[HIGH COURT OF AUSTRALIA.]

THE STATE OF VICTORIA AND OTHERS . PLAINTIFFS;

AND

THE COMMONWEALTH OF AUSTRALIA AND OTHERS . . . . . } DEFENDANTS.

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MELBOURNE, *Nov.* 1, 3, 4.

SYDNEY, *Dec.* 17.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Shipping—Wreck—Within Victoria—Removal—Power to remove—State or Commonwealth power—Navigation Act 1912-1935 (*No.* 4 *of* 1913—*No.* 30 *of* 1935) *sec.* 329—*Marine Act* 1928 (*Vict.*) (*No.* 3723), *sec.* 13.

Constitutional Law—State and Commonwealth statutes dealing with same subject matter—Inconsistency—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 109.

Sec. 13 of the *Marine Act* 1928 (Vict.) provides for the removal, at the instance of a State authority, of any ship sunk in a port within Victoria and not removed by the owner, and for the recovery of the cost of removal from the owner. Sec. 329 of the *Navigation Act* 1912-1935 makes similar provision with respect to the removal, at the instance of a Commonwealth authority, of any ship sunk "on or near the coast of Australia."

Held that there was no such inconsistency between the Commonwealth and State provisions as would (at any rate, in the absence of intervention by the Commonwealth authority in purported exercise of a power under sec. 329 of the *Navigation Act*) deprive the port officer of the power conferred by sec. 13 of the *Marine Act* to secure the removal of a ship sunk in Port Phillip, within Victoria, and to recover the cost from the owner of the ship.

Observations on the effect of sec. 109 of the Constitution.

CASE STATED.

In an action commenced in the High Court by the State of Victoria, the Attorney-General for the State of Victoria and Aubrey Duncan MacKenzie against the Commonwealth of Australia, the

Honourable Thomas Cornelius Brennan and the Union Steamship Co. of New Zealand Ltd. the plaintiffs claimed :—(*a*) A declaration that sec. 13 of the *Marine Act* 1928 (Vict.) was a valid exercise of the legislative power of the State and was of full force and effect. (*b*) A declaration that the plaintiff Aubrey Duncan MacKenzie, subject to and in accordance with the provisions of sec. 13 of the *Marine Act* 1928, may lawfully remove or cause to be removed the wreck of the steamship *Kakariki* from the port of Port Phillip and that the defendant the Honourable Thomas Cornelius Brennan may not lawfully exercise in respect of the wreck the powers conferred by sec. 329 of the *Navigation Act* 1912-1935 of the Commonwealth. (*c*) Alternatively to the declaration claimed in par. *b*, a declaration that the plaintiff Aubrey Duncan MacKenzie, subject to and in accordance with the provisions of sec. 13 of the *Marine Act* 1928, may lawfully remove or cause to be removed the wreck unless the defendant the Honourable Thomas Cornelius Brennan proceeds with reasonable expedition to remove or destroy the wreck or cause the same to be removed or destroyed.

A case, which was substantially as follows, was stated by the parties for the opinion of the court, and was referred to the Full Court :—

1. On 29th January 1937 the steamship *Caradale* came into collision with the steamship *Kakariki*, and as a result of such collision the steamship *Kakariki* was sunk.

2. The wreck of the steamship *Kakariki* now lies in latitude 37° 53′ 16″ south, longitude 144° 54′ 34″ east on a true meridian bearing of 193° 36′, distant 3,250 feet from the Gellibrand Light.

3. The position of the wreck as above set out is within the boundaries of the port of Port Phillip as described in a proclamation of the Governor in Council of the State of Victoria dated 25th March 1919.

4. The port of Port Phillip is a port within Victoria within the meaning of sec. 13 of the *Marine Act* 1928.

5. The position of the wreck is now, and at all times material has been, in tidal waters which are used by shipping generally, including ships engaged in trade or commerce with other countries or among the States of Australia.

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6. The wreck is a danger to such shipping and to such ships.

7. The steamship *Kakariki* was at all times material a ship registered at Melbourne in the State of Victoria.

8. At all times material up to the time of the collision each of the steamships, *Kakariki* and *Caradale*, was licensed pursuant to Part VI. of the *Navigation Act* 1912-1935 of the Commonwealth to engage in the coasting trade within the meaning of that Act.

9. Up to the time of the collision the steamship *Kakariki* had been engaged in inter-State trade and at the time of the collision was proceeding to Melbourne in the State of Victoria from Strahan in the State of Tasmania.

10. Up to the time of the collision the steamship *Caradale* had been engaged in inter-State trade and at the time of the collision was proceeding from Melbourne in the State of Victoria to Sydney in the State of New South Wales.

11. The defendant the Union Steamship Company of New Zealand Ltd. is a body corporate incorporated pursuant to the laws of the Dominion of New Zealand and is registered as a foreign corporation in the State of Victoria and carries on business in the Commonwealth of Australia and is liable to be sued in its corporate name.

12. The said defendant was at the time of the collision the owner of the steamship *Kakariki*, but on 24th February last abandoned the wreck of the steamship to certain underwriters.

13. The plaintiff Aubrey Duncan MacKenzie is the port officer of the State of Victoria and is the person authorized by the provisions of sec. 13 of the *Marine Act* 1928 to do the acts therein set out in all cases to which the provisions of sec. 13 upon their proper construction apply.

14. The defendant the Honourable Thomas Cornelius Brennan is the Minister of the Commonwealth administering the Marine Branch of the Department of Commerce and is the Minister referred to in sec. 329 of the *Navigation Act* 1912-1935 of the Commonwealth of Australia.

The questions for the opinion of the court were :—

(*a*) Is sec. 13 of the *Marine Act* 1928 of the State of Victoria a valid exercise of the legislative power of the State and of full force and effect ?

(*b*) May the plaintiff Aubrey Duncan MacKenzie lawfully exercise in respect of the wreck of the steamship *Kakariki* the powers which are conferred by sec. 13 of the Act ?

(*c*) May the defendant the Honourable Thomas Cornelius Brennan lawfully exercise in respect of the wreck of the steamship *Kakariki* the powers which are conferred by sec. 329 of the *Navigation Act* 1912-1935 of the Commonwealth ?

Fullagar K.C. (with him *Ellis*), for the plaintiffs. The two statutory provisions which deal with the matter are sec. 13 of the *Marine Act* 1928 (Vict.) and sec. 329 of the Commonwealth *Navigation Act*. The question which arises is whether there is any inconsistency between the two provisions and whether the State authority can remove the wreck. A statutory power is given to recover the costs over against the owner. The Victorian authorities are the proper authorities to remove the wreck, first, because the Victorian Act applies and the Commonwealth Act does not. Secondly, if both Acts apply, there is no inconsistency, both provisions being purely enabling provisions. Thirdly, the Commonwealth section is, in any event, invalid. The wreck lies just outside the port of Melbourne as defined in the *Melbourne Harbour Trust Act* but is within Port Phillip as defined by proclamation under the *Marine Act*. The words " on or near the coast of Australia " in sec. 329 (1) of the *Navigation Act* do not include waters wholly within the limits of Australia, i.e. within the line of territory comprised in Australia. " On the coast " means on the boundary of the national territory. Port Phillip is within the territory of Australia, and the shores of Port Phillip are not " on or near the coast of Australia." " Coast " is not an appropriate word in relation to enclosed waters (*Webster's Dictionary*; *Johnson's Dictionary*; *R.* v. *Forty-nine Casks of Brandy* (1); *Navigation Act*, secs. 272, 296, 301, 305 (2), 312, 317, 364). " Wreck " is defined in sec. 294. The *Navigation Act* is not intended to deal with ports already subject to authority, and the *Merchant Shipping Act* 1894 deals separately with wrecks within waters governed by a harbour authority and with those without (secs. 511, 519, 530, 531, 533, 535, 546; see also the *Territorial*

(1) (1836) 3 Hag. Adm. 257, at pp. 273, 274, 275; 166 E.R. 401, at pp. 407, 408.

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Waters Jurisdiction Act 1874 (41 & 42 Vict. c. 73)). In some cases it will be difficult to determine what waters are within the territory and what are without. One rule is that, if the bay has an entrance not more than six miles wide, it will be within the territory of the country (*The Fagernes* (1)). Further, if the ship is wrecked on the coast, there is no inconsistency within the meaning of sec. 109 of the Constitution (*Ffrost* v. *Stevenson* (2); *West* v. *Commissioner of Taxation* (*N.S.W.*) (3)). Each section is simply an enabling section, and there is no reason why each should not be taken as authorizing the person named therein to do the act. Neither of the sections imposes a duty (*Ffrost* v. *Stevenson* (4)). The mere existence of the two powers subsisting side by side does not constitute inconsistency. It is not until some act is done under the Commonwealth section that inconsistency can arise. Sec. 98 of the Constitution is explanatory only and confers no new power (*R.* v. *Turner*; *Ex parte Marine Board of Hobart*; *Tasmania* v. *The Commonwealth* (5)). Several limits might have been envisaged by Parliament in enacting sec. 329, e.g., the vessel may have been engaged in inter-State trade; the waters in which the wreck lies may be used by vessels engaged in inter-State trade; the wreck may be a danger to inter-State trade; the wreck might be caused by a vessel engaged in inter-State trade. The provisions of the *Merchant Shipping Act* could be invoked by making it applicable to ships registered in Australia or to ships used in coastal trade (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (6)). Sec. 329 of the *Navigation Act* is *ultra vires* the Commonwealth Parliament (*R.* v. *Burgess*; *Ex parte Henry* (7)). Such a provision as sec. 15A of the *Acts Interpretation Act* will save legislation which is related on its face to something inside and to something outside the power. But, where the legislation is not related on its face to something within the power that might be saved by introducing one or more limitations on the power, the court cannot guess as to whether the legislation was intended to have one meaning or another. These provisions cannot be related to the trade and commerce power at

(1) (1926) P. 185; (1927) P. 311, at pp. 313, 327, 328.
(2) *Ante*, p. 528.
(3) (1937) 56 C.L.R. 657.
(4) *Ante*, p. 528.
(5) (1927) 39 C.L.R. 411.
(6) (1935) 51 C.L.R. 677, at pp. 691, 692.
(7) (1936) 55 C.L.R. 608.

all. Sec. 329 simply empowers the Minister to remove the wreck, and there is no power in the Constitution which enables the Commonwealth Parliament to legislate with respect to wrecks at all. Navigation is related to the inter-State and foreign commerce power, but "wreck" is not related to any such power, and sec. 329 is *ultra vires*. The words "with respect to trade and commerce" in secs. 51 and 98 of the Constitution are not extended by the power to legislate with respect to "navigation and shipping" in sec. 98 unless the navigation is concerned with inter-State or foreign trade and commerce. Part VII. of the *Navigation Act* is dealing expressly with wrecks in the same manner as they are dealt with by the *Merchant Shipping Act*.

Herring K.C. (with him *Keating*), for the defendants. The *Navigation Act* is attempting to limit outwards the scope of the power. If the wreck is outside the three-mile limit the Federal power does not apply, but if it is within the three-mile limit the Federal power applies. The Federal legislation is not concerned with an inside limit and it includes the whole of the waters within the bay (*The Fulham* (1)). "Coast" means the place where the sea meets the shore. The test of the six-miles crossing at the heads is unsatisfactory. This wreck is "on or near the coast of Australia" within the meaning of sec. 329. If that section is invalid, the great bulk of the *Navigation Act* will fall in the same way. Sec. 98 of the Constitution confers power to legislate with regard to the removal of wrecks (*Australian Steamships Ltd.* v. *Malcolm* (2)). As long as the legisation deals with inter-State trade and commerce, the power that is conferred on the Commonweatth Parliament is universal and the handling of wreck is one of the things that comes within sec. 98 of the Constitution. Sec. 329 must be read in the light of secs. 302 and 308. *R.* v. *Turner*; *Ex parte Marine Board of Hobart*; *Tasmania* v. *The Commonwealth* (3), in which the court did not consider the validity of the *Navigation Act*, shows that the power to legislate as to navigation is not limited to trade and commerce. Sec. 329 is a valid exercise of Federal power (*Newcastle and Hunter River Steamship*

(1) (1898) P. 206.
(2) (1914) 19 C.L.R. 298, at p. 335.
(3) (1937) 39 C.L.R., at pp. 424, 425, 433, 444.

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Co. Ltd. v. *Attorney-General for the Commonwealth* (1)). If sec. 329 is on its face too wide, it can be read down either to ships that are engaged in inter-State trade or to ships which, at the time they are wrecked, are in the fairway of inter-State or foreign shipping (*Hume* v. *Palmer* (2)). If the ship is an inter-State ship the section can validly apply (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (3)). The scheme of the section is not destroyed by excluding some wrecks. *Australian Railways Union* v. *Victorian Railways Commissioners* (4) was decided on the ground that the severance was impossible. But it was held otherwise in *Huddart Parker Ltd.* v. *The Commonwealth* (5). The Commonwealth has covered the whole field, and the legislation being valid, the State legislation has been superseded (*Clyde Engineering Co. Ltd.* v. *Cowburn* ; *Metters Ltd. and Lever Bros. Ltd.* v. *Pickard* (6) ; *The Passenger Cases* (7) ; *Daw* v. *Metropolitan Board of Works* (8)). The test of inconsistency is whether the two Acts can stand together. *Ex parte McLean* (9) puts the test as to whether the whole field has been covered.

Fullagar K.C., in reply. "On or near the coast of Australia" describes an inward limit (*The Fulham* (10) ; *The Leda* (11) ; *The Mac* (12)). The *Navigation Act* will not be wholly bad if this provision is invalid. On the question of inconsistency, see *Daw* v. *Metropolitan Board of Works* (13). The headnote in that case is wrong.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered :—

LATHAM C.J. Sec. 329 of the Commonwealth *Navigation Act* 1912-1935 provides that the Minister may require the owner of a wreck which is on or near the coast of Australia to remove it and that if the owner does not comply with such requisition the Minister

(1) (1921) 29 C.L.R. 357, at pp. 365, 366.
(2) (1926) 38 C.L.R. 441, at pp. 448, 449, 451, 463.
(3) (1935) 51 C.L.R., at pp. 691, 692.
(4) (1930) 44 C.L.R. 319, at pp. 385, 386.
(5) (1931) 44 C.L.R. 492, at pp. 513, 529.
(6) (1926) 37 C.L.R. 466.
(7) (1849) 48 U.S. 283, at p. 399 ; 12 Law. Ed. 702, at pp. 750, 751.
(8) (1862) 12 C.B. N.S. 161 ; 142 E.R. 1104.
(9) (1930) 43 C.L.R. 472, at p. 483.
(10) (1898) P. 206.
(11) (1856) Sw. Ad. 40 ; 166 E.R. 1007.
(12) (1882) 7 P.D. 126.
(13) (1862) 12 C.B. N.S., at p. 180 ; 142 E.R., at p. 1111.

may himself remove the wreck and recover the cost of removal from the owner.

The Victorian *Marine Act* 1928, sec. 13, provides that, if any ship is sunk in any port within Victoria and the owner or master does not clear the port and remove the wreck within the time fixed by the port officer or harbour master, any two justices may, upon complaint made by the officer or harbour master, issue a warrant for the removal of the wreck, and procedure is provided for recovering the costs of removal from the owner.

The ship *Kakariki* is lying wrecked in Port Phillip Bay. The section of the State Act plainly applies to the wreck. Questions have arisen as to whether the section of the Commonwealth Act also applies and if so, whether there is any inconsistency between the two sections. It is suggested for the State of Victoria that the Commonwealth section, properly construed, does not apply to the case because the wreck, being in what are said to be inland waters, is not " on or near the coast of Australia." In the alternative, it is argued that the Commonwealth Parliament has no power to legislate with respect to inland waters or generally with respect to wrecks, because the power of the Parliament under sec. 98 of the Constitution to legislate with respect to navigation and shipping is not an independent power but is only part of the power conferred by sec. 51 (1) to legislate with respect to trade and commerce with other countries and among the States (*Owners of S.S. Kalibia* v. *Wilson* (1); *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (2)).

On the other hand it is argued for the Commonwealth that the Commonwealth section is valid; that it applies to the case; and that the State section is invalid because it is inconsistent with the Commonwealth section. The object of the litigation is to ascertain whether the wreck can be removed by either the Commonwealth or State authority so that the expense of the removal can certainly be recovered from the owner. No action has been taken by either authority by way of actually beginning to remove the wreck.

The State section is obviously within the legislative power of the State Parliament. It can be invalid only if it is inconsistent with

(1) (1910) 11 C.L.R. 689 (2) (1921) 29 C.L.R. 357.

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the Commonwealth Constitution or with some Commonwealth legislation. The argument that the State section is invalid is based solely upon the Commonwealth section. There is, however, no inconsistency in express terms between the two sections, each of which simply purports to confer power upon an authority to do an act. The alleged inconsistency will exist only if the Commonwealth section is interpreted as meaning not only that the Minister can, but also that no one else can, remove the wreck. I see no reason for adopting such an interpretation of the section. The Commonwealth section simply confers a power upon the Minister. It certainly does not say in express terms that no one else shall have a similar power. There is, in my opinion, nothing in the subject matter which makes it necessary to imply a provision to that effect. There is no inconsistency in two persons or several persons having power to remove the same wreck. Both an owner and a mortgagee of a ship, as well as public authorities, may well have a right to remove the same wreck.

If both Commonwealth and State authorities endeavoured to act simultaneously in relation to the same wreck, questions would or might arise as to the validity of the two sections. In view of the possibility of these questions arising, it is desirable not to answer the general questions asked—questions *a* and *c*—in relation to the validity of the sections.

For the reasons which I have stated I am of opinion that the port officer of the State of Victoria may lawfully exercise the powers conferred upon him by sec. 13 of the *Marine Act*.

Question *b* should be answered in the affirmative, and the other questions should not be answered.

RICH J. I agree with the judgment of *Dixon* J.

STARKE J. The thirteenth section of the *Marine Act* 1928 (Vict.) authorizes the removal of any ship sunk, stranded or run on shore in any port within Victoria. The constitutional authority of Victoria to enact this section cannot be questioned.

The three hundred and twenty-ninth section of the Commonwealth *Navigation Act* 1912-1935 also contains provisions which authorize the

removal of ships wrecked, stranded, sunk or abandoned on or near the coast of Australia.

When a law of a State is inconsistent with the law of the Commonwealth the latter prevails and the former to the extent of the inconsistency is invalid (The Constitution, sec. 109, and also *Marine Act* 1928 of Victoria, sec. 263).

Questions have arisen on a special case stated for the opinion of this court. The State contended that there was no inconsistency for several reasons :—(1) That the words " on or near the coast of Australia " are not appropriate to cover waters within Australia or the ports of Australia, but indicated the place of meeting between the mainland and the ocean. (2) That the section exceeded the legislative power of the Commonwealth. The Constitution enabled Parliament to deal with navigation and shipping only so far as its laws were ancillary or relevant to trade and commerce with other countries and among the States (*Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (1) ; *R.* v. *Turner* ; *Ex parte Marine Board of Hobart* (2)). It was contended that the provisions of sec. 329 of the *Navigation Act* were in no wise confined or related to trade and commerce with other countries and among the States. (3) Assuming that the interpretation of the Act and its validity were resolved in favour of the Commonwealth, still the State law (*Marine Act*, sec. 13) was not inconsistent with the law of the Commonwealth (*Navigation Act*, sec. 329).

It is unnecessary to pass upon the first and second contentions, but I cannot say that the argument on behalf of the State satisfied me that they were right. In my opinion, however, the third contention is sound. Inconsistency involves a contrariety of laws. Sometimes the inconsistency may be " direct and positive so that the two Acts " cannot be reconciled or stand together. But more often the inconsistency may be deduced from the scope and object of the Federal legislation as gathered from its language. If, as *Isaacs* J. observed in *Clyde Engineering Co. Ltd.* v. *Cowburn* (3), " a competent legislature expressly or impliedly evinces its intention to cover the

(1) (1921) 29 C.L.R. 357. (2) (1927) 39 C.L.R. 411, at p. 424.
(3) (1926) 37 C.L.R., at p. 489.

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whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field." Criticism has been directed to the words "cover the whole field," but the meaning of *Isaacs* J. is clear enough: if the State law is entirely destructive of the provisions of Federal law on the same subject, then it is inconsistent with it (*Clyde Engineering Co. Ltd.* v. *Cowburn* (1); *Hume* v. *Palmer* (2); *Ex parte McLean* (3); *Stock Motor Ploughs Ltd.* v. *Forsyth* (4)).

The Commonwealth and the States have concurrent powers to legislate with respect to the removal of wrecks. It is not a subject which requires uniform legislation such, for instance, as the regulations for preventing collisions at sea. Moreover, the Federal Act does not by its language indicate the necessity or the propriety of any such legislation. Further, concurrent authority is both useful and necessary. The authority conferred by the Commonwealth legislation is more extensive than that conferred by the State legislation. And cases might arise in which the removal of a wreck might be of little concern to the Commonwealth and yet of importance to the State, and a similar position might arise as regards the State (Cf. *R.* v. *Turner*; *Ex parte Marine Board of Hobart* (5)). It is said, however, that an actual conflict of power must arise if both the Commonwealth and the State pursue, at the same time, the authority conferred by the Commonwealth and State legislation respectively. But no conflict or inconsistency between the law of the State and that of the Commonwealth can arise in such a case unless one or other authority interferes with or obstructs the acts of the other in removing a wreck. A question would then emerge whether the Commonwealth law upon its true interpretation gave power to remove a wreck superior to and exclusive of the power of the State. Between responsible governments no such conflict need be apprehended. Doubtless arrangements would be made in the public interest for the authority best equipped for the purpose to exercise its powers and remove any wreck constituting a danger to shipping.

(1) (1926) 37 C.L.R. 466.
(2) (1926) 38 C.L.R. 441.
(3) (1930) 43 C.L.R. 472.
(4) (1932) 48 C.L.R. 128.
(5) (1927) 39 C.L.R. 411.

Question *a* of the case stated should be answered in the affirmative. It is unnecessary to answer questions *b* and *c*.

DIXON J. It does not appear from the facts stated by the parties in the special case that any steps have been taken by the Minister under sec. 329 of the *Navigation Act* 1912-1935 with reference to the wreck of the *Kakariki*, and we are informed by counsel that in fact no notice has been given by the Minister requiring the owner to remove it. The present proceedings are brought simply because of an apprehension on the part of the respective advisers of the Crown in right of the State and of the Commonwealth lest, if the port officer or harbour master proceeds as under sec. 13 of the *Marine Act* 1928 of Victoria, it may be found that none of the cost of removing the wreck can be recovered from the owners of the ship because under sec. 109 of the Constitution it is held to be invalid for inconsistency with sec. 329 of the Federal *Navigation Act*. The supposition that sec. 329 has the effect of annihilating this provision of the State Act or at least of invalidating it so far as otherwise it would apply to the wrecks of vessels engaged in inter-State or oversea trade or wrecks lying in waters used by such vessels implies a series of hypotheses. It means that sec. 329 is a valid law of the Commonwealth, that it applies to such wrecks and that as a matter of interpretation it applies to wrecks within bays or other tidal waters enclosed within headlands forming a comparatively narrow entrance. If all this be true, it still involves the further assumption that sec. 329 amounts to an exclusive authority for determining in the case of every wreck to which it applies whether or not it shall be removed at the cost of the owners. For reasons which I shall state, I think that only upon this further assumption could sec. 329 of the Federal *Navigation Act* produce an invalidity of sec. 13 of the Victorian *Marine Act* extensive enough to destroy any right which a port or harbour master might otherwise obtain under the latter provision to remove the wreck of the *Kakariki* and charge the owners with the cost of doing so. I am clearly of opinion that sec. 329 of the *Navigation Act* means to create no such exclusive power or authority and that it contains nothing which, if the Commonwealth Minister continues to abstain from exerting the authority

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claimed for him under sec. 329, would impair the operation of sec. 13 of the Victorian *Marine Act* with reference to the wreck of the *Kakariki*. As fear lest the contrary might be the case is the only occasion of the proceeding before us, I think that it is unnecessary to embark upon a discussion of the correctness of what I may call the prior or anterior assumptions which I have mentioned. I shall confine my reasons to a brief statement of why I think that upon its proper construction sec. 329 of the *Navigation Act* does not exclude the operation of such a State law as sec. 13 of the *Marine Act* contains, unless at all events some step is taken by the Commonwealth authorities to exert the power given by sec. 329.

Such a statement must, of course, begin with some formulation of what I understand to be the test of inconsistency under sec. 109 adopted in this court. I attempted in *Ex parte McLean* (1) to explain my conception of the principle upon which the decisions had proceeded, particularly those given upon the *Commonwealth Conciliation and Arbitration Act*, and there (2) will be found all that is required for the purpose now in hand. Substantially, it amounts to this. When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent. Cf., too, *Stock Motor Ploughs Ltd.* v. *Forsyth* (3). Now, having regard to the legislative powers of the Commonwealth under which sec. 329 must be taken to have been enacted, viz., sec. 51 (i.) and sec. 98 of the Constitution, and perhaps also to sec. 2 of the *Navigation Act*, the purpose which must be ascribed to sec. 329 is that of empowering the Minister to secure the removal of wrecks likely to obstruct, embarrass or affect overseas and inter-State navigation. The end in view is not only compatible with, but is aided by, the co-existence of other powers for securing the removal of wrecks. There is nothing

(1) (1930) 43 C.L.R., at pp. 483, 487.
(2) (1930) 43 C.L.R., at p. 483.
(3) (1932) 48 C.L.R., at p. 136.

in the language of sec. 329 and certainly nothing in its nature or subject matter suggesting that, if a wreck fell within the description to which the section relates, the Commonwealth authority should have the exclusive power of determining whether or not the owner ought to remove it. Such a wreck might seriously affect the movement of craft engaged in domestic trade and yet be thought unimportant for the purposes of oversea and inter-State trade, although not so completely outside the waters used by vessels in that trade as to be beyond the Commonwealth power. There is no reason for treating sec. 329 as intending to do more than confer a concurrent or parallel power to enforce the removing of wrecks. No doubt there would be or might be an inconsistency if simultaneous attempts by Commonwealth and State authorities to remove the same wreck were possible. But that means, not that the Federal enactment is an exhaustive statement of what power to compel the removal of wrecks shall exist, but that it confers a power to remove wrecks the exercise of which is intended to be exclusive. In other words, sec. 329 should be interpreted as meaning that the exertion of the power by the Minister shall impose upon the shipowner an obligation to the exclusion of similar obligations which might otherwise arise from the exercise of State authority. It may thus be proper to understand sec. 329 as implying that, when the Minister undertakes the removal of a wreck, he may do so without interference from any other public authority. But, if this be so, no more follows than that, when, but not before, steps are taken under sec. 329 by the Commonwealth authority, the State authority becomes powerless. For under sec. 109 of the Commonwealth Constitution a State law is invalid only to the extent of the inconsistency. The inconsistency discoverable in sec. 13 of the Victorian *Marine Act* 1928 would, on this assumption, extend no further than the application which its general language might otherwise have to wrecks in reference to which the Minister was in course of proceeding under sec. 329 of the Federal *Navigation Act* 1912-1935.

In my opinion the question marked *b* in the special case should be answered : Yes, and that answer is enough to dispel the difficulties which have arisen and also to dispose of the action.

I do not think that we should answer the question marked *c*. No steps to remove the *Kakariki* have been taken under sec. 329

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of the *Navigation Act*, and none is threatened or intended. What the Minister may do under that section in respect of the wreck is, therefore, an abstract question.

I think that we ought not to answer question *a* for another reason. It asks whether sec. 13 of the *Marine Act* of Victoria is a valid exercise of the legislative power of the State and of full force and effect. Apart from inconsistency with some Federal enactment, no one would doubt the validity of sec. 13. But sec. 109 of the Constitution says that a State law shall to the extent of such an inconsistency be invalid, and the question is directed to an invalidity so produced. I do not think that we can affirm that sec. 13 of the *Marine Act* 1928 of Victoria and sec. 329 of the Commonwealth *Navigation Act* can never come into conflict. For example, it seems to me to be obvious that, if Federal and State authorities both went to work upon the same wreck and began to remove it by different and incompatible means, one would have to give way to the other. The facts of the present case do not raise this or any other similar conflict, and I do not think that we ought to enter any further than the facts require upon the question how far sec. 13 of the *Marine Act* 1928 can validly apply to a wreck which has been made the subject of Federal action under sec. 329 of the *Navigation Act*. Any answer we give to question *a*, as framed, must explicitly or implicitly involve that question.

EVATT J. This case concerns a vessel which is now lying wrecked in Port Phillip, Victoria, and is a present danger, not only to vessels engaged in inter-State transport and overseas transport, but also to vessels engaged solely in trade confined to the State of Victoria.

Under sec. 13 of the Victorian *Marine Act* 1928 power is given to a port officer in relation to any wreck in any port in Victoria. He may require the removal of the wreck, whereupon proceedings may be had to secure such removal, at the expense of the owner. This section is obviously within the powers of the legislature of Victoria, being a law in and for that State.

It is claimed on behalf of the Commonwealth that, under sec. 329 of the *Navigation Act*, the Commonwealth executive possesses

authority either to require the wreck to be removed by the owner or to remove the wreck at the expense of the owner.

Whether the Commonwealth Act also applies to the particular wreck depends upon whether such wreck is situated " on or near the coast of Australia." An interesting argument was devoted to the meaning of this phrase ; but it is unnecessary to deal with it. It is also unnecessary to determine whether the enactment as framed extends beyond the relevant legislative power of the Commonwealth, which is limited to navigation in relation to inter-State or overseas trade and commerce. No doubt the Commonwealth could, by properly framed legislation, require the removal of any particular wreck which is an obstruction to such inter-State and overseas commerce. But, owing to the inelasticity of the expression used in sec. 329, if the section is deemed in part invalid, it may not be possible to read it down so as to include wrecks which would constitute such an obstruction. But it will be assumed in favour of the Commonwealth that sec. 329 validly applies to the particular wreck.

The practical difficulty which has arisen is this. Although under either the Commonwealth or Victorian Act the owner may be compelled to bear the cost of removing the wreck, it is feared by Victoria that if it proceeds to remove at the owner's expense, the latter may contend that, by virtue of sec. 109 of the Commonwealth Constitution, the State Act is *pro tanto* void as being inconsistent with the Commonwealth Act if the latter applies to the wreck. Accordingly, the owners are parties to the present action, and will be bound by the declarations of the court. The question of inconsistency is thus the only question which now arises, and I will now deal with it.

Whether and to what extent a law of a State is inconsistent with a law of the Commonwealth cannot be determined by any rule of universal application. Some of the more important questions involved I have attempted to analyze in such cases as *Ffrost* v. *Stevenson* (1) and *Stock Motor Ploughs Ltd.* v. *Forsyth* (2). I have endeavoured to point out the very great difficulties inherent in the conception of regarding a State law as " inconsistent " with a Commonwealth law because the latter either " covers the field " or

(1) *Ante*, p. 528. (2) (1932) 48 C.L.R. 128.

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" expresses an intention to cover the field." Any analogy between legislation with its infinite complexities and varieties and the picture of a two-dimensional field seems to me to be of little assistance.

Those who are inclined to assert a vague and general paramountcy of Commonwealth or Imperial legislation as a result of sec. 109 of the Constitution or the *Colonial Laws Validity Act* respectively, emphasize that " inconsistency " or " repugnancy " between the legislation of two legislatures each of which has jurisdiction in the same territory is not the same as " inconsistency " or " repugnancy " between two enactments of a legislature which has exclusive jurisdiction over a territory. The distinction is important, but it is fallacious to assume that it favours an extended meaning of inconsistency or repugnancy where the legislative authority in relation to a territory is divided between legislatures. On the contrary, as is shown by decisions on the Canadian Constitution, provisions like sec. 109 do no more than declare a rule of last resort which would be applied irrespective of express provision. At times it is not difficult to establish inconsistency between two enactments proceeding from the same legislature. In such cases, the only question is : What is the intention of the one legislature ? And the inference of " an intention " to replace one enactment with another may be drawn even in cases of mere overlapping or mere awkward working of two enactments. But it is different in the case of two legislatures. There, more direct proof of conflict must be established before the courts should conclude that the legislation of one authority is to be treated as void. And this view is reinforced by remembering that, where invalidity or repugnancy causes avoidance of legislation, it is only to the precise extent of such invalidity or repugnancy.

In the earlier history of this court, the question of sec. 109 arose mainly in relation to supposed conflicts between the awards of the Federal industrial arbitration tribunals on the one hand and laws or awards of a State on the other. For a long time it seemed that a principle to be adopted was whether simultaneous obedience to both sets of commands, the Commonwealth and the State, was possible. If it was not possible, then inconsistency arose. If it was possible, there was no case of inconsistency under sec. 109. But this view, though long accepted, was rejected as a decisive test, and

the new idea of " covering the field " was introduced at about the same time as *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (*The Engineers' Case*) (1) called in aid a doctrine of Commonwealth " supremacy " expressly based upon sec. 109 of the Constitution. In *Clyde Engineering Co. Ltd.* v. *Cowburn* (*The Forty-four Hours Case*) (2) a State Act of Parliament dealing expressly with the hours and wages of those working under awards was deemed invalidated *pro tanto* by a Federal industrial award, and subsequently, in *Ex parte McLean* (3), a State law dealing with the status of master and servant generally was also deemed invalidated *pro tanto* by a Federal industrial arbitration award. In the latter case, two justices took the view that " the very same conduct by the same persons is dealt with in conflicting terms by the Commonwealth and the State Acts " (4). But the only " conflict " was that a shearer bound by the Federal award was liable to be punished for the negligent handling of sheep, not only by the Federal award, but also under the State *Master and Servants Act*. A different method of approach is indicated by the judgments of the other two justices who agreed in the result, but who emphasized that the State law under consideration dealt directly with the relation of employer and employed, i.e., the same subject matter as the Federal award.

In the present case, the relevant Commonwealth Act, if valid and applicable, is enacted by virtue of its legislative power over navigation in relation to inter-State and overseas trade and commerce. As is shown by *James* v. *The Commonwealth* (5) and the decisions of this court approved therein, the States of the Commonwealth have concurrent legislative power over inter-State commerce, and, of course, foreign commerce also. While this concurrent power is subject to the overriding provision of sec. 109 of the Constitution, the application of " inconsistency " to laws dealing with trade and commerce is beset with very many difficulties. Speaking broadly, however, it may be asserted that the mere co-existence in the Executive Governments of Commonwealth and State of a power to remove wrecks which endanger both inter-State and overseas

(1) (1920) 28 C.L.R. 129, at p. 132.
(2) (1926) 37 C.L.R. 466.
(3) (1930) 43 C.L.R. 472.
(4) (1930) 43 C.L.R., at p. 479.
(5) (1936) A.C. 578; 55 C.L.R. 1.

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commerce (which is a matter of interest to both Commonwealth and State) and intra-State commerce (which is a matter of concern solely to the State) can seldom be regarded as evidencing or establishing inconsistency between the Commonwealth and State Acts conferring such powers upon their respective Executive Governments. *Ffrost* v. *Stevenson* (6) is an illustration of the principle that the mere co-existence of executive or administrative or judicial powers does not necessarily establish repugnancy or inconsistency between the laws of the two authorities which confer the power.

In the present case illustration is perhaps more helpful than general reasoning. Take the case of roads. There is no road situated within a State which *may* not be used in relation to inter-State transport, at least to some extent. Some roads within a State are used mainly for the purpose of inter-State transport. I suppose there is not a single road within a State which is used exclusively for the purpose of inter-State transport. Under its power relating to inter-State commerce, the Commonwealth Parliament might confer authority upon a Minister or officer to remove an obstruction to traffic used for inter-State transport. Let us assume that a large tree has fallen across such a road, and has made traffic difficult or impossible. Obviously various State authorities, both central and local, might be vested with similar power to remove obstructions from all roads within the limits of the State or the local area. If Acts of the State and Commonwealth co-existed, it is absurd to suggest that the State law is void in relation to roads used for inter-State transport merely because a similar executive power to remove obstructions may be exercised under the Commonwealth Act.

It was suggested in argument that you cannot have two authorities simultaneously engaged in removing the same obstruction, and that, to avoid such inconvenience, a Commonwealth law aimed at the removal of the same obstacle must always be regarded as excluding the State law, so that the Commonwealth law must imply that its officers alone can decide whether the obstruction is to be removed. In my opinion, this argument is hopelessly wrong. Sec. 109 merely deals with laws which conflict, it does not resolve all questions of administrative overlapping which may arise within the territory of

(1) *Ante*, p. 528.

a State which is also the territory of the Commonwealth. Sec. 109 is not to be invoked as embodying the old rule in *D'Emden* v. *Pedder* (1) dressed up as a rule of general Commonwealth suzerainty instead of a rule of mutual non-interference. Let us suppose that, in the case I have taken as an illustration, the Commonwealth decides that the tree shall remain and shall continue to obstruct traffic. In my view, if the Commonwealth enactment was framed in such a way that it sought to make the Commonwealth the final authority to determine whether the obstruction to inter-State (and local) traffic should be removed, the enactment would not be one in relation to inter-State commerce at all, because it would be attempting to confer upon the Commonwealth a general power to exclude the State from exercising its concurrent jurisdiction over the same subject. Yet the complexity of sec. 109 problems is illustrated by the fact that it *might* be competent for the Commonwealth to say that in the case of a wreck situated in an inter-State fairway, where the *manner* of its removal may itself be a matter of importance in safeguarding inter-State waters, a Commonwealth authority should determine, and determine finally, the *manner* to be adopted for removing the wreck so that the work will not interfere with inter-State waters. But where, as here, there is merely an admitted obstruction, the Commonwealth cannot make itself the final authority for determining whether the obstruction should be removed at all, for that is saying, in effect, that the State must suffer inter-State and domestic transport to be prejudiced merely because of Commonwealth inaction.

Further, the mere fact that, in the course of the carrying out of the power to remove obstructions, some new dispute may occur is no reason for denying to the State the right to exercise its general jurisdiction over a subject matter admittedly within its competence. If such disputes arise, they must be resolved according to law. In this particular case, they cannot arise at all once the State has proceeded to act so as to secure the removal of the wreck, because the Commonwealth enactment is not addressed to the removal of wrecks which are already in the process of being removed by the State.

(1) (1904) 1 C.L.R. 91.

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It is unnecessary to examine the concept that, if the Commonwealth Parliament " intends to cover the field," sec. 109 is attracted. Ordinarily, the intention of the Commonwealth Parliament in such matters is by no means conclusive, because, as I have previously suggested, a direct statement by the Commonwealth that it intended that the State should, or could, no longer act, may only raise the question whether such a statement does not invalidate the particular Commonwealth enactment. The Commonwealth's legislative powers exist by reason of their relationship to subject matter, and, speaking generally, they have no power to define or limit the legislative or executive powers of a State. The limits of State powers are to be found in the Commonwealth Constitution itself rather than in Commonwealth enactments. This view is quite consistent with the presence in some Commonwealth laws, such as those dealing with bankruptcy, patents and trade marks, of provisions which terminate the operation of previously existing State laws. There the subject matters practically permit only one system of law and one system of administration. But there is little or no analogy between such subjects and those of trade and commerce or aliens, to take two examples, only, from sec. 51. And, even in relation to such subjects as bills of exchange and promissory notes, where codification has been employed, the interplay between Commonwealth legislative power and the application of sec. 109 is well brought out in the case of *Stock Motor Ploughs Ltd.* v. *Forsyth* (1), a case to which, in my opinion, insufficient attention has been directed.

For the reasons given, I think the questions should be answered by holding that sec. 13 of the Victorian *Marine Act* 1928 is valid and is not inconsistent with sec. 329 of the Commonwealth *Navigation Act*.

McTIERNAN J. This special case relates to the removal from Port Phillip of the steamship which was known as the *Kakariki*. The position of the wreck is within the territorial limits of the State of Victoria and is in tidal waters which are used by shipping generally, including ships engaged in trade and commerce with other countries and among the States of the Commonwealth. It is within the legis-

(1) (1932) 48 C.L.R. 128.

lative power of the State of Victoria to pass a law providing for the removal of a wreck lying at a place within its territorial limits. Sec. 13 of the *Marine Act* 1928 of Victoria authorized the State's port officer or harbour master to proceed for the removal of any ship which is sunk, stranded or run on shore in any port in Victoria. This section, upon its terms, applies to the wrecked ship to which the present case relates. A question arises whether sec. 13 is inconsistent with sec. 329 of the *Navigation Act* 1912-1935 of the Commonwealth, which authorizes the Minister to take steps for the removal of any ship which is wrecked, stranded, sunk or abandoned on or near the coast of Australia. This question assumes that sec. 329 is of full force and effect as a valid exercise of the legislative power of the Commonwealth and that the definition of the locality to which the section is expressed to apply covers the place where the wrecked ship is lying. Both assumptions may be made for the purposes of this case, for the only ground upon which it is contended that sec. 13 is invalid is that it is inconsistent with sec. 329. If the two sections are inconsistent, sec. 13 is rendered invalid by sec. 109 of the Constitution, which provides that if a State law is inconsistent with a Commonwealth law the latter will prevail and the former to the extent of the inconsistency be invalid. Sec. 329 provides that if any ship is wrecked at the place mentioned in the section "the Minister shall have in regard thereto the following powers." These include the power to require the owner of the wreck, by notice in writing, to remove it within a time specified in the notice, or give security for such removal to his satisfaction, and the power to remove or destroy the wreck in the event of the owner not complying with such notice. The terms of this section do not imply any negation or destruction of the powers conferred upon the State port authority or harbour master by sec. 13 of the *Marine Act*, at least until the Minister has intervened by giving notice to the owner requiring him to remove it. No support can be found in sec. 329 for the assumption that Parliament intended that the only executive action which could be taken for the removal of a wreck to which the section applied was Commonwealth executive action. The State port officer or harbour master in no way challenges the supremacy of the Federal section by proceeding to remove a wreck to which sec. 329

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applies, at least, until the Federal Minister puts the provisions of this section into operation. It would not be in keeping with the principles laid down by this court for determining whether a State law and a Federal law are inconsistent according to the intent of sec. 109 to say that the removal of the wrecked ship, even if it is at "a place on or near the Australian coast," is, by force merely of the enactment of sec. 329, placed so completely and exclusively within the control of Federal law, that no State law providing for its removal from that place can have any valid operation after the section was enacted.

In my opinion the question whether sec. 13 of the *Marine Act* 1928 remains a valid exercise of the legislative power of the State which should receive full force and effect until the Commonwealth takes some action under sec. 329 of the *Navigation Act* should be answered in the affirmative.

In my opinion the second question should be answered in the affirmative.

Questions in the special case answered as follows : —(*a*) *No answer.* (*b*) *Yes.* (*c*) *No answer.*

Solicitor for the plaintiffs, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitor for the Commonwealth and the Hon. T. C. Brennan, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the Union Steamship Co. of New Zealand Ltd., *Malleson, Stewart, Stawell & Nankivell.*

H. D. W.