

fraud or oppression, the role of the courts is generally to ratify what the shareholders decide on behalf of the company, so long as this is within the limits of the law. And since, as far as s.84 is concerned, the resolution is not outside those limits, the plaintiff companies' objection that the special resolution was contrary to s.84 of the Act seems entitled to little weight.

Whatever the legal implications and consequences of the special resolution of 17th December, 1956, its purpose in the minds of the company's directors clearly was to counter what they regarded as a real danger to the company as an engineering enterprise. Rapidly increasing numbers of shares were being purchased under investment trust schemes, and the strength of the managers behind them made the prospect of the latter eventually gaining control of the company's affairs not too remote. The existing Board of Directors, which was largely made up of persons experienced in the engineering field, could not be accused of purely selfish motives in attempting to keep control of the company of its own hands in preference to control of a Board composed of investment trust nominees. The directors of a company controlled by such interests could, for example, without *mala fides* on their part, believe that it would be of greater benefit to the company as a whole to encourage maximum returns for as long as possible without keeping in view the continued development of the company as, in this case, an engineering enterprise.

Without intervention by the legislature it is hard to see how a company could protect itself from the possibility of thus losing control of its affairs to investment trust interests. Any steps taken by existing directors and shareholders would be met by such objections as those discussed in the preceding pages. In the State of Victoria certain amendments to the Companies Act in 1955 have to a large extent solved this problem.¹⁸ Although the main purpose of the amendments seems to have been to protect the shareholders in investment companies, certain of the new provisions have the effect of protecting also other companies in which their capital is invested. It has been provided that no investment company can invest more than ten per cent of its paid up share capital in any one company¹⁹ or, more importantly, hold more than five per cent of the subscribed ordinary share capital of any one company.²⁰ When current proposals for review of New South Wales company law come before the legislature, it may be desirable to include similar safeguards for protecting existing companies from the possibly adverse consequences of control by investment company interests.

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OPERATION OF IMPERIAL ACTS IN AUSTRALIA
COPYRIGHT OWNERS' REPRODUCTION SOCIETY LTD. v. E.M.I.
(AUSTRALIA) PTY. LTD.

Although it is likely that the questions raised in the *E.M.I. (Australia) Pty. Ltd., Case*¹ will be the subject of legislation in the near future,² it will remain of interest as a discussion of the effect of a United Kingdom departmental inquiry, the order made pursuant to the inquiry, and confirming legislation of the Imperial Parliament upon the law of a self-governing dominion.

The Imperial Copyright Act, 1911, was adopted by s.8 of the Commonwealth Copyright Act 1912-1950 and forms the Schedule to that Act. Section 8

¹⁸ See generally ss.284-293 of the Companies Act 1958 (Vic.).

¹⁹ See s.286(1).

¹ (1958-9) 32 A.L.J.R. 306.

²⁰ See s.286(2).

² At the time of writing a commission is sitting receiving submissions with a view to reform of the present copyright law and the recommendations may be public by the time this Note is published.

provides that: "subject to any modifications provided by this Act" the British Act should be in force "in the Commonwealth, and shall be deemed to have been in force therein as from the first day of July, One thousand nine hundred and twelve". The High Court has held³ that the Imperial Act operated of its own force in Australia and thus is not liable to constitutional restrictions on its validity and effect by virtue of being an Act of the Commonwealth Parliament.

Under the copyright legislation, once records of a work had been made, with the consent of the owner of the copyright in the work, any manufacturer could make records of the work provided he complied with certain formalities and paid the prescribed royalties to the owner of the copyright. Subsection 3 of s.19 of the Imperial Act, after fixing the appropriate rate of royalty, provided that:

If, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

In 1928 a committee of three was duly appointed by the president of the Board of Trade to hold a public inquiry into the rate of royalty pursuant to the terms of the proviso to s.19(3) quoted above. The committee prepared a report and, in accordance therewith, an Order was made by the Board of Trade which provided, *inter alia*, that the rate of royalty should be increased. The Order also purported to deal with other matters, chiefly under sub-s.7. of s.19, which were considered to be possibly *ultra vires* the Board's terms of reference and power. To confirm this Order the Copyright Order Confirmation (Mechanical Instruments: Royalties) Act, 1928 was passed as a Local and Private Act by the Imperial Parliament, and to settle doubts as to the validity of the Order insofar as it dealt with the matters other than the rate of royalty included an enactment that "the Order set out in the Schedule hereto shall be and the same is hereby confirmed and all the provisions thereof shall have full validity and force".

It was argued for the plaintiff that this Order and confirmation operated as a fulfilment of the proviso to s.19(3) which forms part of the Act in force in Australia and thus alters the rate of royalty applicable in Australia. In rejecting this submission Dixon, C.J.⁴ considered that the confirming Act and the Order which was made a schedule to it could have force only as a legislative Act of the United Kingdom Parliament, and not as a compliance with the procedure set out in the Imperial Act of 1911 for altering the rate of royalty. Taylor, J. came to the same conclusion, basing his reasoning upon the "full validity and force" provisions in the Act, the effect of which was that "the alterations to which it (the Act) was directed depended for their future efficacy not upon a mere confirmation of the Order as provisional legislation but as a positive declaration that its provisions should have the force of law".⁵ The majority thus concluded that for the Board of Trade inquiry and the confirming

³ *Gramophone Co. Ltd. v. Leo Feist Ltd.* (1928) 41 C.L.R. 1. The question as to the correctness of this decision is outside the scope of this Note. The writer may say, however, that he has great difficulty in accepting the view that an Imperial Act, adopted with modifications, some of which were not contemplated by the Imperial Parliament, as a schedule to an Act of the Commonwealth Parliament could operate in Australia as Imperial law. It may well be that some of the difficulties in the present case stem from such a view.

⁴ *Id.* at 309.

⁵ *Id.* at 310-11.

United Kingdom legislation to alter the rate of royalty in Australia required a finding that Imperial legislation should apply to a self-governing dominion so as to change the law operative therein.

The majority then held that the confirming Act of the United Kingdom Parliament did not apply to Australia. At the time of the passing of the Copyright Order Confirmation (Mechanical Instruments: Royalties) Act, 1928 the Statute of Westminster had not been passed and adopted in the dominions. Nevertheless the court said: "the convention was strong and unbending which governed the exercise of the legislative power of the Parliament of the United Kingdom to affect the law in operation in a dominion".⁶ While technically there was residual power to do so in the British Parliament, "every presumption of construction was against such an intention".⁷ For legislation to have this effect it must "clearly contemplate and be of such a nature as to justify such a construction".⁸ That these requirements were not fulfilled was shown by the fact that the inquiry, the report, and the Order were obviously confined to the United Kingdom, the confirming Act was a "local and private" Act of the Imperial Parliament, and, even apart from the extent of the power vested in the Board of Trade subject to Parliamentary confirmation, "it cannot be supposed that the Parliament of the United Kingdom by such legislative procedure . . . intended to affect the law 'operating in Australia'".⁹

Menzies, J. in his dissent argued that the Order had effect apart from the confirming Act and it was unnecessary to discuss whether the Act could have altered the law in a self-governing dominion. He said that the change in the rate of royalty provisions in the Order were clearly within the Board's power under the proviso, and the fact that the "full force and validity" provisions were inserted in the confirming Act to validate other doubtful aspects of the Order did not mean that "the provisional Order to the extent to which it was capable of confirmation was not confirmed: to regard them as so would be to deny effect to the earlier express confirmation of the Order".¹⁰ He argued that the Board of Trade inquiry, the report and the confirming Act did not in any sense change or alter the law in Australia. His view was that:

What s.19(3) of the Copyright Act 1911 did was to fix a royalty rate for the purposes of s.19(2) and make provision for the revision of that rate in accordance with the procedure laid down in the proviso to s.19(3). The making of such a revision would not involve any amendment of the Copyright Act 1911. Part of the machinery for that revision is confirmation by Parliament of an order by the Board of Trade. The procedure is laid down in an Imperial Act extending to Australia and what is done under that Imperial Act operates through the whole area to which the Act extends.¹¹

They thus (in this view) merely complied with the procedure laid down in an Act applicable in Australia to effect a change in the rate of royalty under the Act. In other words, the confirming Act of 1928 was not an Act purporting to exercise the residual power of the Imperial Parliament, it was merely the procedural means provided by the law in force in Australia for the fixing of the rate of royalty.

If the reasoning of Menzies, J. is preferred to that of the majority (and it seems at least persuasive), the result would be that a procedure confined solely to the United Kingdom would determine a matter involving considerable sums of money in another country where relevant circumstances might be totally different. This would be so because the Commonwealth Act of 1912 merely adopted the Imperial Act rather than set up an appropriate procedure

⁶ *Per* Dixon, C.J., at 309.

⁸ *Ibid.*

¹⁰ *Id.* at 314.

⁷ *Ibid.*

⁹ *Ibid.*

¹¹ *Ibid.*

for alteration to the rate of royalty in this country, as the Parliament could have done by the express provisions of the Imperial Act.¹²

It is submitted that an escape from this conclusion might be that suggested by the judge at first instance.¹³ Granted that the proviso to s.19(3) lays down the appropriate procedure for altering the rate of royalty applicable in Australia, the question might be raised whether the procedure has, in fact, been followed. It would at least be arguable, although this was rejected by the High Court, that the requirement that the Board of Trade hold a "public inquiry" was not fulfilled in relation to Australia. It is submitted that it would be open to the court to construe the proviso as requiring a public inquiry into the circumstances relevant in the areas affected, although not necessarily a separate inquiry for each area, and that, as regards Australia, the relevant circumstances were not in fact investigated by public inquiry. It would on this view be impossible for the Board to make an order "as under the circumstances may seem just" when, regarding Australia, the circumstances had not been inquired into. While the procedure for altering the rate of royalty applicable in Australia would still be that laid down by the Imperial Act, the requirements for the application of this procedure to Australia would not have been complied with. A further point of general interest argued in the instant case was the effect on Australian copyright law of the 1956 British Copyright Act, which repealed the 1911 Imperial Act and the 1928 confirming Act. It was submitted firstly, that the 1956 Act repealed the Copyright Act 1911 as a statute operating in Australia and, secondly, that the repeal of the 1928 Act involved the consequence that the Board of Trade Order must thereafter be treated as unconfirmed or, alternatively, since it was a schedule to the 1928 Act, it had legally disappeared altogether.

The former of these arguments was rejected on two grounds. One was the provision in s.41 of Schedule 7 of the Copyright Act 1956, that, insofar as the 1911 Act or an order thereunder forms part of the law of a country other than the United Kingdom after the repeal of that Act in the law of the United Kingdom, it should be "construed and have effect as if that Act had not been so repealed". This (it was said) preserves the operation of the Copyright Act, 1911, in Australia. The other was that since the Act of 1956 contains no declaration that the Commonwealth of Australia requested or consented to its enactment, the repeal could not, because of s.4 of the Statute of Westminster,¹⁴ extend to Australia. For such a repeal would clearly alter the law in operation in Australia in a manner requiring such request or consent. The argument that repeal of the 1928 Act meant that the Board of Trade Order would be left unconfirmed, or would legally disappear, was rejected on two grounds. The first was that the repeal of a statute has no effect on the repealed statute "as an element in a situation provided for by an existing statute", i.e., as the 1928 Act affected the situation under the 1911 Act in Australia. The second was that if repeal had the effect claimed it would revive the old 5 *per cent* rate, which was something not in force when the 1928 Act was repealed and would be contrary to s.38 of the Interpretation Act. Furthermore, "the Act confirming the Board of Trade Order affected the operation in Australia of the Copyright Act, 1911, and it is the Copyright Act, 1911 with the operation that it had on 1/7/1957 that forms part of the law of Australia for the purposes

¹² Section 26 of the Imperial Act of 1911.

¹³ McLelland, J., Chief Judge in Equity, in the Supreme Court of New South Wales in its Equitable Jurisdiction in *Copyright Owners Reproduction Society Ltd. v. E.M.I. (Australia) Pty. Ltd.* (unreported), Oct. 31, 1957.

¹⁴ "No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof."

of s.41 of seventh Schedule to the Copyright Act, 1956".¹⁵ Here again, if the Copyright Act, 1956, were to be regarded as affecting the law of Australia it would be contrary to the Statute of Westminster.

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LIABILITY TO CONTRACTOR'S SERVANT

SMITH v. AUSTIN LIFTS LTD. & ORS.

Where the condition of premises exposes to the risk of injury a servant who is sent to work there by his master, duties may be owed to the servant by both his master and the occupier of the premises. Such duties, and the discharge thereof, were considered by the House of Lords in *London Graving Dock Co. Ltd. v. Horton*,¹ where the somewhat strict rule was laid down that, if the invitee knows of the danger which causes him to be injured, he will be deprived of his remedy against the occupier. In the recent case of *Smith v. Austin Lifts Ltd. & Ors.*² the House of Lords unanimously held their previous decision in *Horton's Case* to be distinguishable but advantage was not taken by their Lordships of the opportunity thus presented to review that previous decision and alleviate the harshness of the rule therein formulated.

In *Smith v. Austin Lifts Ltd.*,³ Smith, the plaintiff, a fitter employed by the first defendants, Austin Lifts Ltd., was sent to work on premises occupied by the second defendants, with whom the first defendants had contracted to maintain a lift. The winding mechanism of the lift was situated in a machine house on the roof of the premises and access thereto was provided by a ladder leading to a pair of doors. Smith was aware of the defective condition of the left of these doors, the result of a broken lower hinge thereon, which left the door suspended by its upper hinge. Such defect had been reported to his employers who had neither visited the premises to ascertain whether the place of work and access thereto were safe, nor had they repaired the door. The employers however did, on four occasions, report the defect to the occupiers who also failed to repair the door. Subsequently Smith, finding that he was unable to bolt the defective door, or to replace it in its proper position, tied the doors together with wire in order to keep them closed. Almost three weeks later, having occasion to enter the machine house, he found the right door open and the left door jammed inside the machine house. In order to obtain access by the right-hand door, Smith, whilst mounted on the ladder, tugged at the left door to test whether it was sufficiently secure to take his weight if he were to use it to lever himself up through the right door. He thereupon tried to enter by the right door, but the left door gave way and he fell from the ladder and was injured.

Smith successfully sued his employers and the occupiers but the verdict of Oliver, J., sitting without a jury, was reversed by the Court of Appeal. The plaintiff appealed to the House of Lords, which restored the decision of Oliver, J.. Two points emerge from this case, namely the discharge of an occupier's duty to an invitee to his premises, and the extent of an employer's duty to provide safe premises for his workmen.

1. *Occupier's Duty to Invitees.* In the present case the status of the plaintiff as an invitee was not questioned by the occupiers.⁴ Accordingly their Lordships,

¹⁵ *Per Menzies J., id.* at 315—the majority found it unnecessary to decide this point.

¹ (1951) A.C. 737.

² (1959) 1 All E.R. 81; (1959) 1 W.L.R. 100.

³ (1959) 1 All E.R. 81.

⁴ Although such status is more commonly accorded to a customer entering a shop