breach of such duty, provided that the case does not fall within the sphere "in which it is reasonable to leave to a skilled workman the decision whether the difficulty that he encounters is one in which he needs help."[43]

Conclusion. Prior to *Smith's Case*[44] Lord Wright had adverted to the policy aspect of *Horton's Case*[45] and had deplored the failure of the majority of the House of Lords in the latter case to consider the "manifold implications or applications in the affairs of ordinary life involved in their sweeping conclusion that knowledge or warning of a danger can nullify the ordinary duty of an invitor to care for the invitee's safety".[46] These observations, it would seem, were not taken into consideration by the House of Lords in *Smith* v. *Austin Lifts Ltd.* The speeches in that case appear to confirm the illogical distinction made in *Horton's Case* between the notice which would absolve an occupier from liability to an invitee, and the knowledge required on the part of an employee to preclude recovery by him of damages from his master for injuries suffered as a result of unsafe premises. To negative liability an occupier apparently is obliged to establish only a full and complete knowledge on the part of the invitee of the risk. An employer, on the other hand, must prove not only his servant's knowledge of the risk but also the servant's consent to run the risk. In this regard, however, the contract of service may also be taken into account insofar as it is restrictive of the employee's choice as to whether he will incur the risk.

In England in 1957 the Occupiers Liability Act[47] was passed with the object, *inter alia*, of minimising the harsh results flowing from *Horton's Case*. The cause of action in the present case arose before that statute came into operation, and consequently its benefits were not available to the present plaintiff. Accordingly, until the passing of Australian legislation corresponding to the English Occupiers Liability Act it would seem that our courts would follow[48] the decisions in *London Graving Dock Co. Ltd.* v. *Horton* and *Smith* v. *Austin Lifts Ltd.*

RUTH JONES, Case Editor — Third Year Student.

EXTRA-TERRITORIAL OPERATION OF INDUSTRIAL AWARDS

R. v. *FOSTER; EX PARTE EASTERN & AUSTRALIAN STEAMSHIP CO. LTD.*

The problem of the extent of the effective operation of industrial awards beyond Australia is likely to be of more frequent occurrence in future years, having regard to the recent rapid growth in the modes of travel and communication between Australia and other countries. Consideration was given to this question, and the matter has been to a certain degree clarified, by the High Court[1] in *R.* v. *Foster & Ors.; ex parte Eastern & Australian Steamship Co. Ltd.*[2]

The case came before the Court by way of an application to make absolute

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[43] *Id.* at 85, *per* Viscount Simonds; *cf. Winter* v. *Cardiff R.D.C.* (1950) 1 All E.R. 819; *Bastable* v. *Eastern Electricity Board* (1956) 2Ll.L.R. 586; *Smith* v. *Broken Hill Pty. Co. Ltd.* (1956) 74 W.N. (N.S.W.) 195.

[44] (1959) 1 All E.R. 81.

[45] (1951) A.C. 737.

[46] "Invitation" (1951-1953) 2 *W.A. Ann. L.R.* 543.

[47] 5 & 6 Eliz. 2, c. 31 (Eng.). Section 2 (4) (a) of that Act reads: "Where damage is caused to a visitor by a danger of which he had been warned by the occupier the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

[48] See e.g. *Walter H. Wright Pty. Ltd.* v. *Commonwealth* (1958) V.L.R. 318; *Australian Shipping Board* v. *Walker* (1959) V.L.R. 152.

[1] Full Court (Dixon, C.J., McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer, JJ.).

[2] (1959) A.L.R. 485.

an order *nisi* for a writ of prohibition. The Merchant Service Guild of Australasia and the Australian Institute of Marine and Power Engineers had each served upon a large number of shipowners, including the prosecutor, a comprehensive log of claims relating to the terms and conditions of employment of the masters, deck officers and engineers engaged by these owners. The vessels operated by the prosecutor were engaged in the cargo trade, and to a lesser extent in the passenger trade, and plied between Adelaide and Kobe in Japan, calling at intermediate ports. North of Tarakan, cargo and passengers were carried from one port to another, but this was not the practice with respect to ports on the Australian mainland. All the masters, deck officers and engineer officers of the vessels resided in Australia and were actually engaged and discharged in Sydney, but the articles were opened and signed in Hong Kong.

Many employers, including the prosecutor, refused to comply with the logs, and in accordance with s.28[3] of the Conciliation and Arbitration Act 1904-1956,[4] the Guild and the Institute gave notice to the Commonwealth Conciliation and Arbitration Commission of the existence of industrial disputes. The Company thereupon made application to the Presidential Commissioner (Foster, J.) to be struck out of the list of respondents to the disputes, on the ground that no dispute within the jurisdiction of the Commission had come into existence in relation to the Company. This contention was rejected, and to stop further proceedings against the Company prohibition was sought against Foster, J., the Guild and the Institute.

The power in pursuance of which the Commission asserted its right to entertain this dispute and to make a binding award in respect thereof, was that conferred by s.72[5] of the Commonwealth Conciliation and Arbitration Act 1904-1958. This section relies for its validity upon the powers granted to Parliament by s.51(i) and s.51(xxxv)[6] of the Commonwealth Constitution. Before the High Court it was contended for the prosecutor that it was not competent for Parliament to provide, under either of these subsections, for the making of such binding awards in respect of the prosecutor's officers and engineers. It was also asserted that s.72 did not purport to empower the Commission to make awards in the present dispute.

In its submissions with respect to s.51(xxxv), the Company had the support of an earlier decision of the High Court—*The Merchant Service Guild of Australasia* v. *The Commonwealth Steamship Owners' Association*[7]—decided upon almost identical facts.[8] In that case the Court in a majority decision[9] found that, disregarding any effect which s.5 of the covering clauses of the Common-

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[3] Section 28(2): "As soon as an organization or employer becomes aware of the existence of an industrial dispute or of an industrial situation which is likely to give rise to an industrial dispute the organization or employer shall forthwith notify a Commissioner or the Registrar accordingly."

[4] This Act was subsequently amended by the Conciliation and Arbitration Act 1958 (No. 30 of 1958) which was assented to and took effect some days after the order *nisi* was granted. The Court consequently considered the power of the Commission under the Act as amended, and this is of some relevance in view of the amendments made to s.71 of the Principal Act, by s.13 of the amending Act. See *infra* n. 27.

[5] Section 72 "The Commission is empowered—
(a) to prevent or settle industrial disputes by conciliation or arbitration; and
(b) to hear and determine industrial matters submitted to it in so far as those matters relate to trade and commerce with other countries or among the States or in a Territory of the Commonwealth, whether or not an industrial dispute exists in relation to those matters."

[6] Section 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
(i) Trade and commerce with other countries, and among the States:
(xxxv) Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:"

[7] (1920) 28 C.L.R. 495. This was the third of a series of cases of the same name, decided in that year.

[8] The Company, conducting its business in a similar fashion to its present day operations, had been a respondent in that case.

[9] Knox, C.J., Isaacs, Rich and Starke, JJ. (Higgins and Gavan Duffy, JJ. dissenting).

wealth of Australia Constitution Act, 1900[10] might have, the power conferred by s.51(xxxv) extended only to disputes as to the terms and conditions of industrial operations carried on within the territorial limits of the Commonwealth. Hence, as the operations of the Company were not confined within Australian waters, the Court held that the Commonwealth Court of Conciliation and Arbitration had no jurisdiction with regard to a dispute between the Guild and the Company.[11] It was conceded[12] that if this decision was to be applied in the present instance, the Company must succeed in its argument upon this point. Was there any justification then for overruling this decision, which had stood for nearly forty years?

To appreciate this question fully regard must be had to the background against which the case had been decided so that the approach adopted towards s.51(xxxv) at that time may be clearly understood. In the first years of operation of the Constitution, the members of the High Court, in their pronouncements upon the essential characteristics of an "industrial dispute" had placed emphasis upon the industrial unrest which was produced. In 1909 in the *Saw Millers' Case*[13] Griffith, C.J. said: "The term 'industrial dispute' connotes a real and substantial difference having some element of persistency, and likely, if not adjusted, to endanger the industrial peace of the community. It must be a real and genuine dispute, not fictitious or illusory. Such a dispute is not created by a mere formal demand and formal refusal without more."[14] Views such as these,[15] involving positive rejection of the notion of a "paper dispute" clearly illustrate the practice of the judges in these early days of the Federation, of taking the degree of industrial disturbance involved as their criterion for the existence of an industrial dispute, within the meaning of s.51(xxxv).

Now although by 1920 the controversy concerning "paper disputes" had to a large degree been resolved in favour of their existence,[16] the earlier firm insistence on "real" disputes and industrial dislocation was still of some significance. In the 1920 decision, it was said: "We think that subsec. xxxv of s.51, on its proper judicial construction, is intended to secure, so far as is possible by conciliation and arbitration, uninterrupted industrial services to the people of the Commonwealth."[17] It seems that the Court was still influenced to some extent by the earlier view that an "industrial dispute" presupposed some form of industrial disturbance. Since the arbitration power was given to Parliament "to make laws for the peace, order and good government of the Commonwealth", the Court upon this approach had then to confine the scope of s.51(xxxv) to industrial disturbance within the Commonwealth, i.e. to industrial disputes in industrial operations carried on within the territorial limits of the Commonwealth.

But the conception of an "industrial dispute" which was adopted by the Court in 1920, no longer prevails. Within ten years it was said in the High Court:

> It is established that to constitute an industrial dispute there must be disagreement between people or groups of people who stand in some

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[10] 63 and 64 Vict. c.12, s.5: ". . . the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth." Consideration of this section had formed the basis of earlier decisions of the High Court upon the same question. See *The Merchant Service Guild of Australasia* v. *Archibald Currie & Co.* (1908) 5 C.L.R. 737; and *The Merchant Service Guild of Australasia* v. *The Commonwealth Steamship Owners' Association* (1913) 16 C.L.R. 664.

[11] Higgins and Gavan Duffy, JJ. dissenting.

[12] (1959) A.L.R. 485, 509, *per* Menzies, J.

[13] *The Federated Saw Mill, Timber Yard, and General Woodworkers' Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1909) 8 C.L.R. 465.

[14] *Id.* at 488.

[15] See also *id.* at 506, *per* O'Connor, J.

[16] See e.g., *The King* v. *Commonwealth Court of Conciliation and Arbitration and The President thereof and The Australian Builders' Labourers' Federation* (1914) 18 C.L.R. 224.

[17] (1920) 28 C.L.R. 495, 503, *per* Knox, C.J., Isaacs, Rich and Starke, JJ.

> industrial relation upon some matter which affects or arises out of the relationship. Such a disagreement may cause a strike, a lock-out, and disturbance and dislocation of industry; but these are the consequences of the industrial dispute and not the industrial dispute itself, which lies in the disagreement.[18]

This view has been affirmed in many cases since that time.[19] It seems that today the Court looks to the origin of the dispute, and if the demand at the origin is genuine, then other conditions being satisfied, the Court is prepared to find an industrial dispute within the meaning of s.51(xxxv). Upon this view, once a dispute originates within the Commonwealth and falls within the scope of s.51(xxxv), all repercussions and consequences of the dispute can then be dealt with under the power, whether or not they have an effect beyond the territorial limits of the Commonwealth.

In the result, the decision of 1920[20] was not followed by the Court[21] in the present case. Dixon, C.J. considered[22] that the following words[23] by Gavan Duffy and Rich, JJ., so far as they went, expressed the correct principle upon the question:

> Let us assume that the expression "industrial disputes" in s.51(xxxv) of the Constitution means industrial disputes existing within the Commonwealth. When does such a dispute exist within the Commonwealth? We think it exists within the Commonwealth when the disputants reside, the demands and the refusal are made, and the dissidence, dissatisfaction and unrest prevail within the Commonwealth, although the dispute itself may have relation to labour to be performed outside the territorial limits by the employees who are parties to the dispute.[24]

It is submitted, however, that this commendation did not amount to approval of the passage as a definitive statement of the conditions without which an industrial dispute cannot exist. Rather, it seems to this writer to mean that where the conditions there enumerated are fulfilled, a dispute of the requisite nature will be held to exist. Dixon, C.J. expressly stated that "perhaps less" than what this passage lays down would satisfy the necessity of a connection with Australia. This caveat is of particular importance in relation to the apparent requirement in the quoted passage of "dissidence, dissatisfaction and unrest within the Commonwealth". For insofar as it appears that there was nothing before the court in the instant case on which a finding as to the *locus* of the "dissidence, dissatisfaction and unrest" could have been based, it is submitted that the approval of the Chief Justice of the words of the passage referring to the above requirement should not be regarded as binding. To regard it as binding might, moreover, seem to convert his approval into an affirmation that industrial unrest is a *sine qua non* for an industrial dispute—a view which would constitute a reversal of the tendency manifest in the course of decisions above analysed.

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[18] *Caledonian Collieries Ltd. & Ors.* v. *Australasian Coal and Shale Employees' Federation & Ors.* (No. 1) (1929) 42 C.L.R. 527, 552, *per* Gavan Duffy, Rich, Starke and Dixon, JJ.

[19] See e.g., *The Metal Trades Employers' Assn.* v. *Amalgamated Engineering Union* (1935) 54 C.L.R. 387, 429, *per* Dixon, J.; and *R.* v. *Foster; ex p. Commonwealth Steamship Owners' Association & Ors.* (1956) 94 C.L.R. 614, 619.

[20] *Supra* n. 7.

[21] McTiernan, J. delivered a dissenting judgment upon this argument, as in his view the earlier decision should not be reviewed until Parliament saw fit "to pass legislation under s.51(xxxv) evincing the intention to give jurisdiction extending to industrial disputes arising in Australia and ramifying beyond territorial limits." (1959) A.L.R. 485, 496.

[22] (1959) A.L.R. 485, 493.

[23] *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (1913) 16 C.L.R. 664, 702.

[24] This passage expresses a view which was in controversy at that time (1913) and which was not followed in the 1920 decision.

The dispute in the present instance (it was conceded)[25] was one which extended beyond the limits of any one State. It fell within the scope of s.72(a) of the Conciliation and Arbitration Act and hence within the jurisdiction of the Commission. The order *nisi* was accordingly discharged upon this ground.

The general state of the law upon this aspect of the matter however, is still not as clear as could be wished. In the present case, the consequences of upholding the prosecutor's claims were evident to the Court—a situation productive of strange inconsistencies would have been confirmed and approved; a situation which, for example, would have placed airline personnel operating between Melbourne and Hobart, while outside Australian territorial limits, beyond the scope of industrial awards. Many considerations both of a legal and of a non-legal nature, demanded alteration of such outmoded law, and the present decision accomplished this. But in so doing, the judges focused their attention upon the particular facts of the case, and a general test for determining when a dispute will fall within s.72(a), was not formulated. A real connection of the dispute with Australia is necessary, and the statement of Gavan Duffy and Rich, JJ., above, provides an acceptable guide but not an exhaustive test. It seems that the placing of limits upon the application of the new principle must await further decisions by the Court.[26]

Upon the second argument for the prosecutor considerable difference of opinion existed among the members of the Court. The prosecutor asserted that it was not competent for Parliament in pursuance of s.51(i) of the Constitution to provide for the making of awards of the nature of those sought, affecting the prosecutor's employees, and moreover that s.72(b) of the Conciliation and Arbitration Act upon its true construction did not purport so to authorise the Commission. It was contended that it was impossible to find any material relation between conditions of employment on the prosecutor's vessels, and the subject-matter of s.51(i), namely "trade and commerce with other countries, and among the States."

By way of a detailed analysis of the definition sections[27] of the Act however, Dixon, C.J. was able to show that the term "industrial matters" in s.72(b), related directly to questions affecting employment of persons in ships.[28] Having regard to this fact and considering the operation and effect of s.98 of the Commonwealth Constitution,[29] his Honour established the necessary connection with s.51(i). He cited[30] the following passage from the judgment of Gavan Duffy and Rich, JJ. in *Malcolm's Case*:

> It (s.98) authorises Parliament to make laws with respect to shipping, and the conduct and management of ships as instrumentalities of trade and commerce, and to regulate the relations and reciprocal rights and obligations of those conducting the navigation of ships in the course of such commerce, both among themselves and in relation to their employers on whose behalf the navigation is conducted.[31]

Other members of the Court[32] who considered the question agreed that s.72(b)

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[25] Taylor, J., referring to this concession by the prosecutor stated that there was insufficient information before the Court to enable it to decide the point and he expressly reserved it for further consideration should it arise.

[26] Mention might also be made at this point of the consequence that industrial dislocation and turmoil, even on a national scale, of the very nature which the arbitration power was introduced to settle, has on occasions fallen beyond the scope of Conciliation and Arbitration tribunals because of the absence of an "industrial dispute" of the required character; e.g. *Caledonian Collieries Ltd. & Ors.* v. *Australasian Coal and Shale Employees' Federation & Ors.* (No. 1) (1929) 42 C.L.R. 527, and (No. 2) (1930) 42 C.L.R. 558; and *R.* v. *Foster; ex p. Commonwealth Steamship Owners' Assn. & Ors.* (1956) 94 C.L.R. 614.

[27] Sections 4(1) and 71 as amended by s.13 of Act No. 30 of 1958. See *supra* n. 4.

[28] (1959) A.L.R. 485, 494-495.

[29] Section 98: "The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State."

[30] (1959) A.L.R. 485, 495.

[31] *Australian Steampships Ltd.* v. *Malcolm* (1915) 19 C.L.R. 298, 335.

[32] McTiernan, Fullagar, Kitto and Windeyer, JJ., Menzies, J. expressly refrained from

was a law on the subject matters of trade and commerce and navigation, and hence a valid law of the Commonwealth.

Difficulty arose however in relation to the latter half of the prosecutor's argument. Did the present dispute fall within the scope of s.72(b)? Kitto, J. on a matter of procedure held that the Commission had no power under s.72(b) to make awards in the present instance.[33] Taylor, J., upon considering the operations of the Company's vessels and noting that they carried cargo and passengers to and from the Commonwealth as only part of their activities, decided[34] that a law purporting to regulate conditions of employment upon such vessels could not be described as a law with respect to "trade and commerce with other countries", without being equally a law regulating trade and commerce among foreign countries. Accordingly, s.51(i) did not authorise the making of awards in respect of the prosecutor's vessels, and in his opinion s.72(b) did not purport to cover this field. Windeyer, J., on the other hand, held that the character of the dispute, the parties, the vessels and their operations, sufficed to establish the direct, real and substantial connection with Australia, which would bring the dispute within s.72(b).[35] He said:

> A merchant vessel coming to Australia with passengers and cargo, or for passengers and cargo, is not, I think, from the point of view of Australia, any the less engaged in trade and commerce with other countries because in the course of her voyage she may also, as ships commonly do, load and discharge cargo and embark and disembark passengers at ports in other countries.[36]

It is submitted, with respect, that this is the preferable view. His Honour then concluded by stating that he did not wish to be understood as holding that an award in the very terms proposed could properly be made in the present dispute, in view of the fact that the activities of the vessels were likely to result in the employment by the Company of foreign nationals having no connection with Australia.

Dixon, C.J. and McTiernan and Fullagar, JJ. however, making no such reference to the specific terms of the awards sought, found that the Commission had power under s.72(b) to make awards in relation to the dispute before the Court. In arriving at this decision Dixon, C.J. stressed that it did not follow that s.72(b) was as a consequence applicable to ships which were governed by other laws and which did no more than carry goods to or from Australia. There must be some distinct industrial connection with Australia.

In relation, then, to this particular facet of the trade and commerce power, the law seems far from settled. Members of the Court, again confining themselves to the circumstance of this case, found them to be sufficient to establish the connection with Australia which was required to bring the dispute within s.72(b), but again did not lay down any rules of general application. It is easy to visualise in this field the varying degrees of relationship which ships, aircraft, etc., and their crews may have with Australia. There is a great

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expressing an opinion upon the validity of s.72(b) and its ability to authorise a hearing and determination of the industrial matters in question. Taylor, J. while giving consideration to the matter, seems, to the writer, not to have committed himself to a decision upon the question of validity.

[33] He considered that the use of the word "submitted" in s.72(b) meant that a matter could be brought before the Commission only as a result of joint action by *all* the interested parties. Although admitting the difficulty arising from this course where there was a multiplicity of parties he held that the arbitrator, *prima facie* having no right to interfere in a matter, could be approached only in this fashion. In this sense, the dispute before the Court had not been "submitted" to the Commission. (1959) A.L.R. 485, 497-498.

Dixon, C.J., and McTiernan, J., the only other judges to consider this point specifically, inclined to the view that the purpose of the expression was to prevent the Commission acting upon its own initiative with regard to any dispute. They found that the notifications given under s.28 (*supra* n. 3) sufficed to meet the requirements of the section in this regard. It is submitted that this is the better view.

[34] (1959) A.L.R. 485, 505.

[35] *Id.* at 519.

[36] *Id.* at 518.

variety of circumstances and problems which could arise, but as yet we have no test by reference to which we can ascertain when a case comes within s.72(b). We can but anticipate that, when this question next comes before the Court, as come it must, the Court will take the opportunity to formulate sufficient principles to allow of greater certainty in this sphere.[37]

Mention should also be made, of certain views expressed by Windeyer, J. in this case. It had been argued before the Court that the practice of granting powers "to make laws for the peace, order and good government of the Commonwealth", required Commonwealth statutes in order to be valid to refrain from dealing with matters with which the Commonwealth could have no concern. Upon this contention Windeyer, J. observed that as a consequence of the freedom from restriction conferred upon the Commonwealth legislature by the Statute of Westminster, any Commonwealth enactment, if it is a law in respect of a subject set out in s.51, is constitutionally valid.[38] In relation to the Commonwealth "it is now for Parliament alone to judge whether a measure in respect of any topic on which it has power to legislate is in fact for the peace, order and good government of the Commonwealth".[39] If a statute in respect of a subject mentioned in s.51 "purported to affect the internal affairs of another country it might be unenforceable, ineffectual and contrary to the comity of nations. But it would not be *ultra vires* the Commonwealth Parliament in a constitutional sense"[40] and could not be declared invalid by any Australian court. Capacity for effectual enforcement did not determine the legal scope of any power. He also expressed the opinion that *prima facie* Parliament has power to regulate conditions of employment in any activity in respect of which it has express power to legislate. He concluded by saying that it did not follow that the power of Parliament to defy international comity and to ignore considerations of enforcement, extended to subordinate law-making authorities, such as industrial tribunals. "*Prima facie* Commonwealth statutes ought not to be so construed as authorizing any subordinate law-making body to deal with matters which have no real and substantial connection with Australia."[41]

His Honour's preliminary remarks would appear to lead to a considerable widening in the present ill-defined scope of industrial awards, in that if one could imagine Parliament itself assuming the task of prescribing conditions of employment, such conditions could purport to be applicable, even if not necessarily enforceable, in circumstances which exhibit only a very limited connection with Australia. But in view of the fact that the Commonwealth labour powers, either because of their inherent nature or for the purposes of their administration, seem to require for their exercise the existence of subordinate bodies, it may well be that most significance is to be attached to the concluding remarks above, and that we are once again confronted with the puzzle of "real and substantial connection".

The general issues with which the Court was faced in this case were not free from difficulty and involved matters of considerable practical importance. The decision has removed certain of these difficulties, but as stressed earlier the future application of the law in this sphere has been left in some doubt. It may of course be argued in support of the judicial reluctance to formulate strict boundaries of operation, that it would have been unwise for the judges to have restricted themselves unnecessarily in a field not yet fully explored. Nevertheless, the hope may be expressed that the Court,

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[37] The decision does seem however to have affirmed the practice of using the trade and commerce power as a means of regulating labour conditions. Although beyond the scope of this Note, it is interesting to compare the limited use in Australia of s.51(i), with the variety of uses to which the commerce clause of the Constitution of the U.S.A. has been put.

[38] (1959) A.L.R. 485, 515.

[39] *Id.* at 517.

[40] *Id.* at 515.

[41] *Id.* at 518-519.

even in maintaining this desire, will at an early date develop the principles a little further, and perhaps by indicating the construction which is to be placed upon "real and substantial connection" with Australia, enable the area of effective operation of awards to be more accurately defined.

J. D. PYNE, Case Editor — Fourth Year Student.

THE RULE IN *DEARLE* v. *HALL*
B. S. LYLE LTD. v. *ROSHER*

At first sight the recent decision of the House of Lords in *B. S. Lyle Ltd.* v. *Rosher*[1] gives the impression that their Lordships have confined the operation of the equitable doctrine of priority known as the rule in *Dearle* v. *Hall*[2] to the simple situation where there exists a fundholder, a person who has, or has had, a beneficial interest in the fund and two or more successive assignees. But closer examination of the speeches of Lord Reid and Lord Keith reveals that this impression is perhaps too superficial, since both speeches contain reasoning which could be seized upon by a judge desiring to extend the application of the doctrine to new situations.

The doctrine known as the rule in *Dearle* v. *Hall*[3] is said to have originated in the cases of *Dearle* v. *Hall*[4] and *Loveridge* v. *Cooper*.[5] In the former case it was laid down by Sir Thomas Plumer, M.R., that if an assignor, who has a beneficial interest in a fund invested in the name of trustees, assigns it for valuable consideration to a first assignee, who neglects to give notice of the assignment to the trustees, and subsequently the assignor purports to assign the same interest to a second assignee, who has no notice of the prior encumbrance but who gives notice to the trustees of the assignment, the second assignee's interest will be given priority over that of the first. The principle upon which the Master of the Rolls chiefly relied in formulating the rule appeared to be that the plaintiffs, who were the prior encumbrancers in point of time, had been negligent, and that in consequence of their negligence third parties had suffered injury. In addition, because of this negligence a cestui que trust would be put into a position where he could more easily perpetrate a fraud on subsequent encumbrancers. It was the opinion of the Master of the Rolls that "under such circumstances the general rule of priority ought to be qualified."[6]

The doctrine was recognised as binding by the House of Lords in *Foster* v. *Cockerell*[7] in 1835, where Lord Lyndhurst, L.C. approved the decision in *Dearle* v. *Hall*[8] in these terms: "In the case of an equitable assignment the party who was the earlier encumbrancer in point of date was not entitled to priority if he did not give notice; but such priority was justly to be conceded to a party giving notice to the trustees although such party was, according to the date of the assignment only a second incumbrancer."[9] *Foster* v. *Cockerell*[10] clearly decided that priority in the *Dearle* v. *Hall*[11] situation depends solely on priority of notice and is independent of any other consideration of the conduct of the competing assignees.

In *Ward* v. *Duncombe*[12] the House of Lords was asked to extend the doctrine to a situation not already covered by authority. Their Lordships, after inquiring into the principles upon which the rule was based, held that these principles were not so clear nor so convincing that the rule ought to be extended

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[1] (1959) 1 W.L.R. 8.
[2] (1823) 3 Russ. 1.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*
[6] *Id.* at 11.
[7] (1835) 3 Cl. & F. 456.
[8] (1823) 3 Russ. 1.
[9] *Foster* v. *Cockerell* (1835) 3 Cl. & F. 456, 476.
[10] *Id.* 456.
[11] (1823) 3 Russ. 1.
[12] (1893) A.C. 369.