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THE AUSTRALIAN AVIATION CASE*

SIR ROBERT GARRAN†

IMPORTANCE OF THE DECISION

The outstanding interest and importance of the *Aviation Case* is that it is the first definite decision of the High Court on the federal power to legislate with respect to "external affairs," and the first real examination by the Court of the unexplored reserves of federal legislative power contained in those words. Placitum (xxix.) has been referred to by counsel and judges in several cases, but until this case the Court has always been able to avoid basing a decision upon it. In *Roche v. Kronheimer* (29 C.L.R. 329) especially it was relied upon, together with the defence power, by counsel intervening for the Commonwealth in support of the validity of the Treaty of Peace Act; but the court preferred to base its decision upon the defence power, though *Higgins, J.*, said (as *Latham, C. J.*, says in this case) that it could equally well have been supported under the power as to external affairs.

In the *Aviation Case*, the appellant had been convicted of a breach of the Air Navigation Regulations in flying a plane at Mascot in N.S.W. without a license as required by the Regulations. These Regulations were made under the Air Navigation Act, 1920, which purported to empower the Governor-General to make regulations for two purposes:—

- (1) for the purpose of carrying out and giving effect to the International Convention for the Regulation of Aerial Navigation, signed at Paris on 13th October, 1919, and any amendment thereof; and
- (2) for the purpose of providing for the control of air navigation in the Commonwealth and the Territories.

* *R. v. Burgess, Ex Parte Henry*. — The Commonwealth Law Reports — (1936), decided November 10, 1936. High Court of the Commonwealth of Australia. See the summary of the decision at page 125.

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TRADE AND COMMERCE

The second purpose contained no reference to trade and commerce, but no suggestion was made that it could be supported under any other power. The Court was unanimous that the federal commerce power did not enable the Federal Parliament to control aviation within a State, and that the Regulations could not be supported under the head of that purpose. The main contention for the Commonwealth on this branch of the case was that, in the case of aviation, inter-State and intra-State navigation were so commingled that it was impossible to regulate the former without the latter. The Court's answer was in effect that there was doubtless difficulty and inconvenience, even in a greater degree than in land or sea transport, but there was no impossibility; and considerations of convenience could not override the plain words of the Constitution, which did not give the Commonwealth legislative power as to commerce within a State.

There appears to be one qualification of this proposition that is not referred to in the Chief Justice's judgment. In addition to airworthiness and competency of pilots, he refers to "uniform rules of flight," and uniform rules for the safety of the air highway as matters that did not fall within the federal power, however desirable federal control of these matters might be. This seems to put the matter somewhat higher than is warranted by the cases that he cites. It is true that the Court has held that Commonwealth legislation cannot control such matters as accommodation for seamen, and manning scales, in intra-State ships. But collision rules and the "rule of the road" on an inter-State highway are more intimately connected with the regulation of inter-State commerce; and there is much to be said for the proposition that the Commonwealth may, purely in the exercise of its power over inter-State commerce, insist on the observance of uniform rules of the road by all craft using the highway. Such legislation, though affecting instruments of intra-State commerce, would appear to be valid legislation in respect to inter-State commerce. The case of *Hume v. Palmer* (38 C.L.R. 441) is instructive on this point. Federal jurisdiction was there held to be excluded because the intra-State ship was not, within the meaning of the Navigation Act as construed, in waters used by inter-State ships; but the judgment of *Isaacs, J.*, at p. 437, is emphatic as to the federal power to enforce any provisions reasonably calculated to avoid peril to inter-State ships on the highway. Justices *Evatt* and *McTiernan* seem to put the case correctly when they

say that the rejection of the "commingling" theory does not deny that parts of intra-State aviation may be so closely related to inter-State aviation that the instruments of the former will be drawn into the ambit of the federal powers.

As to the first purpose covered by the Regulations, attempts were made by appellant's counsel to whittle down "external affairs" either to some external aspect of other specific subject-matters of federal power, or to the extra-territorial extension of such other powers. These contentions were summarily rejected, and the Court was unanimous in declaring "external affairs" to be a separate and independent subject-matter, to be construed in its natural sense as connoting the relations of Australia with other countries—as, indeed, being equivalent to the "foreign affairs" of the Commonwealth, inclusive of its affairs with other parts of the British Empire. So construed, it is held to authorize, *inter alia*, legislation for carrying out a treaty such as the Air Convention.

This is the central point of interest of the decision. The Convention covers practically the whole field of the regulation of flying—including, in Australia, flying within a State, which apart from treaty, is not within the legislative competency of the Commonwealth. Once grant that the Commonwealth can, for the purpose of giving effect to a treaty, assume control of matters not otherwise within its powers, where can we stop?

One obvious limitation is that the power as to external affairs, like other powers of the Parliament, is subject to the express prohibitions of the Constitution. For instance, the Parliament cannot, for the purpose of carrying out a treaty, make a law establishing any religion (Constitution, s. 116), or prohibiting the use, etc., of intoxicating liquor in a State (s. 113). But what other limits are there?

It was suggested for the appellant that the federal power could only apply to subject-matters that are *in se* proper for international agreement. To this the Chief Justice and Justices *Stark* and *Dixon* reply that, even if the suggested test could be accepted, it would not help the appellant, because this particular Convention would pass the test beyond all doubt. Aviation is a clear example of a subject eminently suitable for international agreement. This Convention brings a large number of countries into line as to important and much disputed questions of international law—such as territorial sovereignty over the air, and the grant of rights of "innocent passage" in time of peace. It lays down uniform rules for flying, landing, and taking off; for securing the airworthiness

of planes and the competency of their pilots; for the registration of aircraft and determination of their nationality; and for many other matters as to which international regulation is highly desirable, in view of the world-embracing nature of modern air navigation.

These reasons are sufficient to support the federal power as to this Convention. But when we try to apply generally the suggested test, whether the subject-matter of a Convention is *in se* proper for international agreement, where are we? Can we make a list of subjects that are, and of subjects that are not, proper for international agreement. What criterion of that can be laid down? In these days, with modern means of travel, and the progressive interlocking of the interests of all nations in social and industrial matters, what bounds can be set to the proper scope of international arrangements? It is difficult to find an answer to the observation of Justices *Evatt* and *McTiernan*, that the mere fact of an international agreement having been made on a subject brings that subject within the field of international relations, so far as that subject is dealt with by the agreement.

Latham, C.J., says that, "It is impossible to say, *a priori*, that any subject is such that it could never properly be dealt with by international agreement." *Starke*, J., says that the power is "comprehensive in its terms and must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other powers or States," and thinks it impossible at present to define its limits more accurately. *Dixon*, J., says that "the limits of the power can only be ascertained authoritatively by a course of decisions in which the application of general statements is illustrated by example"

Justices *Evatt* and *McTiernan*, in their joint judgment, are more definite and more sweeping. They say generally that, in consequence of the close connection between the nations of the world, and their recognition of a common interest, and of the necessity of co-operation in matters affecting social welfare, "it is no longer possible to assert that there is any subject-matter which must necessarily be excluded from the list of possible subjects of international negotiation, international dispute, or international agreement." They cite the declaration, in the Charter of the International Labour Organization in the Treaty of Versailles, that universal peace can only be established on the basis of social justice, and that labour unrest due to unsatisfactory conditions imperils the peace of the world; and they say specifically that the Commonwealth power extends to international agreements as to such matters as suppression

of traffic in drugs, control of armaments, and regulation of labour conditions. If—and it is hard to controvert—there is no constitutional objection to the Commonwealth entering into such agreements and making laws to give effect to them, it follows that the Commonwealth is not (in the words of Article 405 of the Treaty of Versailles) “a federal State, the power of which to enter into conventions on labour matters is subject to limitations,” and the field opened up for possible Commonwealth control is almost unlimited. And even the mere cautious utterances of the rest of the Court indicate that the field is very wide, and its limits hard to define. It is not long since Herbert Spencer undertook to define the proper limits of government interference with individual liberty, in terms that have been described as “anarchy plus the policeman.” Those limits now are quite obliterated; and attempts to define the proper limits of international agreements are not likely to have much greater success.

THE AIR NAVIGATION REGULATIONS

The Act, then, is valid so far as it gives power to make regulations for carrying the Convention into effect, though invalid so far as it purports to give power to make regulations for the general control of aviation. Had the Regulations been found to be in strict conformity with the Convention, and confined to giving effect to it, all would have been well.

But it is not unusual, in legislation implementing treaties, which are diplomatic documents, to follow the diplomatic method of looking at their stipulations broadly, as a working basis, to be followed in the spirit but not necessarily to the strict letter. That was done in the British Order-in-Council, and where, as in the United Kingdom, there is a Parliament with plenary powers, no legal difficulties arise. The Australian regulations seem to be based largely on the British, and also to have been framed on the assumption that the Air Navigation Act gave plenary powers as to aviation. They do not conform strictly in all points with the Convention, and the observations of several Justices as to this call for consideration. They are all in agreement that the regulations need not merely copy the words of the Convention—a course which would often fail to give effect to the Convention, which leaves many details to be prescribed by the national governments at their discretion. But what is the position when the Convention prescribes one thing, and the regulation prescribes something different?

Latham, C.J., requires substantial conformity. He does not quarrel with minor variations, such as the substitution for metric measurements of substantial equivalents in yards and feet; and he would admit matters necessary and convenient to be prescribed, as our statutes put it, for giving effect to the Convention, though not expressly authorized by it. But he finds instances in which the Air Navigation Regulations, in his opinion, run counter to the fundamental principles of the Convention, and of sufficient importance to invalidate the regulations as a whole. *Dixon*, J., says that the nature of the power demands a faithful pursuit of the purpose of giving effect to the Convention. It includes the doing of anything reasonably incidental, but does not permit such wide departures as he finds, which he too thinks invalidate the regulations as a whole. Justices *Evatt* and *McTiernan* seem to insist on strict conformity—even down to exact metric measurements. They base their view that the regulations as a whole are bad on the ground that the draftsmen seem to have addressed their minds to the wrong purpose—to the purpose of controlling air navigation in the Commonwealth, with the Convention in the background as a mere working basis, not to the purpose of giving effect to the Convention.

On this part of the case *Starke*, J., differs from all his brethren, and holds that the regulations are valid, as being in substantial conformity with the Convention and directed to giving effect to it—allowance being made for the flexibility in administration that is appropriate in relation to an international agreement.

THE REMEDY

The consequences of the decision have been described departmentally as "chaos." Doubtless that is so for the moment. But a measure of relief is certainly obtainable by redrafting the regulations. There would still remain embarrassing doubts, when expediency or even necessity prompted some variation; a clause that commended itself in Geneva might be convenient, or even unworkable, in Australia. Control based on the strict letter of a Convention, without a vestige of extraneous power, would often be much hampered. The really satisfactory solution is an amendment of the Constitution giving the Federal Parliament full power of legislation as to air navigation in the Commonwealth.

The alternative plan, of trying to get all the States to agree to an identical reference of power, presents practical difficulties; to say nothing of the doubt whether a reference when made, is final, or is revocable at will by a State Parliament.