[HIGH COURT OF AUSTRALIA.]

ASIATIC STEAM NAVIGATION COMPANY LIMITED AND ANOTHER . . . DEFENDANTS, } APPELLANTS;

AND

THE COMMONWEALTH AND ANOTHER . PLAINTIFFS, } RESPONDENTS.

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SYDNEY, 1955, *April* 15, 22; *May* 2; Taylor J. *Dec.* 2, 5, 6; MELBOURNE, 1956, *June* 6. Dixon C.J., McTiernan, Williams, Fullagar and Kitto JJ.

Shipping—Commonwealth ship—Not ship of war—Collision—Improper navigation of ship but without actual fault or privity on part of Commonwealth—Damages—Limitation of liability—Rate of interest—Merchant Shipping Act 1894 (*Imp.*), *ss.* 2, 3, 23, 503, 504, 741—*Merchant Shipping Act* 1906 (*Imp.*), *ss.* 8, 80—*The Constitution* (63 & 64 *Vict. c.* 12), *ss.* 75 (*iii.*), 78—*Judiciary Act* 1903-1950, *ss.* 56-67.

In determining the extent to which liability may be limited under s. 503 of the *Merchant Shipping Act* 1894 (Imp.), there must be ascertained the amount in Australian currency which represents eight English pounds for each ton of the vessel's tonnage when ascertained in accordance with that section.

So *held* by *Taylor* J.

The Commonwealth of Australia is entitled to limit liability under s. 503 of the *Merchant Shipping Act* 1894 (Imp.) when owing to the improper navigation of a ship of the Commonwealth (not being one of the Queen's ships of war), but without the actual fault or privity of the Commonwealth, loss or damage is caused for which the Commonwealth is liable in damages.

The meaning and operation of the *Judiciary Act* 1903-1950, discussed.

The rate of interest that should be borne by the sum to which such liability is limited should be four per cent per annum.

In re Tennant; *Mortlock* v. *Hawker* (1942) 65 C.L.R. 473, referred to.

Decision of *Taylor* J., affirmed.

APPEAL from *Taylor* J.

In a suit brought by the Commonwealth of Australia and the Secretary, Department of Shipping and Transport, in the original jurisdiction of the High Court by way of writ of summons against the Asiatic Steam Navigation Co. Ltd. the plaintiffs sought, pursuant to s. 503 of the *Merchant Shipping Act* 1894 (Imp.), to limit

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their liability for loss and damage which occurred as the result of a collision on 12th September 1952, near Garden Island, in Port Jackson between the ship *Shahzada* and the ship *River Loddon*.

The statement of claim, as amended, was substantially as follows:

1. At all material times the plaintiff the Commonwealth of Australia was and still is registered as owner of the British ship *River Loddon* registered at Melbourne, Victoria. The plaintiff the Secretary, Department of Shipping and Transport is the permanent head of that Department, and is the permanent head of the Department in respect of which the ship is registered within the meaning of Order in Council No. 1391 of 1924 dated 8th December 1924.

2. At about 10.45 p.m. on 12th September 1952 the ship *River Loddon* came into collision with the ship *Shahzada*, owned by the Asiatic Steam Navigation Co. Ltd., near Garden Island, in Port Jackson, New South Wales.

3. Damage was caused to the *River Loddon* and to *Shahzada* and to goods and merchandise carried on the *Shahzada*.

4. There was not any loss of life or personal injury caused by reason of that collision.

5. The damage was caused without the actual fault or privity of the plaintiffs or either of them.

6. On 18th March 1953, the Asiatic Steam Navigation Co. Ltd., as owner of the *Shahzada*, instituted an action in the High Court against the Commonwealth of Australia claiming £250,000 for damages occasioned by the collision, and appearance thereto had been entered.

7. The plaintiffs had reason to believe that other claims might be brought against them or either of them in respect of damage arising out of the collision.

8. The registered tonnage of the *River Loddon* with the addition of engine-room space deducted for the purpose of ascertaining that tonnage according to the *Merchant Shipping Act* 1894 (Imp.), as amended, was 4454.79 tons.

9. The plaintiffs admitted that the collision was caused by the improper navigation of the *River Loddon* to such a degree that the liability of the plaintiffs for loss and damage resulting from such collision would, if not limited as sought in this application, exceed the sum ascertained by calculating £8 Australian or £8 English—whichever was determined by the court to be appropriate—for each ton of the tonnage of the *River Loddon* ascertained as above, namely 4454.79 tons.

10. The plaintiffs were willing and offered to pay into court whichever sum was properly calculated as above, together with

interest thereon at the rate of four pounds per cent per annum or at such rate as the court deemed proper from the date of the collision until such payment.

The plaintiffs claimed :—(i) a declaration that the plaintiffs and the *River Loddon* were not answerable in damages in respect of loss or damage arising out of the said collision beyond the aggregate amount of £8 per ton of the registered tonnage of the *River Loddon* with the addition of the engine-room space deducted for the purpose of ascertaining that tonnage, (ii) a declaration that the registered tonnage of the *River Loddon* with the addition of engine-room space deducted for the purpose of ascertaining that tonnage was 4454.79 tons and no more and that the amount for which the plaintiffs and the *River Loddon* were liable in respect of loss or damage arising out of that collision was £35,638 6s. 5d. and no more ; (iii) that upon payment being made into court of the sum of £35,638 6s. 5d. with interest thereon at the rate of four per cent per annum from the date of the collision until such payment all further proceedings in the action be stayed except for the purpose of taxation and payment of costs ; (iv) a declaration that the defendant and all and every person or persons whomsoever interested in the *Shahzada* or in the goods, merchandise and other things on board the *Shahzada* or the *River Loddon*, or having any right, title, claim or interest arising out of that collision be restrained from bringing any action or actions in respect thereof ; (v) that all proper directions be given by the court for ascertaining the persons who had any claim in respect of loss of or damage to the *Shahzada* or to goods or merchandise or other things on board the *Shahzada* or the *River Loddon* occasioned by that collision ; (vi) that the said sum of £35,638 6s. 5d. be ratably distributed among the several persons who made out their claims thereto ; and (vii) that all proper directions be given for the exclusion of any claimants who shall not come in within a certain time to be fixed therefor.

In its defence the defendant company : did not admit that the registered tonnage of the *River Loddon* was 4454.79 tons as alleged in par. 8 of the statement of claim ; said that it was not willing to accept the plaintiffs' offer to pay into court the sum of £A35,638 6s. 5d. together with interest thereon at the rate of £A4 per cent per annum from the date of the collision to the date of payment ; said it was not willing to accept the qualified admission of liability contained in the statement of claim. The defendant alleged it to be the fact that in the statement of claim it was alleged without qualification that the collision was caused by the negligent navigation of the *River Loddon*.

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In an affidavit made on 15th April 1955, a bank manager deposed, *inter alia*, that the maximum rate of interest on advances made by banks carrying on business in the Commonwealth of Australia was £5 per cent per annum, which rate of interest became effective as from 29th July 1952; that it was permissible for a bank to charge a lower rate of interest in special circumstances; and that if an advance had been required for ordinary commercial purposes of the defendant's agent he was not aware of any special circumstances which would have called for a lower rate of interest on the advance than £5 per cent per annum.

The issues for trial were:—

1. Whether the registered tonnage of the *River Loddon* with the addition of engine-room space deducted for the purpose of ascertaining that tonnage according to the *Merchant Shipping Act* 1894 (Imp.), as amended, is 4454.79 tons and no more?

2. Whether in the circumstances the sum of £8 per ton mentioned in s. 503 of the *Merchant Shipping Act* 1894 (Imp.) is to be computed in English or Australian pounds?

3. What is the proper rate of interest to be paid by the plaintiffs on the sum to be paid into court?

The relevant statutory provisions and the material provisions of the Order in Council, No. 1391 of 1924, dated 8th December 1924, are sufficiently set out in the judgments hereunder.

The action was heard before *Taylor* J.

During the hearing his Honour ordered that Daiichi Bussan Kaisha Ltd., an owner of cargo on the *Shahzada*, be joined as a defendant in the action.

B. P. Macfarlan Q.C. and *H. J. H. Henchman*, for the plaintiffs.

Sir *Garfield Barwick* Q.C. and *L. W. Street*, for the defendant Asiatic Steam Navigation Co. Ltd.

B. Burdekin, for the defendant Daiichi Bussan Kaisha Ltd.

Cur. adv. vult.

May 2, 1955

The following written judgment was delivered by:—

TAYLOR J. In this suit the plaintiffs, the Commonwealth of Australia and the Secretary of the Department of Shipping and Transport, seek, pursuant to s. 503 of the *Merchant Shipping Act* 1894, to limit their liability for loss and damage which occurred as the result of a collision in Port Jackson between the steamship

River Loddon and the steamship *Shahzada*. At all material times the former vessel was owned by the Commonwealth and she was registered at Melbourne as a British ship in accordance with regulations made, by order in council on 8th December 1924, with respect to the registration of Government ships of the Commonwealth. According to the certificate of registration the owner of the *River Loddon* is the " Commonwealth of Australia, represented by the Department of Shipping and Transport, Melbourne ".

The loss in respect of which the plaintiffs seek to limit their liability consisted of damages occasioned to the *Shahzada* in the collision and the loss and damage sustained by the owners of goods and merchandise in the course of carriage on the latter vessel. The first-named defendant is, and was, at all material times, the owner of that vessel and the second-named defendant is one of such cargo owners.

As far as the facts of the case are concerned it is sufficient to say that the evidence establishes that the plaintiffs are entitled to a decree on the basis that the tonnage of the *River Loddon*, for the purposes of the section, is 4454.79 tons. There was no dispute concerning either the tonnage of the vessel or the fact that the loss and damage was caused without the actual fault or privity of the plaintiffs. The only questions of substance which arose were concerned with the precise extent to which the plaintiffs are entitled to limit their liability and the rate of interest which should be allowed on the outstanding amount.

The solution of the first problem depends upon the significance of the word " pounds " as used in s. 503. For the defendants, it was contended, that the word " pounds " must be understood as a reference to English pounds as distinguished from Australian pounds. This conclusion, it was said, is inevitable when it is borne in mind that the expression is contained in an English statute which was intended, expressly to operate throughout the whole of Her Majesty's dominions, and, accordingly, in places where not only the systems of currency but also the nomenclature employed in the various currencies in use differed from those of the United Kingdom. Counsel for the plaintiffs, however, contended that the statutory provisions under consideration were intended to constitute part of the local law in each separate part of Her Majesty's dominions and that, in those dominions where the nomenclature of the currency corresponded to that used in the section, the expression should be understood as a reference to the local currency.

Examination of the statutory provisions and the nature of the jurisdiction to which it is appropriate leads me firmly to the view

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that the defendants' submission should be accepted. The jurisdiction in admiralty which this Court exercises is conferred by s. 2 of the *Colonial Courts of Admiralty Act* 1890, which provides that, subject to a qualification to which it is unnecessary to refer, every court of law in a British possession which has therein original unlimited civil jurisdiction shall be a court of admiralty, with the jurisdiction in the Act mentioned, and may for the purposes of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction. The jurisdiction of a Colonial Court of Admiralty is declared by the Act to "be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England". It is true that this jurisdiction is exercised by this Court and not by some one or more of its members as an independent Colonial Court of Admiralty (*McIlwraith McEacharn Ltd.* v. *Shell Co. of Australia Ltd.* (1)). Nevertheless, the jurisdiction which is exercised is, as *Latham* C.J. observed in that case, "the same geographically and otherwise as the admiralty jurisdiction of the High Court in England . . . as it existed at the time of the passing of the Act" (2) (see also *The Yuri Maru and The Woron* (3)), and, it may be added, the same as that of other courts in British possessions which derived admiralty jurisdiction under the Act. I mention these matters because they constitute, at least, prima facie grounds for concluding that, as to matters within the jurisdiction of all these courts, the form and degree of relief available ought to be the same and should not depend upon the circumstance that a particular suit has been instituted in one court rather than another.

This background is of considerable importance when one turns to the meaning of the word "pounds" in s. 503 of the *Merchant Shipping Act* 1894. That section is found in an Imperial statute which treats "merchant shipping as an Imperial subject" and which evidences "an endeavour to provide on a national basis for all contingencies of British mercantile navigation throughout the Empire, partly by direct enactment and partly by optional local enactment imperially sanctioned" (per *Isaacs* J. in *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (4)). I should add that Pt. VIII of the Act, which includes s. 503, extends

(1) (1945) 70 C.L.R. 175.
(2) (1945) 70 C.L.R., at p. 188.
(3) (1927) A.C. 906.
(4) (1925) 36 C.L.R. 130, at pp. 142, 143.

expressly to " the whole of Her Majesty's dominions ". Accordingly, although s. 503 may be said to be part of the local law in the sense that it *operates* within the Commonwealth, its local operation merely flows from the circumstance that it is contained in an Imperial statute which expressly extended the operation of that section to the Commonwealth. Indeed, it was so little a part of the local law in the true sense that, apart from the provisions of ss. 735 and 736, its continued operation within the Commonwealth did not and could not depend upon the desires or intentions, however expressed, of any local legislature. The first of the sections to which I have referred did give a limited power of repeal, with the consent of Her Majesty in Council, to local legislatures, and the second authorised local legislatures, subject to the conditions expressed therein, to regulate the local coasting trade. Until the adoption, as from 3rd September 1939, of the *Statute of Westminster* the position, therefore, was that, apart from those sections, a local legislative provision which was repugnant to any provision of the *Merchant Shipping Act* 1894, was void. Nothing has occurred since the *Statute of Westminster Adoption Act* 1942 to effect or modify the operation in the Commonwealth of s. 503 of the *Merchant Shipping Act* 1894, and the position at the present time, therefore, is that it still continues to operate as part of an Imperial statute which extends to this country.

These matters to which I have referred are of some importance in considering the meaning of the word " pounds " in that section. First of all it may be said that the word is used in an English statute which is intended to operate not only in the United Kingdom but also throughout all of Her Majesty's dominions. There can, of course, be no question that in the application of the section to the United Kingdom the expression " pounds " means, and has always meant, English pounds. Nor can there be any question that in its application to British possessions the currency of which did not, or does not, include a unit designated as a pound the expression must, again, be taken to refer to English pounds. Local courts in such possessions would be bound in pronouncing a decree to specify any limitation of liability by reference to the local equivalent of the appropriate number of English pounds. From observations in two cases to which I have been referred this practice seems to have been followed in Canada without question (see *Canadian Pacific Railway Co.* v. *The Steamship Storstad* (1); *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.* (2)). Clearly in the application of the section

(1) (1920) A.C. 397.

(2) (1935) 4 D.L.R. 637; 58 Ll.L. R. 33.

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to the United Kingdom and to British possessions which fall into the category last referred to the word " pounds " means English pounds, and I can see no reason to suppose that in its application to those parts of the British dominions where the word happened to be in use—or, indeed, happened to be adopted at any time—to denote a unit of the local currency any different significance should be given to the expression. If I may adapt a brief observation of their Lordships of the Judicial Committee in *Bonython* v. *The Commonwealth* (1) to the circumstances of this case I think it is clear that the Imperial Parliament in using a term appropriate to the monetary system of the United Kingdom must be presumed to have intended to refer to that system whether or not that term is apt to refer to some other system or systems also. The presumption may, as their Lordships pointed out, be displaced, but there is nothing in the circumstances of this case to displace it. The circumstance that the Act was intended to operate outside the confines of the United Kingdom is nothing to the point. Indeed, the use of the expression " pounds " in a section intended to operate so extensively and in countries where not only the systems of currency but also the nomenclature in common use were different from those of the United Kingdom is a circumstance which reinforces rather than militates against the defendants' argument on this point. But in any event there are no grounds for concluding that the word " pounds " in s. 503 was intended to refer to what are now known as Australian pounds for these are units of a system which depend for its existence on Commonwealth law and which was unknown in 1894 (cf. *Bonython* v. *The Commonwealth* (1); *National Bank of Australasia Ltd.* v. *Scottish Union & National Insurance Co.* (2)). In my view, therefore, the defendants' submissions on this point should be accepted and the extent to which the plaintiffs are entitled to limit their liability for loss or damage to the *Shahzada* and to the goods and merchandise it carried can be determined only by ascertaining that amount in Australian currency which represents eight English pounds for each ton of the vessel's tonnage when ascertained in accordance with the section.

The other matter of substance remaining to be dealt with is the question of what rate of interest should be specified. It has been the practice in limitation suits in England, and in this country, to allow interest at the rate of four pounds per cent per annum (see

(1) (1950) 81 C.L.R. 486.

(2) (1951) 84 C.L.R. 177; (1952) 86 C.L.R. 110.

Roscoe's Admiralty Practice, 4th ed. (1920) p. 396; *The Millimumul* (1) and *James Patrick & Co. Ltd.* v. *Union Steamship Co. of New Zealand Ltd.* (2), although interest allowed on unlimited damages was consistently allowed at the rate of five per cent from a date specified in the Registrar's Report and which was, in general, related to the date upon which the principal disbursements of the injured party were made. This difference in the rate of interest allowed in such cases was referred to by *Bucknill* J. in *The Theems* (3) in dealing with an application for the allowance for an increased rate of interest in a limitation suit. This application he refused observing that no case had been brought to his notice in which, in any limitation action for over one hundred years, more than four per cent had been charged. This observation did not constitute the reason for refusing the application, but it does disclose the existence of a long-standing and settled practice which should not be departed from in the absence of weighty reasons. The fact that five per cent was allowed on unlimited damages was not in his Lordship's view—and, indeed, clearly was never thought to be—a sufficiently weighty reason. On the contrary, his Lordship found in the provisions of O. XLII, r. 16—which specified four per cent as the rate of interest on judgment debts—justification for concluding that four per cent was " the proper rate of interest to be paid by a man who has, notionally, at any rate, been in possession of money which he ought to have paid to the injured party " (4). I have been referred to cases in England in 1945 and 1950 where the same rate was treated by the parties as the appropriate rate (*The Dorunda* (5) and *The Berwickshire* (6)), though I am unaware of any case after 1938 in which the matter was debated. In Australia the practice was, as I have observed, similar to that in England, though for many years the rate of interest allowed on judgments of this Court has been five per cent per annum (*High Court Procedure Act* 1903-1950, s. 26A (2)) and for some years prior to 1933 the appropriate rate was seven per cent per annum. The appropriate rate on judgments in the Supreme Court of New South Wales has been five per cent for a very long period (*Common Law Procedure Act* 1899, s. 143 and r. 520—now O. XXIX, r. 6). However, notwithstanding the difference between the rate of interest allowed on judgment debts in England and New South Wales *Street* C.J., and, subsequently, the Full Court of the Supreme Court of New South Wales, refused, in 1930, to accede to a submission in a limitation suit that the interest

(1) (1930) 30 S.R. (N.S.W.) 461; 47 W.N. 170, 191.
(2) (1938) 60 C.L.R. 650.
(3) (1938) P. 197.
(4) (1938) P., at p. 201.
(5) (1945) 172 L.T. 199.
(6) (1950) P. 204.

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rate should be increased : *The Millimumul* (1). The question now is whether at this stage the rate should be varied in matters of this kind. There is, I think, a great deal of force in the suggestion that the practice has created an anomaly. I venture to think that there is no logical reason why a reduced rate of interest should be payable on limited damages and the anomaly produced by the practice is apparent when it is remembered that a decree limiting a plaintiff's liability will preclude the defendants from pursuing their claims to judgment upon which interest normally would accrue at the higher rate. But the practice has prevailed in this country, notwithstanding these matters, and I do not feel that I would be justified in departing from it for those reasons alone. Nor do I think it sufficient that consideration of present interest rates generally tends to show that four per cent is inadequate, at the present time, to recompense the defendants for the loss of the use of its money. The Court is not bound, and indeed it would be unwise for it to attempt to follow the fluctuations of monetary conditions from time to time. As *Dixon* J. (as he then was) observed in *In re Tennant* ; *Mortlock* v. *Hawker* (2) : " Experience of the marked fluctuations in interest rates has rather confirmed the policy of the court in fixing for its purposes a rate which over a long period represents a fair or mean rate of return for money " (3). This case itself is, perhaps, not quite in point, but the reasons underlying this observation and the cases there cited indicate that there should be no departure from a settled practice of this kind unless the Court is driven to take that course. The fact that interest rates on judgments in this country have for a long time been higher than those allowed in England has not induced the Court to adopt this course on other occasions, and it is, in my opinion, insufficient to warrant that course being pursued now. Furthermore, in suits of this kind it is desirable that there should be uniformity in the practice to be followed and I am of opinion that I should follow the English practice. The rate of interest allowed will, therefore, be four per cent per annum.

Before parting with the case I should refer to three other matters which were mentioned during the course of the hearing. The first of these was concerned with the provisions of s. 80 of the *Merchant Shipping Act* 1906, which provides that the *Merchant Shipping Acts* shall, subject to any exceptions and modifications which may be made by order in council under that section, apply to Government ships registered in accordance with regulations promulgated thereunder *as if they were registered in manner provided by those Acts.*

(1) (1930) 30 S.R. (N.S.W.) 461 ; 47 W.N. 170, 191.

(2) (1942) 65 C.L.R. 473.

(3) (1942) 65 C.L.R., at pp. 507, 508.

On the view that the *River Loddon* was a ship " belonging to Her Majesty " (see *The Cybele* (1); *Young* v. *SS. Scotia* (2); *Symons* v. *Baker* (3)) the italicised words created some doubt in my mind whether, having regard to s. 741 of the *Merchant Shipping Act* 1894, the benefits conferred by s. 503 are available to the plaintiffs. In the concluding stages of the case, after the parties had had an opportunity of considering the matter, some discussion on this point took place and counsel for the first-named defendant contended that those benefits are not so available. He pointed out that under the Act of 1894 ships exempted from registry might obtain the benefit of that section and that since 1906, the operation of s. 503 in relation to any particular ship, has not, in spite of the provisions of ss. 2 (2) and 72 of the Act of 1894, wholly depended upon registration : see *Merchant Shipping* (*Liability of Shipowners*) *Act* 1898, s. 1 and *Merchant Shipping Act* 1906, s. 70. But the fact, nevertheless, is that s. 503 has always applied in the case of registered ships and to my mind it is quite immaterial that its operation extended or was extended also to the case of other vessels. In view of the provisions of s. 741 of the *Merchant Shipping Act* 1894, it was, of course, impossible for ships belonging to Her Majesty to be registered under that Act. Indeed, except where special provision was made, such ships were not ships to which the Act applied at all. But the effect of s. 80 was, in certain circumstances, to render the earlier Act applicable in the case of Government ships and, to the extent therein provided, that section over-rode the provisions of s. 741. The effect of s. 80 might have appeared more clearly if the words italicised above had been omitted, but, in my opinion, those words were not, as suggested by counsel, intended to render applicable to Government ships only those provisions of the *Merchant Shipping Acts* which applied solely, either by express enactment or necessary implication, to registered ships. Indeed, upon consideration, the provisions of s. 80 furnish no ground for so restricting its operation. The notion, implicit in the section, that Government ships should, upon registration pursuant to regulations made thereunder, be regarded, for the purposes of the *Merchant Shipping Acts*, as ships registered in manner provided by those Acts carries with it the notion that such ships should be regarded as both registrable and registered under those Acts and, therefore, as ships to which those Acts apply subject only to any express exception or modification. Nor do I think the defendants obtain any assistance on this aspect of the case from the fact that in 1906 it was impossible in the

(1) (1877) 2 P.D. 224 ; (1878) 3 P.D. 8.

(2) (1903) A.C. 501.

(3) (1905) 2 K.B. 723.

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United Kingdom to maintain a suit against the Crown or against a King's ship for if, upon its true interpretation, s. 80 of the Act of that year operated to displace the provisions of s. 741 of the 1894 Act in certain cases, the benefits of s. 503 became available to the Crown in those parts of His Majesty's dominions where suits against the Crown might have been maintained. In arriving at this conclusion I find it unnecessary to consider whether ss. 56 and 64 of the *Judiciary Act* 1903-1950 operate to define or qualify the rights of the parties.

A further matter adverted to by counsel for the first-named defendant was the fact that the admission of liability made by the plaintiffs in their statement of claim was merely an admission of liability to the extent of the appropriate limit under s. 503. They have not admitted that their vessel was solely to blame and it was urged upon me that this circumstance may give rise to difficulties in adjusting the rights of the parties interested in the distributable fund. On this ground it was contended that I should refuse to stay the pending suit by the first-named defendant against the first-named plaintiff in order to permit of a judicial determination fixing or apportioning the blame for the casualty, or, alternatively, that I should postpone making a decree until those concerned had reached agreement on this point. In support of their contentions I was referred to *The Karo* (1), but it is clear that the first-named defendant is not faced with the problem which presented itself in that case for, in this case, there has been no agreement or admission on the question whether the *Shahzada* was partly to blame. Accordingly it is still an open question for all parties concerned and, though it may be necessary for it to be determined at some later stage in order to determine the manner in which the distributable fund ought to be distributed : see *Stoomvaart Maatschappy Nederland* v. *The Peninsula & Oriental Steam Navigation Co.* (2), this is an issue which can effect only the respective rights of the owners of the *Shahzada* and the cargo owners and can in no way affect the obligations of the plaintiffs. The purpose of seeking to avoid a stay of proceedings was, of course, to attempt to have this issue decided at the expense of the plaintiffs, but I see no reason why, if it becomes necessary for such an issue to be tried, it should not be tried at the risk, so far as costs are concerned, of the parties whose rights may be affected thereby. In the circumstances, I am not prepared to adopt either of the courses suggested, but I shall, if the necessity should arise, direct the trial of an issue on this point.

(1) (1887) 13 P.D. 24.

(2) (1882) 7 App. Cas. 795.

The final matter is concerned with the question of costs. Counsel for the first-named defendant submitted that, in view of the questions which arose, his client was entitled to special consideration and asked for an order for costs as between solicitor and client. It is, I think, sufficient to say that I have considered the matters advanced in support of this application and I see no reason for departing from the usual practice.

From that decision the defendants appealed to the Full Court of the High Court.

N. H. Bowen Q.C. (with him *L. W. Street*), for the appellant, Asiatic Steam Navigation Co. Ltd. In these proceedings interest is awarded as compensation to the injured party for having been deprived of his money from the date of the collision onwards. The Court in fixing the rate should pay regard to the damage which the injured party has suffered by that deprivation. Although the practice in the United Kingdom is to allow four per cent, a practice of very long standing (see *The Northumbria* (1)), and has been followed in Australia, in all the circumstances, dealing with the matter in Australia and applying the principle logically, the judge of first instance should have allowed interest at the rate of five per cent. As to whether or not the rate is liable to fluctuation : see *The Theems* (2). Interest accrues potentially from the moment when the damage was suffered until the liability has been adjudged and the amount finally ascertained (*The Berwickshire* (3)). Those cases and *Shaw Savill & Albion Co. Ltd.* v. *The Commonwealth* (4) show that this apellant is entitled to interest by way of damages. The practice of four per cent was recognised in *The Millimumul* (5).

[WILLIAMS J. referred to *Nixon* v. *Furphy* (6).]

That case and also *Re Tindal* ; *Perpetual Trustee Co. Ltd.* v. *Tindal* (7) show that an inquiry should be made as to what is the fair and proper rate having regard to all the relevant circumstances. The Court will alter the rate if need be : see *In re Tennant* ; *Mortlock* v. *Hawker* (8) and cases there cited. In this jurisdiction although there is an acknowledged practice in the past under which four per cent has in fact been awarded, the practice cannot be an

(1) (1869) L.R. 3 Adm. & Ecc. 6, at pp. 9, 12, 13.
(2) (1938) P. 197, at pp. 198-201.
(3) (1950) P. 204, at pp. 208, 217, 218.
(4) (1953) 88 C.L.R. 164.
(5) (1930) 30 S.R. (N.S.W.), at p. 477 ; 47 W.N., at p. 192.
(6) (1926) 26 S.R. (N.S.W.) 409 ; 43 W.N. 108.
(7) (1933) 34 S.R. (N.S.W.) 8, at p. 15 ; 50 W.N. 247, at p. 249.
(8) (1942) 65 C.L.R., at pp. 507, 508.

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inflexible rule and ought to be altered from two points of view: (a) if its basis is that it should be consistent with the common law basis, then in this jurisdiction it should be consistent with the five per cent allowed by s. 26A of the *High Court Procedure Act* 1903-1950, and (b) if on the other hand, regard is had to the damage suffered by the appellant by having its money detained, then, on the evidence, the proper rate should be five per cent. Ships owned by the Commonwealth, or the Crown itself, are not entitled to the limitation of liability provided for by s. 503 of the *Merchant Shipping Act* 1894 (Imp.). Section 503 is discussed in *Temperley's Merchant Shipping Acts*, 5th ed. (1954), p. 331. On the position which arises where there is liability in the Crown, and the sections stand in the form as in that Act: see *Nisbet Shipping Co. Ltd.* v. *The Queen* (1). The importance of the order in council made pursuant to s. 80 of the *Merchant Shipping Act* 1906 (Imp.) on 8th December 1924 is that in cl. 11 thereof no mention was made of s. 503. So far as the *Judiciary Act* 1903 is concerned, it would be necessary to provide therein that the Crown should have the benefit of s. 503. Although s. 64 of the *Judiciary Act* would require the rights of the parties to be as nearly as possible the same as between subject and subject that would be an insufficient source from which to derive a right to limit liability.

[DIXON C.J. referred to *Baume* v. *The Commonwealth* (2) and *Musgrave* v. *The Commonwealth* (3).]

The Court acts as a Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act* 1890 (Imp.): (*McIlwraith McEacharn Ltd.* v. *Shell Co. of Australia Ltd.* (4)). Sections 56 and 64 of the *Judiciary Act* 1903-1950 would not have had the effect of bringing into operation the limitations provided by s. 503 of the *Merchant Shipping Act* had the Commonwealth been sued in respect of damage caused by a collision brought about by the negligence of one of its ships. That position would still have obtained even after the passing of the *Merchant Shipping Act* 1906 which, by s. 80, provided this procedure for registration if an order in council were passed. Where one has the specific provisions of the *Merchant Shipping Acts* governing the matter, including s. 741, the terms of s. 64 of the *Judiciary Act* would not have carried the right to limit liability at that stage. The mere making of the order in council only meant that ships belonging to the Crown could be registered in the manner provided in that order. They

(1) (1955) 3 All E.R. 161; 1 W.L.R. 1031; 2 Ll.L.R. 173.
(2) (1906) 4 C.L.R. 97.
(3) (1937) 57 C.L.R. 514.
(4) (1945) 70 C.L.R. 175.

were still not required to be registered as were other British ships. Regard should be had to, *inter alia*, ss. 2-54, 74, 260, 261, 266, 373, 374, 503, 504, 508, 741 and 742 of the *Merchant Shipping Acts* as they indicate the type of provision which clearly would apply, because they were to be treated as if they were registered in manner provided by the Act. Part III would not apply because it would not depend upon registration. It applies both to British and foreign ships, regardless of registration. Section 503, and Pt. V in which it occurs, do not depend upon registration. There is nothing in s. 503, considered by itself in isolation, which precludes it from applying to one of Her Majesty's ships. The whole question is whether s. 741 is sufficiently invaded by the order in council construed with s. 80 of the *Merchant Shipping Act* 1906. It is only invaded to the extent of saying that those provisions shall apply which would apply if they were registered.

B. P. Macfarlan Q.C. (with him *H. J. H. Henchman*), for the respondents. The decision of the judge of first instance on both points was correct. The correct rate of interest is four per cent. That rate was established in limitation actions at the earliest point of time, and there has not been any departure whatever from that rate. References to the rate of interest, in addition to those mentioned on behalf of the appellant, are : *Halsbury's Laws of England*, 3rd ed., vol. 1, p. 106 ; *Marsden* on *Collisions at Sea*, 10th ed. (1953), p. 196 ; *Williams and Bruce* on *Admiralty Practice*, 4th ed. (1920), p. 281. In *The Crathie* (1), the rate allowed was four per cent ; in *The Millimumul* (2) the rate allowed was four per cent ; in *James Patrick & Co. Ltd.* v. *Union Steamship Co. of New Zealand Ltd.* (3) the rate determined was four per cent ; in *The Dorunda* (4) the rate was decreed at four per cent ; and in *Shaw Savill & Albion Co. Ltd.* v. *The Commonwealth* (5) the rate of interest was, by consent, four per cent to the date of judgment and thereafter five per cent. Search does not reveal any statement of why the rate of interest was fixed upon at four per cent. The first reference to the rate of four per cent was in *The Dundee* (6). The first and, apparently, the only reference to the rate of interest awarded by the Chancery Court in limitation actions is in *Nixon* v. *Roberts* (7). Five per cent is customary in assessing damages. Four per cent has always been the rate and has been

(1) (1897) P. 178.
(2) (1930) 30 S.R. (N.S.W.) 461 ; 47 W.N. 170.
(3) (1938) 60 C.L.R. 650, at p. 679.
(4) (1945) 172 L.T. 199.
(5) (1953) 88 C.L.R. 164.
(6) (1827) 2 Hagg. Adm. 137 [166 E.R. 194].
(7) (1861) 1 J. & H. 739, at p. 748 [70 E.R. 940, at p. 944].

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so at times when the rate of interest on judgments has varied, either more than or less than four per cent. The High Court in adjudicating upon a limitation action, is sitting as a Colonial Court of Admiralty; it is exercising a jurisdiction exercised by many other courts which are Colonial Courts of Admiralty in many parts of the British Commonwealth, and there is thus every reason for the maintenance of a standard rate of interest having regard to what the practice has always been.

[DIXON C.J. referred to: *Roscoe* on *The Measure of Damages in Actions of Maritime Collisions*, 3rd ed. (1929), pp. 39, 135; *Halsbury's Laws of England*, 3rd ed., vol. 1, p. 106; and *Laird Line* v. *Clan Line* (1).]

Section 503 of the *Merchant Shipping Act* 1894 applies to registered ships. It is important that they are required to be registered, or may be registered. Section 503 has an operation upon ships registered under the *Merchant Shipping Acts*, however they came to be registered. Section 503 does confer a right to limit upon foreign ships and upon British ships but ss. 2 (2), 72 and 508 provide that if it be a British ship, and if it be required to be registered and it is not registered, then it may not take the benefit of s. 503. The *Merchant Shipping Acts* apply as from the point of time when a Government ship is registered. The difficulty, if any, of the 1894 Act forbidding or preventing the registration of Crown ships as British ships was and is overcome by s. 80 of the *Merchant Shipping Act* 1906 (Imp.) and the order in council.

[DIXON C.J. referred to *Farnell* v. *Bowman* (2).]

The issue is the construction of s. 80 and its effect upon s. 741. The question of construction must be approached on the basis that at the time s. 80 was enacted the Crown could be liable in tort in some part of its dominions and could have occasion to seek to limit its liability if s. 503 applied. Section 80 means that all sections are to apply unless excepted by order in council. There has been lawfully created a comprehensive liability in the Commonwealth by the provisions of the *Judiciary Act*. There is, therefore, room for the operation of s. 503. What has been said in this Court and in *Farnell* v. *Bowman* (2) makes plain the nature and breadth of the liability to which ss. 56 and 64 refer. Further references to s. 75 of the Constitution are to be found in: *Werrin* v. *The Commonwealth* (3); *Musgrave* v. *The Commonwealth* (4); *Naismith* v. *McGovern* (5). Earlier decisions on ss. 56 and 64 of the *Judiciary Act*

(1) (1924) 18 Ll.L.R. 394.
(2) (1887) 12 App. Cas. 643.
(3) (1938) 59 C.L.R. 150, at p. 165.
(4) (1937) 57 C.L.R. 514, at pp. 546, 547.
(5) (1953) 90 C.L.R. 336, at p. 343.

are: *The Commonwealth* v. *Baume* (1); *Baume* v. *The Commonwealth* (2); *The Commonwealth* v. *Miller* (3); *Daly* v. *State of Victoria* (4); *Griffin* v. *State of South Australia* (5), and *Pitcher* v. *Federal Capital Commission* (6).

B. Burdekin, for Daiichi Bussan Kaisha Ltd. a defendant cargo owner. This company was made a defendant at the hearing below. The course adopted followed the procedure laid down in these limitation suits as set out in *Roscoe's Admiralty Practice*, 4th ed. (1920), pp. 286, 287. A list of other cargo owners, to the extent of about one hundred or more in number, was duly filed. Notice of appeal was duly served on the company by the appellant. The cargo interests clearly come within the category in O. 70, r. 5, sub-par. 3. The cargo interests, including the company, are entitled to appear on this hearing. For the proper rate of interest: see *The Theems* (7). *McIlwraith McEacharn Ltd.* v. *Shell Co. of Australia Ltd.* (8) is an authority that this Court, in a case heard in this Court, will follow its own rules of procedure and practice, which, applying it, would be interest at five per cent. This Court will be guided by its own rules (*The Commonwealth* v. *Owner of M.V. "Armadale"* (9)) and should determine the rate of interest at five per cent.

[KITTO J. referred to *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 179, par. 260.]

The *Millimumul* (10) and *James Patrick & Co. Ltd.* v. *Union Steamship Co. of New Zealand Ltd.* (11) were each respectively decided before the introduction of exchange control. A matter which should be taken into account is that the relationship of money now, between England and Australia, is fixed at four pounds English to five pounds Australian. *Nisbet Shipping Co. Ltd.* v. *The Queen* (12) is somewhat different from this case because it was an actual warship and therefore it was not necessary to consider the interpretation of s. 80 of the 1906 Act. Section 741 is not one of the sections excepted in the order in council. If the whole Act applies to Government ships then s. 741 is one of the sections in that Act and cannot be omitted; therefore the order in council does not effectively bring Government ships within the limitation provisions of s. 503.

Cur. adv. vult.

(1) (1905) 2 C.L.R. 405.
(2) (1906) 4 C.L.R. 97.
(3) (1910) 10 C.L.R. 742.
(4) (1920) 28 C.L.R. 395.
(5) (1924) 35 C.L.R. 200.
(6) (1928) 41 C.L.R. 385.
(7) (1938) P., at p. 201.
(8) (1945) 70 C.L.R. 175, at pp. 191, 207.
(9) (1947) 75 C.L.R. 628.
(10) (1930) 30 S.R. (N.S.W.) 461; 47 W.N. 170, 191.
(11) (1938) 60 C.L.R. 650.
(12) (1955) 3 All E.R. 161; 1 W.L.R. 1031; 2 Ll.L.R. 173.

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June 6.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN AND WILLIAMS JJ. Two questions are raised for decision in this appeal. One is whether the Commonwealth of Australia is entitled to limit liability under s. 503 of the *Merchant Shipping Act* 1894 when owing to the improper navigation of a ship of the Commonwealth (not being one of the Queen's Ships of War), but without the actual fault or privity of the Commonwealth, loss or damage is caused for which the Commonwealth is liable in damages. The other is a subsidiary question as to the rate of interest that should be borne by the sum to which such liability is limited. Should it be four or five per cent per annum ?

The limitation of a shipowner's liability is, of course, the creature of statute and it now rests on ss. 503 and 504 of the *Merchant Shipping Act* 1894. Section 741 of that statute, however, provides that the Act shall not, except where specially provided, apply to ships belonging to Her Majesty. It was not until the *Crown Proceedings Act* 1947 that in Great Britain the Crown became liable for tort. The framers of that Act dealt particularly with the question of limitation of liability : see *The Truculent* (1). But while there was no liability of the Crown in tort to limit, s. 503 could have had no application or at most a very restricted application even if s. 741 had not been in the Act. As perhaps actions within pars. (a) and (b) of s. 503 might have been brought in contract, it might not have been wholly inapplicable. The *Merchant Shipping Act*, however, operated generally throughout the Empire and there were colonies, such as New South Wales, where the Crown was under a liability for tort : cf. *Farnell* v. *Bowman* (2). When the Commonwealth was established it quickly assumed a similar liability by the *Claims against the Commonwealth Act* 1902, the place of which was taken by Pt. IX (ss. 56-67) of the *Judiciary Act* 1903, provisions still in operation. Three years later the Parliament of the United Kingdom passed the *Merchant Shipping Act* 1906. Section 80 (1) of that Act provided as follows :—" Her Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purpose of the Merchant Shipping Acts, and those Acts, subject to any exceptions and modifications which may be made by Order in Council, either generally or as respects any special class of Government ships, shall apply to Government ships registered in accordance with those regulations as if they were registered in manner provided by those Acts."

(1) (1952) P. 1, at p. 7.

(2) (1887) 12 App. Cas. 643.

" Government ships " is an expression defined by sub-s. (3), and means " ships not forming part of Her Majesty's Navy which belong to Her Majesty, or are held by any person on behalf of or for the benefit of the Crown, and for that reason cannot be registered under the principal Act." Orders in council under s. 80 were made in relation to Government ships belonging to different Departments of the United Kingdom Government but of course s. 503, or at all events pars. (*c*) and (*d*) of sub-s. (1) of that section, still lacked any subject matter in relation to Crown ships of that Government to which it could apply, assuming that the language of s. 80 otherwise would suffice to carry it. But at length an Order in Council, S.R. & O. 1924, No. 1391, p. 658, was made under s. 80 relating to Government ships of the Commonwealth. The order in council recited, among other things, the provisions of s. 80 and contained the necessary regulations prescribing the manner in which ships belonging to the Government of the Commonwealth might be registered. It provided that the Permanent Head of the Department in respect of which the ship should be registered should be the person to carry out any duty imposed by any section of the Act which should become applicable and exercise any right conferred by any such section. The order in council named a large number of sections which it provided should not apply. Sections 502 to 504 were not among the sections thus excluded. The view, however, put against the Commonwealth's claim to limit liability under s. 503 is that a consideration of the meaning and operation of that section, and of the terms of s. 80 of the Act of 1906, shew that s. 503 cannot be made applicable by s. 80. The latter section, it is pointed out, falls far short of applying the *Merchant Shipping Acts* to Government ships. To begin with, the registration provisions do not apply: the manner of registration is a matter for the order in council to regulate. It is to be noted that it is described as the manner in which Government ships may be registered for the purpose of the *Merchant Shipping Acts*. Subject to exceptions and modifications made by the order in council, if a Government ship is registered according to such regulations the *Merchant Shipping Acts* are to apply to it as if it was registered in the manner provided by those Acts. What is said is that it appears that only those provisions are made applicable which apply to a British ship in virtue of its registration and that s. 503 is not of that description. For this contention reliance is placed particularly on the last words of s. 80. Just as it is " for the purpose of the *Merchant Shipping Acts* " that a procedure for the registration of Government ships is to be provided, so the provisions of the Acts which are to apply to

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such ships are those the application of which results from registration. The denial of this description to s. 503 is based upon the scope of s. 503 and upon the nature of the provisions concerning the registration of British ships. On its own terms s. 503 applies to all ships, British or foreign. It provides that the owners of a ship, British or foreign, shall not, where all or any of the occurrences it specifies take place without their actual fault or privity, be liable to damages beyond the amounts which it limits. A foreign ship is of course not registered under the *Merchant Shipping Acts*. A British ship must be so registered unless exempted : s. 2 (1). There is no positive definition of " British ship " but s. 1 enumerates the qualifications which owners of British ships must have and these relate to nationality. If a ship required by the Act to be registered is not registered under the Act she is not to be recognised as a British ship (s. 2 (2)) and if she is not recognised as a British ship then nothing in Pt. VIII, which contains s. 503, is to be construed to extend to her (s. 508). Certain small craft are exempt from the requirement of registration (s. 3) and a pass may be granted to a ship that is not registered to proceed from one port to another in the Queen's dominions and the pass has the effect of registration (s. 23). Further, s. 503, among other sections, is to extend and apply to owners, builders and other parties interested in any ship built at any port or place in the Queen's dominions from the launching of the ship until registration under the Acts : s. 1 of the *Merchant Shipping* (*Liability of Shipowners*) *Act* 1898 and *Merchant Shipping Act* 1906, s. 8, Sch. II. This dispensation has received a liberal application, with the result apparently that no matter how long registration may have been delayed or omitted the right to limit liability exists if the ship is British built and has always been British owned : *The Harlow* (1).

In view of these provisions the claim that s. 503 applies to a Commonwealth Government ship, if registered, is contested on the ground that registration of the ship does not form a criterion of the application of that provision.

Unless s. 503 or the principles it embodies is applicable the Commonwealth rests under a liability unlimited in amount as for tort. That is a result of s. 75 (iii.) and s. 78 of the Constitution and ss. 56 and 64 of the *Judiciary Act* 1903-1955. The consequence of these provisions is to impose upon the Commonwealth a substantive liability in tort ascertained as nearly as may be by the same rules of law as would apply between subject and subject. There has been some difference of opinion as to how far s. 75 of the Constitution

(1) (1922) P. 175.

operates to impose substantive liability upon the Commonwealth, as distinguished from making the Commonwealth subject to the jurisdiction of this Court. There has also been a difference of view as to the scope of s. 64 of the *Judiciary Act* which sometimes has been treated as limited to questions of procedure and at other times as extending in itself to the substantive law governing the liability put in suit. These are matters which have been adverted to in well-known cases: *Baume* v. *The Commonwealth* (1); *The Commonwealth* v. *Miller* (2); *The Commonwealth* v. *State of New South Wales* (3); *New South Wales* v. *Bardolph* (4); *Musgrave* v. *The Commonwealth* (5); *Werrin* v. *The Commonwealth* (6); *Washington* v. *The Commonwealth* (7); *Naismith* v. *McGovern* (8). These differences are of little or no importance in the present case because, by whatever road, it all leads to the same result. It means that you look to the substantive law as between subject and subject as the basis of the delictual liability of the Commonwealth.

One may put aside problems in the application of that law to special situations arising out of purposes or functions peculiar to Government, such as for example were seen in *Davidson* v. *Walker* (9) and *Gibson* v. *Young* (10). It is not because s. 503 contains anything at variance with the due exercise of any function or the proper pursuit of any purpose characteristic of Government that its applicability is disputed. It is because it forms part of a body of legislation from the operation of which the Crown was in terms excluded and because its application between subject and subject was not invariable but depended in given cases upon such matters as the ship being disqualified from recognition as a British ship.

The first inquiry must be whether, independently of s. 80 of the *Merchant Shipping Act* 1906, the foregoing provisions of federal law are not sufficient to incorporate the substance of s. 503 as part of the law governing the tortious liability of the Commonwealth in respect of its ships. That is in effect equivalent to asking whether before the Order in Council of 1924 the Commonwealth could limit its liability in respect of its ships substantially as s. 503 provides in the case of British ships which do not belong to the Crown. The question is by no means the same as that decided by the Privy

(1) (1906) 4 C.L.R. 97.
(2) (1910) 10 C.L.R. 742.
(3) (1923) 32 C.L.R. 200.
(4) (1934) 52 C.L.R. 455, at pp. 459, 460, 497, 506, 507.
(5) (1937) 57 C.L.R. 514, at pp. 543, 546-548, 550, 551.
(6) (1938) 59 C.L.R. 150, at pp. 161, 165-168.
(7) (1939) 39 S.R. (N.S.W.) 133; 56 W.N. 60.
(8) (1953) 90 C.L.R. 336, at pp. 342, 343.
(9) (1901) 1 S.R. (N.S.W.) 196; 18 W.N. 276.
(10) (1900) 21 N.S.W.L.R. 7; 16 W.N. 158.

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Council in *Nisbet Shipping Co. Ltd.* v. *The Queen* (1). It is true that the Canada *Shipping Act* 1934 on which the case was decided contained a section corresponding to s. 503 (1) and another corresponding to s. 741 of the British Act. Under the *Supreme and Exchequer Courts Act* of Canada jurisdiction existed in the Exchequer Court over certain actions against the Crown founded on tort but it was not until 1938 that an amendment was made extending the jurisdiction sufficiently to cover a claim of the kind there in question. The provisions giving a jurisdiction over claims against the Crown had been interpreted in Canada as operating by consequence also to impose substantive liability. It will be seen that the question in the Canadian case entirely depended on reconciling the enactments of a single legislature. In conferring a jurisdiction extensive enough to cover claims against the Crown for damages done by Government ships improperly navigated, was it intended that the section corresponding to s. 741 should no longer operate to prevent the application to the Crown of the section corresponding to s. 503 ? This crucial question of interpretation was answered by Viscount *Simonds* in the manner shown by the following passage : "The right to limit liability is, as has already been said, derived solely from a section of an Act which unequivocally enacts that the Act shall not apply, except where specially provided, to ships of His Majesty. Where, then, can the Crown find that right ? It appears to their Lordships that there is no sufficient justification for saying that, because the Exchequer Court in the exercise of its jurisdiction applies to proceedings between subject and Crown the law which it applies between subject and subject, therefore it should apply even that law which by the terms of the statute enacting it is expressly excluded from application to the Crown " (2).

The situation in Australia is quite different from that with which Viscount *Simonds* dealt. Before the adoption of the Statute of Westminster by Act No. 56 of 1942 the *Merchant Shipping Act* 1894 was not a law which in its application to Australia the Parliament of the Commonwealth could affect. Nor could that Parliament make a law inconsistent with it. No question therefore could arise of amendment of the law it contains by subsequent legislation. But the Constitution, itself a law of the Imperial Parliament passed after the *Merchant Shipping Act* 1894, conferred the fullest power upon the Commonwealth Parliament with reference to the law governing the liability of the Crown in right of the Commonwealth.

(1) (1955) 3 All E.R. 161 ; 1 W.L.R. 1031 ; 2 Ll.L.R. 173.

(2) (1955) 3 All E.R., at p. 164 ; 1 W.L.R., at pp. 1035, 1036 ; 2 Ll.L.R., at p. 178.

It was certainly open to the Parliament to deal with the question by what substantive law should the Crown's liability in tort be governed, by adopting a general rule that, so far as may be, the law applicable in like circumstances as between subject and subject should apply to the relations between the Crown and the subject. No reason exists why the law between subject and subject thus to be adopted or adapted should not be found in the *Merchant Shipping Act* 1894 (notwithstanding s. 741) as well as elsewhere. On this view the question is rather whether s. 503 contains in fact principles or provisions forming part of private law falling under such a description that the general rule, of its own nature, would or would not, so to speak, gather in and incorporate them in the law governing the delictual responsibility of the Crown.

But the exceptions to the uniform operation of s. 503 cause a difficulty in treating the provisions of the section as supplying a general rule of the law relating to liability arising from improper navigation which is appropriate for adoption as part of the law of torts affecting the Crown in right of the Commonwealth. Section 2 (2) combined with s. 508 of the *Merchant Shipping Act* 1894 means that s. 503 does not cover unregistered British ships, unless exempted, a disqualification apparently intended by way of sanction. Again this must be read subject to s. 2 as amended of the Act of 1898. Then there are the small exempted ships and ships sailing under a pass. If, in order to test the matter, you take your stand at a date before the making of the order in council of 1924, when registration of a Government ship was not provided for, it is easy to see that these exceptions and qualifications do not fit the case of the Crown. But that does not necessarily determine the matter. All ships of the Crown must, *ex hypothesi*, be British ships. Is not the true way of regarding s. 503 to treat it as laying down a broad prima facie rule for all ships, British and foreign, a rule forming part of the law relating to liability for damage of the description it covers ? It is only prima facie in the sense that it is subject to qualification where the qualification is relevant. But the qualification expressed in ss. 2 (2) and 508 is irrelevant to the case of the Crown and so must be the exceptions engrafted upon that qualification. What remains of the qualification was directed to penalising British shipowners who failed to register ; but the Crown has never been under an obligation to register and, up to the orders in council under s. 80 of the Act of 1906, it could not do so. On the whole the better view seems to be that s. 64 of the *Judiciary Act* or, if not s. 64 itself, the law resulting from ss. 56 and 64 of that Act and ss. 75 (iii.) and 78 of the Constitution covers s. 503 as part of the private law on the

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subject which it incorporates in the law applicable to the liability of the Crown. It is necessary to reserve the case of a ship of war which prima facie seems in any case to be outside legislation in a *Merchant Shipping Act*.

The conclusion just stated is independent of the operation of s. 80 of the Act of 1906 and of the order in council of 1924 made thereunder. But it by no means follows that the same conclusion is not required by s. 80. The argument to the contrary has been sufficiently explained already. It depends upon the force given to the expression " as if they were registered in manner provided by those Acts ", when those words are read in the context supplied not only by s. 80 itself but the other material provisions of the Act. The argument that it brings in only those provisions of the *Merchant Shipping Acts* which apply to a British ship in virtue of registration fails to take into account the distinction between the two modes of registration with which s. 80 is dealing. The purpose of the words is to say that although the Government ship is not registered in conformity with the Act, the provisions of the Act shall apply to it as if it were, that is to say if its registration is in pursuance of an order in council. Section 80 does not seem to be concerned with distinguishing between the provisions which apply only because a British ship is registered and provisions which apply to every ship unless unregistered. What seems to be its concern is to undo the effects of s. 741 where there is an order in council and registration of a Government ship and to undo it notwithstanding that registration is not in accord with the Act of 1894. Section 503 certainly applies to every British ship that is registered. The more natural meaning to give s. 80 is to read it as bringing into application all provisions which apply to a registered ship, even if they apply to a foreign ship also. The policy of the provision seems to have been to empower the authorities to except by the order in council whatever provisions appeared unsuitable or undesirable but otherwise to submit Government ships to the advantages and disadvantages of the provisions of the *Merchant Shipping Acts* just as if the ships were registered thereunder. This is in substance the view adopted by *Taylor* J., from whom the appeal comes.

The decree by which liability was limited fixed the amount resulting from limitation and ordered that it be paid into court. The decree directed that it should be paid into court with interest thereon at the rate of four per cent from a specified date until payment into court. It is complained that the rate of interest is too low and that it should have been fixed at five per cent. The same

question was raised in England in *The Theems* (1). In that case *Bucknill* J. adhered to the rate of four per cent. His Lordship said : " No case has been brought to my notice in which, in any limitation action for over a hundred years, more than four per cent has been charged. It was four per cent in *The Dundee* (2) in 1827, and that I hold to be the proper rate to-day " (3). His Lordship had also referred to the fact that four per cent is the rate of interest in England on a common law judgment. The rate of interest upon a judgment of this Court is five per cent : see s. 26A (2) of the *High Court Procedure Act* 1903-1950. This difference of course gave a foothold for the contention that the rate in Australia should not follow the rate in England. But, as far as can be ascertained, four per cent has been the rate adopted in Australia in limitation proceedings. The very point was raised in *The Millimumul* (4). Speaking for the Full Court, *Ferguson* J. said that no doubt the rate was very low according to then present conditions. His Honour said that the practice of the Court of Admiralty in England should be followed and the Supreme Court therefore adhered to the rate of four per cent. The same kind of question in relation to the rate of interest adopted for some purposes in equity was discussed in *In re Tennant* ; *Mortlock* v. *Hawker* (5), where a number of cases was collected. So far as can be ascertained, the practice in limitation suits which, of course, are not very frequent in Australia, has been to adopt the rate of four per cent. There appears to be no good reason for departing from that rate. The reasons given in *In re Tennant* ; *Mortlock* v. *Hawker* (6), although relating to another jurisdiction, are not altogether inapplicable.

The appeal should be dismissed with costs.

FULLAGAR J. On 12th September 1952 the ship *River Loddon*, owned by the Commonwealth, came into collision near Garden Island in Port Jackson with the ship *Shahzada*, owned by the appellant company. The collision occasioned no loss of life or personal injury, but on 18th March 1953 the appellant company commenced an action in this Court against the Commonwealth claiming £250,000 in respect of damage to property occasioned thereby. Other claims by cargo owners and others were made or expected to be made, and on 6th April 1954 the Commonwealth commenced a suit in this Court for the purpose of limiting its

(1) (1938) P. 197.
(2) (1827) 2 Hagg. Adm. 137 [166 E.R. 194].
(3) (1938) P., at p. 201.
(4) (1930) 30 S.R. (N.S.W.), at p. 477 ; 47 W.N., at p. 192.
(5) (1942) 65 C.L.R. 473, at pp. 507, 508.
(6) (1942) 65 C.L.R. 473.

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liability on all claims to an amount ascertained in accordance with s. 503 of the *Merchant Shipping Act* 1894 (Imp.). The suit came on for hearing before *Taylor* J., who on 2nd May 1955 made an order declaring that the Commonwealth was answerable in damages in respect of the collision to an extent not exceeding £A44,726, being an amount calculated at the rate of £E8 per ton of the registered tonnage of the *River Loddon*. It was ordered that, upon payment into court of the said sum with interest thereon at four per cent per annum from date of collision to date of payment into court, proceedings in the appellant company's action should be stayed. Provision was also made for the making of claims by other persons to share in the amount paid into court.

It is from this order of *Taylor* J. that this appeal is now brought. Two points are raised by the appellant. It is said, in the first place, that the Crown in right of the Commonwealth is not entitled to the benefit of s. 503 of the *Merchant Shipping Act* 1894. It is said, in the second place, that the rate of interest fixed by the order should have been not four per cent but five per cent or some higher rate. It is convenient to deal first with the important question of the applicability of s. 503 in favour of the Commonwealth.

Section 503, so far as material, provides in general terms that the owners of a ship, British or foreign, shall (if certain conditions are fulfilled) not be liable for damage caused by that ship to another ship or her cargo beyond an amount exceeding £8 per ton of the ship's tonnage. The liability here referred to is the total liability to all persons who have suffered damage. It would appear that the provisions of s. 503 might be raised by way of defence in an action brought by any such person: see *Temperley's Merchant Shipping Acts*, 5th ed. (1954), p. 339. But where there are, as there commonly are, a number of claimants, and the total of the claims exceeds, or is likely to exceed, the limit set by s. 503, it is clearly very desirable that some convenient means should be provided for bringing all the claims to assessment and apportioning the amount limited under s. 503 among them. To provide such means is the purpose of s. 504, which enables the owners of the ship at fault to bring what is called a suit for limitation of liability. In such a suit an order may be made such as that which has been made by *Taylor* J. in the present case.

It is unnecessary for present purposes to determine whether the right of the appellant company to bring its action for damages against the Commonwealth, which is an action of tort, is derived directly from s. 75 (iii.) of the Constitution or from s. 56 of the *Judiciary Act* 1903-1950 (Cth.) 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. I should have thought myself that the latter was the correct view. In any case, in that action s. 64 of the *Judiciary Act* is applicable. That section provides that in any suit to which the Commonwealth is a party the rights of the parties shall, as nearly as possible, be the same as in a suit between subject and subject. No question of limitation of liability was, so far as appears, raised in the appellant company's action for damages, and with that action we are not directly concerned. We are concerned with the Commonwealth's suit for limitation of liability. And the right to bring that suit is wholly the creation of the *Merchant Shipping Act* 1894. It exists, if it exists at all, solely by virtue of the direct operation of ss. 503 and 504 of that Imperial Act, and the question whether it exists or not is, as it seems to me, to be determined solely by reference to the terms of that Imperial Act.

Now, ss. 503 and 504 occur in Pt. VIII of the *Merchant Shipping Act* 1894, and s. 509 provides that the provisions of Pt. VIII shall, unless the context otherwise requires, extend to the whole of Her Majesty's dominions. Prima facie, therefore, ss. 503 and 504 apply in the present case. When, however, we turn to s. 741 of the Act, we find it provided that : " This Act shall not, except where specially provided, apply to ships belonging to Her Majesty ". There is no special provision to the contrary to be found in Pt. VIII, and I should think—nor did I understand it to be disputed—that the ship *River Loddon*, being owned by the Commonwealth, was a ship belonging to Her Majesty within the meaning of the Act. It follows that, so far as the *Merchant Shipping Act* 1894 is concerned, the Commonwealth is not entitled to bring these proceedings under s. 504 or entitled in any other way to take advantage of the provisions of s. 503.

There is no Commonwealth legislation which directly affects the application of Pt. VIII of the *Merchant Shipping Act* 1894. Before the *Statute of Westminster* 1931 was adopted by the Commonwealth in 1942 any such legislation would have had to be reserved for the King's pleasure under s. 735. The *Navigation Act* 1912 was so reserved, and the royal assent was proclaimed on 24th October 1913, but that Act, though amended from time to time, has never dealt with limitation of liability, but has left that matter subject to the Imperial Act of 1894. Nor do I think that the application of Pt. VIII of that Act is in any way affected by s. 64 of the *Judiciary Act* of the Commonwealth. That section has been in the Act since

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1903, when it replaced s. 3 (2) of the *Claims against the Commonwealth Act* 1902. It is contained in the same Part of the Act as s. 56, which renders the Commonwealth liable to be sued in contract or in tort. In submitting itself to this liability the Commonwealth could no doubt make its liability subject to any exception or qualification it chose, and, in particular, could make its liability for its ships subject to the limits prescribed by Pt. VIII of the *Merchant Shipping Act* 1894 or to any other limits. But, in my opinion, the effect of s. 64 is not to make applicable either in favour of the Commonwealth or against it a statute the express terms of which exclude the Crown. For the purposes of suits to which the Commonwealth is a party the general law as between subject and subject is to apply. But this general enactment cannot be regarded as derogating from any special enactment which by its own terms is made either applicable or inapplicable to the Commonwealth. Although the Canadian statute there in question was less explicit than our s. 64, I think that what Viscount *Simonds* said in *Nisbet Shipping Co. Ltd.* v. *The Queen* (1), is appropriate to the present case. His Lordship there said: "It appears to their Lordships that there is no sufficient justification for saying that, because the Exchequer Court in the exercise of its jurisdiction applies to proceedings between subject and Crown the law which it applies between subject and subject, therefore it should apply even that law which by the terms of the statute enacting it is expressly excluded from application to the Crown" (2). The position may perhaps be tested by supposing that the Commonwealth sues in ejectment the tenant of land owned by it, and the defendant relies on State legislation which restricts the rights of landlords to eject tenants. That legislation does not, and in my opinion as a matter of constitutional law could not, bind the Commonwealth. Could it possibly be said that the effect of s. 64 was to place the Commonwealth in its ejectment action in the position of a subject in respect of that legislation? See *The Commonwealth* v. *Bogle* (3).

So far, however, I have been considering only the provisions of the *Merchant Shipping Act* 1894, and the position in this case does not depend solely on Pt. VIII of that Act. Section 80 of the *Merchant Shipping Act* 1906 provides that: "Her Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purpose

(1) (1955) 3 All E.R. 161; 1 W.L.R. 1031; 2 Ll.L.R. 173.

(2) (1955) 3 All E.R., at p. 164; 1 W.L.R., at p. 1036; 2 Ll.L.R., at p. 178.

(3) (1953) 89 C.L.R. 229.

of the *Merchant Shipping Acts*, and those Acts, subject to any exceptions and modifications which may be made by Order in Council, either generally or as respects any special class of Government ships, shall apply to Government ships registered in accordance with those regulations as if they were registered in manner provided by those Acts." On 8th December 1924 an order in council was made under this section with respect to " ships belonging to the Government of the Commonwealth of Australia (not being ships of war forming part of the Navy of the Commonwealth of Australia) hereinafter referred to as ' Government ships '." The order made special provision for the registration of Government ships of the Commonwealth. Clause 11 of the order provided that a large number of provisions of the Imperial *Merchant Shipping Acts* should not apply to Government ships registered under its provisions, but the list does not include any of the sections contained in Pt. VIII of the *Merchant Shipping Act* 1894. There is a curious proviso to cl. 11 which reads : " Provided always that no provision of the *Merchant Shipping Act* which, according to a reasonable construction, would not apply in the case of Government ships shall be deemed to apply to such ships by reason only that its application is not hereby expressly excluded." The *River Loddon* is clearly a Government ship within the meaning of s. 80, and a Commonwealth Government ship within the meaning of the order in council, and she appears to have been duly registered in Melbourne under the order in council in 1944 and again in 1947.

No reliance was, I think, placed by the appellant company on the curious proviso to cl. 11 to which I have referred. On one reading it could be taken as applying s. 741 to all the provisions of the Act of 1894, with the result that none of them could apply to Commonwealth Government ships. But this seems to me to be an unreasonable reading. I think that the validity of the proviso is doubtful. In any case, so far as Pt. VIII of the Act of 1894 is concerned, it must, in my opinion, for the purposes of the proviso, be construed by itself and read by itself. It contains nothing to suggest that it is not applicable to Government ships.

The argument of the appellant company was based on the language of s. 80 of the Act of 1906. According to that section the effect of the order in council is to make the provisions of the *Merchant Shipping Acts* which are not excluded by the order in council itself applicable to Government ships registered in accordance with it " as if they were registered in manner provided by those Acts ". The application of ss. 503 and 504 of the *Merchant Shipping Act* 1894 is not conditional on registration : s. 503 in terms applies to

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any ship, British or foreign. It is said that s. 80 therefore only makes applicable to Government ships registered under an order in council such consequences as flow under the Act from registration. It is said that the benefit of ss. 503 and 504 is not under the Act a consequence of registration.

The argument in my opinion attributes far too much weight to the words " as if they were registered in manner provided by those Acts ". As *Taylor* J. observes, the fact is that ss. 503 and 504 have always applied to registered British ships, and I agree with him in thinking that it is immaterial that their operation extended also to other vessels. In fact it is not strictly accurate to say quite generally that the benefit of ss. 503 and 504 is not a consequence of registration. For s. 2 (1) provides that every British ship shall, unless exempted from registry, be registered under the Act, and s. 2 (2) provides that if a ship required by the Act to be registered is not registered, she shall not be recognised as a British ship. It would seem to follow that a British ship required to be registered but not registered would not be entitled to the benefit of s. 503, for she would not be a foreign ship and she could not be " recognised " as a British ship. It is true, of course, that neither before nor after the enactment of s. 80 of the Act of 1906 has s. 2 (2) applied to ships belonging to Her Majesty or to Government ships, for s. 741 of the Act of 1894 had the effect of exempting such ships from the requirement of registration, and s. 80 the Act of 1906 merely enables Government ships to be registered and does not make registration compulsory. But in the generality of cases it could be truly said that the right of a British ship to take advantage of the provisions for limitation of liability was conditional on registration, and I think it very probable that the draftsman of s. 80 used the language he did because he had the provisions of s. 2 of the Act of 1894 in mind—not specifically with relation to limitation of liability but generally with regard to the status of British ships. What he really meant might perhaps have been fully expressed if he had said " as if they were required to be registered and were registered in manner provided by those Acts ". But, however this may be, what he has actually said means, I think, no more and no less than that, subject to such exceptions as the order in council may prescribe, Government ships registered in manner provided in the order in council shall be in the same position under the *Merchant Shipping Acts* as ships registered in the manner for which general provision is made by those Acts. To restrict the application of s. 80 as suggested by the appellant company would be, in my opinion,

to adopt a wrong construction of that section, and I think that the appeal, so far as it is based on this ground, must fail.

So far as the rate of interest is concerned, I have nothing to add to the views expressed in the joint judgment of the Chief Justice, with which I agree on this point.

The appeal should, in my opinion, be dismissed.

KITTO J. I agree that on the true construction of s. 80 of the Act of 1906, that section and the order in council made under it entitle the Commonwealth to succeed in this case.

I also think that s. 64 of the *Judiciary Act* 1903-1950 (Cth.) provides an independent ground for reaching the same conclusion. When one reads *Farnell* v. *Bowman* (1) and the New South Wales section which was there construed by the Privy Council, and then turns to s. 64 of the *Judiciary Act*, the conclusion seems inevitable that the rights referred to in s. 64 include the substantive rights to be given effect to in the suit. If that be so, it follows that s. 64 must be interpreted as taking up and enacting, as the law to be applied in every suit to which the Commonwealth or a State is a party, the whole body of the law, statutory or not, by which the rights of the parties would be governed if the Commonwealth or State were a subject instead of being the Crown. The portion of that law which is taken by s. 64 from statutes, whether Imperial, Commonwealth or State, is then to be applied in such suits by the independent force of that section; and if, in its original setting any provision of that law was so expressed as not to apply to the Crown, s. 64 nevertheless explicitly makes it applicable, as completely as possible, to the determination of the rights of the Commonwealth or State against its opponents and of their rights against the Commonwealth or State.

The case of *Nisbet Shipping Co. Ltd.* v. *The Queen* (2) appears to me to be a decision upon a different problem. The Judicial Committee had there to decide what law was made applicable *by implication* by a Canadian section which said no more than that a designated court should have jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. The decision may be stated, I think, by saying that although, broadly speaking, the Canadian section may be taken as implying that in exercising the jurisdiction conferred

(1) (1887) 12 App. Cas. 643.

(2) (1955) 3 All E.R. 161; 1 W.L.R. 1031; 2 Ll.L.R. 173.

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the court is to apply between subject and Crown the law which it would be bound to apply between subject and subject, yet the implication is not to be taken as absolute, for the terms of the section do not show an intention to make applicable to the Crown any statutory provisions, at least of the same legislature, as are by their own terms excluded from application to the Crown. Possibly both the general implication and the limit thus ascribed to it may be regarded as wrapped up in the word " claim ". In construing s. 64 of the *Judiciary Act*, however, the task is not to fix the limits of an implication. It is to give effect to unambiguous words. Its requirement is, in effect, to put out of account any special position of the Crown, and as far as possible to decide all questions of right in the same way as they would have been decided if the Commonwealth or State had been a subject.

The requirement is not observed in the present case unless s. 64 is treated as giving the provisions found in ss. 503 and 504 of the *Merchant Shipping Act* an operation as between Commonwealth and subject as an enactment of the Commonwealth Parliament, notwithstanding that as between them they have (apart from s. 80 of the 1906 Act) no operation as an enactment of the Imperial Parliament.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Ebsworth & Ebsworth.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

J. B.