Legal Aid

On 11 September, the Attorney-General in answer to a question without notice, stated that in N.S.W. and the A.C.T. there was no residential bar on a party to divorce litigation obtaining legal aid under the existing interim system. He stated that the same policy would be reflected in the drafts of the new legal aid scheme. H.R. Deb. 1143.

On 26 September, the Attorney-General in reply to a question upon notice, gave details of the means test on legal aid in civil and criminal cases in the A.C.T., in Federal Courts and under Federal law. H.R. Deb. 2139.

National Service

On 20 August, the Minister representing the Minister for Labour and National Service, in answer to a question without notice, indicated that there was no relief available to families who had all sons called up apart from the normal grounds for compassionate relief. S. Deb. 170.

CASE NOTES

BONSER v. LA MACCHIA[1]

Constitutional Law — "Fisheries in Australian waters beyond Territorial limits" — Seaward boundaries of States — Territorial Sea — Continental Shelf.

The Commonwealth was given power under section 51(x) of the Constitution to make laws with respect to "fisheries in Australian waters beyond territorial limits". However, it was not until 1952 that this power was first exercised and not until 1969 in *Bonser v. La Macchia* that the High Court was called upon to directly interpret this section. The case also provided an opportunity for the Court to consider the seaward limits of the States and jurisdiction over the territorial sea.

The defendant was prosecuted in a New South Wales court of summary jurisdiction for an offence under section 13(1) of the Fisheries Act 1952-1967 (Cth) (the Act), which makes it an offence to do an act prohibited by a notice in force under section 8 of the Act.[2] The acts charged were the using of a trawl net of smaller dimensions than permitted under a notice in force under section 8 of the Act, such acts occurring six and a half nautical miles off the coast. The parties were agreed as to these facts. However, the prosecution was removed into the High Court pursuant to section 40 of the Judiciary Act 1903-1966 (Cth), the interpretation of the Constitution being involved. The defendant challenged the validity of the proclamation made under section 7 of the Act, which gives the Governor-General power to declare any Australian waters proclaimed waters for the purposes of the Act, on the ground that it was not a valid exercise of the power conferred on Parliament by section 51(x) of the Constitution.

Thus, the primary question for the Court was as to the meaning of section 51(x) of the Constitution.

The Attorney-General of the Commonwealth, who appeared for the complainant, submitted that it was unnecessary for the purposes of the case to decide the inner limits of the waters in the constitutional power and urged the Court not to reach a decision on the matter. The

[1] (1969) 43 A.L.J.R. 275; [1969] A.L.R. 741. High Court of Australia; Barwick C.J., McTiernan, Kitto, Taylor, Menzies, Windeyer, Owen JJ. (Taylor J. died before judgment was delivered.)

[2] S. 8 reads in part:

(1) The Minister may, by notice published in the *Gazette*—

(c) prohibit the taking from proclaimed waters or from an area of proclaimed waters, of fish, or fish included in a class of fish specified in the notice, by a method or equipment specified in the notice.

Solicitor-General for New South Wales, who sought leave to intervene, also supported this submission. However, this did not deter Barwick C.J. and Windeyer J. from reaching a definite decision on the matter.

The defendant rested his case on three main grounds:

1. Section 51(x) of the Constitution is limited to fisheries within three miles of the coast.

2. If that submission should fail, the expression "Australian waters" does not allow a proclamation to cover waters as far seaward as those covered in the proclamation challenged and it is therefore void.

3. The constitutional power with respect to "fisheries" does not extend to the regulation of the activities of fishing.

The whole Court, in individual judgments, rejected these three arguments and decided that the proclamation was a valid exercise of power. However, the Court was not agreed as to the precise limits of the constitutional power. Barwick C.J., Kitto and Menzies JJ. decided that the fisheries power does not authorise the Commonwealth to pass laws with respect to fisheries within three miles of the coast. McTiernan and Owen JJ. did not decide whether the constitutional power is so limited. Windeyer J. alone decided that the Commonwealth can legislate within the three mile limit, as well as outside it, under the constitutional power. But, while Kitto and Menzies JJ. decided that State territorial limits extend three miles from the coast, Barwick C.J., like Windeyer J., decided that State territorial limits end at the low water mark. Barwick C.J., unlike Windeyer J., decided that the territorial sea which belongs to the Crown in right of the Commonwealth as successor to the Imperial Crown, is not included in the constitutional power with respect to fisheries.

Australian Waters

It was agreed by the whole Court that all the proclaimed waters could be called "Australian waters". Under the proclamation an area at varying distances from the coast, but generally about two hundred miles, was described as proclaimed waters. In arriving at the conclusion that all this area could be described as Australian waters, the Court looked for some proximity between the waters in question and Australia. The expression, in the words of Kitto J.:

> connotes a propinquity or other physical relation sufficient to make the enactment of laws concerning fisheries in those waters a matter of natural relevance to the government of the Australian Commonwealth.[3]

It was stressed that the final determination of what are Australian waters is a matter for the courts. However, it is for the executive

[3] (1969) 43 A.L.J.R. 275, 287A.

to make the initial judgment and to form an opinion as to the extent of Australian waters. This opinion is then open to challenge in the courts. All the judges recognized that geographic considerations alone are not decisive. Barwick C.J. and Windeyer J. agreed that the denotation of Australian waters may change and need not be the same today as in 1900. But Barwick C.J., unlike Windeyer J., would consider Australia's interests in defence and commerce, as well as in fisheries, in deciding what are Australian waters.[4]

That the court took such a wide view of Australian waters is to be welcomed. It ensures that Australia can control fishing activities some distance from her shores and means that she can introduce conservation measures in the high seas without relying on an international agreement. Although international comity might confine the operation of such laws to Australians it remains an important power as, with growing technological advances and increased exploitation of the high seas for fisheries, it is essential that a country have the power to introduce measures of conservation. The meaning given to "Australian waters" ensures that this will be possible. By not laying down detailed guidelines as to what are Australian waters, the Court gives the Executive a flexibility necessary in dealing with changing situations.

State Territorial Limits

The case provided the Court with an opportunity to consider State territorial limits, a matter which has been the subject of much academic writing and of differing conclusions in recent years. However, it can not be said that the Court as an institution helped to solve this problem; rather it added to the confusion. Barwick C.J. and Windeyer J. decided that State boundaries ended at the low water mark. McTiernan and Owen JJ. did not reach a decision on the matter. Kitto and Menzies JJ. seemed to conclude that the territorial limits of the States extended to include the territorial sea, but both left a final decision for a later case. The question of competence over the territorial sea is an important one as rights over the seabed and superjacent airspace are also involved. That the judges were able to reach such divergent conclusions illustrates the obscurity of the law on the subject. The conclusion one reaches as to where State boundaries end seems very much to depend on the approach one adopts. If one makes a purely historical analysis of practice in 1900 one can easily conclude that the States were assumed to have control over territorial waters. But if one makes a legal analysis of the territorial sea doctrine one can easily arrive at the opposite conclusion. This is reflected in the different conclusions of Barwick C.J. and Kitto J. Perhaps, in the final analysis the conclusion one reaches is a question of policy, depending for its answer on one's view of federalism.

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[4] *Id.* 282G. For the view of Windeyer J. see *Id.* 291B.

The Canadian Supreme Court in *Reference re Ownership of Offshore Mineral Rights*[5] had been faced with a similar question. The Court was asked in an advisory opinion to decide who owned the continental shelf and seabed of the territorial sea: Canada or the provinces? The Court had little difficulty in concluding that the seabed belonged to Canada, finding no historical, legal or constitutional basis upon which the provinces could claim legislative jurisdiction over the territorial sea or the continental shelf. Although legalistic in approach, the Court placed reliance on the fact that it was Canada which was recognized in international law as having rights in the territorial sea and continental shelf. Considerable reliance was also placed on *Regina v. Keyn*,[6] a decision of the Court of Crown Cases Reserved in 1876.

The case of *Keyn* is generally regarded as standing for the proposition that the territorial limits of the realm at common law ended at the low water mark. Although Kitto J.[7] casts doubt on this proposition, Barwick C.J.,[8] Professor O'Connell[9] and Sir Percy Spender[10] do not share these doubts, much reliance being put on this case in arriving at their conclusions that the colonies do not have rights in the territorial sea.

But while Barwick C.J., like the Canadian Court, placed considerable reliance on the fact that "rights in the territorial sea arise by international law and depend upon recognition by other sovereign States",[11] Kitto J. made a purely historical analysis. The Federal Council of Australasia Act 1885 (U.K.)[12] gave legislative authority for laws in respect of "Fisheries in Australasian waters beyond territorial limits." Although such provision was made on the assumption that the colonies had fishery competence within the territorial sea, it was possible that this resulted from a misapprehension as to the law. Certainly, if one adopts the commonly accepted view of *Keyn*,[13] one could conclude that the Council was under a misapprehension. The constitutional provision was derived from this provision and it was the general understanding at the time that the States would continue to have power within the three mile limit. It was to these considerations that Kitto J. gave

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[5] (1968) 65 D.L.R. (2d) 353. For discussion of this decision see: I. L. Head, "The Canadian Offshore Minerals Reference: The Application of International Law to a Federal Constitution" (1968) 18 Univ. Toronto L.J. 131.

[6] (1876) 2 Ex. D. 63.

[7] (1969) 43 A.L.J.R. 275, 285C.

[8] *Id.* 278D.

[9] D. P. O'Connell, "Problems of Australian Coastal Jurisdiction" (1958) 34 Brit. Y.B. Int. L. 199, 209; (1968) 42 A.L.J. 39.

[10] Australian Conservation Foundation, *The Future of the Great Barrier Reef* (1969) 31-33. Compare E. Campbell, "Regulation of Australian Coastal Fisheries" (1958-1963) 1 Tas. Univ. L. Rev. 405, 416.

[11] (1968) 65 D.L.R. (2d) 353, 376.

[12] 48 and 49 Vict. c60.

[13] (1876) 2 Ex. D. 63.

weight, while Barwick C.J. and Windeyer J. were much more concerned to consider the question of competence over the territorial sea in the context of international law developments.

Barwick C.J. concluded that the rights in the territorial sea, being derived from international comity, were those in right of the Imperial Crown. Some time since the passing of the Statute of Westminster in 1931 these rights passed to Australia when she became an independent nation State. Windeyer J. also concluded that territorial waters, being an adjunct of a sovereign state, must be taken to reside in the Imperial Crown and not in the States:

> The Commonwealth has become, by international recognition, a sovereign nation, competent to exercise rights that by the law of nations are appurtenant to, or attributes of, sovereignty. It follows, in my opinion, that rights in and over the territorial sea and its seabed are now vested in the Crown in right of the Commonwealth of Australia.[14]

It is submitted that this view best represents the national interest. Instead of having the jurisdiction over the maritime areas partitioned between a central government and the States, it would allow a unified control which, considering twentieth century developments, is surely desirable.

"Beyond territorial limits"

Having decided what were State territorial limits, the Court had to interpret the words "beyond territorial limits" in the constitutional power and reached diverse conclusions. The general understanding had been that the words referred to State limits. This was the view taken by Kitto J. and Windeyer J., as well as by the draftsman of the proclamation under the Act. Barwick C.J. took the words to mean Imperial limits —with the result that the constitutional power operated from the three mile limit even though State territorial limits ended at the low water mark. It was recognized that this view was "pregnant with practical difficulties."[15] With respect, this view seems hard to justify in logical terms and is not altogether compelling. Windeyer J.—although he

> cannot escape misgivings; for there are powerfully persuasive reasons for saying that in 1900 the words "waters beyond territorial limits" may have meant waters beyond the limits of territorial waters, territorial waters meaning the open sea up to three miles from the seashore[16]

—decided that State territorial limits ended at the low water mark, and that the constitutional power operated from there. This view means the Commonwealth can control all ocean fisheries and would appear much more realistic than that of Barwick C.J.

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[14] (1969) 43 A.L.J.R. 275, 294G.
[15] *Id.* 281F.
[16] *Id.* 292B.

The Territorial Sea

The nature of jurisdiction over the territorial sea raises many problems and it cannot be said that the Court helped to solve these. If the territorial sea is regarded as within Commonwealth sovereignty, which was the view of Barwick C.J., then surely the Commonwealth can legislate with respect to it. However, he does not consider this question, nor the possible extent of legislation under the external affairs power, and seems to envisage State laws continuing to apply in the area. At least the view of Windeyer J. definitely allows Commonwealth control of fisheries in an area within its sovereignty.

If on the other hand the territorial sea is regarded as part of a State's territory, what rights has the Commonwealth to legislate for that area? The external affairs power, the exact scope of which is not at all clear,[17] may be applicable. However the judgments avoid discussing the effect that Australia's adherence to the Convention on the Territorial Sea has on its power to legislate in that area. The Convention, while recognizing a State's sovereignty over territorial waters, is primarily concerned with problems of delimitation. It is to be doubted that simply by adhering to such a Convention the Commonwealth could gain a right to control fisheries or unilaterally to extend State territorial limits. If Australia, following the development of international law, extends the territorial sea to six or twelve miles or alters the baselines does this involve an alteration to State boundaries for constitutional purposes? Does section 123 of the Constitution[18] apply to this situation? Most commentators submit that section 123 is not applicable to alterations of the maritime boundaries of the States as a result of international law.[19] This appears the most satisfactory view to take, but the actual words of the section are capable of being read quite differently.[20]

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[17] P. H. Lane, "External Affairs Power" (1966) 40 A.L.J. 257.

[18] Section 123 reads: The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

[19] D. P. O'Connell, "Problems of Australian Coastal Jurisdiction" (1958) 34 Brit. Y.B. Int. L. 199, 231; R. D. Lumb, *The Law of the Sea and Australian Offshore Areas* (1966) 64-65; C. W. Harders, "Australia's Offshore Petroleum Legislation: A Survey of its Constitutional Background . . ." (1968) 6 M.U.L.R. 415, 423.

[20] It is interesting to note that in the announcement by the Commonwealth government of its intention to assert a claim to the seabed from the low water mark to the limits of the continental shelf, the claim excluded internal waters as they existed at federation.

Does this mean that the alterations in the baselines from which the territorial sea is measured, made in 1967 in accordance with the convention on the Territorial Sea, do not operate domestically?

Another problem, which the judgments raise but do not examine in detail, is one as to the rights of the States to legislate extra-territorially as an exercise of their power to make laws for the peace, order and good government of the State. If the territorial sea is within Commonwealth sovereignty, the States might find it more difficult to show the necessary connection[21] between events in the territorial sea and the good government of the State. It seems clear that the States today can enact some laws to control fishing even in areas of the high seas.[22] But whether the colonies, as Barwick C.J. suggested,[23] had the same competence to legislate extra-territorially may be debatable. He cited *Croft v. Dunphy* but it must be remembered that that was a case concerned with a Dominion's power and not that of a colony. Professor O'Connell has suggested that it was understood that the colonies power to legislate extra-territorially was confined to the territorial sea and did not apply in respect of the high seas.[24] The understanding seems to have been prompted by considerations of policy: the desire not to compromise the Imperial government by colonial action. The mere fact that the colonies enacted laws operating in the territorial sea does not, however, presuppose that they had only sovereignty in the area.

The Continental Shelf

Many of the problems arising in respect of the territorial sea also occur in relation to the continental shelf. The juridical nature of the continental shelf remains unclear. The International Court of Justice in the *North Sea Continental Shelf* cases[25] suggested that a coastal State had an inherent right in the shelf by virtue of its sovereignty over the land and as an extension of it in an exercise of sovereign rights for the purpose of exploiting its resources. This may suggest that the shelf is not extra-territorial as generally believed. The question therefore arises as to who is competent to exercise jurisdiction in respect of the shelf: the Commonwealth, the States or both?

In international law the right to explore and exploit the shelf is vested in the Commonwealth. Australia has ratified the Continental Shelf Convention and may be able to rely on the external affairs power in order to control mining and sedentary fisheries on the shelf. But has it any rights otherwise? The continental shelf is defined in the Convention as beginning from the seaward limit of the territorial sea. But the International Court drew no distinction between the seabed of the territorial sea and the continental shelf. Barwick C.J. suggested that

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[21] *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)* (1936-37) 56 C.L.R. 337, 375; *Johnson v. Commissioner of Stamp Duties* [1956] A.C. 331.

[22] *Giles v. Tumminello* [1963] S.A.S.R. 96; *Munro v. Lombardo* [1964] W.A.R. 63.

[23] (1969) 43 A.L.J.R. 275, 280D.

[24] D. P. O'Connell, "The Doctrine of Colonial Extra-Territorial Incompetence" (1959) 75 L.Q.R. 318.

[25] (1969) I.C.J. Reps. 1; also reported (1969) 8 *International Legal Materials* 340; for comment on the cases see: (1969) 3 F.L. Rev. 283.

this judgment of the International Court provided a sounder basis for a claim to the seabed of the territorial sea than claims to jurisdiction over territorial waters.[26] Sir Percy Spender also regarded the judgment as support for the view that the Commonwealth under international law has an exclusive right to explore and exploit the seabed from the low water mark.[27] Even if one concluded that the territorial sea in 1900 belonged to the colonies, this would not necessarily mean that they also had the right to explore and exploit the seabed beneath the territorial sea. Sir Percy Spender says:

> One thing, I think, is reasonably clear, namely that when the previous colonies of Australia became incorporated in the Commonwealth, there did not exist any idea whatever of any colony having dominion over the seabed beneath territorial waters, or having the right to exploit the resources of any part of that bed.[28]

The United States Supreme Court[29] and the Canadian Supreme Court[30] have also attributed rights over the shelf to the federal body and not to the member states.

In Australia the question of jurisdiction over the shelf remains unresolved. In the past both the Commonwealth and States have legislated in respect of the shelf. In the case of sedentary fisheries the Commonwealth has relied on the fisheries power to legislate outside the territorial sea. State mining laws have been extended to cover the shelf but the provisions generally indicate a belief that it is extra-territorial. Uniform Commonwealth and State legislation has been passed to control exploitation of petroleum both in the seabed of the territorial sea and the continental shelf. It was hoped that the dual legislation would avoid problems of litigation, but it can hardly be said to be the most efficient way to organise control of such an important resource.[31]

One therefore welcomes the Commonwealth government's announcement of its intention to legislate to assert control over the seabed from the low water mark on the ground that this will at least enable the High Court to give a definitive decision on who has jurisdiction over the shelf. This legislation is not intended to upset the agreement on offshore oil and gas.[32]

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[26] (1969) 43 A.L.J.R. 275, 279D.

[27] Australian Conservation Foundation, *The Future of the Great Barrier Reef* (1969) 27.

[28] *Ibid.*

[29] *United States v. California* (1946) 332 U.S. 19.

[30] *Reference re Ownership of Offshore Mineral Rights* (1968) 65 D.L.R. (2d) 353.

[31] R. D. Lumb, "The Offshore Petroleum Agreement and Legislation" (1968) 41 A.L.J. 453.

[32] On 16 April 1970 the *Territorial Sea and Continental Shelf Bill* was introduced into the House of Representatives in accordance with the government's intention as announced at the opening of Parliament on 3 March 1970.

The Bill purported to declare and enact that sovereignty in respect of the territorial sea and its seabed is vested in and is exerciseable by the Crown in

It seems that the Commonwealth relies on the external affairs power for its legislation in respect to exploitation of shelf resources. If this power depends for its exercise on a treaty, it does not appear to be an altogether satisfactory basis for Australian control of shelf resources. It has been suggested, however, that the external affairs power provides authority for laws giving effect to rules that are part of customary international law.[33] If this is so then the Commonwealth may have much wider powers over the shelf than generally believed. Such a view as to the extent of the external affairs power could also have repercussions in other areas.

Problems also arise in deciding what body of law is applicable within the off-shore areas. The petroleum legislation is deliberately vague, applying the laws of the adjacent State in the off-shore area but only in relation to petroleum exploration and not otherwise. The present uncertainty is increasingly untenable, particularly in relation to exploitation of resources other than petroleum, and a definite decision on the body of laws to be applied is required in order for business enterprises to be able to know how to regulate their affairs.[34]

Conclusion

Bonser v. La Macchia was primarily concerned with the meaning of section 51(x) of the Constitution and so avoided reaching a decision on many of the problems of maritime jurisdiction. However, even as a judgment on section 51(x) it can not be regarded as satisfactory. Diverse conclusions were reached on diverse grounds. The correct law

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right of the Commonwealth. Similar provision was made in respect of internal waters. The Bill sought to give the Governor-General power to declare the limits of territory in which the Commonwealth claims sovereignty but not so as to be inconsistent with the Convention on the Territorial Sea.

Saving provisions of the Bill ensured that the Commonwealth's assertion of sovereignty would not affect existing State ownership of wharves and port facilities.

It was expected that this Bill would be followed by further legislation on off-shore mining by which the Commonwealth would exercise sovereign control in respect of mining for all minerals other than petroleum, relying on the States to make use of their facilities to implement the legislation, receiving in return a proportion of the royalties. (1970) C.P.D. 1276 (16 April 1970).

However, at the time of writing, the legislation has met with strong opposition and has been held over to the Budget Session of Parliament in August 1970. If the legislation is passed in its existing form it is clear from statements by the State governments that it will be the subject of immediate challenge in the High Court.

[33] C. W. Harders, "Australia's Offshore Petroleum Legislation: A Survey of its Constitutional Background . . ." (1968) 6 M.U.L.R. 415, 424.

[34] D. P. O'Connell, "Problems of Australian Coastal Jurisdiction" (1968) 42 A.L.J. 39, 46-47; R. D. Lumb, "Sovereignty and Jurisdiction over Australian Coastal Waters" (1969) 43 A.L.J. 421, 446-447.

on the subject therefore remains unclear. Australian fisheries continue to be controlled by a divided system of jurisdiction. But as Windeyer J. said:

> This arrangement of, generally speaking, complementary laws in respect of different areas, must seem wise and convenient, except perhaps for fishermen and lawyers.[35]

It is to be hoped that Australian judges will admit the importance of the policy considerations that have carried the day in the United States[36] and Canada.[37] In today's complex world it may be doubted that it is satisfactory to have jurisdiction over various areas of the sea divided between State and Commonwealth and between various heads of power. Such a division can only lead to uncertainty in domestic and international action. One therefore hopes that, when occasion arises to consider the problems of off-shore jurisdiction again, recognition will be more unanimously given to the vital importance of the oceans for Australia's security and commerce and the responsibilities of the nation State.

H. BURMESTER

TEORI TAU v. THE COMMONWEALTH OF AUSTRALIA[1]

Constitutional Law — Commonwealth power to make laws for the Territories — Constitution section 122 — Acquisition of property on just terms — Constitution section 51 (xxxi) — High Court Rules — Order 35 Rule 2.

The proceeding before the High Court was a special case under Order 35 Rule 2[2] for a declaration whether an ordinance of the Territory of Papua and New Guinea made pursuant to the New Guinea Act 1920 or the New Guinea Act 1920-1926 or the Papua and New Guinea Act 1949-1964 which provides for compulsory acquisition of property, is

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[35] (1969) 43 A.L.J.R. 275, 298F.

[36] *United States v. California* (1946) 332 U.S. 19.

[37] *Reference re Ownership of Offshore Mineral Rights* (1968) 65 D.L.R. (2d) 353.

[1] (1970) 44 A.L.J.R. 25. High Court of Australia: Barwick C.J., McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ.

[2] Order 35 rule 2 of the High Court Rules provides: "If it appears to the Court or a Justice that there is, in a proceeding, a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact determined, the Court or Justice may make an order accordingly and may direct that question of law to be raised for the opinion of the Court or of the Full Court, either by special case or in such other manner as the Court or Justice deems expedient".