

has stated—"In other words, for the purpose of applying the order of the High Court, it must be considered that the sale price charged to a customer by the taxpayer company consists of only two factors, viz., sale value and sales tax, and that the latter represents the full amount of legal liability in respect of the former. Thus, if the rate of sales tax is five per cent. and the sale price is £21, the amount of sales tax included in the sale price is £1."

Question referred answered by declaring that upon the proper construction of the said Act in ascertaining the sale value of the goods sold by the respondent in the circumstances of the case the amount to be deducted pursuant to sub-sec. (5) of sec. 18 from the amount charged to its customers by the respondent for such goods is the amount which should have been paid by it for sales tax on the sale value of the said goods. Case remitted to the Chief Justice for determination. Costs of case to be costs in the appeal.

[Solicitors—For the Commissioner, H. F. E. Whitlam, Crown Solicitor for the Commonwealth; for the taxpayer, Weigall and Crowther.] O. J. G.

Before Dixon, J. (Sydney). { Dec. 7, 1938;
March 28, 1939.

NAGRINT v. THE SHIP REGIS (Formerly RODNEY).

Admiralty—Collision—Negligence—Suit in rem—For recovery of damages—For personal injuries—Damage done by ship—To its passenger—Admiralty Court Act 1861 (24 and 25 Vict., c. 10), sec. 7—Colonial Courts of Admiralty Act 1890 (53 and 54 Vict., c. 27), sec. 2.

In consequence of a collision between two vessels in Port Jackson, one of the vessels overturned, and a girl passenger thereon was struck and sustained personal injuries. The passenger brought a suit *in rem* in the Admiralty jurisdiction of the High Court, seeking damages on the footing of negligent navigation, and naming as sole defendant the ship in which she had been a passenger.—

Held that, upon the facts alleged, proceedings *in rem* lay against the ship, the damage in question being damage done by a ship within the provisions of section 7 of the Court of Admiralty Act 1861 (24 and 25 Vict., c. 10), and thus within the jurisdiction of the High Court, by virtue of the Colonial Courts of Admiralty Act 1890 (53 and 54 Vict., c. 27).

QUESTION OF LAW.

Cordy Nagrint, suing on behalf of his daughter, Lorna Ellen Irene Nagrint, in the Admiralty jurisdiction, made a claim for £400 damages from the ship *Rodney*, owned by Charles Henry Rosman. It was alleged that in February, 1938, when the United States warship *Louisville* was proceeding down Sydney Harbour towards the Heads, the *Rodney* so negligently approached the warship that, in order to avoid

a collision, it became necessary for the *Rodney* to alter her course, and in doing so the *Rodney* capsized, and Lorna Nagrint was struck and injured. Condemnation of the ship was asked for. The defendant contended that the plaintiff was not entitled to damages, and that the allegations did not render the ship liable to condemnation.

On 7th December, 1938, Dixon, J., ordered that, before any evidence was given, the question of law be decided as to whether upon the facts alleged in the Statement of Claim, proceedings *in rem* lay against the ship. The name of the vessel had been changed to *Regis*.

Evans and May for the plaintiff.

Monahan and Brereton for the defendant.

Cur. adv. vult.

DIXON, J.—The suit is brought in the Admiralty jurisdiction of this Court, with a view to proceeding *in rem* against the ship *Rodney*, which has been renamed the *Regis*. According to the allegations in the Statement of Claim, on 13th February, 1938, the plaintiff was a passenger upon the *Rodney* when that vessel took sightseers down Port Jackson to watch the departure of an American cruiser. The *Rodney* with its passengers followed the cruiser down the harbour, through the waters ordinarily used by ships engaged in trade and commerce with other countries. It is alleged that the *Rodney*, owing to improper navigation, approached close to the cruiser, and in changing her course in order to avoid a collision capsized "and struck and injured the plaintiff, causing personal injuries to her, and also precipitated her into the water." She complains of the consequences of the immersion both to her health and to her wearing apparel. It is not clear how the *Rodney* "struck" the plaintiff but, as I understand what was stated at the bar, the allegation is intended to cover proof that, as or after she was precipitated into the water, some part of the vessel struck her.

The existence of a remedy *in rem* against the vessel, as distinguished from a remedy *in personam* against the owner of the *Rodney*, is said to be of practical importance in the particular circumstances obtaining, and for this reason the plaintiff has sued in Admiralty.

An appearance to the writ was entered on behalf of the owner, who at once raised the objection that the cause of action set up was not a matter of Admiralty jurisdiction. As it appeared that a question of law was involved which it would be convenient to have decided before any evidence was taken or any question of fact was tried, I ordered that the question be raised as an objection to the sufficiency of the Statement of Claim to support a proceeding *in rem*—Order XXXII., r. 2, Rules of High Court. The question of law stated is whether upon the facts alleged in the Statement of Claim proceedings *in rem* lie against the ship *Rodney* (now called the *Regis*). In effect the question is whether the plaintiff's claim falls

within the Admiralty jurisdiction. The conclusion I have reached is that the claim may be enforced in Admiralty because it is a claim for damage done by the ship within the meaning of sec. 7 of the Admiralty Court Act 1861. But, to explain what is involved in the question and in the conclusion, some account is necessary of the not very simple course which has been taken by statute and judicial decision in extending the jurisdiction of the High Court of Admiralty, by which the jurisdiction of this Court comes to be measured by that provision, and some discussion is necessary of the interpretation or interpretations which the provision has received.

Under sub-sec. (2) of sec. 2 of the Imperial Colonial Courts of Admiralty Act 1890, a jurisdiction is given to a Colonial Court of Admiralty over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise. The High Court of Australia is a Colonial Court of Admiralty. If sec. 30A of the Judiciary Act 1903-1937 was validly enacted by Act No. 11 of 1914, it is a Colonial Court of Admiralty because that section contains a declaration to that effect, pursuant to sec. 3 (a) of the Imperial Act. If sec. 30A was not validly enacted, it is a Colonial Court of Admiralty because it is a Court of law in Australia of original civil jurisdiction, unlimited as to the value of the subject-matter within the meaning of secs. 2 (1) and 15 of the Imperial Act—see *John Sharp and Sons Ltd. v. Katherine Mackall*, (1924) 34 C.L.R. 420, 30 A.L.R. 321; *McArthur v. Williams*, (1936) 55 C.L.R. 324 at pp. 340-341 and 358-360, [1936] A.L.R. 239; *Union Steamship Company of New Zealand Ltd. v. Caradale*, (1937) 56 C.L.R. 277, [1937] A.L.R. 142.

The jurisdiction which this Court derives from the Imperial Act as a Colonial Court of Admiralty is the Admiralty jurisdiction of the English High Court as it existed when the Imperial Act was passed, that is in 1890—see *The Yuri Maru and The Woron*, [1927] A.C. 906 at p. 915.

The Admiralty jurisdiction of the English High Court in 1890 depended primarily upon sec. 16 (5) of the Judicature Act 1873, which transferred and vested in the High Court the jurisdiction which at the commencement of that Act was vested in or capable of being exercised by the High Court of Admiralty.

The jurisdiction of the High Court of Admiralty had been confirmed and extended by the Admiralty Court Act 1840 (3 and 4 Vict., c. 65) and the Admiralty Court Act 1861 (24 and 25 Vict., c. 10). Before those Acts the jurisdiction over causes of action arising within the body of a county was, speaking generally, denied by the Common Law Courts—Holdsworth, *History of English Law*, vol. I. pp. 552-9. Even if the matter complained of had occurred on the high seas, it is not clear that the High Court of Admiralty would have been permitted to entertain a claim by

a passenger carried upon a ship against the owner for personal injury caused by the negligent navigation of the ship, though there are many instances where suits for remedies *in personam* for tort committed on the high seas, such as assault, were maintained in Admiralty without interference by prohibition—*The Ruckers*, (1801) 4 C. Rob. 73, 165 E.R. 539; *The Agincourt*, (1824) 1 Hagg. (Adm.) 271, 166 E.R. 96; *The Lowther Castle*, (1825) 1 Hagg. (Adm.) 384, 166 E.R. 137; *The Sarah*, (1862) Lush. 549, 167 E.R. 248; and *The Petronella*, (1730) Burrell 311, 167 E.R. 587, the notes to which give a number of early unreported claims *in personam* brought in the Court of Admiralty for damages for injury to person or property—cf. Holdsworth, *History of English Law*, vol. XII. at p. 692.

Section 7 of the Admiralty Court Act 1861 provided that the High Court of Admiralty should have jurisdiction over any claim for damage done by any ship. The very generality of this provision has provoked attempts to limit its operation to particular kinds of claims. One view suggested was that it did not extend the kind of subject-matter or cause of action over which the Court of Admiralty should have jurisdiction, but meant only that there should be no exclusion of any claim on the ground that the waters where it arose were within the body of a county, and it had not arisen on the high seas. Section 6 of the Admiralty Court Act 1840 had enacted, among other things, that the Court of Admiralty should have jurisdiction to decide all claims for damage received by any ship or sea-going vessel, whether such ship or vessel may have been within the body of a county or upon the high seas. It was suggested that the later provision was intended only as the counterpart of the earlier, and to produce the same effect where the damage was done, not received, by the ship. Another suggestion was that the words "claim for damage done by any ship" applied only to damage to ships or other property, and not other forms of injury or loss, as for instance, personal injury.

These limitations, after some fluctuation of decision, have, I think, finally been rejected authoritatively. The effect of decisions to which I shall refer is that the jurisdiction includes claims for personal injuries, and that the criterion is not whether, according to the decisions of the Courts of Common Law, the claim is of a kind which, if arising on the high seas, the Court of Admiralty might entertain. The word "done," however, imposes a limit upon the operation of the section, and makes it necessary to distinguish between damage simply sustained on or in connection with a ship and damage inflicted by the ship as a thing, so to speak, capable of causing harm.

At one stage in the course of decision a difference of opinion arose between the Court of Admiralty and the Courts of Common Law upon the question whether proceedings under Lord Campbell's Act might

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be brought in the former Court. The Court of Admiralty decided that it had jurisdiction over such proceedings—*The Guldfare*, (1868) L.R. 2 Ad. & Ecc. 325; *The Explorer*, (1870) L.R. 3 Ad. & Ecc. 289. The Court of Queen's Bench decided that it had not—*Smith v. Brown*, (1871) L.R. 6 Q.B. 729. To claimants under Lord Campbell's Act the importance of the question lay in the remedy *in rem*, which proceedings in Admiralty gave them. For by sec. 35 of the Court of Admiralty Act 1861, it was provided that the jurisdiction conferred by that Act might be exercised either by proceedings *in rem* or by proceedings *in personam*.

The question therefore survived the fusion of jurisdictions effected by the Judicature Act. At first the Court of Appeal was equally divided upon the question, the opinion of two Lords Justices from the Common Law side being against the jurisdiction *in rem* and that of two from the Chancery side being in its favour—*The Franconia*, (1877) L.R. 2 P.D. 163. But later the Court of Appeal unanimously held that claims under Lord Campbell's Act must proceed *in personam* before a jury, because that statute gave a special remedy and procedure and it was exclusive—*The Vera Cruz* (No. 2), (1884) L.R. 9 P.D. 96. This decision was affirmed by the House of Lords—*Seward v. Vera Cruz*, (1885) L.R. 10 A.C. 59. In the early stages of the controversy the reasons given for denying that claims for loss of life could be the subject of Admiralty proceedings *in rem* were much wider than those finally adopted. Section 7 of the Court of Admiralty Act 1861 was construed as relating only to damage done to property, and therefore as incapable of extending to personal injury or loss of life—(1871) L.R. 6 Q.B. at p. 734-6. But in the end the decision that claims under Lord Campbell's Act fell outside sec. 7 was placed entirely on the nature of the claim by relatives for the loss of actual or prospective support by the deceased, on the special remedies given by Lord Campbell's Act, and on the implications found in its provisions. It was conceded that proceedings *in rem* lay for personal injuries as well as damage to property, a proposition which had been decided by the Privy Council in *The Beta*, L.R. (1868) 2 P.C. 447; but overruled by the Queen's Bench on prohibition in *Smith v. Brown*, L.R. (1871) 6 Q.B. 729.

In *The Franconia*, (1877) L.R. 2 P.D. 163 at p. 170. Bramwell and Brett, L.JJ., had expressly refrained from offering any opinion upon the question whether the Court of Admiralty would have jurisdiction in a case of personal hurt where there was no death and the person hurt was the plaintiff. But in *The Vera Cruz* (No. 2), (1884) L.R. 9 P.D. 96 at p. 99, Brett, M.R., said—"The section, indeed, seems to me to intend by the words 'jurisdiction over any claim,' to 'give a jurisdiction over any claim in the nature of 'an action on the case for damage done by any ship, 'or in other words, over a case in which a ship was 'the active cause, the damage being physically caused

"by the ship. I do not say that damage need be "confined to damage to property, it may be damage to "person, as if a man were injured by the bowsprit of "a ship. But the section does not apply to a case "when physical injury is not done by a ship." Fry, L.J., said (at p. 101)—"First, then, does damage in- "clude injury to the person? I consider that it does, "for the reasons given in the judgment which "Baggallay, L.J., delivered in *The Franconia* on behalf "of himself and James, L.J. The preamble of the "Act leads me to the same conclusion." Bowen, L.J., did not mention personal injury, but he said (p. 101)—"The Act gives a claim for compensation for damage "done by the ship—this, and this only, is the cause of "action. 'Done by a ship' means done by those in "charge of a ship, with the ship as the noxious "instrument."

In the House of Lords the question whether personal injury fell within the jurisdiction *in rem* was mentioned by Lord Blackburn only, who treated it as irrelevant but not closed—(1885) 10 A.C. p. 72. The Admiralty Division adhered to the interpretation by which claims for personal injuries were included in its jurisdiction *in rem*—*The Theta*, [1894] P. 280. But when the British Legislature decided to extend the remedy *in rem* to claims for loss of life, apparently it was thought better to put the jurisdiction *in rem* in cases of personal injury beyond doubt. By sec. 5 of the Maritime Conventions Act 1911, which does not extend to Australia—sec. 9 (1)—it was provided that any enactment which confers on any Court Admiralty jurisdiction in respect of damage, shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*. This provision was transcribed by sec. 262 of the Commonwealth Navigation Act 1912-1935. If this section operates, through the Colonial Courts of Admiralty Act 1890, upon sec. 7 of the Court of Admiralty Act 1861 in its indirect application to the High Court of Australia, and if it applies to the case of a passenger claiming against a vessel engaged in intrastate trade, but sailing in waters used by oversea ships, it would exclude all possibility of questioning the jurisdiction to entertain proceedings *in rem* for claims for personal injury, provided that the injury was "done by the "ship." But assuming that sec. 262 of the Navigation Act is justified by sec. 98 of the Constitution, it is not clear how far it can stand with the proviso to sec. 3 of the Colonial Courts of Admiralty Act 1890; and the decision in *R. v. Turner, Ex parte Marine Board of Hobart*, (1927) 39 C.L.R. 411, [1927] A.L.R. 174, tends against the view that there is a sufficient relation between the casualty in the present case and foreign or interstate trade or commerce, to bring the rights or remedies of those injured under the operation of Commonwealth law.

Reliance may be placed upon sec. 51 (xxxix.) and sec. 76 (iii.) of the Constitution to support sec. 262, but the decision of the Court in *John Sharp and Sons v. Katherine Mackall*, (1924) 34 C.L.R. 420, 30 A.L.R. 321, places the jurisdiction of the High Court of Australia upon the authority of the Colonial Courts of Admiralty Act 1890, and not upon sec. 30 (b) of the Judiciary Act. With such a foundation for the jurisdiction, it would seem that effect should be given to the proviso to sec. 3 of the Colonial Courts of Admiralty Act 1890, as against sec. 262. But in any case it appears to me to be established by authority that, independently of the provisions contained in sec. 5 of the British Maritime Conventions Act 1911 and in sec. 262 of the Commonwealth Navigation Act, sec. 7, of the Court of Admiralty Act 1861, gives jurisdiction where damage is done by a ship to a person or to a thing, including, of course, another ship. The chief authorities are—*The Sylph*, (1867) L.R. 2 Ad. & Ecc. 24; *The Beta*, (1869) L.R. 2 P.C. 447; *The Vera Cruz* (No. 2), (1884) L.R. 9 P.D. 96 at pp. 99 and 101; *The Zeta*, [1893] A.C. 468 at p. 478, *per* Lord Herschell; *The Theta*, [1894] P. 280.

The fullest statement of the grounds for the conclusion is to be found in the judgment of Baggallay, L.J., in *The Franconia*, (1877) L.R. 2 P.D. at 163, pp. 173-176.

The conclusion that a claim for damages for personal injuries falls within the jurisdiction *in rem* does not answer the objection to the jurisdiction. For there remains the contention that sec. 7 of the Admiralty Court Act 1861 does not cover a claim by a passenger against the ship carrying him for negligent navigation causing such an accident as that described. The contention, perhaps, does not really depend on separate or alternative grounds. But for clearness or convenience I think it may be treated as based on two grounds, viz., first, on the view that claims by a passenger for injury caused by negligence in carrying him are completely outside sec. 7; and secondly, on the view that the injury was not "done" by the vessel. In a very summary manner Butt, J., rejected an argument that sec. 7 covered a claim by a cargo owner for damage to his goods caused by a collision of the carrying vessel with another, owing to the improper navigation of the former—*The Victoria*, (1887) L.R. 12 P.D. 105.

The ground of the decision appears to have been that sec. 7 applied only to damage done by a vessel to something external to it with which it can come into contact, and not to things like cargo on board. In *The Franconia*, (1877) L.R. 2 P.D. 163 at p. 171, Bramwell and Brett, L.JJ., say—"It is remarkable that no jurisdiction is given in a case of bodily hurt to a passenger, nor to his goods for injury done in the ship." In *The Bermuda* (No. 2), (1887) 12 P.D. 58 at p. 95, Lopes, L.J., speaking of the Admiralty rule for the division of the loss where both vessels are

to blame for a collision between them, said—"This rule before the Judicature Acts clearly did not apply to claims brought by passengers or by representatives of deceased passengers under Lord Campbell's Act. Such claims were not brought in the Admiralty Court at all, because there was no question of maritime lien; but were brought in a Court of common law, in which the ordinary rule as to contributory negligence was in force." It is doubtful, perhaps, whether Lopes, L.J., had sec. 7 in mind.

From these citations it does appear to have been assumed as a general proposition that proceedings *in rem* would not lie where the real ground of complaint was a failure in the duty to carry goods or passengers safely. The existence or prevalence of such a view is readily to be accounted for by three considerations, viz., that the jurisdiction of the High Court of Admiralty did not cover the enforcement of liabilities under contracts of affreightment, that sec. 6 of the Admiralty Court Act 1861 made an express and guarded provision in reference to claims for loss of and damage to cargo, and that the interpretation of sec. 7 was arrived at by a slow and uncertain course of development. But once sec. 7 received a meaning which made its application depend, not on any prior conception of the ambit of Admiralty jurisdiction, not on any limited construction of the word "damage," and not on any restricted denotation of the word "claim," but simply on the question whether the damage could properly be said to have been "done by the ship," no reason existed for differentiating between passengers or members of the ship's company on the one hand and strangers to the ship on the other.

It is true that where passengers or crew suffer injury it will less often be possible to say that the ship did the damage. In most cases, if an injury is sustained by a passenger or one of the ship's company, it will be found to have occurred in or on the ship, and not to have been "done by" the ship. But cases may arise and have arisen where the ship is the instrument of damage. The distinction between loss or injury inflicted by the ship regarded as an active agent and loss or injury which, though occurring on or in connection with the ship, and attributable to the negligence of the master or crew, is not "done by the ship," may appear artificial and unreal. For, after all, whether, for example, a plaintiff's complaint is that he fell down an uncovered hatchway on the vessel or suffered immersion because his dinghy was overturned or swamped by the movement of the ship, negligence in or about the management of the ship by her master, officers or crew, or one or some of them, is the foundation of his cause of action, if any. Yet the distinction is the turning point of a number of decisions, both in England and the Dominions.

The criterion is usually expressed by a citation of the words of Brett, M.R., (1884) L.R. 9 P.D. at p. 99,

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"a case in which a ship was the active cause, the 'damage being physically caused by the ship'; or of those of Bowen, L.J. (*ibid* at p. 101)—Damage "done" by those in charge of a ship, with the ship as the "noxious instrument." In *The Theta*, [1894] P. 280 at p. 284, Bruce, J., applied these expressions to the case of an officer injured by falling into the hold of a ship lying between his own ship and the wharf while attempting to gain his own ship. The learned Judge held that the damage was done on board the ship, but not by the ship. In *The Minerva*, [1933] P. 224, the ship proceeded against, had, after completing the loading of grain by means of an elevator-barge, taken aboard part of the elevator during the storing of gear by the barge. While the ship's derrick was returning the part taken aboard, the rope of the derrick broke, and the part fell on the deck of the barge, doing damage both to itself and to the barge. Bateson, J., applied the same criterion, and held that, by the failure of the ship's derrick to act properly in the hands of the owner's servants, the ship was the active cause of the damage.

In the *Queen Eleanor*, (1899) 18 N.Z. L.R. 78, a stevedore's labourer fell into the hold through some fault in a hatch or in the hatchway. Stout, C.J., referred to *The Vera Cruz* (*supra*) and *The Theta* (*supra*), and said (at p. 84)—"But for the decisions 'I have referred to I should have thought that the 'words of the section were wide enough to cover such 'a class of case, but in interpreting the English Act 'I feel I am bound by English decisions. It was, 'in my view, the ship that did the damage, by her 'faulty construction; but that is not the meaning of 'done by the ship,' which the English Courts have 'held to be within the jurisdiction of the Admiralty 'Court. I came to this conclusion not without some 'doubt and with regret."

In *The Duart Castle*, (1899) 6 Canadian Ex. C.R. 387, an engineer was scalded through the breaking of a stopvalve on a steamer, and McLeod, J., held that this was damage done by the ship. In *Barber v. The Nederland*, (1909) 12 Can. Ex. C.R. 252, and *Mulvery v. The Neosho*, (1919) 19 Can. Ex. C.R. 1, on facts like or analogous to those of *The Queen Eleanor*, the same conclusion was reached by the Canadian Exchequer Court. In *Outhouse v. The Thorshavn*, [1935] Can. Ex. C.R. 120, the remoter consequences of jettisoning oil were held to be damage done by the ship; and in *Lincoln Pulpwood Company v. The Rio Casma*, [1935] Can. Ex. C.R. 123, damage suffered by a barge through being placed in an improper berth by the crew of the defendant ship in order to make room for the latter ship was held to be damage by that ship.

It is true that these cases are no more than illustrations of the manner in which the test has been applied. But they show that when the injury arises from some defect in the condition of the ship, considered as pre-

mises or as a structure upon which the person injured is standing, walking or moving, the ship is treated as no more than a potential danger of a passive kind, a danger to the user, whose use is the active cause of the injury. But where the injury is the result of the management or navigation of the ship as a moving object or of the working of the gear or of some other operation, then the damage is to be regarded as done by the ship as an active agent or as the "noxious instrument."

In the present case, according to the allegations, the improper navigation of the ship caused her so to behave that she capsized. Her behaviour as an active agent was the direct cause of the harm, and in that sense she was the noxious instrument.

In my opinion proceedings *in rem* lie, and this Court has jurisdiction.

Order that the question of law stated in the order of 7th December, 1938, be determined as follows, viz.: That upon the facts alleged in the Statement of Claim proceedings *in rem* lie against the ship *Regis* (formerly *Rodney*). Costs, plaintiff's costs in the cause, including costs of order dated 7th December, 1938.

Order made.

[The hearing took place before Rich, J., on May 1.—*Evans* and *May* for the plaintiff. *Monahan* for the ship and its owner, on the question of damages only. *Monahan* applied for an order that the ship, which was under arrest, should be permitted to ply in Sydney Harbour. After argument, the following order was made: Upon the undertaking of the owner and the first mortgagee to deposit the proceeds of the policy of insurance in the event of loss of ship and without prejudice to the arrest and to the maritime lien, if any, of the plaintiff, appoint the owner the agent of the Marshal, and allow the ship to ply in the harbour of Port Jackson as heretofore. After evidence and argument,—RICH, J.: In this case the plaintiff proceeded *in rem* against the ship and not *in personam* against the owner. A question of law was raised which, lying at the threshold of the proceedings, it was convenient to dispose of before any evidence was given or any question or issue of fact was tried. The question of law was whether upon the facts alleged in the Statement of Claim proceedings *in rem* lay against the ship. This question was heard by Dixon, J., and His Honour decided the question in the affirmative. The jurisdiction of the Court having been thus decided, it devolves upon me to determine the issue of fact whether improper navigation of the ship caused her to capsize so that she was the direct cause of the harm and consequential damage to the plaintiff. Mr. Monahan now appears for the ship and its owner on the question of damage only if negligence be proved. On the evidence led by the plaintiff on the issue of negligence, none being offered by the defendant, I am

satisfied that the capsizing was occasioned by negligence, and that, to use the language of Lord Justice Bowen in *The Vera Cruz* (No. 2), (1884) 9 P.D. 96 at p. 101, damage was done by those in charge of the ship, with the ship as the "noxious instrument."—His Honour pronounced for the plaintiff's claim, and assessed damages at the sum of £200, and condemned the ship in such damages and costs. The owner having appeared, he became liable for the amount of such damages and costs—*The Gemma*, (1899) P. 285; *The Duplex*, [1912] P. 8; *The Joannis Vatis* (No. 2), [1922] P. 213 at p. 222. His Honour adjudged that the plaintiff recover against the defendant, C. H. Rosman, the said sum of £200, together with the taxed costs of the action, to be paid to the plaintiff within twenty-one days from date, in default of such payment His Honour made an order for appraisal and sale of the ship.]

[Solicitors—For the plaintiff, Carruthers, Hunter and Co.; for the defendant, Dawson, Waldron, Edwards and Nicholls.] S. K. H.

FULL COURT — (Latham, C.J.,
Rich, Starke, Dixon, Evatt
and McTiernan, JJ.)
(Melbourne.)

Feb. 28, Mar. 1,
May 11.

HOME BENEFITS PTY. LTD. v. CRAFTER. HOUSEHOLD HELPS PTY. LTD. v. CRAFTER.

Constitutional law—Trading stamps—Interstate trade
—No restriction of — *Trading Stamp Act 1924-1935*
(South Australia), sec. 5 (1) (a) (2)—*Commonwealth Constitution*, sec. 92.

The Trading Stamp Act 1924-1935 (South Australia) prohibits, in connection with the sale of goods in South Australia, the use of trading stamp coupons or other tokens the production of which will entitle the purchaser of the goods to receive either money, goods at a reduced price, or any reward or benefit other than a cash discount. The Act also provides that no person shall in South Australia deliver or promise any money, goods or advantage in exchange for any stamp, coupon, photograph, &c., issued in connection with goods sold in South Australia. It further provides that no person shall in or from South Australia despatch or offer to despatch any such stamp, coupon, photograph, &c., in exchange for money, goods, or reward, whether the exchange shall be effected or become effective in South Australia or elsewhere, and it prohibits any person from inviting or encouraging any other person to commit a breach of the enactment mentioned.—

Held, that although incidentally the provisions of the Act might affect interstate transactions, the Act does not infringe section 92 of the Commonwealth Constitution. It regulates trade uniformly by prohibiting methods which are regarded as undesirable, but it does not prohibit interstate trading or interfere with freedom of trade as at the frontier.

James v. The Commonwealth, [1936] A.C. 578, 55 C.L.R. 1, [1936] A.L.R. 333, applied.

APPEALS.

In the Police Court at Adelaide, South Australia, Home Benefits Proprietary Limited and Household

Helps Proprietary Limited were convicted of an offence against the Trading Stamp Act 1924-35 (South Australia). The complaints were laid by Percy Greyham Crafter, police prosecutor.

The transaction in question in the complaint against the firstnamed Company is described in the judgment of Dixon, J., hereunder as consisting "in a "Sydney Company, acting doubtless under an arrangement with the suppliers of the particular brand of "tea, coffee and cocoa, offering to send to Adelaide "by post, or by any means provided by the customer, "goods in return for specified quantities of wrappers "or packages of that brand of tea, &c., and postage "stamps of a specified amount, being much less than "the value of the goods."

At the hearing of the complaint against the firstnamed Company, before Mr. E. J. R. Morgan, S.M., evidence was given that a printed circular delivered at the home of T. H. Packman, in Hyde Park, near Adelaide, was expressed in the following terms:—

Please tell your friends who regularly use Bushell's Tea, Coffee or Cocoa that they can now offer to buy from us in Sydney any of the articles illustrated here. All they have to do is—(1) Send us their name and postal address and the name of the article they want. (2) Send us in postage stamps the amount of the price and postage marked under the article they choose. (3) Satisfy us, by enclosing photos or otherwise, that they have used a sufficient quantity of Bushell's Tea, Coffee or Cocoa to have the number of photos stated under the article they select. If this is done it will be an offer to buy from us in Sydney the article named at the stated price, which we may accept or refuse, and a request to us to deliver the article to the post office at Sydney for them, and for the post office to take delivery on their behalf at Sydney as their agent . . . Home Benefits Pty. Ltd., Box 3417.R., G.P.O., Sydney.

It appeared that the photos referred to in the circular were small pictures cut from the packages in which Bushell's tea had been sold. The list of articles comprised numerous household articles at prices lower than those ruling in the wholesale trade in South Australia.

The Magistrate, on 7th November, 1938, found that the defendant Company, by means of a printed circular, encouraged Packman to despatch in South Australia portions of packages delivered about Bushell's tea which had been sold in South Australia, and encouraged Packman to despatch the photos in exchange for goods. The defendant Company was convicted and fined £25, with costs £10 9s., and it appealed to the High Court.

On the same day, 7th November, 1938, before Mr. Morgan, S.M., Household Helps Pty. Ltd., of Sydney, was convicted of having at Adelaide, by means of an advertisement in the *Advertiser* newspaper, encouraged other persons to despatch, in exchange for goods, wrappers delivered about goods which had been sold in South Australia, namely Velvet soap. The defendant Company was fined £15, with £3 19s. costs, and it appealed to the High Court against that conviction.

The appeals were heard together.