[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

TURNER (As constituting a COMMONWEALTH COURT OF MARINE INQUIRY at HOBART);

Ex parte THE MARINE BOARD OF HOBART.

THE STATE OF TASMANIA AND ANOTHER Plaintiffs;

AGAINST

THE COMMONWEALTH AND ANOTHER . Defendants.

H. C. of A. 1927.

Melbourne, *Feb.* 22-25.

Sydney, *April* 13.

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

Constitutional Law—Powers of Commonwealth and State—Powers of the Parliament of the Commonwealth—Navigation and shipping—Court of Marine Inquiry—Casualty in navigable river of State—Collision between ships not engaged in foreign or inter-State trade or commerce—Waters used by such ships—Prohibition—Judicial power—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), (XXXIX.), 71, 72, 98—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *sec.* 478—*Navigation Act* 1912-1925 (*No.* 4 *of* 1913—*No.* 8 *of* 1925), *secs.* 2, 356, 364—*Interpretation Act* 1889 (52 & 53 *Vict. c.* 63), *sec.* 18—*Marine Act* 1921 (*Tas.*) (12 *Geo. V. c.* 60), *sec.* 125.

A collision took place in the waters of the River Derwent between two steamships owned and registered in Hobart and engaged solely in trading in the Port of Hobart and not then engaged in trade or commerce with other countries or amongst the States. The place at which the collision occurred was a short distance outside the course ordinarily used by ships engaged in such trade or commerce, but the two steamships had traversed part of that course shortly before the collision took place.

Held, by *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that a Court of Marine Inquiry established under the *Navigation Act* 1912-1925 had no jurisdiction to inquire into the collision:—

By *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ., on the grounds (1) that the facts above stated did not indicate any relation between the casualty

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and foreign or inter-State trade or commerce; (2) that sec. 478 of the *Merchant Shipping Act* 1894 did not enable the Parliament of the Commonwealth to alter the nature of the jurisdiction exercised by any Commonwealth Court so as to affect the division of powers which the Constitution makes between Commonwealth and State:

By *Powers* J., on the ground that, although sec. 478 of the *Merchant Shipping Act* 1894 authorized the Parliament of the Commonwealth to direct an inquiry to be made as to a casualty to a British ship registered in Australia wherever it happened, the two steamships which collided were within the exemption in sec. 2 (1) of the *Navigation Act* from the operation of the Act, for at the time of the collision neither of them was within any of the exceptions from that exemption.

Newcastle and Hunter River Steamship Co. v. *Attorney-General for the Commonwealth*, (1921) 29 C.L.R. 357, applied.

Per Isaacs J.:—(1) (*a*) Sub-sec. 1 of sec. 478 of the *Merchant Shipping Act* 1894 is in itself an independent grant of power in respect of a separate independent subject, namely, the matters enumerated in the sub-section—which include the casualty in question in these proceedings; (*b*) sub-sec. 2 of that section enlarges the jurisdiction of a Court or tribunal by enabling it to make inquiries respecting any of the matters enumerated in sub-sec. 1 although occurring outside its ordinary territorial jurisdiction. (2) The power conferred on the Parliament of the Commonwealth by secs. 51 (I.) and 98 of the Constitution extends to the protection of inter-State and foreign trade vessels by legislative provisions reasonably calculated to avoid even the risk of collision. (3) The expression "waters which are used by ships engaged in trade or commerce with other countries or among the States" in sec. 2 (1) (*b*) of the *Navigation Act* 1912-1925 means waters which such ships do in fact use whenever circumstances require.

Per Higgins J.:—(1) The Commonwealth *Navigation Act* 1912-1925, on the true construction of sec. 2 (1) (*b*), applies to the inquiry; and the Act in this respect is within the power of the Federal Parliament under the Constitution (sec. 51 (I.), (XXXIX.)). (2) Prohibition would lie against the Commonwealth Court of Marine Inquiry to prevent that Court from inquiring into the collision, although the officer who conducts such an inquiry under the *Navigation Act* 1912-1925 is not exercising the judicial power of the Commonwealth within the meaning of Chap. III. of the Constitution.

APPLICATION for prohibition and demurrer.

An application was made to the High Court by the Marine Board of Hobart, constituted under the *Marine Act* 1921 (Tas.), for an order nisi for a writ of prohibition to prohibit Ernest William Turner, as constituting a Commonwealth Court of Marine Inquiry at Hobart under the *Navigation Act* 1912-1925, from proceeding with an

inquiry as to a collision which had taken place between two steam vessels, the *Cartela* and the *Togo*, in the Port of Hobart.

On 22nd February 1927, after the argument upon the application had begun, an action was instituted in the High Court by the State of Tasmania and the Marine Board of Hobart against the Commonwealth and Ernest William Turner, as constituting a Commonwealth Court of Marine Inquiry at Hobart, asking, by the statement of claim endorsed on the writ, for certain declarations and an injunction. To the statement of claim the defendants pleaded and demurred. Subsequently, at the suggestion of the Court, the statement of claim was amended, and as amended was as follows :—

1. On 25th December 1926 two steam vessels named respectively the *Cartela* and the *Togo* collided in the waters of the River Derwent at the approach to Sullivan's Cove in the Port of Hobart, Tasmania.

1 (a). The place at which the said vessels *Cartela* and *Togo* actually collided was situate a short distance outside the course ordinarily used by ships engaged in trade or commerce with other countries or amongst the States but the said vessels *Cartela* and *Togo* had traversed part of the said course so used as aforesaid immediately before the collision took place. No vessel engaged in trade or commerce with other countries or amongst the States was at the time of the said collision actually affected by the navigation of either of the said vessels *Cartela* and *Togo*.

2. Both the said vessels are owned and registered in the Port of Hobart and are mercantile vessels trading solely within the Port of Hobart as defined by sec. 1 (*p*) of the interpretation part of By-law No. 1 of the Marine Board of Hobart.

2 (a). Neither of the said vessels was on the said 25th December 1926 nor at any other time except as hereinafter stated engaged in trade or commerce with other countries or amongst the States. At certain periods of the year each of the said vessels carries within the Port of Hobart amongst other cargo goods in the course of transit to other countries and to other States.

3. Both the said vessels hold certificates authorizing them so to trade and to carry passengers issued by the said Board under the provisions of Part XIV. of the *Marine Act* 1921 of Tasmania.

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4. The master and the engineer of each of the said vessels hold proper and valid certificates of competency issued by the said Board under a statute now repealed but containing provisions similar to those of the said Part of the said Act and all such certificates remain of full effect by virtue of sec. 11 of the said Act.

5. After the happening of the said collision a preliminary inquiry was held and a report furnished to the said Board by the Harbour-Master of the Port of Hobart pursuant to sec. 125 of the said Act and the said Board decided that a further inquiry was necessary and requested the Governor of Tasmania to constitute a Court of Inquiry for that purpose in accordance with the said Act.

6. The Governor of Tasmania on the advice of his Ministers was prepared to constitute such a Court and had in fact taken certain steps to constitute such a Court when the Government of the Commonwealth of Australia interposed and the Government of Tasmania without admitting that the Government of the Commonwealth of Australia had any authority or power to interfere in any way in the matter stayed all proceedings to constitute the said Court of Inquiry.

7. A Court of Inquiry has been established for Hobart under the provisions of the Commonwealth *Navigation Act* 1912-1920 and Ernest William Turner a Police Magistrate of the State of Tasmania has been constituted such a Court for Hobart as appears by a notification published in the Commonwealth of Australia *Gazette* on 29th September 1923.

8. The said Ernest William Turner has commenced to hold and proposes to continue to hold an inquiry into the said collision and has taken steps in connection with the holding of such inquiry and on 11th February 1927 held a sitting of the said Commonwealth Court of Inquiry (with two nautical assessors) and proceeded to take certain evidence.

9. The plaintiffs submit: (a) that upon the proper construction of the Commonwealth *Navigation Act* 1912-1925 the said Commonwealth Court of Marine Inquiry has no jurisdiction to enter upon or hear the subject matter of the said inquiry into the said collision or to exercise any of the said powers conferred on the said Court by the said Acts; (b) alternatively with (a) that if upon the proper

construction of such Acts they purport to give jurisdiction to such Court to inquire into the subject matter of such collision or exercise any of such powers in respect thereof the said Acts are to that extent *ultra vires* the Commonwealth Constitution and void; (c) the power given by the Commonwealth Constitution to the Commonwealth Parliament of legislating with respect to navigation and shipping is limited to so legislating with respect to trade and commerce with other countries and among the States and does not authorize legislation controlling or regulating ships not engaged in such trade or commerce whilst using the waters of a State port which happen also to be sometimes used by ships engaged in such trade and commerce.

10. The said alleged Commonwealth Court of Marine Inquiry is a Court created by the Parliament of the Commonwealth within the meaning of secs. 71 and 72 of the Commonwealth Constitution but the Justices of such Court have not been granted the tenure prescribed by the said sec. 72.

11. The said alleged Court of Marine Inquiry threatens and intends to proceed with the hearing of the said inquiry and will unless restrained by this Honourable Court continue the same and exercise such of its powers purporting to be conferred upon it by the said *Navigation Act* as it in its discretion considers appropriate or expedient.

12. By reason of the matters stated in the preceding paragraphs the plaintiffs submit that the said alleged Court of Marine Inquiry is a pretended Court and has no jurisdiction to inquire into the said collision or to exercise any of the powers conferred upon it by the said Navigation Acts.

The plaintiffs claim —

(1) Declarations to the effect of the matters stated in each of pars. 9 (a), (b) and (c) and par. 12 respectively;

(2) An injunction to restrain the said alleged Commonwealth Court of Marine Inquiry from proceeding with the hearing of the said inquiry and from exercising any of the powers purporting to be conferred by the said *Navigation Act*.

To that statement of claim the defendants demurred.

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Ellis, for the Marine Board of Hobart, in support of the application for prohibition.

Owen Dixon K.C. (with him *C. Gavan Duffy*), for the Commonwealth, took a preliminary objection. This is not a case for prohibition. The Court of Marine Inquiry is not a tribunal to which prohibition will lie. Prohibition only lies to prevent a usurpation of judicial authority. The Court of Marine Inquiry was in this case doing nothing more than holding an inquiry for the purpose of making a report. It was not proceeding to exert any power that could be called judicial. (See *Navigation Act* 1912-1920, secs. 358, 364, 365.) Under sec. 364 the Court is not authorized to exert any power adversely to anyone except witnesses. It had not before it any party against whom the investigation was being made.

[At this stage of the argument it was stated that a writ would be issued in an action by the State of Tasmania claiming an injunction. The writ was later on issued with a statement of claim endorsed thereon and a demurrer thereto was filed.]

Ellis. On its proper construction the *Navigation Act* does not apply to these vessels at all. They are not excepted from the exemption from the operation of the Act in sec. 2 (1) by clause (*b*). Sub-sec. 1 does not mean that if a vessel falls within one of the three clauses (*a*), (*b*) and (*c*), the Act necessarily applies to it. In order to come within clause (*b*) a vessel must at the time of the casualty be in waters which are "used" by ships engaged in foreign or inter-State trade or commerce. "Used" should be construed as "habitually or ordinarily used." If on the facts the *Navigation Act* applies, it is *ultra vires* the powers of the Parliament of the Commonwealth conferred by secs. 51 (I.) and 98. The power as to shipping is limited to such aspects of shipping as are relevant or ancillary to foreign and inter-State trade and commerce. The case of *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1) is conclusive on the matter. The cases in the Supreme Court of the United States are not applicable (*Owners of s.s. Kalibia* v. *Wilson* (2)). The *Navigation (Collision) Regulations* of the

(1) (1921) 29 C.L.R. 357.

(2) (1910) 11 C.L.R. 689.

Commonwealth (Statutory Rules 1923, No. 100) do not apply, for there were, within the meaning of art. 30 of those Regulations, rules made by a local authority which governed the course of those vessels. There has been an investigation by a competent tribunal within the meaning of sec. 364 (2) (*a*) of the *Navigation Act*. The Harbour-Master, who made an investigation and report, was a competent tribunal (see sec. 125 of the *Marine Act* 1921 (Tas.)).

Sir Edward Mitchell K.C. (with him *Moore*), for the State of Victoria intervening. The power of the Commonwealth Parliament to legislate as to shipping and navigation, being limited to shipping and navigation so far as it relates to foreign and inter-State trade and commerce, does not authorize legislation controlling or regulating ships which are not engaged in such trade or commerce while using the waters of a port of a State which are sometimes used by vessels which are engaged in such trade or commerce. That power authorizes legislation as to ships engaged in foreign and inter-State trade or commerce but does not authorize legislation for regulating traffic in the ports of States (see *Attorney-General for Ontario* v. *Reciprocal Insurers* (1)). The power does not extend to subverting the control of ports by the State port authorities. The Court of Marine Inquiry as created by the *Navigation Act* is a Court exercising the judicial power of the Commonwealth (see secs. 356 (2), 370, 394). Prohibition will lie to that Court, first, because it is a Court and, secondly, if it is not a Court, because it is a statutory body which is embarking upon an enterprise in respect of which the exercise of its powers would be *ultra vires* (*R.* v. *Electricity Commissioners*; *Ex parte London Electricity Joint Committee* (2)). [Counsel was stopped upon the question whether prohibition would lie to the Court of Marine Inquiry.] If proceedings are commenced in a Court to which certain powers are given to be exercised at its judicial discretion that Court cannot disclaim that it is going to exercise that discretion. The Court of Marine Inquiry had no jurisdiction to deal with this matter. It had no power to make an inquiry merely for the purpose of a report and it had no jurisdiction to deal with the certificates of the officers because of the provisions of the Merchant Shipping

(1) (1924) A.C. 328.

(2) (1924) 1 K.B. 171, at p. 193.

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Acts. Sec. 478 of the *Merchant Shipping Act* 1894 does not authorize the Commonwealth Parliament to legislate with respect to all ships in waters used by ships engaged in foreign and inter-State trade and commerce. The Possession in which a British ship's port of registration was, had power before Federation to legislate with respect to that ship. The Commonwealth Parliament in passing the *Navigation Act* appears to have assumed that it had under the trade and commerce power a further power in respect of a ship because it was registered in the Commonwealth and a further power still to legislate because certain waters were used by ships which were engaged in foreign and inter-State trade or commerce. The last power is based on the United States authorities, but there is nothing in the Constitution to support it. It is not incidental to the power given by sec. 98 of the Constitution that the Parliament should have power to deal with ships in a port over which the State has control. The Parliament has power to prevent ships engaged in foreign and inter-State trade or commerce from being interfered with in carrying out that trade or commerce, but it has not power to upset the whole arrangements of a port by enacting that ships engaged in that trade and commerce shall adopt a course irrespective of that prescribed for other ships. It cannot direct an inquiry as to the conduct of ships which have no connection with foreign and inter-State trade or commerce.

Keating, for the State of Tasmania intervening, and *McTiernan*, A.-G. for N.S.W. (with him *Moore*), for the State of New South Wales intervening, adopted the arguments of Sir *Edward Mitchell* K.C.

Owen Dixon K.C. If it be conceded that the Court of Marine Inquiry is a Court established for the purpose of exercising the judicial power of the Commonwealth and is badly constituted, when the powers which this Court is given are examined, there is no cause of action disclosed by the statement of claim: no title is shown to relief by way of declaration or injunction. The State has not a cause of action by reason of the fact that the Legislature of the Commonwealth has exceeded its powers and that Turner intends to

exercise the powers supposed to be conferred upon him. The right of the Attorney-General of Tasmania to protect the public rights of citizens of Tasmania is not denied; but he has no right of action because the Commonwealth Parliament erroneously usurps a power of legislation. The assertion by the Parliament of the Commonwealth that it has a particular power of legislation gives no cause of action to a State which claims an exclusive right to legislate upon the same subject. Such a cause of action is not supported by *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (1) or *Commonwealth* v. *Queensland* (2) or *W. & A. McArthur Ltd.* v. *Queensland* (3). No rights of the Crown, as represented by the State of Tasmania, have been or will be invaded by what has been or will be done. All that has happened is that a person at the request of a Minister of the Crown for the Commonwealth is making certain inquiries. The only coercive powers the exercise of which could be threatened are to require that certain persons shall attend or that certain documents shall be produced. Those powers would be exercised against particular individuals and not against classes of persons. Turner's position depends on whether he is an officer of the Commonwealth. He may be the object of an injunction but not of a declaration of right, and he may be brought within the general jurisdiction of the Court if the matter is one which is dependent on the interpretation of the Constitution. There is no power to restrain Turner from sitting as a Court of Marine Inquiry, nor is there power to restrain him from holding an inquiry in which an order affecting the certificates of the officers may be made. If the allegations of fact are true, they do not show a want of jurisdiction. The jurisdiction depends upon the relevance of the facts to the control by the Parliament of the Commonwealth over foreign and inter-State trade and commerce and over the conduct of persons having authority from the Parliament to engage in that trade and commerce. Since those officers hold certificates under a State Act which has the force of law under sec. 24 of the *Navigation Act* and since the casualty took place in waters used for foreign and inter-State trade and commerce, the

(1) (1908) 6 C.L.R. 469. (2) (1920) 29 C.L.R. 1.
(3) (1920) 28 C.L.R. 530.

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Court of Marine Inquiry may under the terms of secs. 2 (1) and 364 investigate the circumstances. The fact that that Court may afterwards deal with the certificates under sec. 372 does not show want of jurisdiction, for the power under sec. 372 is to cancel certificates only so far as they have operation under the *Navigation Act*. If the certificates in this case enable the holders of them to take part in foreign or inter-State trade or commerce the Commonwealth Parliament may deal with them to that extent. The validity of sec. 2 of the *Navigation Act* is not in question here. The Court of Marine Inquiry is entitled to inquire whether there is reason to suppose that something has occurred which is within the power under sec. 2 and also whether a person is entitled to retain a certificate which entitles him to take part in foreign or inter-State trade or commerce. Sec. 2 (1) confers no power, but is restrictive, and the restrictions are sufficient to enable the Court of Marine Inquiry to investigate a casualty which may or may not interfere with foreign or inter-State trade or commerce. Secs. 356 (2) and 364 are ample to give the necessary authority and the Commonwealth Parliament has sufficient power to give that authority. It is always relevant to foreign and inter-State trade or commerce to find whether that trade or commerce has been obstructed. It may or it may not turn out that facts exist upon which a charge will properly lie under the *Navigation Act* properly construed and upon which a certificate may be cancelled, but nothing appears at present to show that those facts do not exist or, if they exist, that anything will be done. Sec. 478 of the *Merchant Shipping Act* 1894 gives power to the Commonwealth Parliament to authorize a Court or tribunal to make an inquiry as to all casualties to British ships registered in Australia. The Commonwealth is a British Possession within that Act (sec. 18 (2) of the *Interpretation Act* 1889; *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1)). The Commonwealth has exercised the power conferred by sec. 478 in enacting sec. 364 of the *Navigation Act*. The power given by sec. 478 either belongs to the States or belongs wholly to the Commonwealth. The power is not divided so that part of it belongs to the States and part to the Commonwealth. The words "subject to . . . restrictions" &c., in sec. 478, do not

(1) (1924) 34 C.L.R. 420, at pp. 425, 426.

apply to the Constitution of the Commonwealth. The last words of sec. 18 (2) of the *Interpretation Act* 1889 show that since Federation the Commonwealth has been the British Possession with respect to Australia and the States have ceased to be British Possessions.

[ISAACS J. referred to *Sir Henry Jenkyns's British Rule and Jurisdiction beyond the Seas*, p. 2.]

Where inter-State and intra-State traffic are intermingled, the trade and commerce power (sec. 51 (I.) of the Constitution) extends to the whole, and it is within that power to deal with intra-State ships which are navigated negligently across the course habitually used by foreign or inter-State ships. The accepted view in the United States is that, if waters are capable of being used for inter-State commerce, they are within the jurisdiction of Congress (*Willson* v. *Black Bird Creek Marsh Co.* (1); *Minnesota Rate Cases* (2); *Southern Railway Co.* v. *United States* (3)). The Court of Marine Inquiry has not vested in it any judicial power of the Commonwealth. Although called a Court of Record and given power to summon witnesses, it is not given power to ascertain or declare rights or to make orders enforcing rights. The vesting of the judicial power of the Commonwealth in a Court does not depend upon the description of the Court but upon its functions (see *Coomber* v. *Justices of Berks* (4); *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (5)). The ascertainment of facts in order that administrative action may be taken is not judicial. A report and inquiry by the Harbour-Master of Hobart under sec. 125 of the *Marine Act* 1921 (Tas.) is not an inquiry by a competent Court or tribunal within sec. 364 (2) (*a*) of the *Navigation Act*. A tribunal which comes within that sub-section is a body which takes evidence from persons before it; it conducts its business by means of a hearing and not by private inquiry (see *R.* v. *Industrial Registrar*; *Ex parte Sulphide Corporation Ltd.* (6)).

Ellis, in reply. The words of sec. 364 (2) (*a*) are very wide and cover any form of investigation. In view of the powers which are conferred on the Court of Marine Inquiry it is a judicial body and,

(1) (1829) 2 Peters 245, at pp. 250, 251.
(2) (1913) 230 U.S. 352, at p. 399.
(3) (1911) 222 U.S. 20.
(4) (1882) 10 Q.B.D. 267.
(5) (1918) 25 C.L.R. 434.
(6) (1918) 25 C.L.R. 9.

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as it is not constituted as required by sec. 72 of the Constitution, prohibition will lie. An inquiry by the Court of Marine Inquiry is much more than an inquiry to find out whether the matter is one in which it has jurisdiction. The proclamation of the Court of Marine Inquiry for Tasmania on 4th October 1923 purporting to be made under sec. 356 of the *Navigation Act*, the Commonwealth cannot now rely upon the power conferred by sec. 478 of the *Merchant Shipping Act*. This case is governed by *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1). No distinction of substance can be drawn between provisions as to the adequate manning of ships and those as to navigation rules for the avoidance of collisions. There is no necessary implication that foreign or inter-State trade was interfered with. Sec. 478 of the *Merchant Shipping Act* does not confer upon the Commonwealth Parliament power to authorize a tribunal to inquire into this casualty. The provisions, restrictions and limitations referred to in sec. 478 (2) include those imposed by the Constitution, so that the Commonwealth Parliament has jurisdiction only over ships engaged in foreign or inter-State trade or commerce. The States have not by reason of sec. 18 (2) of the *Interpretation Act* 1889 lost their powers under the *Merchant Shipping Act*. The State of Tasmania has a good cause of action. The Constitution of the Commonwealth has created mutual rights and mutual restrictions as to legislation, and a State may come to the High Court and complain of a violation by the Commonwealth of the rights or duties so created.

[At this stage of the argument the amendments of the statement of claim and the demurrer thereto were filed.]

Sir Edward Mitchell K.C. On the facts as they now appear the case is governed by *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1), to the extent that the discrimen in sec. 2 (1) (*b*) of the *Navigation Act* is not such as to bring this case within the Commonwealth legislative power.

Owen Dixon K.C. Since the amended statement of claim that case has no relevance. No support is given to the defendants by

(1) (1921) 29 C.L.R. 357.

sec. 2 (1), but sec. 2 (2) can be relied on as cutting down the words of sec. 2 (1). The circumstances of this case are such as to leave it within the *Navigation Act*. It is now clear that the ships were within the words of sec. 2 (1) (*b*).

Sir Edward Mitchell K.C. Sec. 2 of the *Navigation Act* is necessarily a section conferring jurisdiction. If sec. 51 (xxxix.) of the Constitution can be used to support sec. 364 of the *Navigation Act*, it is because sec. 364 is incidental to the power as to shipping and navigation so far as that is ancillary to foreign or inter-State trade or commerce. Sec. 51 (xxxix.), however, is limited to matters which are incidental to some actually existing power conferred by statute (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (2)). The only justification for sec. 364 of the *Navigation Act* is to be found in sec. 2 (1) (*b*), and that sub-section adopts a different discrimen from foreign or inter-State trade or commerce, namely, the use of waters by ships engaged in such trade or commerce. As to sec. 478 of the *Merchant Shipping Act* 1894, sec. 356 of the *Navigation Act* was obviously intended to create a Court from which an appeal would lie to the High Court and not to the Court mentioned in the *Merchant Shipping Act*.

Cur. adv. vult.

April 13.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, RICH AND STARKE JJ. The object of the demurrer in this case is to obtain from the Court a decision as to whether a Court of Inquiry established under the provisions of an Act of the Legislature of Tasmania intituled the *Marine Act* 1921 or the Court of Marine Inquiry erected under the provisions of Part IX. of the *Navigation Act* 1912-1920 is the proper tribunal to inquire into and finally deal with a casualty occurring under the circumstances set out in the statement of claim, and we propose to deal with it on that footing. It is not disputed that the Tasmanian

(1) (1914) A.C. 237, at pp. 256, 257; 17 C.L.R. 644, at p. 655.
(2) (1920) 28 C.L.R. 129.

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statute purports to give to its tribunal the power which it seeks to exercise, but for the Commonwealth it is argued that for two reasons its tribunal supersedes the Tasmanian Court.

In the first place, it is said that under the powers conferred by sec. 51 (I.) of the Constitution the Parliament of the Commonwealth has the right to erect a Court with exclusive power to deal with the casualty, and that it in fact has done so under Part IX. of the *Navigation Act*. In the second place, it is said that, whether this be so or not, sec. 478 of the Imperial *Merchant Shipping Act* 1894 enables the Parliament of the Commonwealth to authorize the Court of Marine Inquiry to make inquiries into this casualty, and that Parliament in fact has done so.

With respect to the first contention, Part IX. of the *Navigation Act* is said to give to the Court of Marine Inquiry the power which is now asserted on its behalf, because, as modified by sec. 2 (1) (*b*) of the Act, it enables such an inquiry to be made with respect to such casualties when they occur on the high seas or in waters which are used by ships engaged in trade or commerce with other countries or among the States. The casualty in this case is said to come within this description, because when the collision occurred both vessels were in the waters of the River Derwent, and, if this is not enough to satisfy the words of sec. 2 (1) (*b*), it is said that the scene of the collision was so near the course ordinarily used by ships engaged in trade or commerce with other countries that the colliding vessels were then in fact in waters which are used by such vessels within the meaning of the sub-section. It is unnecessary to determine the exact meaning of sec. 2 (1) (*b*). It has already been decided by this Court, in *Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (1), that sec. 51 (I.) as enlarged by sec. 98 of the Constitution enables Parliament to deal with navigation and shipping only by making laws which are ancillary or relevant to trade or commerce with other countries or among the States. Adopting that test, we thought that Parliament was not at liberty to regulate the manning of ships not engaged in inter-State or foreign trade or commerce merely because they went on the high seas or in waters used by ships engaged in such trade or

(1) (1921) 29 C.L.R. 357.

commerce. Adopting the same test in this case, we think that Parliament is not at liberty to direct its Court to deal with a collision between two vessels not engaged in inter-State or foreign trade or commerce merely because the collision occurred in a navigable river in a State, at a short distance outside the course ordinarily used by ships engaged in such trade or commerce, and shortly after the colliding vessels had traversed part of such course. So far as the *Navigation Act* purports to enable the Court of Marine Inquiry to inquire into a casualty occuring in the circumstances set out in the statement of claim, we think it goes beyond the powers conferred by the Constitution and is to that extent invalid, because none of the facts set out in the statement of claim indicate that there is any relation between the casualty and inter-State or foreign trade. For the purpose of this case it is not necessary to inquire further as to the validity of any portion of the Act. It has been suggested that, even if the statement of claim contains nothing to show that the casualty had any relation to inter-State or foreign commerce, there may be other facts, not set out in the statement of claim, which show that such a relation does exist, and that in order to succeed the plaintiffs must negative the existence of such facts. We think that the statement of claim must be taken to negative the existence of any such facts. Originally, the defendants not only demurred, but pleaded to the statement of claim, but, in order that the point at issue might be finally settled, it was agreed between the parties that the statement of claim should be amended so as to state all relevant facts, and that the defence should be withdrawn ; and this was done.

With respect to the second contention for the defence, we think that the effect of sec. 478 of the Imperial *Merchant Shipping Act* 1894 is merely to enable legislatures of British Possessions to enlarge the territorial jurisdiction of their Courts, but not otherwise to alter the nature of their powers. Sec. 478 (2) provides that a Court or tribunal so authorized shall have the same jurisdiction over the matter in question as if it had occurred within the ordinary jurisdiction of the Court or tribunal, but subject to all provisions, restrictions and conditions which would have been applicable if it had so occurred. We do not think that under the section Parliament

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can alter the nature of the jurisdiction exercised by any Commonwealth Court, so as to affect the division of powers which the Constitution makes between Commonwealth and State. No question of the area of territorial jurisdiction exists here, and any discussion of the provisions of sec. 478 is therefore irrelevant to the question which we have to decide.

ISAACS J. Unless the doctrine of "implied prohibitions," discredited by the Privy Council in *Webb* v. *Outrim* (1) and discarded by this Court in the *Engineers' Case* (2), be, consciously or unconsciously, revived and re-applied to the Constitution, this matter appears to me to stand transparently plain in favour of the Commonwealth. It is from the trade and commerce clause (sec. 51 (I.)) that it has, in effect, been sought in the present case to resurrect a once familiar "implied prohibition."

The event out of which the litigation arises, like many others which have given rise to great issues, was in itself comparatively small. But on the decision depends, as will be seen, the power of any authority in Australia in many cases to protect, not merely property at sea, but even the lives of passengers and crew. The facts are simple as it happens. In 1926 a shipping casualty occurred in the Port of Hobart, caused by a collision between two ships registered in Tasmania. The vessels were engaged only in intra-State trade, and no other vessel is concerned. The actual place of the collision was in the waters of the Port, not in the "course ordinarily used" by vessels engaged in inter-State or foreign trade, but immediately after leaving that course. The State of Tasmania insists that it alone has authority to investigate the casualty, and to oust the Commonwealth tribunal which is proceeding with an inquiry; and, on the other hand, the Commonwealth maintains that it has at all events the right to make the inquiry, and incidentally asserts that its authority is exclusive of that of the State.

There are two proceedings, prohibition and action. If it were necessary to deal with the question of procedure I should require further consideration as to whether this is in any event a proper

(1) (1907) A.C. 81; 4 C.L.R. 356. (2) (1920) 28 C.L.R. 129.

case for prohibition. (See, for instance, *In re Clifford and O'Sullivan* (1).) But, in the view I take of the main questions, except to say that I am perfectly clear the plaintiffs would have no *locus standi* to proceed against the Commonwealth merely on the ground that the case was not covered by the Act in point of construction, I do not stop to address myself to procedure. I go on at once to examine the real rights of the parties. Those rights are brought under examination by the Commonwealth's demurrer to the statement of claim.

There emerge from the Commonwealth's arguments in support of the demurrer, three grounds:—

The first is that this controversy, whatever be the substantive law, is not a "matter" within secs. 75 and 76 of the Constitution. This contention is unsustainable for the reasons stated in the *Union Label Case* (2) and the *Queensland Income Tax Case* (3).

The second is that the facts do not show that the ships concerned are excluded from the operation of the *Navigation Act* by par. (*b*) of sub-sec. 1 of sec. 2 of the statute. If they do, there is at once an end of this demurrer, because, whatever the legislative power of the Commonwealth, the conclusion would mean that it had not been exerted so far as to cover this case. I agree, however, with the second contention of the Commonwealth, and therefore hold that the plaintiffs cannot succeed merely on the ground that the statute on its true construction does not apply to the case. My reason, based upon the allegations, is that it is not averred that the ships were not at the essential time in "waters which are used" by inter-State and foreign trade vessels, but the averment is merely that they were not in "the course ordinarily used" thereby. The first phrase is a not unknown form of expression, as, for example, in *Weeks* v. *Ross* (4), and is larger than the second, which is a very familiar expression. This will more clearly appear later. I must add that in my opinion the mere fact that a Commonwealth tribunal is exceeding its jurisdiction as created by a valid Commonwealth statute would not confer upon a State, or a rival State tribunal, a *locus standi* here to restrain the Commonwealth tribunal or to seek a declaration of illegality.

(1) (1921) 2 A.C. 570.
(2) (1908) 6 C.L.R., at pp. 557, 558.
(3) (1920) 29 C.L.R., at pp. 11, 12.
(4) (1913) 2 K.B. 229, at p. 234.

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The third ground is all-important since it concerns the validity of the relevant legislation. The plaintiff State contends that the Commonwealth has no legislative authority whatever to authorize the inquiry in question; the Commonwealth relies both on its general power under the Commonwealth Constitution and on the special power conferred by the Imperial *Merchant Shipping Act* 1894.

1. *Sec.* 478 *of the Merchant Shipping Act* 1894.—To my mind the simplest and least complicated course is to examine the *Merchant Shipping Act* 1894 first, because *the position based on that Act stands distinctly on its own footing.* The Commonwealth Constitution, starting with the then existing Constitutions of the States, withdrew some of the powers thereby given, declared others exclusive in the Commonwealth, and left the rest subject to the Constitution. Of the legislative powers granted to the Commonwealth some are concurrent, some are former State powers made exclusive in the Commonwealth, and others are entirely new. It would be a bold argument that the powers, for instance, in sec. 51 as to weights and measures, or bills of exchange and promissory notes, or bankruptcy and insolvency, or the relations of the Commonwealth with the islands in the Pacific, or conciliation and arbitration, and so on, were limited to inter-State and foreign trade and commerce, by reason of the first power enumerated in sec. 51. In the days when "implied prohibition" was consciously applied, no consistent reason could be given for so limiting those powers. But the real reason is that they are specific powers, complete in themselves, and if incidentally they cross the line of intra-State trade, or any other State power not conferred as an entity upon the Commonwealth, still they must be acknowledged to be exercisable effectively by the Commonwealth and according to the discretion of the united Australian people represented in their national Parliament. That is the exact position of the power conferred by sec. 478 of the *Merchant Shipping Act* 1894. The particular and specific subject matter as to which legislative power is conferred on a British Possession is as to "inquiries as to shipwrecks, or other casualties affecting ships, or as to charges of incompetency, or misconduct on the part of masters, mates, or engineers of ships" in certain named

cases. The Constitution in no way repeals or weakens that enactment. There is no differentiation of ships according to British trade or foreign trade or inter-State trade or intra-State trade. On the contrary, "ship," in the absence of any context otherwise requiring, that is, context in that Act, is defined by sec. 742 thus: "'Ship' includes every description of vessel used in navigation not propelled by oars." One may search in vain for any context differentiating between the trade of separate parts of a federated territory and the inter-State or inter-provincial trade of that territory. Such a division would be not only foreign, but opposed, to the whole scheme of the Act. The only qualifications or limitations on the general words quoted are found in the "cases" enumerated in the section. The Commonwealth Parliament, in sec. 364, has faithfully and even literally followed the provisions of the English section. *Sub-sec.* 1 *of sec.* 478 *is in itself an independent grant of power in respect of a separate and independent subject*, and an enactment that follows it must be lawful. Sub-sec. 2 of sec. 478 of the *Merchant Shipping Act* was relied on by the plaintiffs to limit the grant. Its meaning on the face of the provision appears to me clear, and is really past questioning when its origin is remembered. In 1881, when nothing more existed relevant to Imperial authority to conduct colonial marine inquiries than sec. 242 of the *Merchant Shipping Act* of 1854, a case arose in the Supreme Court of Victoria, namely, *In re Victoria Steam Navigation Board*; *Ex parte Allan* (1), where the Court held that the Victorian tribunal had no jurisdiction to inquire into a casualty in South Australian waters, even though on a voyage to Victoria and though its master and crew were present in Victoria. In 1882 the British Parliament met the situation by the Act 45 & 46 Vict. c. 76. As pointed out in *Murton on Wreck Inquiries*, at p. 153, supported by the speech of Mr. Evelyn Ashley, Secretary of State, reported in English *Hansard* for 1882 (vol. 272, P.D. (3rd ser.), col. 416), the decision referred to was the moving cause of the new legislation. The decision as the law stood was concurred in by the Law Officers of the Crown in England, and the new Act thought necessary. The Act of 1882, by sec. 3, slightly different in arrangement from, but the same in actual provision with,

(1) (1881) 7 V.L.R. (L.) 248; 3 A.L.T. 1.

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sub-sec. 1 of the new sec. 478 of 1894, made the grant of power to the "legislative authority in any British Possession." To leave the matter there would leave the law in *Ex parte Allan* (1) standing. Consequently, a provision was made that wherever the matter occurred, the colonial tribunal should have the same jurisdiction as it would have had if the matter had occurred within its ordinary jurisdiction. In other words, it *was extra-territorial jurisdiction in respect of events occurring abroad.* Let me illustrate this by reference to the arrangement in sec. 478 of 1894. In par. (*b*) of sub-sec. 1 the inquiry may be held "where a shipwreck or casualty occurs in any part of the world to a British ship registered in the British Possession." If the shipwreck or casualty took place in the waters of the Possession, or in such of the waters of the Possession as are allotted to the tribunal so as to constitute its ordinary jurisdiction, then there would *by virtue of sec.* 478 (1) of course be jurisdiction to hold the inquiry, and sub-sec. 2 says that, wherever the matter occurred, the tribunal is to have the same jurisdiction. But to secure equality of treatment the same provisions, restrictions and conditions are to apply to foreign casualties as to local ones. There is nothing in sub-sec. 2 cutting down the amplitude of the power contained in sub-sec. 1 in respect of the class of ships concerned or the trade in which they or the officers are engaged. Indeed, sub-sec. 5 is diametrically opposed to any such differentiation. Let us consider some of the consequences of such differentiation. One set of investigating authorities would inquire into casualties where all the ships concerned were engaged in intra-State trade, and another set of authorities would act where all ships concerned were engaged in inter-State or foreign trade. But suppose a collision between a foreign trade ship and an intra-State trade ship. Apparently each authority would have to confine itself to its own class of ship. The State authority would investigate and report as to the intra-State ship, with no power to summon the officers and crew of the foreign trade ship or inquire into the conduct of the latter ship; and, correlatively, the Federal tribunal would have no means of summoning the officers of the intra-State ship, or any power to inquire into the conduct of that ship. *Hume* v. *Palmer* (2), recently decided, was a case that

(1) (1881) 7 V.L.R. (L.) 248; 3 A.L.T. 1. (2) (1926) 38 C.L.R. 441.

would have raised such a condition of affairs. That this result is the true effect of the Imperial legislation I refuse to believe. It leads not merely to futility but to disaster. The basis of the view is that the exercise of the powers granted by sec. 478 are limited by the extent of the ordinary powers of the Possession under its own general Constitution: in other words, that sec. 478 adds nothing whatever to those powers, except perhaps that it *pro tanto* releases the Possession from the operation of the *Colonial Laws Validity Act*, which does not go far in aiding the Imperial scheme, because it would not assist exterritorially and leaves many cases chaotic. But test that a little further. What becomes of the British casualties that take place abroad—say, in Canadian or Russian or South African or Chinese waters? The ordinary Constitution of State or Commonwealth contains nothing giving power in respect of trade confined to those localities. And yet by pars. (*b*), (*c*) and (*f*) an inquiry is certainly authorized in such cases where the stated additional circumstances appear. Those provisions would in the plaintiffs' view be a dead letter. The condition of confusion, and even of danger, that must inevitably ensue if the plaintiffs' argument be adopted seems to me to be categorically provided against by the British Parliament. That Parliament first of all laid down its own specific rules with regard to the national entity called British merchant shipping. To begin with, by sec. 1 of the Act of 1894 it followed, with modern adjustments, its traditional policy of insisting on British ownership of all "British ships." Its "chief aim" was "the establishment of a system of national identification of shipping" (see *Halsbury's Laws of England*, vol. XXVI., p. 11); and the learned author adds what is very material for our purpose, "upon the achievement of this aim must depend the achievement of all subsidiary aims," including "the safety of mariners." In sec. 2—a dominant provision—it requires that "*every British ship shall*, unless exempted from registry, be *registered under this Act*." The exemptions (sec. 3) are unimportant. Sec. 4, in providing who shall be registrars of British ships, includes in sub-sec. 1 those in British Possessions. As to some Possessions, the "Governor" is named; as to some, the port officer, and, as to "any other port in any British Possession approved by the Governor of the Possession for the registry

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of ships," the persons designated. A port must, as it seems to me, be either a port that is, or a port that is not, approved for the registry of ships. It cannot be a port of registry for some British ships and not a port for others. It would be a source of indescribable confusion that a port be "approved" for the registry of ships engaging in intra-State trade and not approved for the registry of ships engaging in inter-State or foreign trade, or *vice versa*. Secs. 89 and 90 increase the difficulty. It is impossible to imagine the Governor-General and the State Governor in possible conflict over the approval of a port for registry, or as to the officer to be appointed as registrar, or as to the duties to be performed under secs. 89 and 90. And yet that would be the inevitable position if the "implied prohibition" argument were allowed to prevail, because sec. 91 is an emphatic application of Part I. to the whole of the Dominions. The *Merchant Shipping Act* literally abounds in provisions where the suggested distinction would work utter confusion—for instance, sec. 51 of the Act of 1906. The simple truth is that a "British ship" is such irrespective of its trade, and sec. 18 of the *Interpretation Act* of 1889 effectively provides against the conflicts of authority. The *Merchant Shipping Act* 1894, primarily establishing an all-British mercantile marine policy, introduces relaxations by empowering local regulation, mostly subject to Home approval. It has most sedulously, as it seems to me, guarded against local confusion and inconsistency of colonial regulation by its definition of "British Possession." First, in the *Merchant Shipping (Colonial) Act* of 1869 (32 Vict. c. 11) by sec. 2 "British Possession" is defined for that Act in the terms afterwards adopted in the *Interpretation Act* of 1889. That is emphasized and really interpreted in sec. 7, where a necessary reference to Canada is made. That Possession has become a Dominion in 1867, and so, for the purposes of the *Merchant Shipping Act* of 1854 and its amendments, it is declared that "Canada shall be deemed to be one British Possession." Then in 1889 in the *Interpretation Act*, which applies as a standing provision to all subsequent Acts, "British Possession," unless the contrary appears, means "any part of Her Majesty's Dominions exclusive of the United Kingdom, and where parts of such Dominions are under both a central and a local legislature, *all parts* under the central

legislature shall, for the purposes of this definition, be deemed to be *one* British Possession." I can see no room for hesitation in those clear words. The word "part" means a portion of territory. "Parts of a Dominion" are physical portions of territory comprised in that Dominion, such as the Provinces of Canada and the States of Australia. In each case those parts are under two legislatures, one being local and the other central. The selection of the central legislature is for the sake of simplicity and uniformity, because it represents an entire community for at least any important purposes. Those purposes are immaterial for the new Imperial purpose, which is to be entrusted for a single and complete inquiry and report to the single hand of one Dominion, where such exists, and which then forms a subject matter entirely new to whatever Possession it is entrusted. In each case, for the purpose of answering the description of "British Possession," the Dominion of Canada and the Commonwealth of Australia are respectively but one Possession, except where the contrary appears in a particular instance; for example, the *Colonial Probates Act* 1892 (55 & 56 Vict. c. 6). But even in that Act sub-sec. 3 of sec. 4 indicates the general fullness of the definition. The word "colony" is similarly treated.

The contrary view is forced to desert the clear primary meaning of the words, and the sense in which they have been understood by such a skilled exponent of such terms as Sir *Henry Jenkyns*. At p. 2 of his work, "*British Rule and Jurisdiction beyond the Seas*," it is said of the *Interpretation Act*: "The Act goes on to explain that where several communities, each of which has a local legislature of its own, are under a common central legislature, the expression 'British Possession' is to be treated as including all those communities as if they were one community." He instances British India, the Dominion of Canada, the Commonwealth of Australia, and the Leeward Islands. This receives unmistakable confirmation from the Imperial Parliament itself. By the Act 5 Geo. V. c. 21, the *British Ships* (*Transfer Restriction*) *Act* 1915, provision was made in sec. 2 restraining transfer of British ships registered in the United Kingdom to unqualified persons, unless approved by the Board of Trade. Sec. 3 says: "This Act shall apply to British ships registered . . . in any British Possession

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other than those mentioned in the Schedule . . . as it applies to British ships registered in the United Kingdom." The Schedule included British India, the Dominion of Canada, the Commonwealth of Australia (including Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, and Newfoundland. It is inconceivable, if the view presented for the plaintiffs be right, why the various States were not included in the Schedule. No one imagines for a moment that the intention of the Act was that such transfers of ships in intra-State trade only had to be approved by the Board of Trade, while Australian inter-State and foreign trade ships had not.

For these reasons I am clearly of the opinion that the Commonwealth is the sole "British Possession" in Australia for the purposes of sec. 478 of the *Merchant Shipping Act* 1894. But even if it were not the sole British Possession, it is certainly *a* British Possession for *all* such ships as are mentioned in sec. 478, and therefore, for all such ships as are included in sec. 364 of the *Navigation Act*. Par. (*b*) of sub-sec. 1 of sec. 2 of that Act is consequently, in relation to sec. 364, a discrimen, not of power, but of discretion creating a smaller field of legislative operation than was necessary for valid legislation.

2. *The Constitution.*—Apart from sec. 478, just dealt with, the relevant authority to the Commonwealth Parliament to legislate for the case before us is to be found in the Federal trade and commerce power as enacted in the Constitution. In sec. 51 (I.) that power is thus expressed: "Trade and commerce with other countries, and among the States." Since the mainland of Australia is an island continent and since one of its States is an adjacent island, it is self-evident that the power so expressed, even if nothing further were said about it in the Constitution, must *ex natura rerum* include the regulation, control and protection of all the foreign and inter-State trade and commerce that is carried on the sea or other navigable waters within the jurisdiction of the Commonwealth. But sec. 98 has carried the matter further. It declares that "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." "Navigation and shipping" is, and at the date of the

Constitution was, a perfectly well-known distinct subject of legislation. If any effect at all is to be given to that part of sec. 98, the expression "navigation and shipping" meant more than the trade and commerce in the goods, or as respects the persons actually carried by sea or on other navigable waters. That was already included. It meant to extend the power to the whole of that historic department of national life called "navigation and shipping," so far as it bore a substantial relation to the ordinary trade and commerce as ordinarily understood and confided to Commonwealth regulation by sec. 51 (I.). The case of *Australian Steamships Ltd.* v. *Malcolm* (1) was founded on this view. In that case I observed (2): "As trade and commerce with other countries, and the greater part of mercantile inter-State trade, would in itself necessarily involve carriage by means of ships, it is difficult to see how the declaration of extension to 'navigation and shipping' has any substantial meaning unless the subject matter of 'navigation and shipping,' so far as concerns foreign and inter-State traffic is to be included in the 'trade and commerce' controllable by the Commonwealth." My brother *Powers* (3) said that "the words 'navigation and shipping' were used in sec. 98 to enable the Commonwealth Parliament to do all that could be done by the grant of the power to deal with *navigation and shipping in the widest sense*, so far as it was part of or used *in connection with* inter-State commerce." And further on my learned brother added an observation with which I cordially agree: "I cannot accept the contention that the British Parliament added these words in sec. 98 without any intention to add to a power previously conferred by sec. 51 (I.)." That added power is, of course, an enlargement of the *main* power, and is not merely an incidental power. Incidental powers are expressly provided for in sub-sec. XXXIX. of sec. 51. Both my brother *Powers* and I indicated our agreement with the principle laid down in the American case of the *Second Employers' Liability Cases* (4), namely, "*a real or substantial relation to some part of such commerce*" as bringing the legislation "within the range of this power." As I read the joint judgment of my brothers *Gavan Duffy* and *Rich*, the view is likewise expressed

(1) (1914) 19 C.L.R. 298.
(2) (1914) 19 C.L.R., at p. 327.
(3) (1914) 19 C.L.R., at p. 339.
(4) (1912) 223 U.S. 1, at p. 47.

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that sec. 98 extends the trade and commerce power so as to include the subject of "navigation and shipping" itself for the purposes of Federal trade and commerce. The important thing, then, to bear in mind, is that "navigation and shipping," which originally, as by 12 Car. II. c. 18, began as a most unmistakable department of foreign trade, is itself, on a more highly diversified scale, an affirmative legislative power of the Commonwealth, not independently, but so far only as to supplement the trade and commerce power as that would be without it. That opens a chapter, exemplified in *Malcolm's Case* (1), quite different from the more restricted direct regulation and protection of the trade and commerce power as in sec. 51 (I.), dependent merely on the incidental clause 51 (XXXIX.) to effectuate it. It extends by virtue of sec. 98 to the regulation and *protection* of the mercantile instruments—ships—by which it is conducted, and of the property and the human beings involved in the process, including in that, as *Malcolm's Case* shows, compensation where accidents occur to seamen in the course of their vocation. But when so much is settled and must be conceded, the process of reasoning is to me incomprehensible that denies the power to prevent injury to, and even destruction of, life and property by safeguarding inter-State and foreign trade on frequented routes on sea and other navigable waters of the Commonwealth. The plaintiffs rely on the decision in the *Newcastle and Hunter River Steamship Co.'s Case* (2) as covering this case so far as the Federal Constitution is concerned, and p. 368 is particularly relied on. It is needless to say that, though I was not a member of the Court in that case, I accept its binding effect. But I cannot read into it the devastating effect contended for. It concerned only the manning and accommodation of shipping engaged in intra-State trade. I read the judgment as determining that there was not such a relation between the interior subjects of a ship's personnel and their living arrangements on the one hand, and the safety of inter-State vessels navigating the same waters on the other, as to attract the Commonwealth power. That may be so. But the matter is vitally different when we have to deal, not with purely interior arrangements, but with action necessarily fraught with possible danger to

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

others. For that, the *Newcastle and Hunter River Steamship Co.'s Case* (1) is to my mind no authority. I cannot, for instance, conceive of anyone urging it as determining that a provision in the Commonwealth *Navigation Act* declaring that no ship, even though engaging in purely intra-State trade, or even not engaged in any trade whatever, should cross the bows of an inter-State ship at night, within a certain distance, or lay a mine in its path, or give misleading signals in fog or at night, so as to endanger inter-State or foreign shipping, was not within the power of the Parliament. But if so, how can it be consistently contended that all Australian ships that voluntarily navigate the "waters which are used by ships engaged in trade or commerce with other countries or among the States," and so bring possible peril to those ships, cannot be required to observe necessary caution, or what the Commonwealth Parliament, the only authority competent to determine what caution is necessary, thinks is needed to protect its trade and commerce?

During the argument various imaginary regulations for a port were instanced, and their validity was denied. Possibly that was correct. The *Newcastle and Hunter River Steamship Co.'s Case* (1) determines that some categories of regulation are beyond the Commonwealth power. But that is indecisive, and indeed irrelevant, unless the suggested regulations are admitted to have "a real and substantial relation" to the trade and commerce power. But when we have to deal with "navigation and shipping," as that is judicially, and I should say necessarily, understood, every provision reasonably calculated to avoid even the risk of collision has a real and substantial relation to the admitted subject matter. A sense of humanity forbids any lessening of this principle. In *The Beryl* (2) *Brett* M.R. said in a passage now classical:—"I take it that the basis of the Regulations for Preventing Collisions at Sea is that they are instructions to those in charge of ships as to their conduct; and the Legislature has not thought it enough to say, 'We will give you rules which shall prevent a collision'; they have gone further and said that '*for the safety of navigation we will give you rules which shall prevent risk of collision.*' It is not enough if you do only that which will apparently prevent a collision; we will give you rules which shall regulate your

(1) (1921) 29 C.L.R. 357.

(2) (1884) 9 P.D. 137, at p. 138.

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conduct, not merely for the purpose of preventing a collision, but for the purpose of preventing even a risk of collision." Those are weighty words; they do not rest on any technicality; they indicate that those who framed the regulations, and the Judges who interpreted them, recognized that navigation has inherently very special features. The vessels cannot be separated from the waters they navigate, and sea perils are such as to need, for the sake of protecting those who encounter them, treatment beyond that which is sufficient for land transit. And this is the centre of the matter.

3. "*Waters which are used.*"—It is argued that the word "waters" in par. (*b*) of sec. 2 (1) is too wide, even for the purpose I have stated. That needs examination. It is a trite maxim of interpretation that unless language is quite intractable it must be read so as to preserve its validity. That is a general principle of construction applicable to all documents, and particularly to Acts of Parliament, in order not to thwart unnecessarily the expressed will of the community. *Macleod* v. *Attorney-General for New South Wales* (1) is the leading authority. Judges are not tyrants; nor are they legislators; and though their own duty is independent and inescapable, it cannot be forgotten that the will of Parliament is supreme, unless *clearly* beyond its authority. Those considerations would lead me in this case, even apart from sub-sec. 2 of sec. 2, to construe "waters" in such a reasonable manner as to be free from all possible excess. There is no necessity whatever to strain it to the extravagant limits suggested for the plaintiffs: it is capable, and more than merely capable, of a much narrower connotation suitable to the subject matter, and that should be accepted. But in the presence of sub-sec. 2, the plaintiffs' position on this point is wholly indefensible. When Parliament adds to its words a dictionary, saying (*inter alia*) that the word "waters" is to be read and construed so as not to exceed the legislative power of the Commonwealth, then to disregard that essential direction is to interpret sub-sec. 1, not as it stands in the Act, but as it would stand in another Act in which sub-sec. 2 did not appear. Therefore, even if I find that the word "waters"—a very flexible word—is capable

(1) (1891) A.C. 455.

of a too widely extended meaning and also of one within the legislative authority of the Commonwealth, I should feel compelled by judicial precedent and respect for the declared will of the community in which I live to adopt the one which would preserve the legislation rather than one which would destroy it. "Waters which are used" by ships engaged in trade and commerce with other countries and among the States, are waters that such ships use, not merely ordinarily, but even occasionally, so long as the ships do use them, as a matter of established fact, whenever varying circumstances require that portion of the navigable earth's surface to be used for the purpose. Ordinarily the most convenient course will no doubt be adopted. But circumstances may render it necessary at times to deviate from that particular course and to follow another less usual course within the same recognized area. When as a matter of common practice a further tract of water is adopted as part, though it may be a less frequented part, of the highway, it becomes portion of the "waters used" by the named classes of ships. The voluntary assumption by a vessel engaged in intra-State trade only of a course in an area of waters where the presence of other vessels engaged in foreign or inter-State trade may reasonably be anticipated, because it is "used" by them, creates an undoubted risk which it has always been the central object of "navigation and shipping" practice and judicial decision and legislation alike to prevent. The common dangers of that species of trade and commerce called "navigation" by means of its necessary instruments "shipping," the accidents of storm, fog, tides, currents and mishaps to equipment and machinery leaving a vessel at the mercy of the elements, are all to be taken into account, both in gauging the extent of the power conferred and in interpreting the language of the Legislature. Such considerations are, to my mind, unanswerable reasons for requiring all vessels assuming to enter upon the sea "used" by the class of vessels mentioned to be under control for the safety of foreign and inter-State commerce. That area is not, of course, limited to the precise course ordinarily taken: there must be such an area as will allow of a sufficient margin for meeting in seamanlike manner the vicissitudes of navigation. That area is, in my opinion, well described by the words "the waters used," for that means the area

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actually used and which experience has shown to be necessary and within which safety must be provided for. But it is, in my opinion, altogether extravagant to spread the term "waters" in this context so as to cover portions that are not so used at all, simply because in another sense they may be regarded as identified with the surrounding expanse. A few simple illustrations will, I think, make this clear. If we were to speak of "waters which are used by ships engaged in trade and commerce" between England and America, it is true that they would use waters of the Atlantic Ocean: but would that mean all the waters of the Atlantic from pole to pole? If, again, we speak of waters that are used by vessels trading between Port Said and France, who would dream of including the Ægean Sea or the Adriatic? If the words were "waters which were used by vessels engaged in trade and commerce between Folkestone and Dieppe," one could hardly include the whole of the North Sea; or, if trading between Australia and Ceylon, incorporate the whole Indian Ocean. It is equally unreasonable to say that the waters used by P. & O. liners between Perth and Adelaide comprise the whole Southern Ocean, or that the waters of the Gulf of Carpentaria, Hobson's Bay and Sydney Harbour that are in fact used by foreign commercial ships necessarily include as a matter of law every little bay and every inch of water in those harbours. But if it be replied that as a matter of actual fact foreign and inter-State commerce do in practice, for the purpose of their navigation, use all those waters, then that is necessarily, for the reasons above stated, a complete concession of legislative jurisdiction in respect of them. *Marsden* in *Collisions at Sea*, 8th ed., p. 51, says:—"Many years before the rule of the road at sea was regulated by Act of Parliament, the practice of seamen had established rules to enable approaching ships to keep clear of each other. These rules, which are the foundation of those now in force, were well established by custom, and formed part of the general maritime law administered by the Admiralty Court." The foundation of that is, in one word, "safety." Let us apply that to the rule of the Admiralty Court as to the extent of the "waters" which the Court in such cases regards. In *The Europa* (1) Dr. *Lushington* said:—"The *Iron Duke* was on a voyage from Dublin

(1) (1850) 14 Jur. 627, at p. 629.

to Liverpool, and in a locality where she was likely to meet a great number of vessels; but that case and the others are only applicable to this case so far as laying down the principle that *no man may navigate a vessel with probable risk to the lives of others. The great principle is the chance of injury to life.*" The learned Judge goes on to apply his observations to the destruction of property as well as to the destruction of life. He further considers the application of the principle in what he calls "the broad Atlantic," and he proceeds to consider the likelihood of vessels being met with in a locality in that ocean in which the ship concerned was navigating. He says: "*It is probable the place of meeting would be somewhere in that locality.*" It is hard to see how the same idea could be better expressed than in the words of the Federal Act, so long as the words are read conformably to the subject matter and the great principles involved. *Weeks* v. *Ross* (1) was a case concerned with a ship using a canal which was used by sea-going ships for the purpose of going to and from Exeter, that is, from and to the sea. That is called by Lord *Coleridge* J. (2) "waters which were used by ships coming from the sea to the docks and back again." In *The Algol* (3) *Hill* J., in considering negligence, speaks of a new danger to navigation in "an area of the high seas which . . . included the area in which the" ships "were navigating." Lower down he refers to the "locality in which the ships were navigating." The verbal expressions are different, but the effect is the same as in the Federal enactment. As to some statutory regulations, the discrimen, which, though one of *discretion* in relation to sec. 478 of the *Merchant Shipping Act* 1894, is one of *power* in relation to the Constitution, may, as with respect to manning and accommodation, be too wide. But it is divisible (sub-sec. 2 of sec. 2); and as to sec. 364, permitting of inquiries respecting collisions which may involve dangerous navigation with risk to inter-State shipping, there is no doubt in my mind that the legislation is valid.

One other point argued should be mentioned, namely, whether the circumstance that the Court of Marine Inquiry is declared by sec. 356 a Court of Record is such a breach of the judicature provisions

(1) (1913) 2 K.B. 229. (2) (1913) 2 K.B., at p. 234.
(3) (1918) P. 7, at p. 12.

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of the Constitution as to invalidate the whole of Part IX. of the Act. Notwithstanding the truth that the Marine Court is not a Court within the judicature provisions, the answer to the objection is that the functions committed to it are *not necessarily* judicial. They are such as may be, and not infrequently are, entrusted to administrative or quasi-administrative bodies as well as to judicial bodies, and so, whatever might be otherwise thought, sub-sec. 2 of sec. 2 is clear to maintain the validity of sec. 364, so far as that particular objection is concerned. In relation to sec. 364 it must be remembered that, whether the powers thereby conferred are judicial or not, they are by sec. 478 expressly conferrable upon any "Court or tribunal," and therefore we are not limited in this respect by the judicature sections of the Constitution.

In my opinion judgment should be given for the Commonwealth.

HIGGINS J. The Marine Board of Hobart, created under a Tasmanian Act, seeks to prevent the (Federal) Court of Marine Inquiry from making an inquiry into a collision between two steamships, the *Cartela* and the *Togo*. The collision took place in the Port of Hobart on the River Derwent; and at the time of the collision the vessels were not engaged, directly or indirectly, in any inter-State or foreign commerce. The Constitution gives to the Federal Parliament power to make laws "with respect to . . . trade and commerce with other countries, and among the States" (sec. 51 (I.)); and under sec. 98 this power extends to navigation and shipping; but there is no power given to make laws with respect to trade and commerce or navigation or shipping which is confined to one State. It is therefore urged for the Marine Board of Hobart that the Federal Court has no power to inquire into the collision under such circumstances.

It should be observed that under neither of the proceedings as framed, under neither the application for prohibition nor the action, does the Commonwealth seek to prevent the State authority from making an inquiry into the collision. The State authority seeks to prevent the Commonwealth authority from inquiring, saying that the latter has nothing whatever to do with collisions between two intra-State ships.

As to the proper form of proceeding under the circumstances, I cannot agree with the argument for the Commonwealth that prohibition is not appropriate. Having regard to cases such as *R.* v. *Electricity Commissioners* (1), I regard the proceedings before the (so-called) Court of Marine Inquiry as judicial so far as to make them a fit subject for prohibition even if that Court is not in the strict sense a "Court." Indeed, the Commonwealth Court of Conciliation has been held not to be a "Court" in the strict sense when making awards in industrial disputes (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2)); and yet the remedy of prohibition can be applied (*Tramways Case* [*No.* 1] (3); *Builders' Labourers' Case* (4)).

Personally, I should have felt much more doubt as to the action for a declaration and an injunction. I have expressed my views on this subject on previous occasions (*W. & A. McArthur Ltd.* v. *Queensland* (5); *Commonwealth* v. *Queensland* (6); *Luna Park Ltd.* v. *Commonwealth* (7)); but I need not repeat these views, as the majority of my learned colleagues hold a different opinion.

The first question that arises is as to the true construction of the Federal Act—the *Navigation Act* 1912-1920: does this Act purport to allow such an inquiry as that on which it has embarked? The second question is, if it does so purport, is the Act in this respect beyond the powers of the Federal Parliament, and void?

As to the Construction of the Act.—If the Act does not authorize the inquiry, we need not trouble ourselves as to the meaning of the Constitution. This Court of Marine Inquiry has been established by the Governor-General as from 1st October 1923, under sec. 356 of the Federal *Navigation Act*; and under sec. 364 it is given jurisdiction as to *all* casualties affecting ships "(*b*) where a shipwreck or casualty occurs in any part of the world to a British ship registered in Australia." The two steamers are British ships so registered; and, prima facie, the power to inquire applies to them. But sec. 2 (1) (*b*) of the Act provides that the Act shall *not* apply in relation to any river and bay ship unless the ship is on the high

(1) (1924) 1 K.B., at p. 191.
(2) (1918) 25 C.L.R. 434.
(3) (1914) 18 C.L.R. 54.
(4) (1914) 18 C.L.R. 224.
(5) (1920) 28 C.L.R. 530.
(6) (1920) 29 C.L.R. 1.
(7) (1923) 32 C.L.R. 596.

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seas "*or in waters which are used by ships engaged in trade or commerce with other countries or among the States.*" It is clear that the waters of the River Derwent, the waters of the Port of Hobart, are used by such vessels so engaged, although these vessels were not so engaged at the time of the collision. The only difficulty as to the meaning of the Act that I can see is as to the meaning of the word "waters." The collision occurred at a point where normally foreign or inter-State steamers would not run, entering or departing; but are we to take "waters" in the narrow sense of the particular *waterway* which such steamers would normally use, or in the broad sense of a whole body of water available for such steamers—here, in a definite river or bay? In my opinion, the latter is the true meaning—in the words of the *Standard Dictionary*, "any particular body of water, as a lake, a river, or a sea: sometimes used in the plural; as the *waters* of Lake Superior." According to this construction, the framers of the Act intended, rightly or wrongly, that the Federal Court of Marine Inquiry should have power to inquire into collisions that occur in rivers or bays that are used for inter-State or foreign trade. So far as the Act is concerned, however, they must be actually so used in practice; it is not sufficient that they are merely capable of being so used. In other words, the Act is based on the theory that whatever tends to aid or hinder vessels in bodies of water which are in use for inter-State or foreign trade is a Federal concern, and a fit subject for Federal inquiry.

But then comes the question, is this theory warranted by the Constitution? In my opinion, it is. The power conferred by the Constitution is to make laws "*with respect to* . . . trade and commerce with other countries, and among the States"; and (sec. 51 (XXXIX.)) "with respect to matters incidental to the execution of any power vested by this Constitution in the Parliament." Whatever rules the Federal Parliament thinks fit to lay down for the movement of inter-State or foreign commerce, are within the power of the Parliament; and the rules do not cease to apply because vessels engaged in intra-State activities solely are affected by the particular collision. Under sec. V. of the Constitution Act, all laws made by that Parliament are "binding on the Courts, Judges,

and people of every State . . . notwithstanding anything in the laws of any State"; and under sec. 109 of the Constitution "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 Commonwealth law is paramount. Nor does the fact that the State has made laws for inquiry as to causes of collisions prevent the operation of a Commonwealth law for such inquiries in the interest of inter-State and foreign commerce. There is no limit to the power of the Commonwealth to make laws as to operations of navigation provided that the laws are with respect to inter-State or foreign commerce. The State has no reserve powers, no residuary powers, except so far as the Commonwealth powers exerted with respect to one of the express powers granted to the Commonwealth Parliament do not apply (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1)). As *Marshall* C.J. of the United States stated in *Gibbons* v. *Ogden* (2), the power of Congress to regulate commerce among the several States is supreme and plenary: It is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." It was on this principle that we decided in *Stemp* v. *Australian Glass Manufacturers Co.* (3) that the power of the Federal Parliament to make laws with respect to conciliation and settlement of industrial disputes extending beyond the limits of any one State involved a power to prohibit strikes and lock-outs, as strikes and lock-outs tend to spoil the efforts of the Court of Conciliation to prevent and settle disputes by reason instead of by force—economic force.

The Constitution of the United States resembles our Constitution in committing to the Federal power the regulation of inter-State and foreign commerce but not intra-State commerce; so that the same difficulty has had to be faced by the Supreme Court of the United States. *Hughes* J. of the Supreme Court of the United States, stated the position in a luminous and comprehensive judgment (*Minnesota Rate Cases* (4)):—"There is no room in our scheme of government for the assertion of State power in hostility

(1) (1920) 28 C.L.R. 129.
(2) (1824) 9 Wheat. 1, at p. 196.
(3) (1917) 23 C.L.R. 226.
(4) (1913) 230 U.S., at pp. 399 et seqq.

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to the authorized exercise of Federal power. The authority of Congress extends to every part of inter-State commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of inter-State and intra-State operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate inter-State commerce is not limited by the fact that intra-State transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." Then, after pointing out that the power in question was not a case of necessarily *exclusive* power in Congress, the learned Judge added: "In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation." Of course, the States cannot tax inter-State commerce, or prohibit inter-State trade, &c.; "but within these limitations, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power . . . although inter-State commerce may be affected. . . . In such case" (such as pilotage, construction of dams and bridges, wharfage charges, quarantine regulations, &c.), "Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose, and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own."

This judgment of *Hughes* J. is very elaborate; it is practically a treatise on the Federal commerce power in all its numerous aspects. It shows how the limited commerce power is treated as the result of an experience of some 140 years, by this great nation in America in its multitudinous trading activities; and it is very illuminating

for the purposes of a Constitution such as ours which has adopted the same limitations as to commerce. The principles stated have been applied in many concrete cases; but I propose to cite one only —the case of *United States* v. *Governor Robert McLane* (1). There it was held that steam vessels actually belonging to the State of Maryland, and used for the enforcement of the State fishery laws, the protection of oyster beds, &c., in Chesapeake Bay, must obey the laws of the United States as to inspection. As the judgment stated, the Supreme Court had interpreted the Constitution "as having by the commercial clause given to Congress the exclusive power to regulate navigation upon the public waters of the United States, so that all vessels which navigate those waters, whether engaged in commerce, local or inter-State, or for purposes of pleasure simply, may be alike subjected to the regulations which Congress prescribes, with those exceptions only which Congress deems it wise to make. It may be impossible to regulate navigation upon certain of the public waters and highways of commerce by regulating only a portion of the vessels navigating them. *Rules of navigation, to be of effectual avail for the protection and safety of those vessels which are engaged in commerce with foreign nations and among the States, must control also those vessels not engaged in that commerce, which navigate the same waters.* . . . And it is also apparent that Congress proceeds upon the theory that proper regulation requires that all vessels in those waters shall be subject to one uniform system." Reasoning such as I have quoted meets completely the superficial argument that it is ridiculous for the Federal Parliament to sanction an inquiry as to collisions between bay steamers, possibly racing one another on a public holiday. It is for the Federal Parliament, not for us, to "judge of the necessity of Federal action"; it is for that Parliament, not for us, to say what regulations are wise to make. For us, the only question is the question as to the power of that Parliament.

But that question is in danger of being obscured by a dictum, an *obiter dictum*, in which three Judges out of five concurred, in the case of *Owners of s.s. Kalibia* v. *Wilson* (2). These three Judges refused to follow the Supreme Court of the United States in treating

(1) (1887) 31 Fed. Rep. 763, at p. 765. (2) (1910) 11 C.L.R. 689.

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the power of the Parliament to confer on this Court original jurisdiction in any matter of Admiralty and maritime jurisdiction (sec. 76 of our Constitution) as practically giving to the Parliament legislative jurisdiction over Admiralty and maritime matters. There is no doubt, so far as I can see at present, that in the United States this view of the legislative power of Congress has the effect of enabling Congress to make laws over a greater area of waters than it could make by virtue of the commerce power alone. For instance, it has been held that Congress can make laws applicable to waters of a river which are above tide water (*In re Garnett* (1)). It is not necessary, however, to discuss here the validity of this American extension of powers over navigation; it is enough for me to say that the right of our Federal Parliament to make laws for the whole of the waters used for inter-State or foreign commerce is wholly independent of such an extension. The collision took place in waters of the Derwent, within tidal waters in which inter-State and foreign vessels are in the habit of moving, waters which are clearly waters available for and actually used by inter-State and foreign vessels; and, as stated summarily by *Prentice and Egan* (*Commerce Clause of the Federal Constitution*, p. 86)—"The safety of navigation requires that vessels operating upon the same waters shall be subject to the same rules, and shall be under substantially similar obligations."

But it has been contended that this view as to the power of the Federal Parliament to legislate as it thinks fit with regard to all navigation of every kind in waters which are available for, and used by, vessels engaged in inter-State and foreign commerce has been condemned in a case decided by this Court in 1921—*Newcastle and Hunter River Steamship Co.* v. *Attorney-General for the Commonwealth* (2). In that case, however, there was no question as to navigation of ships: the question was as to the manning and accommodation on ships. The Federal Parliament had purported to apply certain humanitarian legislation to purely intra-State vessels as well as to inter-State and foreign vessels, legislation which did not necessarily affect the use of the waters at all. This Court held that the legislation as to manning and accommodation was invalid so far as it concerned intra-State ships. Counsel for

(1) (1891) 141 U.S. 1.

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

the Commonwealth does not impugn this decision, but distinguishes it as not being applicable to the use of the waters; and it is clearly distinguishable. In that case of 1921, counsel for the Commonwealth argued that sec. 98 of the Constitution in some way gave a general power over ships of all kinds in addition to the powers conferred over inter-State and foreign commerce; and we refused to accept the argument as valid. The words of sec. 98 are "*The power of the Parliament to make laws with respect to trade and commerce* extends to navigation and shipping"; and they clearly show that the power to make laws with respect to trade and commerce, limited as it is to inter-State and foreign commerce, is not extended to intra-State commerce, but it includes navigation and shipping in the subjects to which the legislation for inter-State and foreign commerce may apply. In that case counsel for the States stated explicitly that a decision in his favour would leave untouched the question with which we have in this case to deal. When questions arise as to the number of cubic feet proper for each man in the forecastle, or the number of deckhands or stewards to be employed, there is not any necessary connection between the rules to be prescribed for the internal arrangements of vessels engaged in inter-State and foreign commerce and the rules which ought to be prescribed for the internal arrangements of vessels engaged in small intra-State activities. But it is impossible to prescribe rules for the navigation of inter-State and foreign ships in any given body of water without the power to interfere with the freedom of action of all craft and obstacles in that same body of water. The words of the judgment must be read as limited to the particular kind of legislation which was before the Court—legislation for manning and accommodation. It was a joint judgment; and if it be treated as covering the wider subject, it will be very difficult for any Judge to acquiesce in a joint judgment instead of fully stating his own views in his own words in a separate judgment.

It has further been contended for the States that the Federal Act which creates the Court of Marine Inquiry offends against Chap. III. of the Constitution in committing part of the judicial power of the Commonwealth to an officer who has not a life tenure of his office. It is admitted that Mr. Turner, the officer who has to conduct this

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inquiry under the Commonwealth *Navigation Act*, has not a life tenure; and it has been held, by the majority of this High Court, that anyone who exercises the judicial power of the Commonwealth, must, under sec. 72 of the Constitution, have a life tenure (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1)). My brother *Gavan Duffy* and I dissented from this view; but we are bound by the decision of the majority. Personally, I expressed a doubt (2) as to the exercise of jurisdiction by a special officer for such special inquiries with a view to administration, and perhaps legislation, being an exercise of "the judicial power of the Commonwealth"; and I cited in *Alexander's Case* a number of American decisions in support of my doubt. According to these decisions, Courts created by Congress for the territories are not Courts exercising the judicial power of the United States; nor are Courts for private land claims, nor the inter-State Commerce Commission. Nor, according to our own decisions, are Courts created for the Northern Territory or for Papua (*R.* v. *Bernasconi* (3)), nor is the Court of Conciliation in making its awards a tribunal that requires a life tenure for its President (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.*). Now, as a result of a recent decision of this Court as to Boards of Review for income tax assessments, in *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (4), my doubt has been converted into a positive opinion that such an officer as Mr. Turner, holding an inquiry into a collision of vessels, is not exercising the judicial power of the Commonwealth; and that there is nothing in the Constitution to prevent him from prosecuting the inquiry. This objection to the Federal Act fails also, in my opinion.

I think that the rule for a prohibition should be refused, and the action dismissed.

I ought to add that I have not ignored the important but difficult question raised by my brother *Isaacs* as to the effect of sec. 478 of the *Merchant Shipping Act* 1894, in authorizing the Federal inquiry. It is unnecessary for me to come to a definite opinion as to the effect

(1) (1918) 25 C.L.R. 434.
(2) (1918) 25 C.L.R., at pp. 475, 476.
(3) (1915) 19 C.L.R. 629.
(4) (1926) 38 C.L.R. 153.

of the earlier British Act of 1894 when I find that the later Act—the Constitution Act of 1900—is amply sufficient to justify the inquiry.

Powers J. The questions to be decided by the Court on the defendants' demurrer in this action have to be decided on the facts set out in the amended statement of claim admitted by the defendants, namely, (1) that on 25th December 1926 two steamships, named respectively the *Cartela* and the *Togo*, collided in waters of the River Derwent at the approach to Sullivan's Cove in the Port of Hobart, Tasmania; (2) that the steamships in question were British ships registered in Hobart; (3) that the ships in question were engaged for some time before and on the date of the collision in intra-State trade only; (4) that the ships were "bay and river steamers" trading solely in the Port of Hobart; (5) that the ships at the time of the collision were outside the course ordinarily used by ships engaged in trade or commerce with other countries or amongst the States; (6) that the vessels had traversed part of the said course immediately before the collision took place; (7) that no vessel engaged in trade or commerce with other countries or amongst the States was at the time of the said collision actually affected by the navigation of either of the said vessels; (8) after the happening of the said collision a preliminary inquiry was held and a report furnished to the Marine Board of Hobart pursuant to sec. 125 of the State Act, and the said Board decided that a further inquiry was necessary and requested the Government of Tasmania to constitute a Court of Inquiry for that purpose in accordance with the Act; (9) steps were taken to constitute such a Court, when the Commonwealth Government interposed and the State stayed proceedings pending some decision on the rights claimed by the Commonwealth; (10) the Commonwealth established a Commonwealth Court of Inquiry; (11) the said Commonwealth Court commenced to hold and to continue an inquiry into the said collision and proceeded to take evidence.

The State of Tasmania and the Marine Board of Tasmania first applied to this Court for an order to prohibit the Commonwealth Court from continuing to hold the inquiry in question, and later on

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commenced an action for a declaration that the Commonwealth Marine Court has no authority to hold the inquiry in question and for an injunction to restrain that Court from proceeding with the hearing and from exercising any of the powers purporting to be conferred on the Commonwealth Marine Court by the Commonwealth *Navigation Act*.

The Commonwealth demurred to the plaintiffs' claim, claiming that, under the powers conferred on the Commonwealth of Australia by the *Merchant Shipping Act* of 1894, sec. 478, and by the Constitution, secs. 51 (I.) and 98, it had power to pass sec. 364 of the Commonwealth *Navigation Act*, and to constitute the Court of Marine Inquiry in question. It also claimed that the limitation of the exercise of its power by passing sec. 2 (1) (*a*), (*b*) and (*c*) did not prevent the Commonwealth's right to hold and continue the inquiry in question into the collision of the two intra-State trade vessels in the circumstances.

Sec. 478 of the *Merchant Shipping Act* (Imperial), in my opinion, authorized the British Dominion, the Commonwealth of Australia, to order, if it thought fit, inquiries into casualties to British ships registered in Australia wherever the British ships were and wherever they were trading. The Commonwealth Parliament, exercising that grant of power and the powers granted by the Constitution, passed sec. 364 of the Commonwealth *Navigation Act* in similar words to those used in the *Merchant Shipping Act* authorizing inquiries into casualties to all British ships, and if no limitation had been placed on the powers exercised by sec. 364 the particular questions now before the Court would not have arisen. Sec. 2 (1) of the Commonwealth *Navigation Act* 1912 provides that "This Act shall not apply in relation to any Australian-trade ship, limited coast-trade ship, or river and bay ship, or her master or crew, unless the ship (*a*) is engaged in trade or commerce with other countries or among the States; or (*b*) is on the high seas, or in waters which are used by ships engaged in trade or commerce with other countries or among the States; or (*c*) is in the territorial waters of any Territory which is part of the Commonwealth." Under that section it is clear that if the ships in question were not in waters which are

used by ships engaged in inter-State or foreign trade, the Commonwealth by sec. 364 had not exercised the powers it had under sec. 478 of the Imperial Act to deal with the British ships in question, and therefore that it had not power to make such an inquiry as it had authorized the Commonwealth Court of Marine Inquiry to hold, or to authorize it to exercise the powers conferred on that Court. It was admitted that it could make any inquiries (without exercising compulsory powers) to ascertain whether it had jurisdiction to deal with the collision in question. The question whether the vessels were in waters which are used by ships engaged in inter-State or foreign trade depends on the interpretation placed by the Court on those words. It was claimed that the waters referred to included all the waters of a harbour or of a river—even those beyond the portion of a harbour or river at any time used by ships engaged in inter-State or foreign trade, including all small inlets in a harbour and all waters of a river.

The defendants contended that in this case the two ships on the day in question were in the waters of the Port of Hobart. The waters of the Port of Hobart are used by ships engaged in inter-State and foreign trade, and therefore they were in waters used by ships engaged in inter-State and foreign trade. My brother *Isaacs* in his judgment gives the words "in the waters used" a more limited meaning—that is, they do not necessarily include all the waters in a harbour or river because the words are "in waters used." I agree with his definition of the words "in the waters used." I also hold that the words "in waters . . . used" in the section (not "in the waters of a harbour or river used" &c.) would not include more than the waters ordinarily or generally used by ships engaged in inter-State or foreign trade. For instance, waters in a river or harbour above the parts used by vessels so engaged would, in my opinion, not be "waters used" within the meaning of sec. 2 of the *Navigation Act*. I agree with my brother *Higgins* that "the collision occurred at a point where normally foreign or inter-State steamers would not run, entering or departing" from the port.

As I hold that the bay and river steamers in question were not, at the material time, in waters used by ships engaged in inter-State or foreign trade, and that there was not a casualty to a British ship

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in the waters in question, I necessarily hold that the Commonwealth Parliament has not authorized the holding of the inquiry into the collision in question, and therefore that the plaintiffs are entitled to a declaration that the Commonwealth Marine Court is not justified in continuing to proceed with the inquiry. I have not, in the circumstances, to decide the other objections raised. I hold that whatever powers the Commonwealth Parliament has by sec. 478 of the *Merchant Shipping Act* (Imperial) and by sec. 51 (I.) and sec. 98 of the Constitution to authorize such inquiries as it authorized in this case, they have not been exercised so as to affect the vessels in question because of the exemptions set out in sec. 2 (1) (*a*), (*b*) and (*c*) of the *Navigation Act*.

Demurrer overruled.

Solicitor for the plaintiffs, *F. Banks Smith*, Crown Solicitor for Tasmania.

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

Solicitors for the interveners, *J. V. Tillett*, Crown Solicitor for New South Wales; *Frank G. Menzies*, Crown Solicitor for Victoria.

B. L.