with respect to naturalization and aliens as due warrant for the *War Precautions Act*, sec. 5 (1) (*b*), and reg. 2J, but I have not thought it necessary to consider this power in the present case.

The deportation of the Reverend Father Jerger is, in my opinion, in accordance with the law of the Commonwealth. The motion for an interim injunction is therefore dismissed with costs, and the order to show cause is discharged with costs.

Motion for interim injunction dismissed with costs. Order nisi for habeas corpus discharged with costs.

Solicitors for the plaintiff and the applicants, *Frank Brennan & Rundle.*

Solicitor for the defendant and the respondents, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

BOTTOMLEY . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

Public Service of Commonwealth—Salary of officer—Award of Commonwealth Court of Conciliation and Arbitration—"Travelling time"—"Overtime"—Arbitration (Public Service) Act 1911 (*No.* 11 *of* 1911).

An award of the Commonwealth Court of Conciliation and Arbitration, as to the members of an organization who were employed in a certain Department of the Public Service, contained the following provisions:—"For all travelling time an employee shall be paid at ordinary rates to an amount not exceeding one day's pay in any one day. 'Travelling time' means time necessarily spent in travelling in excess of the ordinary time of duty if the excess exceed half an hour . . . . It does not include time of travelling in which the employee is required to perform any duty while travelling or to ride a horse or cycle or to walk or drive a vehicle."

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The plaintiff, who was employed by the Department and was within the award, outside his ordinary hours of duty spent a certain time each day, pursuant to the orders of the Department, in either walking or being conveyed to or from his work from or to camps fixed by the Department or its officers for the convenience of the Department's work.

Held, that when the plaintiff walked the time so occupied was not "travelling time" (although, *semble*, in respect of it the plaintiff might be entitled to payment as for overtime), and that where the plaintiff was conveyed in conveyances which he did not work or drive the time so occupied was "travelling time" in respect of which the plaintiff was entitled to payment as such.

HEARING OF ACTION.

An action was brought in the High Court by Charles David Bottomley against the Commonwealth. By his statement of claim the plaintiff alleged, in substance, (1) that at all material times he was a line foreman in the Electrical Engineer's Branch of the Postmaster-General's Department and a member of the Australian Postal Linesmen's Union, formerly the Australian Telegraph and Telephone Construction and Maintenance Union, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1918; (2) that by an award made on 1st May 1914 by the Commonwealth Court of Conciliation and Arbitration, in a matter in which the organization was claimant and the Public Service Commissioner and the Postmaster-General were respondents, as varied by an order of 21st November 1916, it was awarded and ordered (*inter alia*) that the minimum wage to be paid per annum to an employee of the defendant doing the kind of work performed by the plaintiff should be at the rate of £222 per annum or 1s. 9d. per hour; (3) by the award it was also awarded and ordered that the hours of duty of all linesmen should not exceed 46½ hours per week; (4) that by an order of the above-mentioned Court made on 4th April 1917 it was ordered (*inter alia*) that the award should be varied as from 8th March 1917 by substituting for a certain clause the following:— "For all travelling time an employee shall be paid at ordinary rates to an amount not exceeding one day's pay in any one day. 'Travelling time' means time necessarily spent in travelling in excess of the ordinary time of duty if the excess exceed half an

hour"; (5) that between 1st June 1917 and 13th July 1917, both inclusive, the plaintiff was working in his employment with the defendant as line foreman at certain places in Victoria, and in the course of his employment necessarily spent in travelling in excess of his ordinary time of duty on certain specified days a total of 24 hours 5 minutes; (6) that by virtue of the foregoing facts the plaintiff became entitled to receive from the defendant the sum of £2 2s., being payment for the said 24 hours at 1s. 9d. per hour, but that the defendant refused to pay such sum. The plaintiff claimed £2 2s.

By its defence the defendant pleaded (*inter alia*) that by an order of the Commonwealth Court of Conciliation and Arbitration made on 21st November 1916 it was provided (*inter alia*) that there should be a Board for the determination of difficulties or disputes arising under the award and the constitution of the Board was provided for, and that it was further ordered that the determination of the majority should be the determination of the Board binding on the parties (par. 5); that difficulties and disputes having arisen between the parties to the award upon the question whether time spent by an employee in travelling between the place of his camp and the locality of his work was within the definition of "travelling time" referred to in par. 4 of the statement of claim, a Board duly constituted determined that it did not (par. 6); that the times referred to in par. 5 of the statement of claim were spent, if at all, in travelling between the place of the plaintiff's camp and the locality of his work, and that the plaintiff's claim was concluded by the said determination (par. 7).

The action was heard by *Starke* J.

The other material facts are stated in the judgment hereunder.

J. R. Macfarlan, for the plaintiff.

Latham, for the defendant.

Cur. adv. vult.

March 16.

STARKE J. read the following judgment:—The plaintiff, Charles David Bottomley, is a line foreman in the Electrical Engineer's

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Branch of the Postmaster-General's Department and a member of the Australian Postal Linesmen's Union, formerly the Australian Telegraph and Telephone Construction and Maintenance Union. This Union submitted a claim to the Commonwealth Court of Conciliation and Arbitration relating to salaries, &c., pursuant to the *Arbitration (Public Service) Act* 1911. The Postmaster-General and the Commissioner of the Public Service were respondents to the proceedings. The Arbitration Court made an award upon the claim in April 1914, and certain orders varying the original award in November 1916 and April 1917. It is on this award and the orders varying the same that the present action is based.

No objection was taken before me that an action against the Commonwealth based upon the award and orders is incompetent. I therefore follow my decision on this point in *Kay* v. *The Commonwealth* (1).

The plaintiff Bottomley was instructed to take charge of a party of telegraph line repairers, repair the telegraph lines between Sale and Warragul in Victoria, and establish camps for the convenient performance of the work. The camps were located in different places according to the work in hand. The plaintiff and his party sometimes walked from their camp to the scene of the work, sometimes went by trolley, which the plaintiff did not work, and sometimes by horse conveyances, which were hired by the Department and which were not driven by the plaintiff. The hours worked by the plaintiff and his party were 46½ hours per week, but during the period mentioned in par. 5 of the statement of claim the plaintiff spent in addition 24 hours and 5 minutes in proceeding from the camp to the scene of the work and in returning therefrom to the camp. And it is in respect of these 24 hours and 5 minutes that the plaintiff makes his claim.

The order of 4th April 1917 provides that "for all travelling time an employee shall be paid at ordinary rates to an amount not exceeding one day's pay in any one day." "'Travelling time' means," according to the definition in the order, "time necessarily spent in travelling in excess of the ordinary time of duty if the excess exceed half an hour and includes any time during which

(1) 27 C.L.R., 327.

the employee is detained at a railway station or other place owing to the train or conveyance being late or during which the employee has to wait for a time not exceeding half an hour for change of trains at a junction. It does not include time of travelling in which the employee is required to perform any duty while travelling or to ride a horse or cycle or to walk or drive a vehicle."

The plaintiff's claim is that the time spent in excess of the ordinary hours of duty in proceeding from camp to his work and returning therefrom to the camp is travelling time within the meaning of the order. He has not, in my opinion, alleged that it was time of duty in respect of which he was entitled to "overtime" rates.

It is clear, I think, that the "travelling time" mentioned in the award is time spent by the employee in travelling for the purposes of the Government Department in which he was employed. Thus a man who merely proceeded from his own home to the place of his work would not be travelling for the purposes of the Department. And he would not, in my opinion, be entitled to claim payment for time so expended either as time of duty or as travelling time.

The object of the award is, I apprehend, to prevent "overtime" claims for mere travelling to and from work at the instance of the Department. But travelling time does not include time of travelling in which the employee is required to perform any duty while travelling, or to ride a horse or cycle, or to walk, or drive a vehicle. This, I apprehend, is because the Department derives benefit from the time so expended, or because, I suppose, riding a horse and so forth involves some extra exertion on the part of the employee for the purposes of the Department.

In the present case the plaintiff was not proceeding from his own home or lodgings to the place of his work, but from camps or stations fixed by the Department or its officers for the convenient performance of the Department's work and pursuant to its orders. In my opinion the plaintiff was on duty during the time so occupied. In the cases in which the plaintiff walked from the camps to his work and back again the order itself excludes the time so occupied from "travelling time," and the time so occupied ought, so far as I can see, to be paid for at "overtime" rates and not at the "travelling time" rate. However, the plaintiff has not claimed overtime rates,

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and therefore cannot recover them in this action. But I do not suppose that the Department will refuse to adjust the matter if it thinks proper to accept my opinion upon this point.

The time expended by the plaintiff going to and from his work on trolleys and in horse conveyances involved no work other than "going" or "travelling," and is therefore, I think, within the award as to travelling time. And in respect of the hours so occupied by the plaintiff in excess of $46\frac{1}{2}$ hours per week he is entitled, in my judgment, to recover in this action.

Some reference was made during the argument to a camp allowance of two shillings per diem paid to the plaintiff under the *Public Service Regulations*, cl. 149. This regulation is not dealing with travelling allowances, and, in any case, cannot affect the proper construction of the award.

The matter pleaded in par. 6 of the defence was not proved, and therefore the defence raised in pars. 5, 6 and 7 of the statement of defence fails.

The order of November 1916 provides that the determination of the majority of the Board shall be the determination of the Board binding on the parties. No determination of the majority was ever given. The Board of Interpretation met, and the representatives of the Department and the Commissioner of the Public Service and of the Union did not agree, and then the Industrial Registrar stated his view "that the time occupied in travelling to and from work situated away from camp is not strictly travelling time, but should be treated as time of duty as in the case of men who sign on in Melbourne and go out to the suburbs to their work." See the Registrar's minute dated 23rd September 1918. No vote of the Board was ever taken, and no determination of the corporate body, so to speak, was ever arrived at. A determination of the Board might easily have been obtained, but, in my opinion, was never in fact obtained.

I cannot accept the argument that the plaintiff's only remedy for a refusal to give him the pay awarded by the Arbitration Court is an appeal to the Board of Interpretation. It is unnecessary, on the view taken by me, to consider the validity of the

provisions in the award as to the Board of Interpretation. I declare that the plaintiff is entitled to ordinary rate of pay on the days mentioned in par. 5 of the statement of claim in respect of the time which he spent in excess of the ordinary time of duty in going from camp to the scene of his work and in returning therefrom to camp on trolleys or in horse conveyances.

The parties can adjust the amount, and judgment may be entered accordingly; or, in case of disagreement, refer to the Principal Registrar to ascertain the amount payable to the plaintiff in accordance with the foregoing declaration.

The plaintiff will have the costs of this action. The amount in issue is small and the plaintiff has not wholly succeeded, but, in the main, he has established his right in point of principle.

Judgment accordingly.

Solicitors for the plaintiff, *Frank Brennan & Rundle.*

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

B. L.