is ambiguous, then on the demurrer it must be construed in favour of the plaintiff. " Voyage " is not an accurate expression. It may mean the general direction, of course, or something else. It is not sufficient to say the voyage was so and so. There is a distinction between " voyage " and " course." Assuming that they are synonymous, the statement of defence does not allege that the warship should have been at the place in its course at the same time that the *Coptic* was there. This is an action for tort against the Commonwealth (*Judiciary Act* 1903-1940, secs. 56, 64). It is based on negligence of the Commonwealth's servants or agents. The material questions are : (*a*) Is there any duty of care ? or (*b*) Is there no duty based on ordinary tests because

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of the circumstances ? To ascertain if there is a duty, one must, of necessity, have regard to the circumstances. But the duty to take care is not altered by the fact that a state of war exists. It may be that the warship was at the place because it was engaged on warlike operations, but that did not relieve the officers from keeping a proper look-out or following usual reasonable conventions of the sea. The sole test is: What duty did the circumstances require ? The paragraphs in the statement of defence are too general and are not specific enough to deal with the circumstances raised by the statement of claim.

Ham K.C. (with him *Henchman*), for the defendant. The plaintiff apparently admits that in some circumstances there is a prerogative which absolves the King from exercising duties of care to the citizens of the Commonwealth. Under those circumstances it cannot be said on a demurrer that these paragraphs afford no ground of defence. The Court does not sit to decide whether the exercise of the discretion by the Executive in operations against the enemy is correct or not. Once the position is established that there is an urgent necessity for the operations which resulted in injury to a citizen, then it follows that because of the urgent national emergency the King has the prerogative right to wage war and to destroy property of a citizen ; no duty to the citizen arises at all. The King may destroy property of the subject for the national good and the subject is not entitled to any compensation therefor. If anything were done intentionally and it were urgently required in the operation, then clearly no right to compensation for the damage would arise. It matters not whether the measures adopted to carry out the operation were done intentionally or negligently. The immunity continues while the Commonwealth is exercising naval or military operations and cannot be limited by circumstances.

[DIXON J. *Harrison Moore*, in *Act of State in English Law*, (1906), pp. 51 et seq., examines the American cases.]

The proper principles governing the matter are to be found in *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (1), *Crown of Leon* (*Owners*) v. *Admiralty Commissioners* (2), *In re a Petition of Right* (3), *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (4). The basis of *De Keyser's Case* (5) is that a statute may override the prerogative, but it is not an authority for the proposition that there is no prerogative. *In re a Petition of Right* (6) establishes that the King

(1) (1918) 25 C.L.R. 32, at pp. 45, 47, 54, 55.
(2) (1921) 1 K.B. 595, at pp. 606, 607.
(3) (1915) 3 K.B. 649, at pp. 651, 653, 658, 659, 665, 666.
(4) (1920) A.C. 508, at pp. 549-557, 561, 564, 565.
(5) (1920) A.C. 508.
(6) (1915) 3 K.B. 649.

may do anything in pursuance of his object in prosecuting the defence of the realm : See *Lloyd* v. *Wallach* (1). This is a clear case of urgent national necessity. The Court is not competent to consider the details of the collision as the matter is one of the exercise of the King's prerogative. The cause of action is not justiciable. Sec. 56 of the *Judiciary Act* 1903-1940 does not attempt to override the prerogative ; in fact, in this case in time of war, the prerogative, in effect, overrides it. *The Volcano* (2) is not an authority to the contrary. There was not any war in existence in that case. The Court should order that service of the writ be set aside.

Windeyer K.C., in reply. There must be an intentional exercise of the prerogative (*Crown of Leon Case* (3)). The King is not in any different position from anyone else. For example, it must be shown that compulsory acquisition of anything by the Crown was reasonably necessary (*Cope* v. *Sharpe* (4) ; *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 688.

Cur. adv. vult.

Dec. 5.

The following written judgments were delivered :—

RICH A.C.J. I agree with the judgment of *Dixon* J., which I have had the advantage of reading, and cannot usefully add anything to it. In my opinion the demurrers should be overruled and the motion dismissed. The costs should be costs in the cause.

STARKE J. This suit is brought by the plaintiff against the Commonwealth in Admiralty for damage occasioned by a collision between the plaintiff's ship *Coptic* and His Majesty's Australian Ship *Adelaide*. The plaintiff alleges that the collision was brought about by the negligence of the defendant's officers or servants in that :—1. A proper and sufficient look-out was not kept on the *Adelaide*. 2. The *Adelaide* was navigated at an excessive speed. 3. The *Coptic* was pursuing a course directed by the naval authorities of the Commonwealth. The course was known to or should have been communicated to the *Adelaide* and steps should have been taken to avoid that course. 4. The *Adelaide* should have indicated her presence to the *Coptic*. 5. The *Adelaide* was not navigated in a proper and seamanlike manner.

The Commonwealth denied these allegations, and demurred, but abandoned its demurrer on the argument before this Court. It also raised the following plea as a defence to the suit :—" 19. At

(1) (1915) 20 C.L.R. 299.
(2) (1844) 2 Wm. Rob. 337 [166 E.R. 282].
(3) (1921) 1 K.B. 595.
(4) (1910) 1 K.B. 168.

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the time of the said collision and at all material times there existed a state of war in which the Commonwealth of Australia was engaged. 20. At the time of the said collision H.M.A.S. *Adelaide* was part of of the Naval Forces of the Commonwealth of Australia and was under the control of the Naval Board of Administration for the Naval Forces of the Commonwealth constituted under the *Naval Defence Act* 1910-1934. 21. At the time of the said collision and at all material times H.M.A.S. *Adelaide* was engaged in active naval operations against the enemy in the present state of war which operations were being carried out by the Government of the Commonwealth for the benefit of the Nation as a whole and under the prerogative right of His Majesty and such operations were urgently required and necessary for the safety of the realm. 22. The voyage the extinguishment of lights and the speed of H.M.A.S. *Adelaide* were necessary for the proper carrying out of the said operations and were necessary for the public safety and the defence of the realm and the national emergency called for the taking of the measures adopted by H.M.A.S. *Adelaide*. 23. The plaintiff's supposed cause of action consists solely in acts, matters and things done or occurring in the course of active naval operations against the King's enemies by the armed forces of the Commonwealth."

And to this plea the plaintiff demurred upon the ground that it did not disclose or constitute any defence to the plaintiff's cause of action. The Commonwealth also moved, upon affidavit, to dismiss the suit or to set aside the service of the writ because of the matters set forth in the plea already set forth. The plaintiff's demurrer and the Commonwealth's motion were heard together.

In English law, the Crown was not liable for the wrongful acts of its officers (*Tobin* v. *The Queen* (1)); the remedy was against the person who actually committed the wrongful act. Consequently the proper party to be sued for damage for collision with one of His Majesty's ships was the officer navigating the ship at the time of collision. Usually the Admiralty appeared for and defended the proceedings on his behalf (*H.M.S. Sans Pareil* (2); *The Olympic and H. M. S. Hawke* (3)). In Australia, the Constitution and the *Judiciary Act* 1903-1940, secs. 56 and 64, enable any person making any claim against the Commonwealth whether in contract or in tort to bring a suit in respect of the claim against the Commonwealth. The Commonwealth is thus made responsible for the acts, neglects or defaults of its officers in the course of their service as in a suit between subject and subject unless the officer is executing some

(1) (1864) 16 C.B.N.S. 310 [143 E.R. 1148].

(2) (1900) P. 267.

(3) (1913) P. 214, at p. 216.

independent duty cast upon him by the law (*Baume* v. *The Commonwealth* (1); *The Commonwealth* v. *New South Wales* (2); *Pitcher* v. *Federal Capital Commission* (3); *Musgrave* v. *The Commonwealth* (4); *Field* v. *Nott* (5)).

The plea alleges that the officer or officers in charge of the *Adelaide* at the time of the collision with the *Coptic* were appointed pursuant to the *Naval Defence Act* 1910-1934. Persons so appointed are officers of the Crown serving in the Naval Forces of the Commonwealth, and the executive power of the Commonwealth is vested in the Crown (Constitution, ch. II.). But the Commonwealth comes under no legal liability for the acts or omissions of its officers unless such acts or omissions be tortious, or in other words unless such acts or omissions would as between subject and subject be tortious; that is, in breach of some legal duty, in the particular case, to take care. There is no doubt that those who navigate the seas must take reasonable care and use reasonable skill to prevent their ships from doing injury to others. And officers navigating the King's ships must observe like care and skill and have been held responsible in damages for injuries by reason of their neglect to exercise such care and skill (*H.M.S. Sans Pareil* (6); *Robertson's Civil Proceedings by and against the Crown*, (1908), p. 525). Indeed, that duty has been maintained although the navigating officers of the King's ships were engaged in what may be described as "warlike operations." *H.M.S. Hydra* (7) is one illustration; *H.M.S. Drake* (8) is another. In the latter case, the cruiser *Drake*, while in charge of its captain, the defendant, had been torpedoed and was in a disabled and damaged condition, with a heavy list to starboard. She was trying to reach port and save herself. She collided with a merchant ship and so damaged her that the merchant ship had to be beached. A suit was brought in which it was alleged that the defendant had not kept his course and speed and had exhibited improper lights. The suit was dismissed, but on the ground that the *Drake* was unable to avoid the collision, not through negligence, but "because there was no step that she could have properly taken in the short time that elapsed after each vessel realized what the other was doing" (per *Scrutton* L.J. (9)). The case of the *Warilda* is possibly another instance. She was under requisition by the Admiralty on the terms of the form of charterparty called T.99. The charterparty did not, I gather, operate as a demise of the ship so as to make

(1) (1906) 4 C.L.R. 97.
(2) (1923) 32 C.L.R. 200.
(3) (1928) 41 C.L.R. 385.
(4) (1937) 57 C.L.R. 514.
(5) (1939) 62 C.L.R. 660.
(6) (1900) P. 267.
(7) (1918) P. 78.
(8) (1919) P. 362.
(9) (1919) P., at p. 380.

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the *Warilda* a King's ship. She was, however, armed and is described as "part of the naval forces of the country" and "had what was appropriately called the status of a warship and was engaged on a war duty, namely the carriage of wounded soldiers." Whilst so engaged and proceeding according to instructions, without lights and at maximum speed, she collided with another merchant vessel and caused considerable damage. It was held that the collision was due to the negligence of the *Warilda* in not giving way and slackening speed and judgment was given against her and affirmed by the Court of Appeal and the House of Lords. The possession of the *Warilda* remained, I suppose, with her owners, through the master and crew, who continued the owner's servants; but still she was engaged in a "warlike operation" under the direction of the Crown through the Lords Commissioners of the Admiralty. Nevertheless she acquired no immunity, by reason thereof, from the duty of taking reasonable care and using reasonable skill in navigating the seas: See *Attorney-General* v. *Adelaide Steamship Co. Ltd.* (1); *Elliot Steam Tug Co. Ltd.* v. *Admiralty Commissioners*; *Page* v. *Admiralty Commissioners* (2) and *The Broadmayne* (3), *Law Quarterly Review*, vol. 35, p. 12, as to requisitioning ships.

The plea raised by pars. 19 to 23, both inclusive, of the defence, remains for consideration. "Not everything done by a King's ship or a King's officer in time of war is necessarily a warlike operation or the consequence thereof": See *Britain Steamship Co. Ltd.* v. *The King* (4). And, as already indicated, not every warlike operation, by which I mean an operation of a warlike character as distinguished from an operation or an act of war (see *Britain Steamship Co. Ltd.* v. *The King* (5)) excuses a person from the duty of taking care or justifies the suspension of the ordinary law.

It was said, however, that the Crown has wide prerogative powers for the defence of the realm when the necessity arises (*Case of The King's Prerogative in Saltpetre* (6); *In re a Petition of Right* (7); *The Broadmayne* (3); *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (8)). "I have no doubt," said Lord *Moulton* in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.*, "that in early days, when war was carried on in a simpler fashion and on a smaller scale than is the case in modern times, the Crown, to whom the defence of the realm was entrusted, had wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when

(1) (1923) A.C. 292, at pp. 296, 297, 299, 307.
(2) (1921) 1 A.C. 137, at p. 140.
(3) (1916) P. 64.
(4) (1921) 1 A.C. 99, at pp. 129, 133.
(5) (1921) 1 A.C., at pp. 108, 133.
(6) (1606) 12 Co. Rep. 12 [77 E.R. 1294].
(7) (1915) 3 K.B. 649.
(8) (1920) A.C. 508.

the necessity arose. But such necessity would be in general an actual and immediate necessity arising in face of the enemy and in circumstances when the rule *Salus populi suprema lex* was clearly applicable. The necessity would in almost all cases be local, and no-one could deny the right of the Crown to raise fortifications on or otherwise occupy the land of the subject in the face of the enemy, if it were necessary so to do" (1). And in *The Broadmayne* (2) the following passage from *Chitty's Prerogatives of the Crown*, (1820), p. 50, was cited with approval by *Swinfen Eady* L.J. :—"The King may lay on a general embargo, and may do various acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion. The King cannot change by his prerogative of war, either the law of nations or the law of the land, by general and unlimited regulations" (3). Indeed, the law has been clear, I think, since the judgment of Lord *Camden* in *Entick* v. *Carrington* (4), that a public officer cannot defend himself by alleging generally that he has acted from necessity in the public interest and for the defence of the realm, whether he has or has not the express or implied command of the Crown (*Mackenzie-Kennedy* v. *Air Council* (5); *Raleigh* v. *Goschen* (6)). An "argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions" (*Entick* v. *Carrington* (7)). "If any person commits . . . a wrongful act or one not justifiable, he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the Executive Government or of any officer of State" (*Raleigh* v. *Goschen* (6)). He must find his justification, if any, in the common law or in some statutory provision, and it is for the courts of law to determine whether the justification exists.

So far, therefore, as the plea in the present case justifies the matters complained of, under the prerogative of the Crown, for the benefit of the nation as a whole, and necessary for the safety of the realm in a national emergency, the plea is bad. No such justification is known to or is allowed by the law.

But it is also argued that the plea alleges that the matters complained of consist solely in acts matters or things done or occurring in the course of naval operations against the King's enemies by the armed forces of the Commonwealth. In my judgment, there is no

(1) (1920) A.C., at p. 552.
(2) (1916) P. 64.
(3) (1916) P., at pp. 67, 68.
(4) (1765) 19 St. Tr. 1030.
(5) (1927) 2 K.B. 517, at p. 532.
(6) (1898) 1 Ch. 73, at p. 77.
(7) (1765) 19 St. Tr., at p. 1073.

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doubt that the Executive Government and its officers must conduct operations of war, whether naval, military, or in the air, without the control or interference of the courts of law. Acts done in the course of such operations are not justiciable and the courts of law cannot take cognizance of them. In my judgment, the case of *Ex parte D. F. Marais* (1) so decided. The Lord Chancellor, in delivering the opinion of the Judicial Committee, said :—" They are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals "(2)—See also *Tilonko* v. *Attorney-General of Natal* (3) ; *Clifford and O'Sullivan* (4) ; *Egan* v. *Macready* (5) ; *R.* v. *Allen* (6) ; *R.* (*Garde*) v. *Strickland* (7) ; *R.* (*Ronayne and Mulcahy*) v. *Strickland* (8) ; *Higgins* v. *Willis* (9) ; *R.* (*Childers*) v. *Adjutant-General of the Provisional Forces* (10).

It is the right and duty, however, of the courts of law to determine whether a state of war exists. Judicial notice may be taken of a state of war, possibly, in case of uncertainty, from information obtained from the Executive Government (*Duff Development Co. Ltd.* v. *Kelantan Government* (11)), or the fact may be proved by other means. And so also, I apprehend, it is the right and duty of the courts of law to determine whether the matters complained of were done or omitted in the conduct of an operation or act of war. It is not enough to say that the matters complained of were done in time of war or were operations of a warlike character connected with the carrying on of war. But the immunity arising from the conduct of war cannot be confined to the theatre of operations where combatants are actively engaged : it must extend, in modern times, to all theatres in which action on the part of the King's enemies is imminent.

If it be established that the matters complained of were done or omitted in the conduct of war in the sense indicated, the courts cannot and will not interfere : such matters are not justiciable. War cannot be controlled or conducted by judicial tribunals : what is necessary or reasonable in its conduct must necessarily rest with those charged with the responsibility of the operations in whatever theatre of war they take place. But there is authority for the proposition that though the courts of law cannot interfere with the conduct of war, *durante bello*, yet after the cessation of hostilities

(1) (1902) A.C. 109.
(2) (1902) A.C., at p. 114.
(3) (1907) A.C. 93, at p. 95.
(4) (1921) 2 A.C. 570.
(5) (1921) 1 I.R. 265.
(6) (1921) 2 I.R. 241.
(7) (1921) 2 I.R. 317.
(8) (1921) 2 I.R. 333.
(9) (1921) 2 I.R. 386.
(10) (1923) 1 I.R. 5, at p. 14.
(11) (1924) A.C. 797.

or the restoration of peace the courts have jurisdiction to inquire and determine whether matters done or occurring during its continuance affecting the rights or properties of the King's subjects were justifiable: See *R.* v. *Allen* (1); *R.* (*Ronayne and Mulcahy*) v. *Strickland* (2); *Higgins* v. *Willis* (3); *Pollock* on *Torts*, 10th ed. (1916), p. 129; *Law Quarterly Review*, vol. 18, at pp. 129-130, 133-142, 143-151, 152-158. But this proposition is of academic interest rather than of real importance, for Acts of Indemnity (e.g., 10 & 11 Geo. V. c. 48) usually protect all officers of the Crown acting in good faith.

The plea in the present case alleges, as already stated, that the matters complained of were done or occurred in the course of naval operations against the King's enemies by the armed forces of the Commonwealth. Upon demurrer, the truth of these allegations must be assumed, though it may be doubted whether they can be established as facts. For the reasons given, however, the allegations afford, if established in fact, a good plea, *durante bello* at least, to the complaint of the plaintiff in this suit.

The motion of the Commonwealth to dismiss the suit or to set aside the service of the writ should, for the like reasons, be refused.

It was suggested during argument that any inquiry as to the matters raised by the plea already mentioned would involve the disclosure of naval secrets and be prejudicial to the interests of the State. If such danger exists, a motion should be made either to stay further proceedings until the danger be passed or to hear such proceedings in camera pursuant to the provisions of the *National Security Act* 1939 (1939 No. 15), sec. 8.

Both demurrers should be overruled and the motion on the part of the Commonwealth dismissed.

DIXON J. In this suit in Admiralty, two proceedings were argued before the Full Court. One is a demurrer on the part of the plaintiff to a separate ground of defence pleaded in the defendant's statement of defence. The other is a motion by the defendant summarily to dismiss or to stay the suit.

The defendant is the Commonwealth of Australia and the suit is brought in the original jurisdiction of this Court under sec. 56 of the *Judiciary Act* 1903-1940, which provides that any person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court.

The word "Commonwealth" in this connection describes the Crown in right of the Commonwealth of Australia. Thus the

(1) (1921) 2 I.R. 241. (2) (1921) 2 I.R. 333. (3) (1921) 2 I.R. 386.

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provision, though procedural in form of expression, casts upon the Executive a liability for tort from which at common law the Crown was immune. It assumes that, from the mere statement that the King may be sued in tort, enough appears to enable the courts to ascertain in the light of the general substantive law what kind of acts or omissions on the part of the servants of the Crown would amount to a civil wrong for which the Treasury would be responsible.

In the present case the matter complained of by the plaintiff is the supposed improper navigation of a ship of war of the Royal Australian Navy in time of war. The plaintiff is the owner of a ship of the mercantile marine called the *Coptic*, which came into collision with the warship whilst on a voyage from Brisbane to Sydney. The collision took place during the hours of darkness of a day early in September 1940. Both ships were proceeding with lights out, the *Coptic* on a southerly course and the warship on a course with an exactly corresponding northerly bearing. The starboard bows of the two ships came into contact. The course of the *Coptic* had been given her by the naval authorities before she left Brisbane. Under Statutory Defence Regulations to which I shall presently refer she was bound to pursue the course so directed.

The negligence on the part of the Commonwealth which, as the plaintiff alleges, caused the collision, may be placed into two distinct categories not clearly distinguished in the statement of claim. One consists in the failure of the naval authorities, having directed the *Coptic* to pursue the course given her, to inform the command of the warship that the *Coptic* was on that course. The other consists in improper acts or omissions in the navigation of the warship, such as the failure to keep a sufficient look-out and navigating the vessel at an excessive speed. The pleading suggests, too, that those in charge of the warship should have known or realized that the *Coptic* was or might be on that course and should have taken steps to avoid it and to indicate to her the presence of the warship in her vicinity.

To all this the defendant Commonwealth pleads as a distinct ground of defence that at the time of the collision the warship was engaged in active naval operations against the enemy in the present state of war; that the operations were urgently required and necessary for the safety of the realm; that the voyage, the extinguishment of lights and the speed of the ship of war were necessary for the proper carrying out of the operations and for the public safety and the defence of the realm, and that the national emergency called for the taking of the measures adopted by the warship. The pleading proceeds to allege that the plaintiff's supposed cause of action consists solely in acts, matters and things done or occurring

in the course of active naval operations against the King's enemies by the armed forces of the Commonwealth.

To this ground of defence so pleaded the plaintiff demurred. Before dealing with the substantial question of the sufficiency of the defence pleaded, it is necessary to state shortly the effect of the statutory regulations in consequence of which the *Coptic*, a British ship on a voyage from Brisbane to Sydney, was pursuing an assigned course with lights out.

By the British *Defence* (*General*) *Regulations* 1939, reg. 43, the Admiralty are empowered by order to make provision as to the places in or to which vessels may be and go and generally for regulating the movements, navigation . . . and lighting of vessels. The regulation calls such orders "navigation orders." Under this provision a navigation order, to be cited as the Darkening Ship Order 1939 (Statutory Rules and Orders 1939 No. 1155) was made. The areas to which it applies include areas for which route instructions are issued. Where the regulation has effect, no light of any description shall be exposed between sunset and sunrise in any British vessel (with certain exceptions) so as to be visible outboard or to reflect upwards. By Navigation Order No. 1, 1939 (Statutory Rules and Orders 1939 No. 1157) British merchant vessels are required to comply with any sailing or routeing instructions which may from time to time be issued by the Admiralty or by any person authorized by the Admiralty to act under this order.

In Australia, the *National Security* (*General*) *Regulations* (S.R. 1939, No. 87), reg. 45, corresponds to reg. 43 of the British *Defence* (*General*) *Regulations* and in fact transcribes it *mutatis mutandis*. By an order thereunder the Minister for Defence ordered that all vessels registered in Australia and all vessels in Australian territorial waters should comply with all directions given by any officer authorized in that behalf by the Naval Board in relation to the movements, navigation and lighting of the vessel (*Commonwealth Gazette*, 1939 No. 88, 26th September).

It is evident that route instructions had been issued for an area comprising the waters through which the *Coptic's* voyage took her and that the Australian naval authorities have been authorized by the Admiralty to act under Navigation Order No. 1.

Apart altogether from any question whether it is the Commonwealth which is responsible for what is done or omitted in acting under this authorization, it is clear that the duty undertaken by the naval authorities in giving route instructions to a ship forms a part of the Crown's function of waging war by sea and protecting British ships from enemy action.

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The plaintiff makes the giving of a course to the *Coptic* in the performance of this function of the Crown the foundation upon which to base an alleged duty of care on the part of the naval authorities to see that the officers responsible for the navigation of the warship were informed of and were alive to the fact that the *Coptic* would be in the neighbourhood and, on the part of those officers, an alleged duty of care to avoid the course assigned to the *Coptic* or to give her some warning of the presence of the warship. Look-out and speed are, of course, matters for which the plaintiff relies upon the ordinary duty of careful navigation.

The obligation of due care to avoid harm to others, though a general duty, arises out of the situation occupied by the person incurring it or the circumstances in which he is placed. On the assumption, which for the purposes of the demurrer we are bound to make, that the warship was at the time of the collision engaged in active naval operations against the enemy, can it be said that a legal duty towards civilians or others using the sea to exercise reasonable care for their safety fell upon those conducting the operations? It may be assumed that the liability of the Commonwealth to be sued in tort means that if an officer or servant of the Crown in right of the Commonwealth acting in the course of his service under the authority of the Crown, and not for the purpose of exercising or fulfilling an independent power or duty, commits a civil wrong, then the Commonwealth is vicariously liable for his breach of duty. But, putting aside the exceptional case of an immediate duty lying on the Crown itself, as, for instance, when the duty that has been broken arises from the occupation of land, if the officers and servants of the Commonwealth singly or collectively are under no liability in respect of the matters complained of, the Commonwealth itself cannot be liable.

In the present case, at all events, the liability of the Commonwealth must be vicarious; it must depend on the existence of a duty of care either in the officers and ratings taking part at the time of the collision in the navigation of the warship or in the officers who, according to the plaintiff, ought to have supplied the information of the *Coptic's* course and probable whereabouts or in those who, notwithstanding such information, laid the course of the warship. This sufficiently appears inferentially from the practice obtaining in England, where the Crown is not liable for tort. There, when damage is done by one of His Majesty's ships, proceedings *in personam* are instituted against the captain or other naval officer on whom it is hoped that personal fault can be fixed. The Admiralty usually assumes the responsibility of defending the suit and answering

any damages found against the defendant. But no plaintiff is entitled to succeed unless he selects as defendant an officer personally liable for the neglect or default in the navigation of the ship: See *The Athol* (1); *Nicholson* v. *Mouncey and Symes* (2).

Outside a theatre of war, a want of care for the safety of merchant ships exposes a naval officer navigating a King's ship to the same civil liability as if he were in the merchant service. But, although for acts or omissions amounting to civil wrongs an officer of the Crown can derive no protection from the fact that he was acting in the King's service or even under express command, it is recognized that, where what is alleged against him is failure to fulfil an obligation of care, the character in which he acted, together, no doubt, with the nature of the duties he was in the course of performing, may determine the extent of the duty of care: Cp. *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 666. It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships the navigating officer of a King's ship of war was under a common-law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations. It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer's conduct as a discharge of the duty of care, though the duty itself persists. To adopt such a view would mean that whether the combat be by sea, land or air our men go into action accompanied by the law of civil negligence, warning them to be mindful of the person and property of civilians. It would mean that the Courts could be called upon to say whether the soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No-one can imagine a court undertaking the trial of such an issue, either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy. But the principle cannot be limited to the presence of the enemy or to occasions when contact with the enemy has been established. Warfare perhaps never did admit of such a distinction, but now it would be quite absurd. The development of the speed of ships and the range of guns were enough to show it to be an impracticable refinement, but it has been put out of question by the bomber, the submarine and the floating mine. The principle must extend to all active operations against the enemy. It must

(1) (1842) 1 Wm. Rob. 374 [166 E.R. 613].

(2) (1812) 15 East. 384 [104 E.R. 890].

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cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaisance and engagement. But a real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manœuvring among other ships in a harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances. Thus the commander of His Majesty's torpedo-boat destroyer *Hydra* was held liable for a collision of his ship with a merchant ship in the English Channel on the night of 11th February 1917, because he failed to perceive that the other ship, which showed him a light, was approaching on a crossing course. The hearing was *in camera* and obviously the *Hydra* was on active service and war conditions obtained (*H.M.S. Hydra* (1)).

It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls. But, when, in an action of negligence against the Crown or a member of the armed forces of the Crown, it is made to appear to the court that the matters complained of formed part of, or an incident in, active naval or military operations against the enemy, then in my opinion the action must fail on the ground that, while in the course of actually operating against the enemy, the forces of the Crown are under no duty of care to avoid causing loss or damage to private individuals.

There is no authority dealing with civil liability for negligence on the part of the King's forces when in action, but the law has always recognized that rights of property and of person must give way to the necessities of the defence of the realm. A good statement will be found by Sir *Erle Richards*, *Law Quarterly Review*, vol. 18, at p. 135. To justify interference with person or property, it must, according to some, be shown that the measures were reasonably considered necessary to meet an appearance of imminent danger. But this seems a strict test: See *Pollock* on *Torts*, 14th ed. (1939), p. 132, note *t*, and p. 134; *Law Quarterly Review*, vol. 18, at pp. 139-141 and 158, and cp. *R.* v. *Allen* (2).

The uniform tendency of the law has been to concede to the armed forces complete legal freedom of action in the field, that is to say in the course of active operations against the enemy, so that the application of private law by the ordinary courts may end where the active use of arms begins. Consistently with this tendency the civil law of negligence cannot attach to active naval operations against the enemy.

(1) (1918) P. 78.

(2) (1921) 2 I.R. 241.

As to the suggestion that when the naval authorities assigned a course to the *Coptic* they incurred a duty of care with respect to the course to be taken by the warship, there is at least one further objection. For the direction was given to the *Coptic* under a governmental power of control for safeguarding ships against enemy action and for the better conduct of the war, and a liability in negligence is not imposed upon the Crown for the manner in which such a power is exercised.

In my opinion the ground of defence demurred to (pars. 19 to 23 of the statement of defence) is good in law. Great reliance was placed by the plaintiff upon the omission from the pleading of an express statement that the collision was caused by measures taken by the warship for the purpose of naval operations against the enemy and of anything in the nature of an attempt to justify the precise acts complained of on the ground of necessity, actual or apprehended. But in the view I have expressed the pleading contains enough to negative the duty of care. No other wrong is alleged, and the cause of action in negligence, in my opinion, is answered by the facts pleaded. The plaintiff's demurrer ought therefore to be overruled.

The question remains whether the action should go to trial, the plaintiff having traversed, as well as demurring to, the paragraphs containing this ground of defence, or, on the other hand, the affidavit of the First Naval Member of the Naval Board is conclusive to show that the action is not maintainable so that it ought to be stayed.

The extent to which the Court should receive the statement of an officer of State as conclusive upon a matter of the present description is not well defined. Here there are two distinct things covered by the statement contained in the affidavit. One is the fact that the warship was at the time of the collision engaged in active naval operations against the enemy. The other relates to the necessity, for the purpose of the operations, of the voyage, the extinguishment of lights, the speed, and the measures adopted by the vessel.

As to the second head, I have no doubt that the Court should accept the statement of the opinion of the First Naval Member of the Naval Board as decisive. The Court is not in a position to know or to inquire what measures are necessary for the proper conduct of a warlike operation and must depend upon those upon whom finally rests the responsibility of action: Cf. *Crown of Leon (Owners)* v. *Admiralty Commissioners* (1), per *Darling* J.; *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (2), per Lord *Sumner*; *Joseph* v. *Colonial Treasurer (N.S.W.)* (3).

(1) (1921) 1 K.B., at p. 607.
(2) (1920) A.C., at p. 565.
(3) (1918) 25 C.L.R., at p. 47, per *Isaacs* J., and pp. 54, 55, per *Gavan Duffy* J.

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But I do not think that the question whether, at the time of the collision, the warship was engaged in active operations against the enemy so that no liability to the *Coptic* for improper navigation could attach is in the same category. It is an issue which, except for the possible necessity of keeping secret the facts upon which it depends, a court may decide for itself, and perhaps, from one point of view, it may be said ought to decide.

There can be little doubt that any statement in open court as to the purpose of any voyage or manœuvre of a ship of war during hostilities is a thing which only becomes possible when lapse of time has made the information useless to the enemy. There are, therefore, grounds of policy independent of the nature of the issue which might provide some reason for regarding the matter as one covered by the exceptional rule giving conclusive effect to official statements. But on the whole I think it is a matter of fact and not of opinion and is not one which the Executive is authorized to decide. It is not like such facts as the existence of a state of war, the recognition of a foreign state, the extent of the realm or other territory claimed by the Crown, or the status of a foreign sovereign. The difficulty arising from the secrecy of the matters affecting the issue must be dealt with in some other manner. If hearing *in camera* does not ensure sufficient secrecy, and it is thought impossible, lest evidence be lost, to postpone the issue, the matter might in the end rest upon burden of proof and presumptive inferences. But it is enough for the present to say that I think the motion ought to be refused.

I would make the costs of the demurrer and of the motion costs in the cause.

McTIERNAN J. In my opinion the demurrers should be overruled and the motion dismissed. I have read the reasons for judgment of *Dixon* J. and agree with them.

WILLIAMS J. During the night of 3rd September 1940, a collision at sea occurred off the Australian coast between the M.V. *Coptic* a ship owned by the plaintiff, and H.M.A.S. *Adelaide*, a warship owned by the Commonwealth of Australia, which caused damage to the *Coptic*.

The plaintiff has sued the Commonwealth of Australia in this Court in Admiralty in respect of the damage suffered by the *Coptic* and alleges in the statement of claim, *inter alia*, that the collision was due to the negligent navigation of the *Adelaide*.

I have had the advantage of reading the judgments of my brothers *Starke* and *Dixon*, where the notice of motion, the relevant portion of the pleadings and the nature of the present proceedings are referred to, so that I only propose to indicate briefly my reasons for agreeing that the motion to set aside the service of the writ should be dismissed and both demurrers overruled.

The evidence in support of the motion is an affidavit by the first naval member of the Naval Board of the Commonwealth, Admiral Sir Ragnar Colvin, K.B.E., C.B. He states that at the time of the collision the *Adelaide* was engaged in active naval operations against the enemy in the present war, that the operations were being carried out by the Government of the Commonwealth for the benefit of the nation as a whole and under the prerogative right of His Majesty, and that the operations were urgently required and necessary for the safety of the realm. He also states that the voyage, the extinguishing of lights and the speed of the *Adelaide* were necessary for the proper carrying out of these operations. In my opinion this evidence is not sufficient to have the writ set aside.

The statement of claim alleges the damage to the *Coptic* was due to an ordinary peril of the sea, namely, a collision at night. It alleges the *Adelaide* was guilty of negligence in certain respects, of which I need only mention one, namely, that a proper and sufficient look-out was not kept having regard to all the circumstances. In England the Crown cannot be sued in tort, so that where collisions have occurred, due to the negligent navigation of warships, the practice has been to sue the captain or other officer in charge. The Commonwealth is liable for the acts and defaults of its servants committed in the course of their duty in the same way as in a suit between subject and subject. In circumstances, therefore, where an action in Admiralty can be brought in England against the captain of an English warship for damage caused by its negligent navigation, a proceeding can be brought in this Court against the Commonwealth for damage caused by the negligent navigation of an Australian warship. The English authorities show that such actions have been brought in war-time (*H.M.S. Hydra* (1); *H.M.S. Archer* (2); *H.M.S. Drake* (3)). The standard form of charter-party under which ships were requisitioned by the Admiralty during the last war contained two clauses, one of which provided the Crown should be responsible for all damage in consequence of hostilities or warlike operations, while the other provided that all ordinary sea risks should be borne by the owner. The meaning of these clauses has

(1) (1918) P. 78.
(2) (1919) P. 1.
(3) (1919) P. 362.

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been frequently considered in the House of Lords: *Britain Steamship Co. Ltd.* v. *The King* (1); *Attorney-General* v. *Ard Coasters Ltd.*; *Liverpool and London War Risks Insurance Association Ltd.* v. *Marine Underwriters of S.S. Richard de Larrinagu* (2); *Commonwealth Shipping Representative* v. *P. & O. Branch Service* (3); *Clan Line Steamers Ltd.* v. *Board of Trade* (4); *Board of Trade* v. *Hain Steamship Co. Ltd.* (5). The cases have been collected by Lord *Hailsham* in his speech in *Clan Line Steamers Ltd.* v. *Board of Trade* (6). The speeches of their Lordships contain many statements which throw light upon the meaning of the expression "warlike operations." In *Britain Steamship Co. Ltd.* v. *The King* (7) it was held that the risk of collision at night is an ordinary maritime risk even in war-time, but aggravated by the removal of the protection of the usual lights of navigation (8). Lord *Sumner* said: "Not everything done by a King's ship or a King's officer, in time of war is necessarily a warlike operation or the consequence thereof." In *Attorney-General* v. *Ard Coasters Ltd.* (9) he pointed out that operations in war and operations of war are not necessarily the same.

The statement of defence in the present case alleges that the plaintiff's supposed cause of action consists solely in acts matters and things done or occurring in the course of active naval operations against the King's enemies by the armed forces of the Commonwealth. It does not state that actual hostilities were in progress at the time. If this was proved the alleged cause of action would not be justiciable (*Ex parte D. F. Marais* (10)). If the allegation can be established it would be a good defence, but it must be proved at the hearing of the action by proper evidence. Emphasis must be laid on the word "solely." The *Adelaide* might have been doing a number of things required by her being engaged on active naval operations against the enemy without any of these things being the proximate cause of the collision. The cases of *H.M.S. Hydra* (11) and *H.M.S. Archer* (12), to which I have already referred, show that a warship is not released from the duty to take due care in war-time, although it may be engaged in dangerous operations such as patrolling waters infested by submarines or returning to port in a damaged condition after a naval engagement; but, if the collision is due to the special circumstances arising out of such operations, the warship would not, of course, be guilty of negligence.

(1) (1921) 1 A.C. 99.
(2) (1921) 2 A.C. 141.
(3) (1923) A.C. 191.
(4) (1929) A.C. 514.
(5) (1929) A.C. 534.
(6) (1929) A.C., at pp. 522-525.
(7) (1921) 1 A.C. 99.
(8) (1921) 1 A.C., at p. 129
(9) (1921) 2 A.C., at p. 153.
(10) (1902) A.C., at p. 115.
(11) (1918) P. 78.
(12) (1919) P. 1.

In the present case the Court ought to accept the Admiral's statement that the voyage the *Adelaide* was engaged upon, the extinguishing of lights and its speed were necessary for the carrying on of the operations, but those are all only matters to be taken into account in deciding the real question whether under all the circumstances the collision was caused by lack of due care on the part of the *Adelaide*. The *Coptic* and the *Adelaide* were both on the courses assigned to them by the naval authorities, but that did not mean that both ships should not have taken all precautions that were practicable to avoid a collision having regard to the difficulty of navigation imposed on them by war conditions. Each ship was in charge of its own officers, and it could not be suggested the orders were to keep this course whatever the consequences might be. It would not be sufficient in order to destroy the plaintiff's case to establish that the *Adelaide* was on a particular course and steaming without lights at a particular speed. If the plaintiff could prove that the *Adelaide* was not keeping a proper look-out it would be open to the Court to find it was this breach of duty on the part of the *Adelaide*, and not the acts she was performing in the course of active naval operations which was responsible for the collision.

The motion should be dismissed and both demurrers overruled.

Demurrers overruled and motion dismissed. Costs—costs in the cause.

Solicitors for the plaintiff, *Blake & Riggall.*

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

J. B.