THE COMMONWELATH OF AUSTRALIA AND THE POST MASTER GENERAL

V.

AMALGAMATED WIRELESS(AUSTRALASIA) LIMITED.

JUDGMENT. MR JUSTICE RICH.

THE COMMONWEALTH OF AUSTRALIA AND THE POST MASTER GENERA

v.

AMALGAMATED WIRELESS (AUSTRALASIA) LIMITED.

Order

Suit dismissed with costs, but without prejudice to any action which the plaintiffs may be advised to bring in relation to the defendant's obligation to conform to the International Telegraph Convention of St. Petersburg or Madrid or the regulations annexed thereto.

K-3 of 1941

IN THE HIGH COURT OF AUSTRALIA.

Original

COMMONWEALTH OF AUSTRALIA & ANOR.

v.

AMALGAMATED WIRELESS (AUSTRALASIA) LIMITED.

REASONS FOR JUDGMENT.

Judgment delivered at SYDNEY.

on 17th April, 1940.

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THE COMMONWEALTH OF AUSTRALIA AND THE POST MASTER GENERAL

V.

AMALGAMATED WIRELESS (AUSTRALASIA) LIMITED.

JUDGMENT. RICH J.

The object of this suit is to restrain the defendant company from distributing among certain newspapers copies of overseas messages transmitted from England or Canada over its beam wireless system. It appears that before the establishment by the defendant company of beam wireless communication with Great Britain when the newspapers depended upon cables for their European news a system obtained by which news coming over the cables was simultaneously distributed among newspapers for which it was intended. An association or associations of certain of the principal newspapers had been formed and cables were sent addressed by a registered indicator word to the association. From the cable offic copies of the messageswere distributed among the constituent members of the association. Except where a newspaper was in the same city as the offic

/cable company so that copies of the messages could be delivered by hand the practice necessarily involved the use of the Post Master General's In_land Telegraph System. Arrangements subsisted between the Post Master General and the cable company under which charges were fixed and their collection and payment arranged for; an arrangement carrying, no doubt, some profit to the Post Master General's department. When the ne beam wireless stations began to operate an analogous arrangement was made with the defendant company. The defendant company carries on under franchises from the Commonwealth which is the holder of half of its share capital. The franchises consist in licences under the Wireless A and the Post and Telegraph Act. The former licences authorise the company to maintain and operate its wireless stations and to conduct there from a radiontelegraphic servide with the stations in Great Britain and Canada. The latter licences authorise the company to use its telegraph land line between its receiving and transmitting stations which are situated a little out of Melbourne and its office in that city and thenc to its office in Sydney. The instruments constituting the company's

franchises are numerous,illdrawn and sometimes confusing in detail. Bu in the view I take of the case it is unnecessary to set out or discuss their various provisions. It is enough to say that under them the com· pany was authorised to conduct a commercial business with the public fo the receipt and transmission by beam wireless of messagesbetween Austra· lia, Great Britain or Canada and for that pu_rpose to maintain and oper; ate its wireless stations and to use the land line connections in conju -tion with the transmissi0n and receipt at those stations of overseas traffic. The company was authorised to accept and deliver to the publi through its own officeand agencies any overseas messages intended for transmission,or to receive for delivery through its wireless services an relay such messages from one part of the Commonwealth to another through its wireless stations and land line connections. After some time the Post Master General terminated the agreement for the distribution of press messages which at first he had made with the company. His object was to require that the whole distribution should be undertaken by his department leaving none of it to the company. The company was quite we able to distribute the messages to all the Melbourne and Sydney newspape

concerned. It could do so with greater expedition it considered than was likely to be accomplished if the message on receipt was handed to th Postal Department in Melbourne or Sydney for distribution by means of it system and organization. At any rate the company decided to do the distributing in Melbourne and Sydney by hand from its own offices. The messages sometimes came addressed to an indicator word registered as an address in Sydney, sometimes to one registered in Melbourne. The company treated this as accidental and immaterial. Any message transmitted from England or Canada necessarily went over its entire system, viz its wirele: receiving stations and land line to Melbourne and thence to Sydney, and the Sydney and Melbourne offices had only to convert the message from Morse to plain writing. The litigation has been raised by the Post Master General with a view to securing for his Department the charges or profits made upon the distribution of the copies of overseas press messages thus received. In argument before the Full Court where the hearing took place under an order of Starke J. the plaintiffs based their case on two alternative contentions. They first said that the distribution of

the overseas messages fell outside the defendant company's franchise. They next said that under the conditions annexed to the franchise the defendant company was required to conform to the obligations undertaken the Commonwealth in the International Telegraph Convention of Madrid and that of StPetersburg which the former superseded, and that the practice of distributing messages was a violation of those Conventions. Some objection was raised by the defendant company's counsel to the admissibility on the pleadings of this latter contention as presented. Apart from any such objection the contention wears a somewhat strange appearance coming as it does from the Post Master General who proposes himself to carry ou for his own profit the very practice which he says amounts to a breach c the Commonwealth's International obligations. I am glad to say that I have arrived at the conclusion that there is no substance in the contention that the International Convention is being broken. Mr Hudson who presented the Post Master General's case with a force which lost nothing by the candour of the argument took us through a large number of provisions in the Madrid Convention not one of which was inconsistent with what the

company is doing. His purpose was, however, to shew us that the Convention supplied a means, viz multiple press telegrams, of accomplishing the same end and meant that no other course should be adopted. I cannot agree with this contention. I do not think that the International Convention is concerned with what the country of destination may do in respect of a message, beyond requiring that it should be delivered according to the tenour of the address and that the appropriate charges should be collected. I therefore return to the first contention which after all presents a consistent if mistaken contention and constitutes the re basis of the claim. This claim may be dealt with in two ways. It is possible to take the detailed provisions and the exact words of each agreement and then to analyse the steps taken by the company at each sta of the reception of a message and its distribution and to consider whet at any point there is any inconsistency between the agreement and what wa done. On the other hand the case may be considered in a much broader aspect. The clear scope of the agreements is to authorise the company to

carry on an undertaking for the transmission and receipt of overseas messages in an ordinary business manner. The broad question is seen to be whether in distributing the messages the company has gone outside its function. I have no hesitation in adopting the opinion that it is acting completely withi the ambit of its authority. I cannot understand the treatment of the distribution of copies which treats them as new inland messages sent fro the wireless station or from the Melbourne office to the Sydney office or from either of those offices to the newspapers concerned. From a rational business point of view the distribution to the constituent members of the association of the message addressed to the association appears to be the completion and consummation of the transmission and receipt of the message. Mr Hudson took us through every relevant provision and made his points upon the exact words with clearness and precisi But adopting this detailed treatment of the case as the test the same result appears to me to ensue. For at no single point could I see any collision between any step taken by the company and the exact words of t conditions of the agreements. For these reasons I am of opinion the suit should be dismissed.....

As the senior judge it falls to my lot to pronounce the formal order. T judges are of opinion that the suit should be dismissed. Two judges are of opinion that an order should be made in favour of the plaintiffs. Of these three if not four are of opinion that the plaintiffs' suit is not supported by the International Telegraphic Conventions but they are equal divided as to the effect of the terms of the agreements between the plaintiffs and the defendant. The fifth judge sitting, Evatt J., thinks that a special order should be made dismissing the suit without prejudice to any action which the plaintiffs may be advised to bring in relation to the defendant's obligation to conform to the International Telegraphic Conventions. The whole suit was referred to the Court for decision not separate questions. Th judgment or order disposing of the suit must be that for which a majority can be found. An order dismissing the suit without prejudice is less unfavourable to the plaintiffs than the absolute dismissal which according to my individual opinion should be the result. The order will, therefore, be made in accordance with the opinion of Evatt J.

COMMONWEALTH OF AUSTRALIA AND THE POSTMASTER GENERAL V

AMALGAMATED WIRELESS (AUSTRALASIA) LIMITED.

JUDGMENT. STARKE J.

This is an action which, pursuant to an order made in Chambers, was argued before the Full Court upon the pleadings and admissions of fact made between the parties. But to make the matter intelligible it is necessary, I am afraid, to summarise the relevant material.

The Post and Telegraph Act 1901-1934 confers upon the Postmaster General the exclusive privilege of erecting and maintaining telegraph lines and of transmitting telegrams or other communications by telegraph within the Commonwealth and performing all the incidental services of receiving collecting or delivering such telegrams or communications except as provided by the Act of the regulations. Sec.80. And the Postmaster General may on such conditions as he deems fit authorise any person to erect and maintain telegraph lines within the Commonwealth and to use the same for all purposes of and incidental to telegraphic communication. Sec.81. The Wireless Telegraphy Act 1905-1936 conferred upon the Minister for the time being administering the Act (the Postmaster General) the exclusive privileges of establishing erecting maintaining and using stations and appliances for the purpose of

(a) transmitting messages by wireless telegraphy within Australia and receiving messages so transmitted and

(b) transmitting messages by wireless telegraphy from Australia to any place or ship outside Australia and

(c) receiving in Australia messages transmitted by wireless telegraphy from any place of ship outside Australia. Sec.4. The Minister was also authorised to grant licences to establish erect maintain or use stations and appliances for the purpose of transmitting or receiving messages by means of wireless telegraphy for such terms and on such conditions and on

payment of prescribed fees. Sec.5. It was also provided by Sec.6 that except as authorised by or under the Act no person shall

(a) establish erect maintain or use any station or appliance for the purpose of transmitting or receiving messages by means of wireless telegraphy or

(b) transmit or receive messages by wireless telegraphy. Penalty £500 or imprisonment with or without hard labour for a term not exceeding five years.

The Wireless Agreement Act 1924 approved of an agreement made between His Majesty's Government of the Commonwealth and The Amalgamated Wireless Australasia Limited (the defendant in this action and hereafter so called) which is set forth in a schedule to the Act. This agreement recites an agreement of the 28th, March 1922, which is referred to as the principal agreement. The Wireless Agreement Act 1927 approved an agreement of the 15th. November 1927 between the Commonwealth of Australia and the defendant and the agreement provides that it shall be read and construed as supplemental to and amending the agreements of the 28th. March 1922 and 20th. August 1924 respectively and unless the context otherwise required as one with the existing agreements. The main purpose of these agreements was that the defendant should construct maintain and operate in Australia the necessary stations and equipment for a direct commercial wireless service between Australia and the United Kingdom and between Australia and Canada; provide and operate a system of feeder stations for wireless connection between the main high power stations and the capital cities of all the States, equip and organise the feeder stations so as to provide communication with merchant ships round the coast of Australia and to take over the existing Commonwealth radio stations. The Commonwealth, it was agreed, should grant to the defendant all permits and licences necessary for the full realisation of this programme. Agreement 28th. March 1922

Clauses 5 & 13.

The agreement of November 1927 provided that the defendant was entitled, subject to the terms of licences granted to it by the Commonwealth and to the provisions of any International Radio Convention to which the Commonwealth was a party, and to the Wireless Telegraphy Act, to establish and operate commercial wireless services, inter alia, between Australia and other countries, and to negotiate and enter into agreements for the conduct of such wireless services - Clause 14(1). The Commonwealth agreed that it would not impose any conditions or restrictions of any kind upon the defendant which exceeded the conditions and requirements of the International Radio and the International Telegraph Convention, the Wireless Telegraphy Act and the Post and Telegraph Act and that no Department of the Commonwealth should carry on any commercial wireless service in competition with the Company - Clause 14(6). The Commonwealth also agreed, if requested by the defendant, to provide for the defendant the necessary land line connections for the operation of its wireless stations and to transmit over the internal communication service of the Commonwealth any overseas messages handed in by the public at any Post Office or handed over to the Commonwealth by the defendant for such transmission and the defendant agreed to pay to the Commonwealth for such lines and such services the usual rates charged by the Commonwealth. Clauses 15(1) and 13. The agreement also provided that the defendant should comply with the requirements of the International Radio Convention concerning the fixing and the payment to the Commonwealth of terminal or transit or land line charges on all messages received at or despatched from the defendant's wireless stations and in all cases in which such charges were paid to the Commonwealth no further charge should be made for transmission of messages over the internal communication service of the Commonwealth. Clauses 13 & 15(1). The defendant was entitled, subject to the requirements of the

Post and Telegraph Act, to accept from and deliver to the public through its own offices and agencies any overseas messages intended for transmission or received for delivery through its commercial wireless service and to relay such messages from one part of the Commonwealth to another through its wireless stations and/or land line connections as it might consider most expedient subject to the payment of the terminal and/or transit charges but the defendant might not, otherwise than as provided in the agreement, transmit or receive inland messages unless required by the Commonwealth in cases of interruption to line circuits. Clause 16.

In April of 1927 a licence was granted to the defendant to erect maintain and operate wireless stations at Ballan and Rockbank in the State of Victoria and to conduct a radio telegraph service between those stations and corresponding stations in England. In May of 1928 a similar licence was granted in connection with a radio telegraph service between these stations and corresponding stations in Canada. The defendant, pursuant to these agreements and licences, erected wireless stations for the reception and transmission of overseas messages between Australia, the United Kingdom and Canada. The stations were erected near Ballan in Victoria some 50 miles from Melbourne. The defendant requested the Postmaster General to provide necessary land line connection for the operation of its wireless stations. He accordingly did provide these connections between Ballan and Melbourne and Melbourne and Sydney as appears by various agreements of the 12th. November 1926, 11th. January 1927 and 31st. July 1929 referred to in the admissions and for the considerations therein stated. The agreements stipulate that the connections shall be used exclusively in conjunction with the reception and transmission of, inter alia, such overseas traffic as the Postmaster General may licence from time to time. The grant of the use of the Ballan to Melbourne connection was for a period of ten

years but subject to determination if the defendant refused or neglected to pay any sum payable under the agreement or if in the opinion of the Postmaster Ganeral the defendant did not observe the conditions of the agreement. The grant of the use of the Melbourne to Sydney land line might be determined by either party giving six months notice in writing.

The provisions of the International Radio and Telegraph Conventions and Regulations relevant to this action are those known as the St. Petersburg Convention 1875 and the regulations as revised in Paris in 1925, but now superseded by the Madrid Convention and Regulations of 1932 to which the Commonwealth was a party. I shall refer to the Madrid Convention and Regulations which so far as material to this action do not substantially differ from those of St. Petersburg. The convention relates to international telegraphic communication. The Contracting Governments recognised the right of the public to communication by means of an international service - Art.22. The Convention was completed by regulations - Art.2. The telegraphic regulations were applicable to wireless communication, so far as was not otherwise provided - Cap.1 Art.1. They made provision for tariffs in connection with telegraphic and radio electric transmission of international correspondence composed of terminal rates of the Administrations of origin and destination and of transit rates of intermediate Administrations in cases where the territory or channels of communication of these administrations were used for the transmission of correspondence and also provided for an accounting system between the Administrations. Cap. VII & XXVIII.They regulated the form of communications and directed, for instance, that the communications should contain an address and all the particulars necessary to ensure delivery of the communication. Cap.V Arts.13 & 15. They also provided for press communications at reduced rates. Cap.XXI. Press telegrams, it was provided, must be addressed to newspapers, periodical publications, or news agencies, and

solely in the name of the newspaper, publication or agency and not in the name of a person connected in any capacity whatever with the management of the newspaper publication or agency and must only contain matter intended for publication and instruction relative to publication. But the use of an abbreviated address was authorised. Art.68 Secs.3 & 4. Multiple press telegrams were also recognised. Sec.8. A multiple telegram might be addressed to several addresses in the same locality or in different localities served by the same telegraph office or to the same addressee at different abodes in the same locality or in different localities served by the same telegraph office. Cap.XVI. Art.61. Finally in Cap.XXI Art.72 it was provided that the provisions concerning press telegrams were not obligatory for Administrations which declared their inability to apply them. But this article was not acted upon, so far as Australia is concerned.

The dispute in the present action relates to radio press messages. Prior to June 1935 the Australian Press Association registered with the Postmaster General various code words such as Newswire, Radnews, Express, Pressapa, and so forth, and addresses at which overseas messages so addressed should be delivered. The managers of this association were the proprietors of the Melbourne Argus and the Sydney Morning Herald between the 30th. November 1932 and the 30th. June 1935 and the offices of the association were in Melbourne. In June of 1935 the Australian Associated Press Pty. Ltd. was incorporated in Victoria under the Companies Act and took over the activities of the association and the registered code words. The registered office of this Company was in Melbourne.

The defendant received radio press messages, in its commercial wireless service, from and through the United Kingdom and Canada, addressed Newswire, Radnews, Express, Pressapa, and so forth, Sydney or Melbourne as the case might

be. No question arises in relation to the relay of these messages over the land line connections of the defendant and delivery at the code address. But in March of 1927 the defendant informed the Postmaster General's Department that the Australian Press Association had requested it to distribute certain press messages received over its radio service to various journals in accordance with attached lists. Thus to take an example; that a message addressed to Newswire Melbourne should be delivered not only at the code address but a copy also distributed to various journals in Melbourne Sydney Newcastle Brisbane Launceston Adelaide Perth and Kalgoorlie. Such a copy of the message is called a "drop copy". In April of 1927 the Postmaster General's Department stated its requirements in connection with this press distribution service, Substantially the department authorised the defendant to act as its agent for the purposes of distribution in Sydney and Melbourne but itself arranged the transmission and distribution of the messages in centres other than Sydney and Melbourne. It also stated the payments that would be made to the defendant for this distribution service but arranged to perform the accounting work, which included, I assume, the charges for the service to the associated newspapers. At all events, the Department added, "In the case of similar services undertaken by the Cable Companies, this department authorises each particular service, renders accounts to the newspapers concerned, collects all fees, and pays over to the Companies their proportion of such collection. The same procedure will apply in connection with press "drop copy" arrangements for the Beam Service".

In November of 1930 the Department intimated to the defendant that, following upon a reorganisation of the Commonwealth telegraphic service, it proposed to discontinue as from midnight on 6th. December 1930 the existing arrangement under which the defendant acts as the department's agent in the distribution of "drop copies" of press messages to certain

newspapers in Australia and that it would undertake from the date mentioned the preparation, transmission from Melbourne and Sydney respectively, and delivery, of all the copies (including the original) required by the addressee to be distributed within Australia. The Department also requested that the defendant hand over the original message addressed to newspapers of which copies were supplied to a newspaper in a city other than that of the original address. The defendant replied that it was satisfied with the existing arrangement and proposed to deliver "drop copies" as previously and make the usual charge direct to the newspapers. The department insisted upon the discontinuance of the "drop copy" service by the defendant. It pointed out that no provision existed in the International Regulations for the supply of "drop copies" to any newspaper other than the addressee to whom the original message was directed and that the "drop copies" were in substance Commonwealth telegrams originating at the office of destination of the international message. But the defendant maintained its position.

Early in 1937 the present action was commenced and the Commonwealth Government and the Postmaster General claim in substance declarations that the defendant is invading the exclusive privilege conferred upon the Commonwealth or the Postmaster General by the Wireless Telegraphy Act, 1905-1936, and the Post and Telegraph Act 1901-1934; that the defendant has committed breaches of the agreement dated 15th. November 1927 and the land line agreements of 12th. November 1926, 11th. 20 January ~~July~~ 1927 and 31st July 1929, and injunctions restraining such acts and damages or an inquiry as to damages.

The question is whether the agreements made with the defendant and the licences granted to it authorise the preparation and distribution of these "drop copies" to newspapers other than the addressee indicated by the code word at the address registered with the Postmaster General. It is

clear, I think, that these "drop copies" are not and cannot be regarded as multiple press telegrams within the meaning of the International Radio Convention and Regulations. The wireless services which the defendant was authorised to conduct were between Australia and ships at sea, between Australia and commercial or private aircraft (except aircraft trading or operating exclusively within Australia), between Australia and any territory under the authority of the Commonwealth (not being part of the Commonwealth) and between Australia and other countries; in other words overseas messages received from or intended for transmission to (a) a ship (b) a place outside Australia or (c) commercial or private aircraft other than aircraft trading or operating exclusively within Australia. (Agreement 15th. November 1927 Articles 14 & 15). The receipt and transmission of the overseas press messages to addressees indicated by the code words at an address registered with the Postmaster General was a wireless service which was within the licence and authority of the defendant. The defendant in receiving and transmitting those messages including the land line transmission of those messages to the indicated addressee acted within its licence and authority and consequently in so doing did not invade the exclusive privilege of the Commonwealth or the Postmaster General or commit any breach of the agreements that have been mentioned. But what authority or licence, apart from the "drop copy" arrangements, which were terminated on and from midnight on the 6th. December 1930, had the defendant to prepare and transmit over its land line connections "drop copies" of the overseas press messages? They were not overseas messages within the meaning of the agreements of the licences. The newspapers to which the "drop copies" were distributed were not addressees indicated by the code words nor were they at the address where messages so addressed should be delivered. Indeed, some of the newspapers were not, I understand, members of the Association or of the Company but it is not clear on

the admitted facts what the relations of the various newspapers were to the Association and the Company.

But it is argued that this "drop copy" service is incidental to the defendant's wireless service, that it is necessary for the full realisation of its programme (Agreement 28th. March 1922 Cl.13), that the defendant is entitled to negotiate and enter into agreements for the conduct of its wireless service (Agreement 15th. November 1927 Cl.14), that the Commonwealth could not impose any condition or restriction of any kind upon the operations of the defendant calculated to obstruct the business of the defendant (Agreement 28th. March 1922 Cl.15) or exceeding the conditions and requirements of the Radio Convention and the Post and Telegraph Act (Agreement 15th. November 1927 Cl.14(6)), and that no Department of the Commonwealth could carry on any commercial wireless service in competition with the Company (Agreement 15th. November 1927 Cl.14(6)). As well might it be said that a stockbroker, a grain merchant or a dealer in metals could receive overseas radio messages containing stock exchange or other quotations and without any reference to the Department of the Postmaster General, direct copies or "drop copies", if that expression be preferred, of the messages be distributed to his clients throughout Australia. But the agreement of the 15th. November 1927 Cl.16 itself provides that the defendant shall not otherwise than as provided in the agreement transmit or receive inland messages unless required by the Commonwealth in cases of interruption to line circuits.

In my opinion the contention of the defendant is not well founded. The "drop copy" service is not incidental to the defendant's wireless service in the sense that it is necessary to the execution or carrying out of that service. The "drop copy" service is not required for the full realisation of the programme set out in para.5 of the agreement of 28th.

March 1922 as sufficiently appears from the terms of para.5 itself. The defendant may negotiate and enter into agreements for the conduct of its wireless services but this "drop copy" service is in truth an inland service and has nothing to do with overseas or international services. The Commonwealth has not imposed any condition or restriction upon nor obstructed any service, that is, any overseas service, which the defendant is licensed or authorised to carry on. Moreover, the "drop copy" arrangement of March-April 1927 indicates the construction of the agreements and licences which the parties themselves adopted. The defendant then acted on the view that it could not carry on a "drop copy" service with press messages without the approval and sanction of the Department of the Postmaster General. Possibly the defendant can conduct the "drop copy" service more efficiently and expeditiously than the Department of the Postmaster General but I suppose the Commonwealth will receive more revenue if the Department conducts that service though the Commonwealth holds, I think, one more than half the shares in the defendant Company. But these considerations are beyond the functions of this Court.

The result is that a declaration should be made to the effect that the "drop copy" overseas press message service carried on and conducted by the defendant invades the exclusive privilege of the Commonwealth and the Postmaster General under the Wireless Telegraph Act 1905-1936 and the Post and Telegraph Act 1901-1934, that an injunction should be granted restraining the defendant from so acting, and that an inquiry as to damages should be ordered if desired.

THE COMMONWEALTH OF AUSTRALIA

and the POST MASTER GENERAL

v.

AMALGAMATED WIRELESS (AUSTRALASIA) LIMITED

JUDGMENT DIXON J.

COMMONWEALTH of AUSTRALIA

and the POST MASTER GENERAL

v.

AMALGAMATED WIRELESS (AUSTRALASIA) LTD.

This suit, brought in the original jurisdiction, has been referred to the Full Court for hearing upon admissions of fact.

The defendant conducts the beam wireless service between Australia and Great Britain and between Australia and Canada under agreements with the Commonwealth and licences granted by the Post-master-General in pursuance of the agreements. The inward traffic includes press messages despatched from those

countries for publication/ in Australian newspapers which have formed associations for the purpose of obtaining overseas news by cable and wireless..

The news or press association registers a code address which the sender of the message uses and on receipt of the message copies are distributed in accordance with the standing directions of the association among its members. Newspapers entitled to copies are published in all the States and therefore in many cases the distribution involves the transmission of the message over the telegraph system of the Postmaster-General. But in Melbourne and Sydney, where the defendant has offices connected by land line with its beam

wireless receiving station at Rockbank Victoria, the copies for the newspapers published in those cities are delivered directly by the defendant's. For such copies the defendant makes a charge at the rate of five pence for every fifty words contained in a copy, a charge paid by the association.

The object of the suit is to establish that in preparing and distributing the copies for reward in Melbourne and Sydney the defendant goes beyond its franchise and infringes upon the exclusive rights of the Postmaster-General. The Commonwealth and the Postmaster-General as plaintiffs claim declarations of right, an injunction and an account of the payments received or damages.

The matter depends upon the scope of the defendant's franchise and, in some degree, upon the extent of the Postmaster-General's exclusive rights. The latter are conferred by Statute and the former must be ascertained from the terms of a succession of agreements and licences; but the provisions of these instruments cannot be applied without an understanding of the exact course followed by the defendant in doing the acts complained of. The beam wireless signals in Morse code are received on the aerial of the defendant's wireless station at Rockbank. A landline, installed for the defendant's use by the plaintiffs, connects that station with the defendant's Melbourne office. The defendant's equipment at Rockbank automatically filters amplifies and changes the frequency of the electro magnetic oscillations received

on the aerial and, in their altered form, passes them to the landline, by which they are carried into the Melbourne office. There they pass into apparatus which transforms them into direct current impulses corresponding to the Morse code signals sent from Great Britain or Canada. From this apparatus the direct current impulses pass to a landline, again installed by the plaintiffs for the defendant, connecting the defendant's Melbourne and Sydney offices. Both offices are equipped with apparatus which automatically records the Morse characters on tape as the direct current impulses go through the circuit, with which of course the apparatus in each office is connected. The reception at Rockbank and the recording at the offices in Sydney and Melbourne

form a single and instantaneous electro-magnetic operation. It does not clearly appear, but it is perhaps to be inferred or assumed that, if messages are coming through which concern one office only, the tape may be stopped in the other.

The Morse characters recorded on the tape are transliterated and typed in the office and the typescript forms the original copy of the messages for delivery or distribution. The messages with which we are concerned all bore one or another of a number of code words as or in place of an address. The words had been registered, some at Sydney some at Melbourne, with the Postmaster-General as code addresses for international telegrams. "Indicator word" appears to be the technical name given to a word registered to indicate a telegraphic address.

Most of the indicator words were registered by press associations, but the registration of some of them was done by a newspaper proprietor or proprietors.

After a time one of the chief press associations was incorporated as a company; others may be taken to be voluntary associations ad hoc. But however the indicator word was registered the distribution of messages addressed to it among the proprietors of newspapers was done pursuant to arrangements made among them for the purpose of sharing or spreading the cost of obtaining overseas news. In effect the proprietors mutually agreed that news should be collected abroad and sent to Australia as press messages by cable or beam wireless addressed to an indicator word or words and then distributed amongst their newspapers for simultaneous publication, and amongst other

newspapers if the service was extended to include them. In accordance with these arrangements instructions were given to the defendant, under the authority of the press associations or proprietors registering the indicator words, that when a wireless beam message was received addressed to such a word, copies should be delivered to the newspapers specified in the instructions, that is, specified in a list of newspapers among which press messages addressed to that word should be distributed. When such a press message came through, copies were at once made in the Sydney and in the Melbourne offices of the defendant, and were delivered to the newspapers in those respective cities which under the defendant's instructions were entitled to receive copies of that message. The place of registration of the

indicator word, Melbourne or Sydney, was treated as immaterial, except in one respect. For the first delivery or copy in the city of registration no charge was made, but, in the other city, it bore a charge . The charge appears to have been based upon the rates per word for telegrams between Melbourne and Sydney with an additional threepence for each message. The defendant paid over to the Postmaster-General the equivalent of the telegraphic rate. The explanation of the charge to the press association and of the payment of the greater part of it to the Postmaster-General lies in part probably in the history of the relationship between the defendant and the Department and in part in a resolve by the defendant at all hazards to comply with the International Telecommunication Convention.

The monopoly of the Postmaster-General which forms the foundation of his claim that the defendant cannot lawfully make copies of wireless press messages and deliver them to newspapers in the manner described, consists of three classes of exclusive rights, all of which are relied upon by the plaintiffs. Except under his authority, no one but the Postmaster-General may conduct or perform anything in the nature, first, of a postal service, second, of a telegraph service, and third, of a wireless communication service.

It is of course quite plain that, if the defendant did not possess the authority of the Postmaster-General or of the Commonwealth, the use of its receiving station and the landlines thence to Melbourne and on to Sydney for the purpose of receiving and conveying Morse

code signals from abroad would constitute an invasion of the Postmaster General's exclusive rights under both the second and the third heads, the heads of telegraphic and wireless communication. It might therefore be supposed that the whole question was the extent and the conditions of the authorization which under its agreements and licences the defendant in fact possesses. Broadly speaking the purpose of that authorization is to enable the defendant to conduct, as part of a commercial undertaking, a public radio telegraph service with Great Britain and Canada. Accordingly the defendant, on its side, seeks to place upon the distribution of the press messages among the newspapers who combine to obtain them the complexion of an integral part of the ordinary business done, in the case of press messages, by a

cable or wireless undertaking. On the side of the plaintiffs, however, a very different colour is given to the distribution of copies. So far from regarding it as an incident in the business of transmitting messages by wireless, the Postmaster-General presents it as an independent service performed after the function of transmitting the press message is discharged and not in reason connected with it. The circumstance that the message passes through the defendant's hands doubtless gives the defendant an opportunity of making and distributing the copies, but, according to the view adopted by the Postmaster-General, it is a domestic employment or service consisting in the local distribution or delivery of material, the entry of which into Australia is complete,

carried out in pursuance of arrangements or instructions locally made or given. His view of the nature of the distribution of the message is brought out by the expression by which the Department, with the acquiescence of the defendant, describes the copies delivered to the newspapers, namely "drop copies", an expression drawn from American postal usage. "The term 'drop matter' is common in American post offices meaning matter for local delivery without passing from one post office to another". O.E.D. s.v. "Drop - letter".

A little consideration will show that, although this view of the matter if valid would exclude or tend to exclude the preparation and distribution of copies of press messages from the

ambit of the defendant's franchise, yet, by the same reasoning it would bring or tend to bring those acts of the defendant outside the area of the Postmaster-General's monopoly over wireless, and unless and save insofar as the plaintiffs could rest their claim on an unauthorized use of the landline between Sydney and Melbourne, outside the Postmaster-General's monopoly over telegraphs. Whether for this reason or as a natural consequence of treating the distribution of copies as a delivery of missives originating in Australia, the Postmaster-General invokes his postal monopoly. That monopoly is conferred by means of a prohibition of a penal character. Sec.98 of the Post and Telegraph Act 1901-1934 provides that no letter

shall be sent or carried for hire or reward otherwise than by post, and goes on to provide a penalty for "sending or conveying a letter" for hire or reward otherwise than by post. It is evident that the purpose of the section is to prevent the employment for reward of any person or agency, except the post office, for the transmission of a written communication from a sender to an addressee. To attempt to define the application of the not very exact terms in which the provision is expressed is both unnecessary and unwise, but I think that what the defendant did is clearly outside its scope. The hypothesis is that, being in possession of a message transmitted by wireless, the defendant made copies and delivered them and received payment for performing this entire service. The reward was for the documents

themselves, not for conveying or carrying them from one point or person to another. The defendant was, on the hypothesis stated, paid for preparing and handing over the document, not for its transmission. To desert the hypothesis and regard the delivery as the completion of the transmission of a message from a person in Great Britain or Canada to a number of persons in Australia is to bring it out of the realm of the postal service and into the realm of wireless or radio-telegraphic communication. The plaintiffs' postal monopoly may therefore in my opinion be dismissed from consideration. The success of the suit must, I think, depend upon the acts of the defendant being beyond its franchise and yet constituting an infringement of

the Postmaster-General's exclusive rights with respect to telegraphic or wireless communication or, if they are within the general scope of the defendant's franchise, nevertheless amounting to a breach of the conditions imposed upon the exercise of the licences granted to the defendant.

What I have called the defendant's franchise is the result of a series of instruments made over a period from 1922 to 1932, agreements between the defendant and the Commonwealth or the Postmaster-General and licences. The foundation of the agreements is the existence in the Postmaster-General of the exclusive rights and powers conferred upon him by the Post and Telegraph Act 1901-34 and by the Wireless Telegraphy Act 1905-1919. Sec.80 of the former

Act provides that the Postmaster-General shall have the exclusive privilege of erecting and maintaining telegraph lines and of transmitting telegrams or other communications by telegraph within the Commonwealth and performing all the incidental services of receiving collecting or delivering such telegrams or communications except as provided by the Act or Regulations. Sec.81 empowers the Postmaster-General to authorize any person, on such conditions as he thinks fit, to erect and maintain telegraph lines within the Commonwealth and to use the same for all purposes of and incidental to telegraphic communication.

Sec. 4 of the Wireless Telegraphy Act confers upon the Postmaster-General as the minister ~~in~~ administering that Act the

exclusive privilege of erecting maintaining and using stations and appliances for the purpose of, among other things, transmitting and receiving overseas wireless messages. Sec. 5 empowers him, for such terms and on such conditions and for payment of such fees as are prescribed, to grant licences to persons to establish erect maintain or use stations or appliances for the purpose of transmitting or receiving messages by means of wireless telegraphy.

The first agreement made 28th March 1922, dealt with the general relations of the Commonwealth and the defendant Company, including the allotment to the former of a bare majority of shares in the latter's capital and the appointment of directors representing the Commonwealth. It provided for a programme of radio-telegraphic

development. The programme included the construction maintenance and operation in Australia of a direct commercial wireless service with Great Britain and of feeder stations connecting the system with the State capitals. But it may be doubted whether the beam stations were then in contemplation; the feeder stations intended were wireless, not landline, connexions. However the agreement stipulated that in operating the feeder stations the defendant should facilitate the performance by the Commonwealth of its obligations under the international conventions and the Commonwealth undertook to grant all permits and licences necessary for the full realization of the programme and not to impose any condition or restriction upon the defendant's operations calculated to obstruct its business.

These undertakings were afterwards redefined (see Cls. 4: 5(a) (b) and (d): 10: 13 and 15).

The apparatus and equipment for beam wireless communication with Great Britain seems to have been completed and put in operation in the first half of 1927. By an agreement between the Postmaster-General and the defendant dated 12th November, 1926, (as amended by a later agreement) the Postmaster General agreed to provide for the defendant the landlines or telegraphic channels between Melbourne and its receiving station at Rockbank and also its transmitting station at Ballan, the defendant paying him an annual sum.

The Postmaster-General, by the agreement, granted for a term to the defendant the use of the channels for purposes of and

incidental to telegraphic and telephonic communication, but it was stipulated that the channels should at all times be used exclusively in conjunction with the transmission and receipt at the Ballan and Rockbank wireless stations of such overseas traffic as the Postmaster-General might license from time to time (c.f. Cls.1 4 &6 (1)) . By an agreement dated 11th. January 1927 between the Postmaster-General and the defendant the former undertook to provide a landline or channel for telegraphic communication between the defendant's office in Sydney and its office in Melbourne. He granted to the defendant the use of the channel for purposes of and incidental to telegraphic communication for a term but it was agreed that the channel should at all times be used exclusively in conjunction with the transmission and

reception of such overseas and coastal radio traffic as the Postmaster-General might license from time to time . (c.f. Cls. 1: 4& 6 (1)). By a licence dated 12th. April 1927 the Postmaster-General authorized the defendant to erect maintain and operate wireless stations at Ballan and Rockbank and to conduct a radio-telegraphic service between those stations and corresponding stations in England. It was one of the conditions that the defendant should comply with the provisions of the Post and Telegraph Act and the Regulations thereunder and of the International Telegraph Convention and the Regulations thereunder and with the provisions of any amending or substitutional Act Convention or Regulation. The licence was executed by the defendant without prejudice to its rights under its agreements. In the following year

a similar licence was granted for Canada. In the meantime a new general agreement, dated 18th November 1927, was made between the Commonwealth and the defendant. The obligation of compliance with the International Telegraph Convention was again expressed and it was added that in particular the defendant should comply with the requirements of that convention concerning the fixing and the payment to the Commonwealth of terminal or transit or landline charges on all messages received at or despatched from the defendant's wireless stations. By clauses strangely expressed as defining the clauses I have mentioned of the earlier agreement, it was provided that the defendant was entitled, subject to the terms of the licences and the convention and the legislation, to establish and operate commercial

wireless services between, inter alia, Australia and other countries and that the Commonwealth should not impose conditions or restrictions upon the defendant which exceeded the conditions and requirements of that and another convention and of the legislation. The Commonwealth undertook to provide the necessary land line connexions for the operation of the defendant's wireless stations. A clause provided that the defendant should be entitled at all times, subject to the requirements of the Post and Telegraph Act, to accept from and deliver to the public through its own offices and agencies any overseas messages intended for transmission or received for delivery through its commercial wireless services and to relay such messages from one part of the Commonwealth to another through its wireless station

and landline connexions as it may consider most expedient, subject to payment of the terminal transit and landline charges, expressions bearing the same meaning as in the conventions and regulations thereunder, but that the defendant should not otherwise than as provided by the agreement transmit inland messages.

By an agreement dated 30th July 1929 the agreement of 11th. January 1927 relating to the Melbourne and Sydney landline was superseded but the clauses I have set out were reproduced in the substituted agreement, the new provisions of which are not material. Two further agreements relate only to amendments of earlier instruments.

The foregoing statement collects together I believe the provisions from which the extent, in material respects, of the author-

authority/
granted by the plaintiffs to the defendant may be ascertained. The statement appears to show that, in considering whether the distribution of copies of press messages in the manner practised by the defendant is allowable, it is necessary to observe the distinction between three separate parts or divisions into which the inquiry naturally falls. There is first the question whether what the defendant did falls within the general scope of the authority conferred upon it.

There is secondly the question whether it involved any non-compliance with the International Telegraphic Convention or the regulations thereunder. There is thirdly the question whether in so far as any part of the defendant's course of action exceeds the scope

of the authority affirmatively granted, it is nevertheless lawful because it is also outside the Postmaster-General's monopoly and does not need the support of his licence or authority.

In considering the first question it may not be unimportant to notice that there are three stages in the reception of the radio telegraphic message before it is put upon paper, all of which need the justification of the Postmaster-General's authority.

These are (1) the use of the wireless station at Rockbank (2) the use of the landline or telegraphic channel thence to the Melbourne office and (3) the use of the landline or telegraphic channel between that office and the Sydney office. Up to the point of the Melbourne office there can I think be no question that in

every case, whether the press message bears an indicator word registered in Sydney or in Melbourne, the process of reception must be the same whether copies are to be distributed or not. The message must in all cases be received at Rockbank. The receipt at that station of a press message was none the less the exercise of a licence to maintain erect and operate the station and to conduct a radio telegraphic service with Great Britain or Canada because afterwards copies were delivered to more than one person. If to deliver the copies violated an express condition of the licence that is another and independant matter.

Again, in my opinion, the contention cannot be supported that the distribution of the copies had what may be described as the

retroactive effect of making the use of the landline from Rockbank to Melbourne unauthorized.

The purposes of the use of the landline remained, in the language of the grant contained in the agreement of 12th November 1926, those of and incidental to telegraphic communication and it was none the less used exclusively in conjunction with the transmission and receipt at Ballan and Rockbank wireless stations of such overseas traffic as the Postmaster -General might license. The traffic licensed was that between those stations and Great Britain or Canada, and its description would not be changed because the distribution of copies was practised even to strangers to the addressees.

But a difference arises in considering the third section

of the transmission. Where the indicator word is registered in Melbourne, so that, if it were not a press message subject to the arrangement or instructions entitling Sydney newspapers to copies, there would be no need to allow the Morse code signals to proceed further than the Melbourne office, it may be urged that the use of the landline from Melbourne to Sydney in the case of that particular message is for the purpose of transmitting the messages to those newspapers. In fact all direct current impulses carrying the Morse code signals proceed from the point of transformation to Sydney as on one circuit independently of the question whether they must be taken off kk in the Melbourne office or the Sydney office or in both for the purpose of delivery to the addressee or addressees.

This practice is not outside the authority because it is a use exclusively in conjunction with the reception of such overseas (and coastal radio) traffic as the Postmaster-General has licensed, viz. the traffic from Great Britain, Canada and ships and it is incidental to telegraphic communication (c.f. Agreements of 11th January 1927 and 30th July 1929, Cls. 4 and 6).

But even so the question remains whether to take off in Sydney a message with a Melbourne indicator word for the purpose of copying, is a "use" of the channel outside the authority. The same question may perhaps be asked about the taking off in Melbourne of a message bearing a Sydney indicator word. That means, is it outside the authority given by the agreement just mentioned to permit the

tape in the second office to register the signals the purpose in view being to distribute additional copies. I think not. The use still appears to me to be within the words of the agreements, viz. a use incidental to telegraphic communication and in conjunction with such overseas traffic as the Postmaster-General has licensed viz. traffic from Great Britain and Canada. The words had no such purpose in view as that which it is now sought to ascribe to them. The source and the telegraphic nature of the communication, not its classification as news or as a message for one or many addressees or its use or application on its receipt, were the matters to which the words were directed. It is perhaps a convenient place to add that I do not think that taking of the message involves

a breach of the provision, in clause 16. of the agreement of 15th November 1927, that the defendant shall not transmit or receive an inland message otherwise than as provided in that agreement. It is not an inland message because it does not originate in Australia.

So far, in dealing with the first of the parts or questions into which the inquiry appears to me to divide itself, I have thought it right to consider the application to the detailed facts of the exact provisions of the instruments concerned. I have done this first, because a discussion in detail of the facts and the application to them of the provisions of the documents makes it easier to state the broader grounds which I think form an independent and further foundation for the conclusion that what the defendant is

doing is part of, and within, the function assigned to it by the Commonwealth and the Postmaster-General. The authority which the various instruments I have considered were designed to give to the defendant may be summed up as that of conducting the business of radio telegraphic communication with Great Britain and Canada as a public undertaking, performing for the public a service in many respects like that long undertaken by the cable ~~Companies~~. Such a service included carrying press messages not only for individual newspapers but for press associations and combinations of newspapers. The franchise given by the Commonwealth to the defendant was meant to enable it to carry on a new and developing method of international communication and the general words adopted in the various instruments

for describing its nature were not intended to tie it to any narrow or rigid procedure in conducting its service but to allow it to meet public demands and serve the public needs in radio telegraphic communication with Great Britain and Canada by all reasonable means conducive to the end the words describe.

The specific requirements of legislation and regulations must of course be observed and an overriding limitation was and is the necessity of strictly fulfilling the obligations imposed on Australia by the International Conventions. But these are specific restrictions and conditions which must be independently considered.

Now from the correspondence between the Postmaster-General and the defendant, particularly that at the time when the defendant

began its service, it appears that the system by which an association of newspapers registered an indicator name and arranged that the messages transmitted from Great Britain addressed to it should be distributed amongst them for simultaneous publication had been long practised during the period when their overseas telegraphic news came by cable only.

It is true that arrangements between the cable companies and the Postal Department subsisted which regulated the part they respectively took in carrying out the arrangements for distributing the press messages and it appears that the Department assumed to ~~xxxjxxxxx~~ Authorize the cable companies to carry out the part allotted

to them as its agent. In the same way the needs of the newspapers using the beam wireless were served at first by the defendant and the Postmaster-General acting under an arrangement between them and again the Postmaster-General purported to confer an informal authority upon the defendant. He terminated these arrangements for the purpose of taking over the entire performance of the service demanded by the newspapers and it was then that the company claimed that the distribution by hand of the messages in Sydney and Melbourne was part of the service it was competent to perform. But the arrangements between the cable companies and the Postal Department or the former

arrangement between the defendant and the Postal Department for carrying out the requirements and instructions of the newspapers were necessitated plainly by the fact that the Postmaster-General controlled the telegraphic network which was indispensable for the transmission of messages to the greater number of cities where newspapers are published. In asserting that the companies were his agents the Postmaster-General was doing no more than attempting to preserve a claim which he now sets up. What is significant is that the course of dealing with newspapers now in question was a recognized incident of overseas cable and wireless traffic in press messages. The function of delivering copies, for simultaneous publication by the constituent members of a press association

was an essential part of the complete transmission of the messages. From this it appears to me to follow that the defendant needs no further justification, in the absence of some express limitation or condition, than the authorization to carry on the business of wireless communication as a public undertaking. For the distribution of copies in the manner described is fairly incidental to the exercise of that authority in handling press messages.

The second of the questions into which the controversy appears to me to be divided must therefore be considered. That question is whether the course followed by the defendant in distributing in Sydney and Melbourne press messages addressed to an indicator word means a noncompliance with any of the provisions

of the International Telegraph or Telecommunication Conventions.

In my opinion neither of the successive conventions nor the regulations thereunder forbid the administration of a country of destination itself to follow such a course or to allow a private enterprise recognized by it to do so.

The Convention now in force, that of Madrid, though made in 1932, came into operation on 1st January 1934. The Revision of Paris of 1925 of the St. Petersburg Convention was in force up to that date. I can discover no difference in their provisions which can distinguish the effect produced by one on the answer to the question in hand from that produced by the other. Neither contains any express provision with which the

arrangement with the newspapers is inconsistent. In the absence of an express provision discountenancing the practice it is not surprising that the Commonwealth postal authorities should have concurred with the cable companies and, in the beginning, with the defendant in carrying out the arrangement with newspapers for a distribution of press messages addressed to an indicator word of a press association or the like. But it is suggested that the regulations contain an exhaustive statement of the procedure for ensuring that an international telegraph message will be delivered to more than one addressee or to an address other than that expressed in the message or be transmitted to more than one destination or to a destination other than that indicated in the message.

On this ground it is said that an exclusive method is provided in the International Telecommunication Regulations for accomplishing what is in effect done under the arrangements made by the newspapers, and that consequently the implications of the Regulations have been broken. A similar argument is expressed in Parag. 11A. of the Statement of Claim, which, however, seeks to make an implication that the services provided by the Regulations, and the tariff bases, shall be uniform and exclusive, rather than to rely upon the more specific provisions as to multiple addresses and readdressing. There is perhaps some ground for the contention made in answer by parag. 11A. of the Defence that the agreements, some of which have Parliamentary

authority, amount to special arrangements within the reservation made by Art. 13 of the Madrid Convention (Art. 17 of that of St. Petersburg)). But in any case I do not think that the view is sound that the Regulations under the Convention impliedly exclude the possibility of the administration of destination making arrangements with expectant recipients or addressees of international messages for an additional distribution or delivery of the messages, so long, at all events, as it is not inconsistent with the actual execution of the positive directions contained in the messages.

The articles which provide that multiple telegrams may be sent look to what the sender may do to effectuate his

object. These provisions apply to press telegrams, no doubt. (See Art. 61 and Art. 62 of the Madrid Convention Regulations. Art. 67 § 3. and Art. 68 of St. Petersburg Convention Regulations) And so, probably, do the provisions as to redirection at the order of the addressee. (Art. 60 of the Madrid Convention Regulations). But again they are concerned with the relations of sender to addressee and the right of the addressee to vary the delivery directed by the address and also to use the international channels of communication upon the second or further course of the telegram towards delivery.

It was suggested that the administration where the message originates has a financial interest in

seeing that at the place of destination no facilities are provided or allowed which would tend to reduce the use of the procedure for multiple press telegrams. But Art. 15§ 9 allows an address to be written in an arbitrary or abbreviated form but gives a warning that the right to have such a telegram delivered depends on the addressee's making special arrangements with the telegraph office of destination: and this appears to be enough to show that it is not the policy of the regulations to prevent the administration of destination, or private enterprise acting under that administration, from taking any course which might tend to relieve senders from the necessity of using as many words as otherwise would be required.

Art. 56§9 of the St. Petersburg Convention Regulations, dealing with the redirection of a message, provides that if the redirections take place within the State to which the office of destination belongs the supplementary charge to be collected from the addressee is reckoned from each redirection, at the inland tariff of that State. (Cf. Madrid Regulations Arts. 59 and 60). When at the beginning of the Beam service the Postmaster-General informed the defendant of the terms upon which the arrangement with the press associations was to be carried out, it would appear that he adopted the view that when a message bearing an indicator word address registered in Melbourne was delivered in

Sydney or vice versa, the first copy should be treated as redirected for the purpose of collecting the charge allowed by this regulation. That at all events is my inference from the last parts of parags. 18 and 21 of the Admissions, the letters of 22nd February 1927 defendant to Wilson & MacKinnon and 8th April 1927 P.M.G. to defendant.

After the break with the plaintiffs, the defendant appears to have continued the charge and handed it over to the Postmaster-General, making a further charge of threepence on its own account for copying. See plaintiffs' particulars of 2nd Sept. 1937 parag. (d) (ii). But these facts do not, I think, give any help to either party in relation to the interpretation or applica-

application/
of the International Convention and the Regulations thereunder. Neither party, doubtless, was averse from collecting the charge and the defendant did not want to incur the accusation that it had failed to impose and hand over a charge which the Regulations were supposed to allow or call for.

My conclusion is that the defendant has not failed to comply with the conditions or requirements of the International Telegraph or Telecommunication Conventions or the Regulations thereunder.

The views I have adopted make it unnecessary to pursue the third of the three parts into which, as it appears to me, the enquiry into the lawfulness of the defendant's distribution of the

copies of the press messages naturally falls. For as I take the view that the defendant's franchise is a sufficient justification, the question does not arise whether the distribution of all or some of the copies falls outside the scope of the Postmaster-General's monopoly, but, if contrary to the view I have expressed, the preparation and distribution of the copies were treated as something divorced from the receipt of the overseas message and from the conduct of the business of wireless communication with other countries, then I think it would be impossible to bring so much of the distribution within the Postmaster-General's monopoly as consisted in the preparation and distribution in Melbourne of copies of a message to an indicator word registered in Melbourne,

or in Sydney of copies of a message to an indicator word in Sydney, unless it were considered to amount to the sending or conveying of a letter otherwise than by post contrary to Sec. 98 of the Post and Telegraph Act.

Distributions in Sydney of messages to a Melbourne indicator word or vice versa would depend on the question whether the landline between those cities had been used for an inland message or that landline or the Melbourne apparatus had been used in breach of some other condition of the agreements for the provision of the landlines or in excess of the authority conferred by such agreements.

In my opinion the plaintiffs' case fails entirely and and the result would be that the suit should be dismissed with costs. But, since reaching that conclusion, I have had the advantage of reading the judgment of Evatt J. in whose opinion the present action does not fairly present for determination the grave questions of international law involved in the interpretation of the Conventions and the regulations annexed thereto. There is much force in the reasons his Honour gives for regardir the claim that the Company has infringed the Conventions as something outside the substantial contention intended to be raised by the litigation. Indeed I doubt whether the pleadings

rely on the Conventions except for the purpose of restricting the ambit of the Company's franchise, as distinguished from establishing a breach of the condition or obligation. Having regard to the division of opinion in the Court I agree that the curial order must be that stated at the end of the judgment of Evatt J.

THE COMMONWEALTH OF AUSTRALIA and the POSTMASTER-GENERAL.

v.

AMALGAMATED WIRELESS (AUSTRALASIA) LTD.

Judgment — Evatt J.

Contrary to the wishes of the plaintiffs, the defendant, hereinafter called "the company", has adopted the practice of delivering wireless messages despatched from overseas, and addressed to a named recipient at Sydney or Melbourne not only to the named addressee, but also to a number of other addressees. All of such addressees are newspaper companies or associations, which, by contractual arrangements with the original addressee, are entitled to receive and use the overseas message for the purpose of publication in various newspapers. The procedure or organization set up by the company has been called a "drop copy" procedure. This phrase is convenient enough, but it rather suggests that the additional newspapers are merely receiving a copy of an original message intended for the exclusive benefit of the primary addressee. But, as will be apparent, this does not accurately summarize what is done by the company in conjunction with the newspaper associations.

The contention of the plaintiffs is that the defendant company's method of delivering the message is not authorized by the terms of the wireless agreement of November 15th, 1927, between the Commonwealth and the company (which was approved by the Commonwealth Parliament on December 22nd, 1927, and became a schedule to the Act No.37 of 1927). The plaintiffs also maintain that, by reason of its method of handling messages, the company has been guilty of breaches of clauses in certain agreements relating to the company's land line connections and channels between Rockbank, Victoria (the actual point of receipt of the overseas message via beam wireless) and Melbourne and Sydney - the clauses all providing that such land channels may be used by the company solely for the purpose of handling overseas messages. The plaintiffs also contend that the company has invaded three exclusive rights or monopolies of the Commonwealth.

The three statutory monopolies of the Commonwealth are the

following:-

(1) the exclusive privilege of the Postmaster-General to transmit telegrams within the Commonwealth and to perform all the incidental services of receiving, collecting or delivering such telegrams (Post and Telegraph Act, 1901-1934, Sec.80).

As to this, the plaintiffs say that, under the company's system of delivering the press messages, portion of the company's telegraphic service between Rockbank and Melbourne, and between Rockbank and Sydney, and between Melbourne and Sydney, viz, that portion referable to "copies" as distinct from the primary message, constitutes an invasion of the Commonwealth's telegraphic monopoly.

(2) the exclusive privilege of the Post Office to deliver letters for reward which is to be implied from Sec. 98 of the Post and Telegraph Act, 1901-1934. This section penalizes any person who for reward conveys any letter "otherwise than by post".

On this point, the plaintiffs say that, both in Melbourne and Sydney, the company, for reward, conveys envelopes addressed to various newspaper offices, and within each envelope there is a document. Of course, this is quite true, but the fact is so dissociated from the company's course of business looked at in its entirety that it rather suggests that, if Sec.98 is being infringed, it is only because the Commonwealth's monopoly of telegraphic communication is being infringed.

(3) the exclusive privilege conferred upon the Minister by Sec.4(c) of the Wireless Telegraphy Act, 1905-1919, i.e. of using stations and appliances for the purposes of receiving in Australia messages transmitted by wrireless telegraphy from any place outside Australia.

But for the wireless agreements, the fact of invasion of these Commonwealth rights would be patent. But it is impossible to determine the lawfulness or otherwise of the defendant's method of receiving, handling and delivering newspaper messages from overseas without first examining the nature and scope of the rights conferred upon the company by the wireless agreements. These agreements are all backed by Commonwealth enactments, and their main object was to enable the company not only to perform, but to monopolize ,

services of a class which, prior to the agreements, the Commonwealth itself monopolized. In conferring this monopoly upon the company, the Commonwealth provided for the retention by the government of a controlling interest in the business and assets of the company.

I therefore turn to the agreements between the Commonwealth and the company. Under the original agreement dated March 28th, 1922, it was provided (in clause 13) that the Commonwealth should at all times grant to the company free of charge such permits and licences as were necessary for the rull realization of a programme set out in clause 5 of the agreement; this programme included the maintenance and operation in Australia of stations and equipment necessary for "a direct commercial wireless service between Australia and the United Kingdom", and also "a system of feeder for wireless connexion between the main high power stations and the capital cities of all the States" (clause 5(a) and (b)). Later, in the year 1924, the agreement was varied. Finally, in 1927, a supplemental and amending agreement was made. Clause 13 of the 1927 agreement provided that, in operating its stations, the company should "comply with the provisions of" . . "any International Telegraph or Radio Convention; and that, in particular, the company should comply with international telegraphic conventions as to the fixing and payment to the Commonwealth of terminal, transit or landline charges. Then came clause 14, perhaps the most important provision in the agreement. It declared that the company was entitled, subject to the terms of the licences granted and the provisions of any international radio convention etc. "to establish and operate commercial wireless services . . . between Australia and other countries" (clause 14(1)).

Clause 14(6) declared that clause 15 of the principal agreement was defined to mean that the Commonwealth should not impose any conditions or restrictions upon the company in excess of the conditions and requirements of the International Telegraph Convention, the International Radio Convention and the Wireless Telegraphy Act, and the Post and Telegraph Act. Clause 14(6) also declared that no department of the Commonwealth should carry on any commercial wireless service in competition with the company.

Under clause 15, the Commonwealth undertook that, if so requested by the company, it would provide for it "the necessary land line connexions for the operation of its wireless stations", and would also transmit over the internal communication services of the Commonwealth any overseas message handed over to the Commonwealth by the company for such transmission, the company to pay the Commonwealth for such services at the usual rates.

Clause 16 of the agreement declared that at all times, subject to Post and Telegraph Act requirements, the company was entitled to (inter alia) "deliver to the public through its own offices and agencies any overseas messages . . . received for delivery through its commercial wireless services, and to relay such messages from one part of the Commonwealth to another through its wireless stations and/~~or~~ land line connections as it may consider most expedient". This right was subject to payment of the terminal and/or transit charges. Clause 16(2) also provided that the company should not, otherwise than as provided in the agreement, "transmit or receive inland messages" unless required by the Commonwealth in case of interruption to line circuits.

The material portions of the agreement have now been set out, and it is necessary to examine the true nature of the "drop copy" service which the company is performing for the benefit of the newspaper associations and syndicates.

The mutual admissions of fact take, as a typical case, a beam wireless message addressed "Newswire Sydney". "Newswire" is a code word or indicator which stands for the proprietary company which took over the business of the Australian Press Association. The registered office of the proprietary company is in Little Collins Street, Melbourne. The overseas message addressed "Newswire Sydney" duly reaches the company's terminal station at Rockbank, Victoria. From that point, over the land line from Rockbank to the company's Melbourne office, and from that office to the company's Sydney office, the overseas message reaches the company's Melbourne and Sydney offices, and it may be recorded and utilized at either or both places. Not only at Sydney (the locality of

destination of the message to "Newswire"), but at Melbourne also, the company makes copies of the message, five copies being delivered to newspaper offices at Melbourne, and four copies being delivered at Sydney, two to newspaper offices, and two to press associations. Each "copy" delivered in Sydney and Melbourne is a duplicate of every other message, i.e. each "copy" purports to be an original or primary message.

The above procedure is called the "drop copy" service, for it may be said that copies are, so to speak, dropped at Melbourne of a message while it is en route to Sydney. But there is a second method of procedure, though it seems to be used far less frequently. Thus, a message may be addressed "Starpress Melbourne". In such case, although the addressee is in Melbourne, copies of the message are also delivered at Sydney. It can hardly be said that the "copies" delivered in Sydney are "drop copies", for there is involved in their delivery a use of overland communication extending far beyond both the assumed point and the assumed locality of delivery of the primary message.

Here I may mention that the necessary land line agreements concerning the company's channels between Rockbank and Melbourne, and Melbourne and Sydney all contain a clause providing that "the channels shall at all times be used exclusively in conjunction with the transmission and receipt at the Ballan and Rockbank wireless stations of such overseas traffic as the Postmaster-General may license from time to time", or providing to the like effect.

I have already mentioned that the plaintiffs contend that the use of the channels between Rockbank and Melbourne and Melbourne and Sydney for the purpose of the "drop copy" service involves a breach of clauses like the above on the ground that such channels are not being used in connection with the receipt of overseas traffic. Again, the alleged illegality depends upon the broader question whether the company's method of handling and disposing of the news messages amounts to the transmitting by it of new inland messages, or whether it constitutes the delivery of numerous overseas messages each of which is intended for more recipients than one.

Omitting the question begging phrase "drop copies", what is it that the company is really doing? Clearly, it is delivering to the recipients indicated by the press associations and agencies the message despatched by the overseas correspondent of such agencies. What is done in Australia by the company may be considered under three heads all referred to in the company's letter of February 22nd, 1927. These heads are:-

(1) The copying and delivery of each original message to its indicated address and destination, whether in Sydney or Melbourne.

(2) The copying and delivery of additional "copies" of the overseas message to newspapers at the locality of the primary destination.

(3) The copying and delivery of additional copies of the overseas message to newspapers at a locality other than the locality of the primary destination.

The main case for the plaintiffs may be summarised by the assertion that heads (2) and (3) are not sufficiently related to the overseas wireless service authorised by the charter of the company.

Here I wish to interpolate a reference to a very important international telegraphic regulation, viz. article 61 of the Madrid Convention regulations. It relates to "multiple telegrams". The article makes provision by which one international telegram may be addressed either to several addresses in the same locality, or in different localities served by the same telegraph office, or to the same addressee at different abodes in the same locality, or in different localities served by the same telegraph office. Thus, the "multiple telegram" is a telegram specially devised in order to cover cases where, in the country of origin, a sender desires his telegram to reach more addresses than one in the country of destination, but also wishes to avoid the great expense involved in despatching as many telegrams as there are addresses. In the result, the scheme adopted is that the telegram should be charged as a single telegram subject to the conditions (1) that all the addresses to be reached shall be reckoned in the "wordage" of the telegram, (2) that, in addition to the word rate, a fee shall be paid

for the necessary copying of the message at the office of destination (article 61 § 3). "Press telegrams" are also provided for in article 68 et seq. of the Madrid regulations. By international agreement, such telegrams enjoy special concessions because of their agreed value to the public. Further, the provisions of the "multiple telegram" may be uaed for such press messages (art. 68 § 8). Obviously, "multiple press telegrams" are specially adapted to the function of an international press service from a single correspondent to numerous newspapers within the country of destination. I shall refer later to the analogy between the service performed by the "multiple press telegram" and that performed in the present case.

What function is the company performing in relation to the disputed "drop copy" service? It is clear that the leading newspaper proprietors in Australia have contracted for various joint news services in the course of which messages from overseas correspondents will be made available to a multiplicity of newspapers in Australia. It would seem proper to describe the company's part in the provision of this service as that of receiving and delivering each overseas message to the select list of newspapers for all of whom the overseas message is intended. Why is not the service within the company's charter?

Under the 1927 agreement, clause 14(1) authorises the company to operate commercial wireless services between Australia and other countries, while clause 14(6) precludes the Commonwealth from carrying on any commercial wireless service in competition with the company. Clause 16 of the same agreement expressly empowers the company to deliver to the public through its own offices and agencies any overseas message received for delivery through its commercial wireless services; and, for the purpose of such delivery, the company is authorised to employ its own land lines and wireless stations as it deems expedient.

It is true that, by the same clause (clause 16), the company is forbidden to transmit or receive "inland" messages, and the plaintiffs say (1) that in the disputed cases, the company is

transmitting and receiving and delivering "inland" messages, and (2) that the company's channels between Rockbank and Melbourne, and between Melbourne and Sydney are not being used exclusively in connection with the receipt of overseas traffic.

Both these contentions will illustrate the opposing theses. But, underlying both the contentions of the plaintiffs is the assumption that, in its handling of the multiple newspaper service, the company is dealing afresh with a single overseas message intended by sender and recipient alike to reach only one addressee in Australia. If this assumption is made, it is obvious that the defendant is engaged in transmitting and receiving inland messages contrary to clause 16 of the 1927 agreement. On the same assumption, two other conclusions at once follow:- (1) If the sole addressee is in Melbourne, deliveries of a copy of the message at Sydney would involve an invasion of the Commonwealth's telegraphic monopoly, and perhaps of its postal monopoly also. There would also be involved a plain breach of the land lines agreement, because the Melbourne-Sydney channel would be employed in relation to an inland message from Melbourne to Sydney, not to a message from overseas to Sydney. (2) If the sole addressee is in Sydney, the interception of this message at Melbourne en route and the copying and delivering at Melbourne of copies of the message would involve a breach of the land line agreement, and possible infringements of Sec.98 of the Post and Telegraph Act.

In other words, if there is one addressee ~~xxxxx~~ in Australia for whom alone the overseas message is intended, the company has employed its stations, land lines and agencies not solely for the purpose of delivering the overseas message to the intended recipient, but also for the purpose of transmitting and delivering new inland messages from the single recipient of the overseas message (or perhaps from the company itself) to other persons in Australia, the "fresh" inland messages reproducing the contents of the single overseas message.

In my opinion, the assumption of the plaintiffs is fallacious because, from a business point of view, its interpretation of the

of the facts is quite artificial and unreal. The truth of the matter is that the receipt by all the Australian newspapers of the message from overseas is part and parcel of a direct overseas service of press messages to such newspapers. The sender of the message in parts overseas, the company and the Australian newspapers who receive the "copies" all know and intend that the message shall reach each and all of them, and reach them in the form of a first or original overseas message to each newspaper. To this end alone, all the stations, lines and agencies of the defendant are directed. As and when each newspaper publishes the "news" to its readers, it is entitled to claim, as no doubt it does claim, that it is giving to its readers the benefit of an overseas service and of overseas messages received by it from an overseas correspondent. In reality, there is never any transmission or receipt by the company of a true inland message (i.e. a message originating and terminating in Australia). On the contrary, the company is receiving, relaying and delivering one multiple overseas message to a number of recipients for each of whom the message is intended. It happens that the company is enabled to employ special facilities for delivery where the recipients of such a multiple overseas message are to be found in Sydney or Melbourne. But, in the present case, the admitted use of these facilities (including the land line connections, the simultaneous recording of the message at Sydney and Melbourne, and the making and delivery of copies at either city) is a use which constitutes an integral portion of one great business or system of receiving and delivering such multiple messages from overseas to Australia.

As I have already suggested, the "multiple press telegram" which is expressly authorised by the international regulations shows clearly that what the company is doing in Australia in execution of the "drop copy" service is, in all its essentials, the receipt and delivery of a special class of overseas message. The very existence of the "multiple press telegram" provides evidence that the delivery to each one of many addressees of the one international telegram is a recognized and essential part of the inter-

national service of telecommunication. Here the company has produced a result of the same class or character as that produced in the case of a "multiple press telegram". In other words, it has delivered a single overseas message to a number of recipients. The fact that the procedure adopted by the sender, the company and the newspaper associations seems to depart from the conventional procedure governing "multiple press telegrams" is nothing to the point. It is enough that the service, copying and delivery of a single telegram from an overseas correspondent to a multiplicity of recipients in the country of destination is intended by the sender of the message. It is a service which belongs to a well established class of international telegraphic service. The result is that, even though the company does not handle a "multiple press telegram" in ordinary form, it is performing in Australia the same functions of receipt, relaying, copying and delivery as would or might be called for in the case of an overseas "multiple press telegram".

It follows that the company has acted within the wide authority to operate an "overseas" commercial wireless service granted by the 1927 wireless agreement. In each of the disputed instances, the company has employed its own stations, land lines and agencies solely for the purpose of receiving, relaying and delivering overseas messages. All of these services constitute an essential part of any overseas wireless service, and none of them relate to the transmission, receipt or delivery of an inland message.

The last contention of the plaintiffs is that the company has broken those clauses of the wireless agreement which require compliance by the company with the international telegraph regulations.

It is admitted that, up to January, 1934, the Commonwealth was a party to the International Telggraph Convention of St. Petersburg, and the regulations annexed thereto, and that, since January, 1934, the Commonwealth has been, and still is, a party to the Madrid International Telecommunication Convention and the regulations thereunder, which, on January 1st, 1934, replaced the St.

Petersburg regulations. For present purposes, the international regulations under the two Conventions are not to be distinguished, and, in this judgment, reference is made solely to the Madrid Convention.

During argument, a large number of the regulations were mentioned, but I need refer to some only of these. Article 61, which has already been discussed, is concerned with "multiple telegrams". These messages may be addressed either (1) to several addresses in the same locality or (2) in different localities served by the same telegraph office, or (3) to the same addressee at different abodes in the same locality, or (4) in different localities served by the same telegraph office. It may be assumed that the city of Melbourne may properly be regarded as one "locality" within the meaning of article 61 § 1, and that the city of Sydney is also one such "locality". It would seem that in the case of a "a multiple telegram" directed to Sydney, the copying and delivery of the telegram to addresses in Melbourne would be outside the scope of the "multiple telegram" contemplated by article 61.

It has also been pointed out that the "multiple telegram" is applicable to press as well as private messages. But, the Madrid regulations make no express provision for multiplying the addressees of an overseas message except in case of a "multiple press telegram" where, as in the case of a "multiple telegram", the permissible addressees would presumably be confined to persons in the same locality within the country of destination (article 72). Article 72 provides that in regard to anything "not specifically provided for in articles 68 to 72, press telegrams "are subject to the provisions of these regulations and of special agreements concluded between Administrations.

An important feature of the international regulations is the system of accounting prescribed by articles 85-88 inclusive. Unless otherwise arranged, each Administration carries the share of the charges accruing to it to the debit of the Administration with which it is in direct contact. (art. 85 § 2). The accounts are based on the number of words transmitted during the month (art 86 § 1), and the number of words announced

by the office of origin serves as the basis for the application of the charge (art.86 § 3). It is only in the European system that Administrations are permitted to depart from the general method of settling accounts on the basis of the number of words transmitted. In that system, they may settle on the basis of the number of telegrams passing across the frontier, each telegram being considered to comprise the average number of words shown by statistics (art.87 § 1). This exception suggests that the system of accounting for charges in international telecommunication is founded upon the number of words transmitted between the various co ntries. As a necessary part of the accounting system, the originals of telegrams and documents relating to them are retained by the Administrations and preserved until the relevant accounts are settled (art.89).

Having regard to the regulations summarized above, the argument that a breach of the Convention has been committed may perhaps be thus expressed: By the arrangement between the company and the newspaper associations, an overseas message is enabled to derive all the advantages of a "multiple press telegram", although the message as lodged contains fewer words than the regulations contemplate. For, first of all, the original message e.g. to "Newswire Sydney" omits the names of several addressees within the same locality - Sydney - yet all such addressees will receive the message; and secondly, addressees in two localities (Sydney and Melbourne) are obtaining copies of the overseas message, whereas a "multiple press telegram", like a "multiple telegram" is intended for multiple delivery only within the same locality or the localities served by the same post office.

It may therefore be argued that by its active participation in the arrangement with the newspapers, the company does not perform the international service regulated by the international regulations. Thus, in the typical case of a message addressed "Newswire Sydney", the company does much more than deliver the message to the one addressee. The argument against the company involves the assertion that, in the country of destination, the service to be performed shall never exceed, but merely conform to the instruct-

ions of the sender expressed in the proper form at the point of despatch. If the sender requires his telegram to be delivered to a multiplicity of addresses in the country of destination, he should obey the conventional restrictions applicable to the cases of "multiple telggrams" and "multiple press telegrams". If the argument is right, then, in the case of "Newswire Sydney", two "multiple press telegrams" would be required, one for Sydney, and the other for Melbourne. On this footing, the ~~requirement~~ argument proceeds to assert that, by its arrangements in Australia, the company has, in effect, enabled the sender of the overseas message to avoid the "wordage" called for by the international regulations.

These contentions serve to show that a question of considerable importance is involved, viz. whether a breach of the international convention is committed by a government of the territory of destination in cases where, in obedience to standing instructions from the addressee of a single international telegram, such government uses its internal communication system to deliver copies of the international telegram ~~xxxxxxx~~ to a multiplicity of addresses within the territory. In other words, is the country of destination entitled to use or permit the use of its inland system for the multiple delivery of any overseas message which at the point of origin does not call for such delivery in accordance with the international regulations?

In my opinion, these grave questions of international law do not fairly arise for determination in the present action. It has been made apparent that, in relation to the "drop copy" service, the Commonwealth's real claim is not based on the fact that the "wordage" of each overseas message handled by the company is insufficient. On the contrary, the Commonwealth's real contention is that the company is performing the very services which should be performed by the Commonwealth. Prior to 1930, while the international regulations were in full force, the Commonwealth was actually performing such services through the agency of the company. It follows that any finding by this Court that the procedure adopted by the company departs from the international requirements would

carry with it the further findings (1) that, prior to 1930, the Commonwealth had directly broken its international obligations under the Convention, and (2) that, since 1930, the Commonwealth has broken such regulations by permitting the company to act as it has done. The practical result of the same finding would be that neither the company, nor the Commonwealth could perform the "drop copy" service without breach of the international regulations. Such a result is the last thing intended by the present plaintiffs. The pleadings show, I think, that the plaintiffs had no intention of suggesting that a crucial question of international law should be determined, as a subordinate side issue to the present controversy. I have already elaborated my reasons for thinking that it is the company and not the Commonwealth which is entitled to perform the services of handling relaying, copying and delivering each overseas press message to a multiplicity of newspaper offices in Sydney and Melbourne. It is possible that, in spite of the decision of the Court as to the company's charter under the wireless agreements, the Commonwealth may still desire to invoke the international regulations in order to perform its press services, because the primary message is not in order. But I am of opinion that if, upon full consideration, the Commonwealth so desires, it should commence a fresh action in which each and every breach of the international regulation shall be specifically alleged, and the questions of breach, damages and relief may be separately considered.

In my opinion, the present action should be dismissed without prejudice to the plaintiffs right to institute a fresh action based upon any allegations of non compliance with the international regulations in relation to telecommunication.

COMMOMWEALTH OF AUSTRALIA AND THE POSTMASTER-GENERAL -v- AMALGAMATED WIRELESS (AUSTRALASIA) LIMITED

JUDGMENT McTIERNAN J.

The plaintiffs claim that since December 6th. 1930 the defendant has, without the authority of either of them, received and carried out instructions given by addressees of messages transmitted from overseas and received by the defendant's wireless station to deliver copies of such messages to persons other than the addressees themselves. The plaintiffs also claim that authority to do certain of such acts was expressly conferred on the defendant on April 8th. 1927, but was expressly determined on November 18th. 1930. A declaration is sought that by doing the acts complained of since December 6th. 1930 the defendant has encroached on exclusive statutory privileges of the plaintiffs in matters of wireless and telegraphic communication and postal service and committed certain breaches of agreements between the plaintiffs and the defendant. The plaintiffs also claim an injunction restraining the defendant from doing the acts complained of, and damages.

It is convenient to refer, at the outset, to the statutory provisions upon the basis of which agreements were made between the parties and licenses granted to the defendant. By sec. 4 of the Wireless Telegraphy Act 1905-36 the Postmaster-General, as the Minister administering the Act is invested with the exclusive privilege of establishing, erecting, maintaining and using stations and appliances for transmitting and receiving wireless messages between Australia and overseas. By sec. 5 licenses to exercise this privilege may be granted by the Minister on prescribed terms and conditions. By sec. 80 of the Post and Telegraph Act 1901-34 the Postmaster-General is invested , subject to the exceptions and provisoes set out, with the exclusive privilege of erecting and maintaining telegraph lines and of transmitting telegrams and other communications by telegraph and performing all the incidental services of

receiving and collecting or delivering such telegrams or communications. By sec. 81 the Postmaster-General may on such conditions as he deems fit authorise any person to erect and maintain telegraph lines and to use them for all purposes of and incidental to telegraphic communication. By sec. 4 the Postmaster-General's Department is given control of the postal and telegraph services of the Commonwealth. Sec.98 provides that (with certain exceptions) no letter shall be sent or carried for hire otherwise than by post . A penalty is provided by the section for a breach of the provision.

A statement in detail of one series of the acts complained of has been agreed upon by the parties and included in the mutual admissions of facts. Between November 30th. 1932 and May 11th. 1937 the defendant received at its Melbourne and Sydney offices through its wireless station at Rockbank radio messages from the United Kingdom and Canada addressed to "Newswire Sydney". "Newswire" was a code word for the Australian Associated Press registered with the Postmaster-General, first in Victoria at all material times until November 30th. 1932, thereafter at Sydney until June 30th. 1935. From this date until March 11th. 1937 it was registered at Sydney and stood for Australian Associated Press Pty. Ltd., a company incorporated in Victoria. The defendant made copies at its Melbourne and Sydney offices of all messages addressed to Newswire Sydney, and with the authority of the addressee delivered the copies to certain newspaper proprietors and news associations in the respective cities. The process of the receipt of messages in the defendant's Melbourne and Sydney offices may be shortly described. As soon as the transmitted morse messages are received at the receiving station at Rockbank they are automatically filtered, amplified, changed in frequency, passed along a landline from Rockbank to the Melbourne office and there transformed into impulses

corresponding to the original morse messages and automatically recorded on tapes. Simultaneously, the transformed messages are automatically passed over the land channel between the Melbourne and Sydney offices, and, if necessary, recorded in morse on tapes in the Sydney office. The defendant admits that in the same manner as with the code word Newswire other messages were received by it during the period between December 6th. 1930 and March 11th. 1937 addressed to several other code words registered in either Melbourne or Sydney and copies of such messages were, according to the instructions in each case, delivered to various newspaper proprietors or news associations in Sydney or Melbourne or in both cities. The particulars of these acts are admitted to be the particulars delivered under the plaintiffs' statement of claim. The rates charged by the defendant for the service of delivering the copies are: (a) in the city (Melbourne or Sydney) where the code word was registered, for the first copy nil, for others 5d for 50 words or part thereof; (b) in the other city, for the first copy the rates prescribed by postal regulations for press telegrams between Melbourne and Sydney plus a copying fee of 3d, for others 5d for every 50 words or part thereof. All the rates received for the first copies in (b) less the copying fee of 3d were remitted by the defendant to the Postmaster-General.

Such, then, is the nature of the service which the defendant has been conducting and to which the plaintiffs object. The questions, therefore, to be determined are: whether the plaintiffs, who have the statutory privileges referred to in matters relating to wireless, telegraph and postal communication, have, by agreement or licence or both, given the defendant a right or franchise to conduct the service of delivering in Melbourne or Sydney or both cities copies of press messages addressed to one addressee to newspaper proprietors and news associations other than the addressee (which may, for convenience, be hereafter

referred to as the "multiple-message service"); whether ~~if no right or franchise has been given,~~ the defendant has bound itself in any way by any agreement not to conduct such a service or any part of it; and whether, in the absence of any provision in any agreement binding the defendant not to carry on such a service, the conduct of the service by the defendant, even if it has been given no positive right or franshise, is still lawful because it is outside the privileges of the plaintiffs. It is clear that the questions may have to be determined in relation to one or the other of two distinct kinds of acts performed in the multiple-message service, namely, the transmission of the messages by the land channel from Melbourne to Sydney and the multiple copying and delivery of them. The legality of the act of receiving the original messages by wireless telegraphy cannot, of course, be questioned.

It is necessary, first of all, to consider the relevant parts of the agreements between the parties and the licenses granted by the Postmaster-General to the defendant. The principal agreement between the parties is that of March 28th. 1922. The Company (the defendant) undertook by clause 4, amongst other things, to proceed with the development, manufacture, sale and use of apparatus for wireless communication with countries overseas. By clause 5 the Company undertook, amongst other things, to construct, maintain and operate in Australia the necessary stations and equipment for a direct commercial wireless service between Australia and the United Kingdom./ The Commonwealth undertook by clause 13 at all times to grant all permits and licenses necessary for the full realisation of the programme set out in clause 5, and by clause 15 not to impose any condition or restriction of any kind upon the operations of the Company calculated to obstruct its business, provided that the obligations of the Commonwealth did not extend to any wireless service not included in clause 5 and competing

with the land telegraph lines of the Commonwealth. By clause 12 "the Commercial Wireless Service" is declared to mean, for the purposes of the agreement, "a service capable, as regards plant, apparatus and personnel, of maintaining communication throughout 300 days of every year on the minimum basis of twenty words per minute each way for twelve hours per day." By a supplemental and amending agreement dated November 15th. 1927 clauses 4 and 13 of the principal agreement, which have been referred to were defined to mean that "the Company is entitled, subject to the terms of the licenses granted or to be granted by the Commonwealth to the Company,...to establish and operate commercial wireless services between Australia and other countries..." (clause 14 (1)). Clause 15 of the principal agreement, which has been referred to, was defined to mean that "the Commonwealth shall not impose any conditions or restrictions of any kind upon the Company which exceed the conditions and requirements of the International Radio Convention, the International Telegraph Convention, the Wireless Telegraphy Act and the Post and Telegraph Act, and no Department of the Commonwealth shall carry on any commercial wireless service in competition with the Company." (clause 14 (6)). By clause 16 (1) it was provided that "the Company shall be entitled at all times, subject to the requirements of the Post and Telegraph Act, to accept from and deliver to the public through its own offices and agencies any overseas messages intended for transmission or received for delivery through its commercial wireless services an d to relay such messages from one part of the Commonwealth to another through its wireless stations and/or land line connections as it may consider most expedient,... and the Company shall also be entitled to exchange...service messages among its wireless stations, but the Company shall not, otherwise than as provided in this agreement, transmit or receive inland messages unless required by the Commonwealth in cases of interruption to line circuits."

"Commercial wireless services" were declared, for the purposes of the supplemental and amending agreement, to include wireless telegraphy, wireless ~~telephony~~ telephony and all further developments of wireless transmission or reception for commercial purposes." By agreements dated November 12th. 1926 and January 11th. 1927 the Postmaster-General agreed to provide for the Company the necessary telegraph channels between Melbourne and Rockbank and Ballan, and Melbourne and Sydney respectively. The agreements provided that the channels should be used exclusively in conjunction with the transmission and receipt of such overseas traffic as the Postmaster-General might license from time to time. They were granted "for purposes of and incidental to telegraphic and telephonic communication." The Postmaster-General, in pursuance of sec.5 of the Wireless Telegraphy Act 1905-19 granted a license dated April 12th. 1927 of 12 months duration, which was renewed from time to time to the Company "to erect, maintain and operate,... wireless stations at Ballan and Rockbank in the state of Victoria and to conduct a radio-telegraph service between these stations and corresponding stations in England". A license in similar terms permitting a service between the Company's stations and Canada was granted by the Postmaster-General on 23rd. May 1928 and was renewed from time to time. The Company accepted these licenses without prejudice to any rights it might have under the agreements.

The first question, then, is: has any right to conduct the multiple-message service been conferred, expressly or impliedly, on the defendant by the agreements or licenses? Clearly no right has been given in express words. Is the right to be implied from the agreements or licenses or both? By the principal agreement the defendant is authorised to conduct a"direct commercial wireless service" between Australia and the United Kingdom. In the supplemental and amending agreement it is declared that the defendant is

entitled to establish and operate "commercial wireless services". Is the right to conduct the multiple-message service to be included in the right to operate a commercial wireless service (or services)? Neither the definition of a commmercial wireless service in the prior agreement nor the definition of commercial wireless services in the latter gives any assistance in implying the right; for the prior definition relates merely to a required minimum capacity of traffic for the transmitting and receiving stations, the latter seeks to ensure that the phrase includes all scientific forms and developments of wireless communication. Again, no assistance is found in the licenses, in which it is provided that the defendant may conduct a "radio-telegraph service". Nor does it appear that such a service is essential to the full achievement of a commercial wireless service. The complete commercial service seems rather to be the receipt of the morse message from overseas, its translation into English words and the transmission by the necessary channels to the addressee at his address. And it appears from the evidence that this was the bulk of the business of the defendant's commercial wireless service; for in the admitted facts it is stated that the defendant received at its offices in Melbourne and Sydney for delivery in Australia "a considerably greater number of governmental, commercial and private messages from the United Kingdom and Canada and from various other countries through the United Kingdom and Canada than the press messages aforesaid." Nor is there in the evidence proof of any facts which could show that such a service as the multiple-message service is the kind of thing that is customarily performed in "commercial wireless services". It may be deduced from a letter written by the Postmaster-General to the defendant on April 8th. 1927 that cable companies carried on the service of delivering multiple messages to the press before the inauguration of the defendant's beam

wireless. But it also appears from this letter that the companies conducted such a service under authorisation from the Postmaster-General and that the Postmaster-General purported to grant a license to the defendant to carry on such a service "as agents of this Department". In my opinion, nothing in this letter or the correspondence generally proves any usage or practice of conducting such a multiple-message service as part of , or even incidental to, a commercial cable or wireless service. And it is difficult to see how the cable companies could have derived any rights from any such suggested usage as against the statutory privileges of the plaintiffs. ... Whatever rights they had must have reposed in the authority conferred on them by the plaintiffs. In my opinion, therefore, the defendant cannot rely on the agreements or licenses in claiming to be entitled to carry on the multiple-message service; such a right cannot be implied from the provisions enabling it to conduct a commercial wireless, or wireless-telegraphy, service, nor from any other provision.

The second question is whether there is any provision in the agreements by which the defendant has bound itself not to conduct such a service. There is a provision whereby, in my opinion, the defendant has bound itself impliedly not to conduct that part of the service which consists in transmitting from Melbourne to Sydney by use of the land channel messages addressed to an addressee in Melbourne. Although it is stated in the evidence that the message signals passing out from Rockbank are automatically and simultaneously recorded in Melbourne and Sydney, it is not suggested that they must be so recorded in both cities, that is, that they must pass on to Sydney because of a fixed circuit necessarily including Sydney, and, therefore, involving the use of the land channel between the two offices. Presumably, like any other telegraphic channel (and the evidence shows that this was a "channel for telegraphic communication")

the circuit may be made to extend only so far as is required and may, therefore, be completed for messages from Rockbank to Melbourne only. Clause 16 (1) of the supplemental and amending agreement, which has been quoted above, after setting out what the defendant may do in regard to accepting and relaying overseas messages through its wireless stations and land lines, provides that the defendant "shall not, otherwise than as provided in this agreement, transmit or receive inland messages unless required by the Commonwealth in case of interruption to line circuits". Now, as has already been seen, no provision in this or any other of the agreements or licenses gives the defendant the right to conduct the multiple-message service; and, in my opinion, the defendant has not, for the same reasons, been authorised to do either part of it - either the transmission to Sydney of messages addressed to addressees in Melbourne or the delivery of the multiple copies. It follows, therefore, that the transmission of such a message is a transmission of an inland message "otherwise than as provided in the agreement" and, consequently, a breach of the clause. The receipt in Melbourne of a message addressed to an addressee in Sydney and its translation in Melbourne into English words is not, in my opinion, a breach of this clause. Messages are recorded simultaneously in Melbourne and Sydney; but the Sydney messages must pass through Melbourne in some form in the circuit between Rockbank and Sydney. There is, therefore, no question of an unauthorised transmission of an inland message.

There is no express provision in any of the agreements by which the defendant is expressly bound not to carry out the delivery of multiple copies of messages in Melbourne or Sydney or both cities ("drop copies", as they have been called) to newspaper proprietors and news associations other than the addressees. But, as shown above, the defendant has no authority to do so. Nevertheless, it

may do so, if, by so doing, it does not infringe any exclusive privilege of the plaintiffs. It is necessary, therefore, to consider the third question in relation to this part of the service, namely, whether the acts of distributing the drop copies in Melbourne or Sydney or both cities are acts which come within any of the statutory exclusive privileges of the plaintiffs. By sec. 80 of the Post and Telegraph Act the Postmaster-General is given "the exclusive privilege of erecting and maintaining telegraph lines and of transmitting telegrams or other communications by telegraph within the Commonwealth and performing all the incidental services or receiving collecting or delivering such telegrams or communications..." From the definition of telegraph line in sec. 3 of the Act plainly the channels from Rockbank to Melbourne and Melbourne to Sydney are "telegraphs" or "telegraph lines" within the meaning of the Act. Consequently, all the original messages sent from Rockbank over the channels to either Melbourne or Sydney come within the description "telegrams or other communications by telegraph". They may be otherwise described as well; they may still be "overseas" or "wireless" or "wireless-telegraphic" messages. But clearly they have this character, at least, for the purposes of the Act. Since, in my opinion, the defendant has no right to deliver the drop copies by any provision of the agreements, it follows that if the drop copies come within the description "telegrams or other communications by telegraph", as the original messages do, then the delivery of them infringes the exclusive privilege of the Postmaster-General conferred by sec. 80. Neither the original messages nor the drop copies are "telegrams" because of the definition given to that word by sec. 3 of the Act. It follows from what has been said that the original messages, that is, the actual pieces of paper containing the translation from the morse message, are "communications by telegraph". Are the drop copies also "communications by telegraph?"

There seems to be no reason, in my opinion, why the first or second or the tenth copy, which have the same origin as the original message in English, namely, the morse message, should assume any different character from the first. Nor does it make any difference to the character of the drop copies that they are destined to go to persons other than the addressee of the original message on account of his instructions. If A, who was leaving the country, were to instruct the Postmaster-General to deliver in his absence all telegrams addressed to him to B, the documents which B would receive would be telegrams. Similarly, if A were to instruct the defendant to deliver to B all radio messages, which are when they reach the defendant's offices "communications by telegraph", the documents which B would receive would be "communications by telegraph". If the defendant were authorised to deliver copies to C, D and E and others, there would be no difference in the nature of the documents. This is the case of the drop copies. In my opinion, therefore, the drop copies are "communications by telegraph" within the meaning of sec. 80 of the Post and Telegraph Act, and the delivery of them, not being authorised, constitute a breach of the exclusive privilege to conduct such a service granted to the Postmaster-General by that section. This argument does not, of course, deny the defendant's right to deliver wireless messages to the addressees thereof, authority to do this being assured to them by agreement.

None of the acts done by the defendant in conducting the multiple-message service has, in my opinion, involved any failure to comply with the International Telegraphic Convention of St. Petersburg and the International Telecommunication Convention of Madrid. I agree with the reasons advanced by my brother Dixon for this conclusion. Accordingly, the defendant has, in my opinion, committed no breach of clause 13 of the agreement of November 15th. 1927 by any failure to comply with the provisions of these Conventions.

In view of these conclusions, the plaintiffs are, in my opinion, entitled to a declaration that the defendant has (a) committed breaches of sec. 16(1) of the agreement of November 15th. 1927 by transmitting unauthorised inland messages, namely, by transmitting to Sydney messages addressed to addressees in Melbourne, and (b) infringed the exclusive privilege of the Postmaster-General of delivering "communications by telegraph" by delivering copies of messages to persons other than the addressees thereof. Accordingly, the case should be remitted to the learned judge to make an order appropriate to these declarations.