[HIGH COURT OF AUSTRALIA.]

HUME . . . . . APPELLANT;
DEFENDANT,

AND

PALMER . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *Aug.* 9, 10, 11; *Dec* 6.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Shipping—State Collision Regulations—Validity—Inconsistency between Commonwealth law and State law—Repugnancy between Commonwealth law and Imperial law—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51, 98, 106-109—*Navigation Act* 1912-1920 (*No.* 4 *of* 1913—*No.* 1 *of* 1921), *secs.* 2, 115, 258, 395—*Navigation Act* 1901 (*N.S.W.*) (*No.* 60 *of* 1901), *secs.* 113, 115—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *secs.* 418, 735, 736—*Navigation* (*Collision*) *Regulations* (*Statutory Rules* 1923, *No.* 100), *reg.* 2; *Sched., arts.* 19, 30—*Regulations of* 3*rd July* 1911 *for Preventing Collisions at Sea* (*N.S.W.*), *art.* 19—*Sea Regulations* 1910 (*Imp.*), *arts.* 19, 30—*Colonial Laws Validity Act* 1865 (28 & 29 *Vict. c.* 63), *sec.* 2—*Interpretation Act* 1889 (52 & 53 *Vict. c.* 63), *sec.* 18.

High Court—Jurisdiction—Appeal from State Court exercising Federal jurisdiction—Prosecution under State law—Contention that State law inconsistent with Federal law—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 73, 76, 109—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *secs.* 30, 39.

The master of a steamship registered in Australia and engaged in inter-State trade was charged before a Stipendiary Magistrate of New South Wales with a breach of the *Navigation Act* 1901 (N.S.W.), in that within the harbour of Port Jackson in New South Wales he contravened art. 19 of the *Regulations for Preventing Collisions at Sea* made under that Act. On the hearing the defendant contended that the proceedings should have been taken under the Commonwealth *Navigation Act* 1912-1920 and the *Navigation* (*Collision*) *Regulations* made thereunder, and that the Magistrate had no jurisdiction to hear the information because the relevant provisions of the *Navigation Act* 1901 (N.S.W.)

H. C. OF A. 1926. HUME v. PALMER.

were inconsistent with the Commonwealth *Navigation Act* and were invalid by force of sec. 109 of the Constitution. The defendant having been convicted and fined,

Held, by the whole Court, that an appeal from the conviction lay to the High Court under sec. 73 of the Constitution and sec. 39 (2) of the *Judiciary Act* 1903-1920.

Miller v. *Haweis*, (1907) 5 C.L.R. 89, followed.

Held, also, by *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Starke* JJ. (*Higgins* J. dissenting), that the provisions of the *Navigation Act* 1901 (N.S.W.) and of art. 19 of the New South Wales *Regulations for Preventing Collisions at Sea*, so far as they related to the offence with which the defendant was charged, were inconsistent with the *Navigation Act* 1912-1920 and were therefore invalid under sec. 109 of the Constitution; and that art. 19 of the New South Wales *Regulations for Preventing Collisions at Sea* was not a "special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters" within the meaning of art. 30 of the Schedule to the *Navigation (Collision) Regulations*.

Held, further, by *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Starke* JJ., that, by reason of sec. 735 of the Imperial *Merchant Shipping Act* 1894 and sec. 2 (2) of the Commonwealth *Navigation Act* 1912-1920, the relevant provisions of the *Navigation Act* 1912-1920 and of the *Navigation (Collision) Regulations* are not invalidated by the *Colonial Laws Validity Act* 1865 on the ground of repugnancy to the *Merchant Shipping Act* 1894 and the *Sea Regulations* made thereunder.

APPEAL from a Court of Petty Sessions of New South Wales.

At the Central Police Court at Sydney before a Stipendiary Magistrate an information was heard whereby Benjamin Palmer, an inspector of the Department of Navigation of New South Wales, charged that on 1st February 1926 William James Hume, being at the time the master of the steamship *Wear*, then navigating within the waters of Port Jackson in the said State, which waters are connected with the high seas, did unlawfully contravene art. 19 of the Rules for Preventing Collisions at Sea, in that his steamer, to wit, the steamship *Wear*, being a crossing vessel and having the steamship *Kuramia* on her own starboard side, did not keep out of the way. The Magistrate convicted the defendant and fined him £10 with £10 18s. costs; in default three months' imprisonment with hard labour.

From that conviction the defendant now, by special leave, appealed to the High Court.

The material facts are stated in the judgments hereunder.

Evans, for the appellant. The appeal to this Court is competent. The Stipendiary Magistrate was exercising Federal jurisdiction when he heard this information, for he could not determine the objection to the jurisdiction of the Court of Petty Sessions without exercising Federal jurisdiction (*Miller* v. *Haweis* (1); *Troy* v. *Wrigglesworth* (2)). The question whether the relevant portions of the *Navigation Act* 1901 (N.S.W.) and the *Regulations for Preventing Collisions at Sea* 1911 thereunder are inconsistent with the *Navigation Act* 1912-1920 and therefore invalid, is a matter involving the interpretation of the Constitution, and the jurisdiction to determine that question is conferred by sec. 39 (2) of the *Judiciary Act*, under which an appeal lies to the High Court. An appeal lies in this case just as it did in *Clyde Engineering Co.* v. *Cowburn* (3). The New South Wales *Regulations for Preventing Collisions at Sea* and the provisions in the *Navigation Act* 1901 (N.S.W.) for enforcing them are inconsistent with the *Navigation Act* 1912-1920 and the *Navigation (Collision) Regulations* made thereunder. Although the Federal and the State Regulations are in the same words, the punishments for breaches are different, as are also the Courts before which the Regulations may be enforced. The Commonwealth has purported to deal with the whole subject of prevention of collisions, and the State legislation on that subject is invalid under sec. 109 of the Constitution (*Union Steamship Co. of New Zealand* v. *Commonwealth* (4); *Clyde Engineering Co.* v. *Cowburn*).

E. M. Mitchell K.C. (with him *K. W. Street*), for the Commonwealth intervening. If the Court of Petty Sessions was exercising Federal jurisdiction this appeal lies under sec. 39 (2) (*c*) of the *Judiciary Act*, and that Court was exercising Federal jurisdiction under sec. 30 of that Act, the matter being one arising under the Constitution or involving its interpretation. Even if an appeal does not lie under sec. 39 (2) (*c*) of the *Judiciary Act*, it lies under sec. 73 of the Constitution. The case cannot be decided without determining whether the State Act is operative, and that depends on whether the State Act is inconsistent with the Commonwealth Act and

(1) (1907) 5 C.L.R. 89.
(2) (1919) 26 C.L.R. 305.
(3) (1926) 37 C.L.R. 466.
(4) (1925) 36 C.L.R. 130.

H. C. OF A. 1926. HUME v. PALMER.

therefore invalid under sec. 109 of the Constitution. [Counsel] referred to *Ex parte Walsh and Johnson*; *In re Yates* (1); *Pirrie* v. *McFarlane* (2); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (3).] There is inconsistency between the Commonwealth *Navigation Act* and the Regulations under it and the State *Navigation Act* and the Regulations under it. The Commonwealth Regulations and the sections of the Commonwealth *Navigation Act* which made the Regulations effective were intended to be a code and to cover the whole field, except so far as subordinate legislation was allowed for special areas; and any State legislation within the same field, even if in identical terms, is inconsistent and invalid under sec. 109 of the Constitution.

Watt K.C. (with him *H. E. Manning*), for the respondent. No appeal lies in this case to the High Court. The Magistrate was dealing, and purported to deal, only with the State Act, and the raising of a contention that there was a Federal law dealing with the matter did not make the matter one of Federal jurisdiction. To show that there was a Federal law in the same terms as the State law does not give rise to an inconsistency within the meaning of sec. 109 of the Constitution, and so make the matter one of Federal jurisdiction. The respondent should not be called upon now to support the State Act and Regulations as against the *Merchant Shipping Act* 1894, for no such objection was taken in the Court below and, if it had been, the proceedings could have been moulded so as to cure the objection. But the Federal Act and Regulations are in conflict with and repugnant to the *Merchant Shipping Act* 1894 and the *Sea Regulations* thereunder, which were operative when the collision took place (see *The Anselm* (4)). If the State Act and Regulations are inconsistent with or repugnant to the Federal Act and Regulations, then for similar reasons the Federal Act and Regulations are repugnant to the *Merchant Shipping Act* 1894 and the *Sea Regulations* thereunder and are invalid under the *Colonial Laws Validity Act* 1865. So that, even if the State Act and Regulations are invalid, the conviction stands under the *Merchant Shipping Act*

(1) (1925) 37 C.L.R. 36, at p. 129.
(2) (1925) 36 C.L.R. 170.
(3) (1923) 32 C.L.R. 413, at p. 430.
(4) (1907) P. 151.

and the *Sea Regulations* thereunder. [Counsel also referred to *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (1); *Australasian Steam Navigation Co.* v. *Smith* (2).]

Evans, in reply.

Cur. adv. vult.

Dec. 6.

The following written judgments were delivered :—

KNOX C.J. The appellant was charged with an offence against the provisions of the *Navigation Act* of the State of New South Wales (No. 60 of 1901) in that he, being the master of the steamship *Wear* then navigating within the waters of Port Jackson in the said State, did unlawfully contravene art. 19 of the *Regulations for Preventing Collisions at Sea* made under that Act. The appellant pleaded not guilty, and on his behalf counsel submitted that the proceedings should have been taken under the Commonwealth *Navigation Act* 1912-1920, and that the Magistrate had no jurisdiction to hear the information because the relevant provisions of the New South Wales law were inconsistent with the Commonwealth *Navigation Act* and were therefore invalid by force of sec. 109 of the Constitution. It was admitted that at the time when the offence was alleged to have been committed the *Wear*, whose port of registry was Melbourne, was on a voyage from Geelong in the State of Victoria to Sydney in the State of New South Wales. The Magistrate overruled the objection to the jurisdiction and, having heard evidence, convicted the appellant and imposed a fine. This is an appeal by special leave from that decision.

The first question that calls for decision is whether the appeal to this Court is competent. For the appellant, and for the Commonwealth as intervener, it was argued that the matter before the Magistrate was a matter involving the interpretation of the Constitution, that the jurisdiction which he exercised was therefore Federal jurisdiction conferred by sec. 39 (2) of the *Judiciary Act*, and that the appeal was authorized by pars. (*b*) and (*c*) of the same sub-section. For the respondent it was contended that the matter

(1) (1915) 20 C.L.R. 148, at pp. 167, 168.

(2) (1886) 7 N.S.W.L.R. 207, at p. 234.

H. C. OF A. 1926.

HUME v. PALMER.

KNOX C.J.

before the Magistrate did not involve the interpretation of the Constitution, but it was not denied that if the interpretation of the Constitution was involved the Magistrate was exercising Federal jurisdiction, and the appeal was competent.

The question which the Magistrate had to decide on the objection taken before him was whether the relevant provisions of the New South Wales *Navigation Act* were inconsistent with the Commonwealth *Navigation Act* within the meaning of sec. 109 of the Constitution and therefore invalid. The Magistrate could not, in my opinion, decide this question without coming to a conclusion as to the meaning of the word "inconsistent" in sec. 109 of the Constitution, and it seems to me to follow that the matter in which the question was raised was a matter involving the interpretation of the Constitution, and therefore a matter in which the Magistrate was exercising Federal jurisdiction. That the question as to inconsistency was substantial and was raised bona fide is shown by the course of the argument in this Court. I am unable to find any distinction of substance on this point between this case and the cases of *Troy* v. *Wrigglesworth* (1) and *H. V. McKay Pty. Ltd.* v. *Hunt* (2). For these reasons I am of opinion that the appeal is competent.

The question of substance which calls for decision on this appeal is whether the provisions of the New South Wales Act and Regulations under which the appellant was charged are inconsistent with the provisions of the Commonwealth *Navigation Act* within the meaning of sec. 109 of the Constitution and therefore invalid. Art. 19 of the Regulations of 1911 made under the *Navigation Act* of New South Wales provides that when two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way. Sec. 115 of the State Act enjoins obedience to these Regulations, which are expressly made applicable to all vessels upon the high seas and in waters connected therewith navigable by sea-going vessels, and by sub-sec. 2 provides a penalty for breach of the Regulations. Sec. 258 of the Commonwealth Act provides that the Governor-General may make regulations for the prevention of collisions, and prescribes

(1) (1919) 26 C.L.R. 305. (2) (1926) 38 C.L.R. 308.

penalties for contravention of such regulations. Statutory Rules 1923, No. 100, made under the authority of this section, contain regulations for the prevention of collisions. By clause 2 it is provided that the Regulations shall apply to all ships (British or foreign) wherever the Commonwealth has jurisdiction, whether upon the high seas or in waters connected therewith and navigable by sea-going vessels, and by clause 4 it is provided that the rules contained in arts. 1 to 31 inclusive of the Schedule to the Regulations shall, for the purposes of sec. 258 of the Act, be the regulations to be observed for the prevention of collisions, and that the contravention by a master or owner of a ship of any of those rules shall be deemed to be a contravention of the Regulations. Arts. 1 to 31 of the Schedule contain a code of rules including rules expressed in the same words as those contained in the Regulations made under the State Act, and other rules copied from the *Sea Regulations* 1910 made under the *Merchant Shipping Act* 1894. Art. 19 of the Rules under the Commonwealth Act is in words identical with those of art. 19 of the Regulations under the State Act. The State Regulations, so far as they go, and those prescribed under the Commonwealth Act are in the same words as the corresponding Rules under the *Merchant Shipping Act*. The contention of the appellant that the relevant provisions of the New South Wales Act and Regulations are rendered invalid by sec. 109 of the Constitution involves two propositions, namely, (1) that those provisions are inconsistent with provisions of the Commonwealth law and (2) that the relevant provisions of the Commonwealth law apply to the circumstances in which the alleged offence was committed and, so applied, are within the power of the Commonwealth Parliament. Assuming the application and validity of the Commonwealth Act and Regulations, the law of the Commonwealth provides a code of rules for avoiding collisions which is intended to be the law on that subject in all places and in respect of all ships within the jurisdiction of the Commonwealth Parliament, and provides further for the imposition of stated penalties for contravention of those rules. The law of the State also provides a code of rules on the same subject which is intended to be the law on that subject in all places and in respect of all ships within the jurisdiction of the State Parliament,

H. C. OF A. 1926.

HUME v. PALMER.

KNOX C.J.

and provides further for the imposition of penalties for contravention of those rules. The rules prescribed by the Commonwealth law and the State law respectively are for present purposes substantially identical, but the penalties imposed for their contravention differ. Under the Commonwealth law a contravention caused by wilful default is an indictable offence, and for a contravention not so caused the penalty is a fine not exceeding £100. Under the State law the penalty is a fine not exceeding £50, and is imposed only in case of wilful default. Moreover, offences against the respective Acts are cognizable by different tribunals. The territorial area which is within the jurisdiction of the State Parliament is also within the jurisdiction of the Commonwealth Parliament, and the power of the Commonwealth Parliament to make laws with respect to navigation and shipping extends to ships engaged in trade and commerce between the States (see *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1)), which are also within the operation of the rules prescribed by the State Act, if valid. In these circumstances, it is, I think, clear that the reasons given by my brothers *Isaacs* and *Starke* for the decisions of this Court in *Union Steamship Co. of New Zealand* v. *Commonwealth* (2) and *Clyde Engineering Co.* v. *Cowburn* (3) establish that the provisions of the law of the State for the breach of which the appellant was convicted are inconsistent with the law of the Commonwealth within the meaning of sec. 109 of the Constitution and are therefore invalid. And art. 30 of Statutory Rules 1923, No. 100, in my opinion does not affect the matter. That article provides that "nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters." Having regard to the preliminary statement in the New South Wales Regulations that "these rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by seagoing vessels" and to the terms of art. 30 of those rules, it appears to me impossible to regard art. 19 as a special rule relative to the navigation of a harbour. Nor do I think the expression "duly made by local

(1) (1921) 29 C.L.R. 357.
(2) (1925) 36 C.L.R. 130.
(3) (1926) 37 C.L.R. 466.

authority" is apt to describe rules made by an Act of the Parliament of New South Wales.

The validity of the relevant provisions of the Commonwealth Act and the rules made under it was challenged on the ground that they were repugnant to the provisions of the Imperial *Merchant Shipping Acts* within the meaning of the *Colonial Laws Validity Act* and were therefore void and inoperative. The answer to this contention is to be found in sec. 735 of the *Merchant Shipping Act* 1894 and sec. 2 (2) of the Commonwealth *Navigation Act*. By sec. 735 of the *Merchant Shipping Act* 1894 it is provided that the Legislature of any British possession may repeal any provisions of that Act (except certain provisions not relevant to this case) relating to ships registered in that possession. The Commonwealth is a British possession (*John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1)), and its Legislature is therefore authorized to prescribe rules of conduct in relation to the navigation of ships registered in Australia, even if such rules be inconsistent with, and by implication repeal, provisions of the *Merchant Shipping Act*. The steamship *Wear* was at the relevant time registered in Australia, and rules relating to her navigation were therefore within the authority conferred on the Commonwealth Parliament by the *Merchant Shipping Act*. She was at the relevant time engaged in trade or commerce between the States, and this Court has decided in *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (2) that the Commonwealth *Navigation Act*, so far as it applies to ships engaged in inter-State or foreign trade, is a valid exercise of the legislative power of the Commonwealth, although such ships are included in the Act in one collective expression with ships not within that legislative power. In the circumstances of this case the operation of the *Colonial Laws Validity Act* is excluded by the authority conferred by sec. 735 of the *Merchant Shipping Act*, and the constitutional limitation of the power of the Commonwealth Parliament to make laws with respect to navigation is satisfied by the interpretation which this Court has put on sec. 2 (2) of the *Navigation Act*. It follows that the regulations for avoiding collisions contained in Statutory Rules 1923, No. 100, in their application to the navigation

(1) (1924) 34 C.L.R. 420.

(2) (1921) 29 C.L.R. 357.

H. C. OF A. 1926.

HUME v. PALMER.

Isaacs J.

of the steamship *Wear* on the occasion in question are a valid law of the Commonwealth.

For these reasons I am of opinion that the appeal should be allowed.

ISAACS J. The respondent Palmer is an inspector of the Department of Navigation of the State of New South Wales. As such inspector, he laid an information under the State *Navigation Act* 1901, No. 60, sec. 115, against the appellant, Hume, for breach of art. 19 of the Collision Regulations established under the State Act. At the hearing before the Police Magistrate, the objection was taken on behalf of the appellant that the State Collision Regulations had no force or operation with respect to the case. The ground of the objection was in substance that, by virtue of sec. 109 of the Commonwealth Constitution, the only valid law regulating the conduct of the appellant in relation to the relevant events was the Commonwealth Act, which by its Collision Regulations superseded the State regulation alleged to be contravened. The Magistrate said he would hear the facts and have any admissions before deciding upon the objection. The facts were fully investigated, and other arguments submitted. The former submission was again made that the Court had no jurisdiction. The Magistrate then summarily convicted the appellant, as we must assume, of wilful default, though that was not charged, and fined the appellant £10 with £10 18s. costs, and in default ordered three months' imprisonment with hard labour. The material facts for the present purpose are that the appellant's ship was at the time of the alleged offence a ship registered in Australia, and was engaged in trade and commerce among the States, being on her way upon a voyage from Geelong in Victoria to Darling Harbour in New South Wales.

There can be no question that the Commonwealth *Navigation Act*, by its own direct provisions and the Regulations made under its authority, applies upon construction to the circumstances of the case. It is inconsistent with the State Act in various ways, including (1) general supersession of the regulations of conduct, and so displacing the State regulations, whatever those may be; (2) the jurisdiction to convict, the State law empowering the Court

to convict summarily, the Commonwealth law making the contravention an indictable offence, and therefore bringing into operation sec. 80 of the Constitution, requiring a jury; (3) the penalty, the State providing a maximum of £50, the Commonwealth Act prescribing a maximum of £100, or imprisonment, or both; (4) the tribunal itself.

There can also be no doubt that the Magistrate, by convicting, overruled the constitutional objection. To do that, he had to determine both that the appellant was culpable, assuming the operative effect of the New South Wales law, and also that, upon what he held to be its true interpretation, sec. 109 of the Constitution did not apply to the case. If on the true interpretation of sec. 109 of the Constitution it does apply so as to make the State statute inoperative, it follows of necessity that the Magistrate must have erred as to its true interpretation. As the case, decided as it was, necessarily required the Court to interpret sec. 109 of the Constitution, since the conviction necessarily involved an interpretation adverse to the appellant, both of statute and Constitution—the converse of *Miller* v. *Haweis* (1)—the case was a matter involving the interpretation of the Constitution within the meaning of sec. 76 of the Constitution and sec. 30 of the *Judiciary Act*, and a matter of Federal jurisdiction. The Police Magistrate, consequently, whether he intended or not, or whether he knew it or not, was exercising Federal jurisdiction within the meaning of sec. 73 of the Constitution.

Sec. 109 of the Constitution, however, gives supremacy only to a Commonwealth *law*, and there is, it appears, a contest also whether the Commonwealth *Navigation Act*, so far as it purports by sec. 258 to give power to prescribe by regulations collision rules for Australian registered ships, is a "law." The respondent contends it is not, on the ground that the collision rules prescribed by the Imperial *Merchant Shipping Act* 1894 are still in force in Australia to the exclusion of any rules prescribed by the Commonwealth Parliament. The *Union Steamship Co's Case* (2) is in point, and I need, as to principles, do no more than refer to that case. There is no doubt that so far as the Commonwealth Constitution is concerned its words are ample to authorize the legislation. The one question

(1) (1907) 5 C.L.R. 89. (2) (1925) 36 C.L.R. 130.

H. C. OF A. 1926. HUME v. PALMER. Isaacs J.

is: Does that legislation conflict with the *Merchant Shipping Act*? Sec. 735 of that statute, in my opinion, authorized the Commonwealth legislation in question. It prescribes that "the Legislature of any British possession" &c.; and the Commonwealth is a British possession within the meaning of that term (*John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1)). The Imperial *Interpretation Act* 1889 (52 & 53 Vict. c. 63), by sec. 18, gives a definition of "British possession" which shows that the term is a geographical expression. The words of sec. 735 of the *Merchant Shipping Act* referring to "ships registered in that possession" mean, as applied to the Commonwealth, ships registered within the territory of the Commonwealth of Australia.

Sec. 2 of the *Navigation Act* prevents the invalidity of the Act for excess of legislative power in one respect from affecting its operation in any other respect.

The case in hand is within authorized legislative limits. The provision in art. 30 has been referred to. That article does not refer to such a general enactment as is contained in the relevant rule in the State Regulations. Its true nature is illustrated in *The Bitinia* (2). A special rule for a harbour by local authority means a rule made specially for that harbour, taking into account its special characteristics, by some authority specially entrusted with that local duty, as distinguished from a power to make such rules generally for harbours.

I would add that, the view pressed by the respondent, that the Imperial Rules still prevailed, would no doubt, if correct, entitle him to succeed in this appeal, but would demonstrate at the same time the illegality of the conviction. For, if sec. 735 does not authorize the Commonwealth legislation, neither can it authorize the State legislation. Sawing off the branch one is sitting on may, while it lasts, be an exciting occupation; but that hardly compensates for the inevitable consequences.

In my opinion the appeal should be allowed.

HIGGINS J. I am of opinion that the decision of the Stipendiary Magistrate in the Court of Petty Sessions necessarily involved a

(1) (1924) 34 C.L.R. 420.

(2) (1912) P. 186, at p. 191.

finding on a question arising under the Constitution or involving its interpretation, and that therefore the appeal is rightly brought before this Court; but that the appeal should be dismissed on the merits.

The s.s. *Wear*, coming from Geelong in Victoria to Port Jackson in New South Wales, came into collision with and injured a ferry steamer of Port Jackson plying its course between Milson's Point and Circular Quay. There is a *Navigation Act* passed by the New South Wales Legislature in 1901; and there are steering and sailing regulations made thereunder which are expressly made to have the same force as if they were enacted in the body of the Act (sec. 113). There is also a *Navigation Act* passed by the Commonwealth Parliament 1912-1920; and there are also regulations made thereunder (Statutory Rules 1923, No. 100). In pursuance of the New South Wales Act, Captain Hume, master of the s.s. *Wear*, was tried and convicted by the Stipendiary Magistrate in a Court of Petty Sessions for contravening art. 19 of the New South Wales Regulations, in that the s.s. *Wear* "being a crossing vessel and having the s.s. *Kuramia*" (the ferry steamer) "on her own starboard bow did not keep out of the way"; and he was fined £10 with costs, or three months' hard labour. An appeal has been brought to this Court by special leave on the grounds (1) that the said conviction was wrong in law and in fact; (2) that the *Navigation Act* of New South Wales is not applicable to a ship registered outside that State and trading among the States; (3) that any proceedings in respect of the conduct of inter-State shipping can only be instituted under the Commonwealth Act and by a Commonwealth authority; (4) that the Magistrate was wrong in proceeding to hear the matter after it had been brought to his knowledge that the s.s. *Wear* was a ship registered outside New South Wales and trading among the States, "and therefore subject exclusively to the navigation laws of the Commonwealth." In these grounds, the word "inconsistent" is not used. It is contended, however, for the respondent, the prosecutor, that there is no right of appeal to this Court from the Court of Petty Sessions. By sec. 73 of the Constitution of the Commonwealth, this Court has jurisdiction to hear appeals from all orders of any Court "exercising Federal jurisdiction"; and it is urged that the

H. C. OF A. 1926.

HUME v. PALMER.

Higgins J.

Court of Petty Sessions was not exercising Federal jurisdiction, but State jurisdiction. But the Court of Petty Sessions was faced at the outset with the objection taken by the defendant's counsel (a) that the proceedings should have been brought under the Commonwealth Act, and that the Court had no jurisdiction to hear the New South Wales information; and also (a distinct objection) (b) that there is an inconsistency between the two Acts (sec. 109 of the Constitution) "inasmuch as there are two authorities dealing with the same matter." Whether these objections were right or wrong, each raised a matter "arising under this Constitution, or involving its interpretation"; and therefore it was a matter of Federal jurisdiction, under sec. 73 of the Constitution; and this Court has power to hear the appeal provided the proper procedure for appeal be followed. As to the procedure, sec. 395 of the Commonwealth Act does not apply; but the *Judiciary Act* 1903 clearly justified the bringing of the appeal to this Court (see sec. 39 (2) (*b*) (*c*) (*d*)). The trial was before a Stipendiary Magistrate as prescribed in (*d*); and the defendant could not have been convicted without finding the arguments of defendant's counsel to be unfounded. Such a finding —a finding (a) that the New South Wales Act remained in full force notwithstanding the Commonwealth Act, and (b) that there was no inconsistency between the two Acts within the meaning of sec. 109 of the Constitution—is an exercise of the Federal jurisdiction within sec. 39 (2), and may be the subject of an appeal direct to this Court. According to *Miller* v. *Haweis* (1) a question of Federal jurisdiction may be raised upon the face of a plaintiff's claim, or it may be raised for the first time in the defence for the purpose of sec. 39 of the *Judiciary Act*. Therefore, in my opinion, we must hear the appeal.

But I can find nothing to justify the contention that the s.s. *Wear* in Port Jackson was subject exclusively to the Commonwealth navigation laws or that proceedings can no longer be taken under the New South Wales Act. Such is not the scheme of the Constitution. Sec. 51 (I.) of the Constitution enables the Commonwealth Parliament to make laws as to trade and commerce among the States, and this power extends to navigation (sec. 98). But secs. 106 to 108 bind equally with sec. 51; and it is enacted by sec. 106 that "the

(1) (1907) 5 C.L.R., at p. 93.

Constitution of each State . . . shall, *subject to this Constitution*, continue as at the establishment of the Commonwealth." The Constitution of New South Wales gives power to the State Legislature to make laws for New South Wales "in all cases whatsoever." Sec. 107 provides that "Every power of the Parliament of a Colony which has become . . . a State, shall, unless it is by this Constitution *exclusively* vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth." The Commonwealth Constitution came into force on 1st January 1901, and this State law came into force on 19th December 1901. The power to make laws as to navigation (at all events, navigation within a State) is not exclusively vested in the Commonwealth Parliament, nor is it withdrawn from the Parliament of the State. The provision as to the citizen's duty where the two laws clash is contained in sec. 109—"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, *to the extent of the inconsistency*, be invalid."

The scheme therefore is that State law and Commonwealth law, within the powers given to State and Commonwealth respectively, may co-exist; but that if they clash—if they are inconsistent, repugnant—the State law must yield.

Now, if the sailing rule as made by the State differed from the sailing rule made by the Commonwealth, the Commonwealth rule would (except for art. 30 of the Commonwealth rules hereafter mentioned) undoubtedly prevail. But the rules are the same, word for word—"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." So the masters of the ships know precisely and definitely what they have to do; and they are not perplexed by conflicting directions as to navigation. By obeying the State rule they obey the Commonwealth rule. So far, no inconsistency is to be found in the two Acts.

There is, moreover, a very salutary provision in the Commonwealth rules themselves which excepts from the operation of the Commonwealth rules any harbours, &c., as to which there is a local rule applicable—art. 30: "Nothing in these Rules shall *interfere with*

H. C. OF A. 1926. HUME v. PALMER. Higgins J.

the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters." There is a rule to the same effect made under the English *Merchant Shipping Act*. Its effect has been discussed in *The Carlotta* (1), *The Bitinia* (2), and in other cases, such as *The C. S. Butler* (3); and the result has been well stated in *Halsbury's Laws of England*, vol. XXVI., p. 477: "The purpose of this article appears to have been, and still to be, to preserve all local rules lawfully made, *whether under a local Act or not*, from any presumption of being abrogated by the Sea Regulations, and also *to make such local rules prevail over the Sea Regulations when the latter clash with a special local rule.*"

It is clear from the cases just cited that the relation of the local rule to the Commonwealth rules is not at all the same as the relation of State laws to Commonwealth laws under sec. 109 of the Constitution. Under sec. 109 the State laws yield to the Commonwealth laws *to the extent of their inconsistency*; but under this art. 30 the Commonwealth rules are not even to be regarded at all when local rules deal with the whole subject. This result is due to the sweeping words of the article to the effect that nothing in the Commonwealth rules "*shall interfere with the operation of*" the local rule of a harbour. The master has generally to act rapidly in critical situations; and the Commonwealth rules do not oblige him to decide on the spur of the moment how far the local rules are inconsistent with the Commonwealth rules, and to give effect to the Commonwealth rules so far as they are inconsistent; he is allowed to ignore the Commonwealth rules, and to obey absolutely the local rules applicable. The Federal Regulations have been wisely framed so as to adopt the rules under the New South Wales Act for Port Jackson, and so as to relieve masters in navigating the harbour from the puzzle of piecing together, on an emergency, possibly conflicting rules under the State Act and under the Commonwealth Act.

I understand, however, that a doubt has been raised whether art. 30 of the Commonwealth Regulations applies to New South Wales Regulations, so as to give this predominance to the latter. I cannot

(1) (1899) P. 223. (2) (1912) P. 186.
(3) (1874) L.R. 4 A. & E. 238.

see why there should be any doubt, when one considers the language of art. 30, and the obvious end to be achieved. The New South Wales Regulations are "relative to"—relate to—the harbour of Port Jackson, although they relate to other things also, such as navigation on the high seas. It is only to the extent that the New South Wales Regulations relate to any harbour, river or inland water of New South Wales that the predominance is given. Then, from the point of view of the Commonwealth the New South Wales Legislature is a local authority, just as from the point of view of the Empire the Commonwealth is a local authority. Moreover, from the point of view of the Commonwealth the New South Wales regulation is a special rule, as distinct from the general rule; just as from the point of view of the Empire a valid regulation as to the Bosphorus or the Danube is a special rule. This contrast between "local" and "general" is maintained right through the *Merchant Shipping Act* 1894 (see in particular Part II. as to marine boards, and Part XI. as to lighthouses). In *Halsbury's Laws of England*, vol. XXVI., p. 479, it is said that "there appears to be no doubt that 'local authority' in this article" (30) "includes authorities in foreign countries," and numerous cases are cited (pp. 373, 480). The *Sea Regulations* 1910, made under the British Act, apply to "tidal waters connected with the high seas . . . if there are no local rules," if they are navigable by sea-going vessels (p. 376); and in my opinion, the same construction ought to be given to the Commonwealth art. 30, which uses the same words as the British art. 30.

So far, then, one finds no inconsistency between State Act and Commonwealth Act. But it is urged for the appellant that there are inconsistencies between the Acts in other respects, and in particular as to the sanctions where a breach of the rules has been committed. The State Act does not impose a penalty unless the breach be wilful (sec. 115 (*a*)); whereas under the Commonwealth Act the penalty may be imposed whether the breach be wilful or not (sec. 258 (2)). It is true that by sec. 258 (4) it is provided that a master guilty of a wilful breach shall be guilty of an indictable offence; but there is no provision that the milder provision of a penalty is not to be applicable even where an indictment would lie. Here, the penalty imposed, £10, is a penalty that could be imposed

H. C. OF A. 1926.

HUME v. PALMER.

Higgins J.

under the Commonwealth Act. But I do not find anything in the Commonwealth Act to justify the State order for three months' hard labour if the penalty be not paid.

But the position has to be considered on much broader grounds. The punishment has been inflicted under the State law for an offence against the State law; and there is no provision in the Constitution that the State Act becomes inoperative from the time that the Commonwealth Act deals (within its powers) with the same subject matter. The State Court has punished the defendant for a breach of the State Act; and that Act, under sec. 107, is valid unless the power to pass such an Act was by the Constitution withdrawn from the State Parliament or *exclusively* vested in the Commonwealth Parliament. The power has not been withdrawn, and it has not been exclusively vested in the Commonwealth Parliament. The Commonwealth Parliament has power to make laws with respect to trade and commerce among the States; and one of the vessels concerned was engaged in inter-State commerce. But the State Parliament has not been deprived of its power to legislate for the safety and convenience of persons and property within the territory of New South Wales; and its *Navigation Act* of 1901 is within that power. The State Act remains valid as to the duties which it imposes on masters of ships in Port Jackson; and the sanctions which that Act imposes for disobedience of the Act remain valid. For any breach of the Commonwealth Act the sanctions imposed by the Commonwealth Act are applicable.

No doubt, the effect would seem to be that the same man may be punished by the Commonwealth and by the State for the same offence—not technically the same, but practically. The remedy is to be found—if the Commonwealth Parliament see fit to adopt it—in some provision forbidding, either absolutely or conditionally, a prosecution by the Commonwealth where there has been a prosecution by the State. In making such a provision, the Commonwealth Parliament would be merely following its own device as to marine inquiries. By sec. 364 (2) of the Commonwealth Act it is enacted that a marine inquiry under the Commonwealth Act is not to be held where the matter has once been the subject of an investigation or inquiry, and has been reported on by a competent tribunal in

any part of the King's dominions. Another analogy is to be found in art. 30 of the Commonwealth Regulations, which gives effect to the local rules applicable to any harbour, river or inland waters.

No reference has been made by counsel for any of the parties to American decisions. In the United States, however, the same kind of difficulty has had to be faced, as between the laws of the Union under the commerce clause of the Constitution and the laws of the States under their residuary powers. Where an Act of the State conflicts with a law of the Union, both of the Acts being within the respective powers of State and Union, the Union law is supreme. It is reassuring to find that the Courts have reached conclusions with which the views which I have stated are in accord. The subject is discussed *passim* in *Prentice and Egan's Commerce Clause of the Federal Constitution*, in *Miller's Constitution of the United States* (1893), in *Cooley's Constitutional Limitations*. But I have found no concrete case in which the position is more satisfactorily stated than in the case of *Smith* v. *Alabama* (1). An Act of the State of Alabama provided that it should be unlawful for an engineer of a railroad train in the State to drive the train without undergoing an examination and obtaining a licence. Smith was driver of an inter-State train, and had not complied with the State Act. It was held by the Supreme Court (2) that the Act was not in its own nature a regulation of inter-State commerce; that it was an Act of legislation within the powers reserved to the State to regulate the relative rights and duties of persons being and acting within its jurisdiction; that so far as it affected transactions of commerce among the States, it did so only indirectly, incidentally, remotely, and not so as to burden or impede the transactions; that it was not in conflict with any express enactment of Congress on the subject, or contrary to any intention of Congress to be presumed from its silence; and that the Act was valid. The Supreme Court said (3) that the State was not cut off by the Constitution from legislating upon all subjects relating to health, life, safety of citizens, though the legislation might *indirectly* affect the commerce of the country; and that the Act was obligatory upon persons within the State's territorial jurisdiction,

(1) (1888) 124 U.S. 465. (2) (1888) 124 U.S., at p. 482.
(3) (1888) 124 U.S., at p. 475.

H. C. OF A. 1926.

HUME v. PALMER.

Higgins J.

whether on land or water or engaged in commerce foreign or interstate, or in any other pursuit. The State had power to define what particular things should be done by a carrier in order to secure the safety of the persons and things he carried. It was competent for Congress to legislate on the subject matter of the Act, prescribing qualifications for engineers of carriers engaged in foreign or inter-State commerce ; and if the State regulation were inconsistent with the Congress regulation, the State regulation must give way (1). But these State regulations were not regulations of inter-State commerce : " They are parts of that body of the local law which . . . properly governs the relation between carriers . . . and the public who employ them, which are *not displaced until they come in conflict with express enactments of Congress* in the exercise of its power over commerce " (2). This case was followed in *Gladson* v. *Minnesota* (3).

In my opinion, therefore, the appeal should be dismissed.

Perhaps I ought to refer to the fact that in course of the discussion reference was made from the Bench to the relation of the British *Merchant Shipping Act* to the Commonwealth *Navigation Act*. The relation of these Acts is not referred to in the grounds of appeal; the question of the relation is not susceptible of a summary, obvious, answer, universally applicable ; and it is not our duty to give an opinion on such a grave constitutional question until an issue be properly raised and *with proper parties*.

STARKE J. The appellant was charged with a breach of the *Navigation Act* 1901 of New South Wales, in that within the harbour of Port Jackson in New South Wales he contravened art. 19 of the State Collision Regulations made on 3rd July 1911 (New South Wales *Rules, Regulations and By-laws*, vol. IV., pp. 317 *et seqq.*) ; but he contended that he was governed by art. 19 of the Collision Regulations passed by the Parliament of the Commonwealth pursuant to the *Navigation Act* 1912-1920, sec. 258, and not by the State Regulations. It was admitted that the appellant was the master of a British ship registered in Australia, engaged

(1) (1888) 124 U.S., at p. 479. (2) (1888) 124 U.S., at p. 480.
(3) (1897) 166 U.S. 427.

in the inter-State trade. As an answer to the appellant's contention the respondent insisted that the Federal Collision Regulations were repugnant to the Collision Regulations made under the *Merchant Shipping Act*, and void and inoperative by reason of the provisions of the *Colonial Laws Validity Act*. It was pointed out that this argument might also destroy the State Regulations, and for the same reason.

Now, art. 19 in each code of regulations contains the same direction, namely, that when two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on the starboard side shall keep out of the way of the other. There seems no doubt that the appellant disobeyed this rule, and it is a grave reflection on our laws that the complications existing in this case can arise. They are unnecessary and detrimental to the public interest. But the Court must decide the questions, and before doing so must also decide, as a preliminary point, whether an appeal to it is competent or not. If the Magistrate who heard the case was exercising Federal jurisdiction the appeal is competent; otherwise it is not (*Judiciary Act*, sec. 39; *Miller* v. *Haweis* (1); *Troy* v. *Wrigglesworth* (2); *H. V. McKay Pty. Ltd.* v. *Hunt* (3)).

The prosecution was based upon the State Act, and it was argued that it was a necessary incident of the Magistrate's jurisdiction as a State tribunal to decide whether the State law governed the case (cf. *Commonwealth* v. *Limerick Steamship Co.* (4)); but the law, as now settled, is that a tribunal does exercise Federal jurisdiction if it be necessary for it in the particular case to decide any question involving the interpretation of the Constitution.

"The character of a case is determined by the questions involved" (*Miller* v. *Haweis* (5)). A question necessarily involved in the determination of the present case is whether overlapping State and Federal sea regulations in practically identical words, are inconsistent laws within the meaning of sec. 109 of the Constitution. That involves the interpretation of the Constitution, and consequently an exercise of Federal jurisdiction. The inconsistency of the

(1) (1907) 5 C.L.R. 89.
(2) (1919) 26 C.L.R. 305.
(3) (1926) 38 C.L.R. 308.
(4) (1924) 35 C.L.R. 69, at p. 118.
(5) (1907) 5 C.L.R., at p. 93.

H. C. OF A. 1926.

HUME v. PALMER.

Starke J.

two laws is established, in my opinion, by the principle expounded in the decisions of this Court in *Union Steamship Co. of New Zealand* v. *Commonwealth* (1) and *Clyde Engineering Co* v. *Cowburn* (2). The Federal law covers the whole subject matter of the State Regulations in relation to navigation and shipping in inter-State and foreign trade and commerce. It produces in its code of sea rules "a uniform whole," and makes it the law for the regulation of navigation and shipping within the ambit of the Federal power. But, in addition, the Federal law has imposed somewhat different sanctions upon contraventions of its code, than are imposed under the State code for the same acts (cf. Federal *Navigation Act*, sec. 258; State *Navigation Act*, sec. 115). It is not difficult to see that the Federal code would be "disturbed or deranged" if the State code applied a different sanction in respect of the same act. Consequently the State regulations are, in my opinion, inconsistent with the law of the Commonwealth and rendered invalid by force of sec. 109 of the Constitution.

There still remains for consideration the effect of the Imperial Sea Regulations operating under the *Merchant Shipping Act*. They are in force everywhere as to British ships. It may well be, but for the provisions in secs. 735 and 736 of the *Merchant Shipping Act*, that both the State sea regulations and the Federal sea regulations would be repugnant to the Imperial sea regulations (*Union Steamship Co. of New Zealand* v. *Commonwealth* (1)). Those sections, however, confer powers on the Legislature of any British possession, subject to certain restrictions, to repeal wholly or in part the provisions of the *Merchant Shipping Act*, which include the *Sea Regulations* (see sec. 418), relating to ships registered in that possession and to regulate the coasting trade of that possession. The Commonwealth is a British possession within these provisions (*John Sharp & Sons Ltd.* v. *The Katherine Mackall* (3)); but it can only exert the powers conferred by the *Merchant Shipping Act* within the ambit of its constitutional powers, that is, as to trade and commerce with other countries and among the States, and as to navigation and shipping so far as it concerns inter-State and foreign trade (The Constitution,

(1) (1925) 36 C.L.R. 130.
(2) (1926) 37 C.L.R. 466.
(3) (1924) 34 C.L.R. 420.

secs. 51 (I.) and 98; *Australian Steamships Ltd.* v. *Malcolm* (1); *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (2)). The power of the Parliament to enact the various provisions contained in the Federal *Navigation Act* rests upon these enactments. That it has gone beyond its powers and authorities in some respects appears likely; but in sec. 2, sub-sec. 2, is a provision that the Act shall be read and construed subject to the Constitution and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for the sub-section, have been construed as being in excess of the power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power. The sub-section was construed in the case of *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth*, and held to be a legislative declaration of the intention of Parliament that if valid and invalid provisions are found in the Act, however woven together, no provision within the power of Parliament shall fail by reason of such conjunction, but the enactment shall operate on so much of its subject matter as Parliament might lawfully have dealt with. The power given to the Federal authority is to make regulations for the prevention of collisions (*Navigation Act*, sec. 258). The *Navigation (Collision) Regulations*, made or purporting to have been made under that power, provide that they shall apply to all ships (British or foreign) wherever the Commonwealth has jurisdiction, whether upon the high seas or in waters connected therewith and navigable by sea-going vessels. Even coupled with the provisions of secs. 1A and 2 (1) of the *Navigation Act*, the generality of the power to make regulations, and the regulations actually made, may be in excess of the legislative power of the Commonwealth, but then comes sub-sec. 2, which ensures their validity to the extent to which they are not in excess of that power. Consequently, the Regulations are within power as applied to ships registered in Australia and engaged in inter-State or foreign trade, and cover the case now before the Court. It is unnecessary to consider whether the State Regulations are repugnant to the Imperial Regulations, for assuming them to have been lawfully passed under its constitutional powers, including in

(1) (1914) 19 C.L.R. 298. (2) (1921) 29 C.L.R. 357.

H. C. OF A. 1926. HUME v. PALMER. Starke J.

those powers the authorities contained in secs. 735 and 736 of the *Merchant Shipping Act*, they then meet a law of the Commonwealth and are inconsistent with it, as already stated, and invalid under sec. 109 of the Constitution to the extent of the inconsistency.

Some reference has been made to art. 30 of the Federal sea regulations, which provides that nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters. A code of sea regulations in the same terms as the Federal sea regulations is not a special rule within the meaning of art. 30. A special rule cannot be a rule that is already laid down in the sea regulations.

The result, in my opinion, is that the appeal should be allowed and the conviction quashed.

My brother *Gavan Duffy* desires me to say that he has read this judgment and concurs with me in thinking that the appeal should be allowed.

Appeal allowed. Conviction quashed. Order of Magistrate discharged. Respondent to pay costs of appeal.

Solicitors for the appellant, *Ebsworth & Ebsworth.*

Solicitor for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the intervener, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.