[HIGH COURT OF AUSTRALIA.]

McILWRAITH McEACHARN LIMITED . . APPELLANT; DEFENDANT,

AND

THE SHELL COMPANY OF AUSTRALIA LIMITED . . . . . } RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 2-4; *June* 27.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

High Court—Admiralty jurisdiction—Colonial Courts of Admiralty—"British possession"—"Local appeal"—State Supreme Court—Appeal therefrom to High Court—Competency—Colonial Courts of Admiralty Act 1890 (53 & 54 *Vict. c.* 27), *ss.* 2, 5, 6, 15, 16 (1)—*Interpretation Act* 1889 (52 & 53 *Vict. c.* 63), *s.* 18—*The Constitution* (63 & 64 *Vict. c.* 12), *s.* 73—*Judiciary Act* 1903-1937 (*No.* 6 *of* 1903—*No.* 5 *of* 1937), *ss.* 30 (*b*), 30A—*Judiciary Act* 1939 (*No.* 43 *of* 1939), *s.* 3.

Shipping—Limitation of liability—"Owner"—Person in possession and control—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 2, 503, 504, 508—*Merchant Shipping* (*Liability of Shipowners*) *Act* 1898 (61 & 62 *Vict. c.* 14), *ss.* 1, 4—*Merchant Shipping Act* 1906 (6 *Edw. VII. c.* 48), *ss.* 70, 71, 85—*Merchant Shipping Act* 1921 (11 & 12 *Geo. V. c.* 28), *s.* 1 (2).

As a result of the *Judiciary Act* 1939, the Supreme Courts of the States, as well as the High Court, are now Colonial Courts of Admiralty under the *Colonial Courts of Admiralty Act* 1890 (Imp.). The Supreme Court of a State exercises its admiralty jurisdiction as the Supreme Court and not as a distinct court created by the *Colonial Courts of Admiralty Act*, and an appeal lies from its judgment to the High Court. *Per Latham* C.J., *Dixon*, *McTiernan* and *Williams* JJ. (*Starke* J. doubting):—Such an appeal is a "local appeal" within the meaning of s. 5 of the *Colonial Courts of Admiralty Act* because the Commonwealth is, for relevant purposes, the "British possession" within the meaning of that term as defined by s. 18 of the *Interpretation Act* 1889 (Imp.) and used in the *Colonial Courts of Admiralty Act*.

The word "owner" in s. 503 of the *Merchant Shipping Act* 1894 (Imp.) and in s. 1 of the *Merchant Shipping* (*Liability of Shipowners*) *Act* 1898 (Imp.) includes a person who has immediate and exclusive possession of a ship either

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indefinitely or for a term and has the responsibility of its control and management by himself and his servants.

Sir John Jackson Ltd. v. *Owners of Steamship "Blanche,"* (1908) A.C. 126, applied.

Decision of Supreme Court of New South Wales (Full Court): *Shell Oil Co. of Australia Ltd.* v. *McIlwraith McEacharn Ltd.*, (1944) 45 S.R. (N.S.W.) 142; 62 W.N. 4, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 23rd May 1941, at about 5.30 a.m., when it was still dark, the tug *Bonnie Bell* was proceeding in a westerly direction up the Parramatta River and was approaching the Gladesville Bridge. The *Bonnie Bell* is about sixty feet long, and had, lashed to her starboard side, a loaded lighter, also about sixty feet long and with a beam of about twenty-five feet, in such a position that the bow of the tug was about twenty feet behind the bow of the lighter, and the stern of the tug about twenty feet behind the stern of the lighter. In breach of collision regulations, the tug was hugging the southern shore of the river on her port side. The steam collier *Hetton Bank* was coming up from behind for the purpose of passing through the bridge, in a correct position on the starboard side of the centre line of the river. The opening span of the bridge is near its southern end and works on a central pivot giving two passages when open.

As the *Hetton Bank* approached the bridge, she gave a sound signal, which was acknowledged from the bridge by a red light. At about this time, those on board saw a moving light (which was in fact the stern light of the tug) broad on the port bow. Soon after this, the bridge showed a green light, which was the recognized "come-on" signal. The *Hetton Bank* stood on, intending to go through the northerly passage of the open span. As she neared the bridge, the tug suddenly went to starboard and the lighter and tug appeared coming right across her bow. By reversing her engines, the *Hetton Bank* managed to take off enough way to allow the tug and lighter to get across without collision, but as the result of the consequent loss of steerage way she collided with parts of the bridge, causing considerable damage to the bridge and to herself. The *Bonnie Bell* made the sudden turn to starboard because her master wanted to take her under the bridge. Her beam, combined with that of the lighter, was too wide to admit of her going through either of the passages in the opening span, but there was plenty of width and clearance for her to go under one of the spans to the north.

The Shell Company of Australia Ltd., the charterer of the tug, had hired the lighter from George Hudson Pty. Ltd. The hiring

was arranged by telephone. An officer of the Shell Co. rang up George Hudson Pty. Ltd. and asked for a lighter. On that company's agreeing to supply one for a month at 10s. a day, the Shell Co. sent a written request for the supply of the lighter in question, Lighter No. 291, from 1st May 1941 to 31st May 1941 at 10s. per day, and took delivery of it. Upon a hiring of this type, if a continuance of the hire was desired, a fresh written request was sent for each succeeding month.

In an action by McIlwraith McEacharn Ltd., the owner of the collier *Hetton Bank*, against the Shell Co., the charterer of the tug, judgment was given for the plaintiff and an inquiry directed as to the amount of damage sustained.

The Shell Co. then, as plaintiff, commenced a suit against McIlwraith McEacharn Ltd., as defendant, in which it alleged that it was the owner of the lighter within the meaning of Part VIII. of the *Merchant Shipping Act* 1894 (Imp.), or of that Part as affected by s. 71 of the *Merchant Shipping Act* 1906 (Imp.), alternatively that the plaintiff was a party interested in the lighter, which was built in Port Jackson and had never been registered under s. 2 of the *Merchant Shipping Act* 1894, and that the lighter was a ship. The plaintiff asked for a declaration that it was not answerable in respect of damages to an aggregate amount exceeding £8 per ton of the gross tonnage of the tug, and alternatively that it was not answerable to an aggregate amount exceeding £8 per ton of the gross tonnage of the tug and lighter.

Section 503 of the *Merchant Shipping Act* 1894 provides that the owner of a ship, British or foreign, shall not, where, *inter alia*, any loss or damage is caused to any other vessel by reason of the improper navigation of the ship without their actual fault or privity, be liable to damages beyond an aggregate amount not exceeding £8 for each ton of their ship's tonnage. By s. 2, every British ship, unless exempted from registry, must be registered, and unless registered, shall not be recognized as a British ship ; and by s. 508 it is provided that s. 503 does not extend to a British ship which is not recognized as a British ship. By s. 742, " ship " includes every description of vessel used in navigation not propelled by oars. The *Merchant Shipping* (*Liability of Shipowners*) *Act* 1898 (Imp.) provided by s. 1 that, *inter alia*, s. 503 should extend and apply to the owners, builders, or other parties interested in any ship built at any port or place in Her Majesty's Dominions, from and including the launching of such ship until the registration thereof, provided always that such owners, builders, or other parties interested should not benefit under the section for a period beyond three months after the launching of such

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ship. By s. 4, " ship " includes every description of vessel used or intended to be used in navigation not propelled by oars and whether completed or in course of completion or construction. The *Merchant Shipping (Liability of Shipowners and Others) Act* 1900 (Imp.) extended s. 503 to loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or movable. By the *Merchant Shipping Act* 1906, s. 70, the proviso to s. 1 of the 1898 Act was repealed, and by s. 71 it was provided that in s. 503 " owner " shall be deemed to include any charterer to whom the ship is demised. By the *Merchant Shipping Act* 1921 (Imp.), it is provided by s. 1 (1) that s. 503 shall operate as if the expression " ship " included every description of lighter, barge, or like vessel used in navigation in Great Britain, however propelled, provided that such a vessel used exclusively in non-tidal waters, other than harbours, should not, for this purpose be deemed to be used in navigation ; and by s. 1 (2), that in the application of s. 503 to any such vessel the expression " owner " shall include any hirer who has contracted to take over the sole charge and management thereof and is responsible for the navigation, manning and equipment thereof.

It was contended that the damage to the *Hetton Bank* was caused by the improper navigation of both the tug and the lighter, and that, this being so, the Shell Co. stood outside the protection of s. 503 itself for two reasons, (*a*) because it was not the owner of the lighter, and (*b*) because the lighter, not having been registered, could not be recognized as a British ship by reason of s. 2, and was therefore deprived of the protection of s. 503 by s. 508. It was contended also that the benefit of s. 503 could not be claimed, notwithstanding absence of registration, by virtue of the 1898 Act as amended by s. 70 of the 1906 Act, because the Shell Co. was not a " party interested " in the lighter.

The judge made a decree limiting liability to £8 a ton of the gross tonnage of the tug.

Upon an appeal by McIlwraith McEacharn Ltd. to the Full Court of the Supreme Court, it was submitted that the Shell Co. was not entitled to limit its liability at all, and, alternatively, that if it was entitled to any limitation, this should be in respect of the aggregate tonnage of the tug and the lighter.

The Full Court held that, in lieu of the pronouncement by the trial judge in the limitation action that the charterer of the steamship *Bonnie Bell* was entitled to limit its liability according to the provisions of the *Merchant Shipping Acts* 1894 to 1940 (Imp.) to an amount at the rate of £8 for each ton of the registered tonnage

of the said steamship with an addition of any engine-room space deducted for the purpose of ascertaining that tonnage, it should be pronounced that the Shell Oil Co. of Australia Ltd. was entitled to limit its liability according to the provisions of the *Merchant Shipping Acts* 1894 to 1940 to an amount at the rate of £8 for each ton of registered tonnage of the steamship *Bonnie Bell* with an addition of any engine-room space deducted for the purpose of ascertaining that tonnage, together with the tonnage of the lighter which was lashed to the said steamship at the relevant time : *Shell Oil Co. of Australia Ltd.* v. *McIlwraith McEacharn Ltd.* (1).

From that decision, McIlwraith McEacharn Ltd. appealed to the High Court.

Other relevant statutory provisions are set forth in the judgments hereunder.

Weston K.C. and *F. P. Evans*, for the respondent, took a preliminary point.

Weston K.C. This appeal is not competent. It is not a matter which comes within the appellate jurisdiction of this Court. It is not an appeal from the Supreme Court of the State, or of any court of the State, but is from a Colonial Court of Admiralty constituted under the *Colonial Courts of Admiralty Act* 1890 (Imp.), which is an independent court from which an appeal only lies direct to the Privy Council.

F. P. Evans. The significant feature of the admiralty jurisdiction is that it is unlimited geographically. It is therefore essentially an Imperial responsibility. The basis of the decision in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (2) is fallacious. That fallacy is that, by reason of the fact that Australia is a British possession within the meaning of that expression, the High Court is by that fact alone the Colonial Court of Admiralty. That is all that that case decides. It does not touch on the question of appellate jurisdiction at all. Whether that case was rightly decided or whether the Court will see fit to review it is immaterial; it still follows that this Court has no appellate jurisdiction in admiralty proceedings. The development of admiralty law is shown in *The Yuri Maru and The Woron* (3). Under the *Vice Admiralty Courts Act* 1863 (Imp.), provision was made for the exercise of vice-admiralty jurisdiction in all British possessions. The ascertainment of those British possessions did not depend upon interpretation but by reference to a

(1) (1944) 45 S.R. (N.S.W.) 144; 62 W.N. (N.S.W.) 4.
(2) (1924) 34 C.L.R. 420.
(3) (1927) A.C. 906.

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schedule to that Act. That schedule included New South Wales and Victoria but did not include Australia as a British possession. A judge of the Vice-Admiralty Court held that office by virtue of an appointment from the British Admiralty and not by virtue of his position as a judge of a British possession. Vice-Admiralty Courts were truly Imperial Courts and were commissioned from Great Britain. The *Colonial Courts of Admiralty Act* 1890 did not effect any material alteration in the jurisdiction except that it gave a right of local appeal where formerly there had been none. The Supreme Court has never been given jurisdiction under either of those Acts by name. All that has been done is that a jurisdiction in admiralty has been conferred upon judges of a certain status. When those judges sit as Colonial Courts of Admiralty they do not sit as judges of the Supreme Court but as independent tribunals. The Courts substituted for Vice-Admiralty Courts are still Imperial Courts. The *Colonial Courts of Admiralty Act* 1890 applied to all British possessions then existing, of which there were six in Australia, except that it was delayed by s. 16 of the Act as far as regards New South Wales and Victoria. In those two areas, Vice-Admiralty Courts were continued until 1911 when they were superseded by Colonial Courts of Admiralty in pursuance of an Order in Council under s. 14 of the *Colonial Courts of Admiralty Act* 1890. Reference to New South Wales in the schedule to the Act is a "contrary intention" sufficient to render inapplicable the meaning of "British possession" appearing in s. 18 of the *Interpretation Act* 1889 (Imp.). Notwithstanding the decision in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1), this Court is not a Colonial Court of Admiralty because Australia is not and never was a "British possession." The political structure of any given British possession determines nothing at all. Australia is not a part of His Majesty's Dominions within the meaning of s. 18 of the *Interpretation Act* 1889. It is a mere political conception aggregating six British possessions into a legislative union ten years after the *Colonial Courts of Admiralty Act* —a special Act—was enacted and not contemplated at the time it was so enacted. An examination of that Act shows that there is no appeal from the Colonial Court of Admiralty jurisdiction found in New South Wales, to the High Court of Australia. If the Court decides to re-affirm the decision in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1) upon the basis therein stated, and, as a consequence of that decision, the States lost all admiralty jurisdiction automatically, then this appeal, being an appeal from a nullity, cannot be entertained. If the High Court has jurisdiction

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

in admiralty, it has not appellate jurisdiction from the Colonial Courts of Admiralty in the States. The appellant has exhausted its right of "local appeal" under s. 5 and s. 7 of the *Colonial Courts of Admiralty Act*. It is significant that in s. 6 the expression used is "the appeal" and not "an appeal." If there is no local appeal, or if there has been a decision on a local appeal, as in this case by the Full Court of the Supreme Court, then an appeal lies therefrom to the Privy Council and not to the High Court. The Colonial Court of Admiralty in New South Wales is not a court of the State, it is an Imperial Court and therefore does not come within the operation of s. 73 (ii.) of the Constitution. The Full Court heard a local appeal under the authority of the *Colonial Courts of Admiralty Act* 1890: See ss. 5 and 7. The High Court has no jurisdiction in admiralty, either original or appellate. Admiralty jurisdiction has been long established in all the States and the justices of the various courts may exercise it when sitting as Colonial Courts of Admiralty under the *Colonial Courts of Admiralty Act*. If the High Court also has admiralty jurisdiction that is merely a juridical system within the Commonwealth.

Taylor K.C. (with him *R. L. Taylor*), for the appellant. The jurisdiction of this Court to entertain this appeal does not depend upon the status of this Court pursuant to s. 2 of the *Colonial Courts of Admiralty Act* 1890. The appeal was not brought to this Court or to the Full Court of the Supreme Court as Colonial Courts of Admiralty. Section 2 does not purport to give to any court appellate powers but entrusts it with original jurisdiction. If, since Federation, the States themselves be not British possessions within the meaning of the *Colonial Courts of Admiralty Act*, it follows that the judge of first instance did not have jurisdiction in the matter and, therefore, that his order, made in proceedings instituted by the respondent, is a nullity. The courts of the various States other than Victoria and New South Wales, that is those States (then colonies) in which the operation of the Act was not delayed, became Colonial Courts of Admiralty in 1890, and in 1911, when, by Order in Council, the Act was proclaimed for Victoria and New South Wales, the last-mentioned States must have been regarded as British possessions within the meaning of the Act and not excluded by the definition in s. 18 of the *Interpretation Act* 1889. Section 2 of the *Colonial Courts of Admiralty Act* deals not with every court of law in a British possession but every court of law in a British possession with unlimited jurisdiction. Whether the various States themselves be British possessions or not, whether they are excluded

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by reason of the definition in s. 18 of the *Interpretation Act* 1889, the various courts of the State are still courts of a British possession. Under s. 5 of the *Colonial Courts of Admiralty Act*, this Court has jurisdiction to determine the appeal whether or not the judge of first instance sat as the Supreme Court of New South Wales or as a Colonial Court of Admiralty as distinct from the Supreme Court of New South Wales. The judge of first instance sat in exercise of the original admiralty jurisdiction of the Supreme Court of New South Wales and not as a separate court. Section 5 shows that the intendment and effect of the Act was to add to the jurisdiction of the Supreme Court. An almost parallel case is *Stewart* v. *The King* (1). The converse type of case where a judge of the Supreme Court, as a *persona designata*, is invested with special functions is illustrated by *Holmes* v. *Angwin* (2) and *C. A. MacDonald Ltd.* v. *South Australian Railways Commissioner* (3). Even if the judge of first instance originally sat not in exercise of the admiralty jurisdiction of the Supreme Court but as a separate court, a Colonial Court of Admiralty, there is still an appeal to this Court from the decision of the Full Court because that Court sat as the Supreme Court of New South Wales and not as a Colonial Court of Admiralty. When construing the words " the appeal " in s. 6 (1), regard should be had to the provisions of s. 5 so that, as in the exercise of the ordinary civil jurisdiction, an appeal lies to the Full Court of the Supreme Court and then from that Court to this Court. There is nothing in s. 7 to indicate that the appellate court was to be a separate court and a distinct entity ; in fact the language of s. 5 is in direct opposition to that interpretation. There are no Imperial Courts of Admiralty, but a function has been added to the Supreme Court and the High Court as courts in a British possession, namely Australia. Accordingly, there is a right of appeal not only preserved by s. 5 but also conferred by the Constitution. *The Yuri Maru and The Woron* (4) illustrates that in 1890 a complete change was made from the system which prevailed in the Vice-Admiralty Courts and the whole purpose of the legislation was to enable the courts of the Dominions and British possessions to exercise their own jurisdiction in admiralty. That is what occurred here. The matter falls within s. 504 of the *Merchant Shipping Act* 1894, or, alternatively, it falls within s. 2 of the *Colonial Courts of Admiralty Act*. In either case, the proceedings are brought in the Supreme Court. An interpretation of s. 6 (1) of the *Colonial Courts of Admiralty Act* is that an appeal lies to the Privy Council in addition to appeals

(1) (1921) 29 C.L.R. 234.
(2) (1906) 4 C.L.R. 297.
(3) (1911) 12 C.L.R. 221.
(4) (1927) A.C., at pp. 910, 913, 914.

which may be brought within the British possession. However, in the circumstances, the provision of that section must be read subject to the Constitution. The Act is not a special provision which remains unchanged by the general provisions relating to the High Court of Australia contained in the Constitution. On the contrary, the Constitution is a special provision rendered necessary by reason of the inauguration of the Commonwealth and the substitution of this Court as a final court of appeal except for an appeal brought by permission before the Judicial Committee of the Privy Council.

F. P. Evans, in reply. On the question of interpreting the appeal section of the *Colonial Courts of Admiralty Act* in the light of the Constitution and the alteration that that may effect, see *Seward* v. "*Vera Cruz*" (1).

LATHAM C.J. The Court will reserve its decision upon the preliminary point and, without prejudice in any way to the preliminary point, will proceed with the hearing of the appeal.

Taylor K.C., for the appellant. The effect of the repeal by s. 70 of the *Merchant Shipping Act* 1906 of the proviso to s. 1 of the *Merchant Shipping* (*Liability of Shipowners*) *Act* 1898 (which extends the operation of s. 503 of the *Merchant Shipping Act* 1894) is to enable limitation of liability to be claimed under the Act even though the vessel is an unregistered ship. A typical example is *The Andalusian* (2). The question now for consideration is whether the respondent was the owner or charterer by demise of the lighter within the meaning of s. 503 of the 1894 Act or s. 71 of the 1906 Act. It is conceded that the respondent was the charterer by demise of the tug-boat *Bonnie Bell*. As regards the lighter, the respondent was neither the owner within the meaning of s. 503, nor a party interested within the meaning of the 1898 Act, nor a charterer by demise within the meaning of the 1906 Act. The position as it was at the date of the passing of the 1906 Act is shown in the observations by the judge in *The Hopper No.* 66 (3). Whatever the position was before the 1906 Act, the legislature, having regard to that judicial decision (4), expanded the meaning of the word "owner" in ss. 503 and 504 of the *Merchant Shipping Act* 1894, to include charterers by demise. In reversing that decision upon appeal, *sub nom. Sir John Jackson Ltd.* v. *Owners of Steamship*

(1) (1884) 10 App. Cas. 59, at p. 68.
(2) (1878) 3 P.D. 182.
(3) (1906) P. 34, at p. 44.
(4) (1906) P. 34; (1907) P. 254.

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"*Blanche*" (1), all that the House of Lords decided, and all it intended to decide, was that a charterer by demise was an owner, and it did not intend to conclude that a person entitled to possession under some informal agreement of hire was an owner within the meaning of s. 503 : See *William Cory & Son Ltd.* v. *Dorman, Long, & Co. Ltd.* (2). The words " shall be deemed to include any charterer to whom the ship is demised " in s. 71 of the 1906 Act are words of extension and not merely declaratory (*Muller* v. *Dalgety & Co. Ltd.* (3)). There cannot be a charterer without a charter and there cannot be a charter between two people without a charter party and that must be a document (*William Cory & Son Ltd.* v. *Dorman, Long, & Co. Ltd.* (4)). The origin of charter parties is dealt with in *Abbott's Law relating to Merchant Ships and Seamen*, 14th ed. (1901), p. 330. A verbal charter party is unknown (*Adamson* v. *Newcastle Steam-Ship Freight Insurance Association* (5)). The expansion by s. 1 (2) of the *Merchant Shipping Act* 1921 of the meaning of the word " owner " so as to include " any hirer who has contracted to take over the sole charge and management " of a lighter, barge or like vessel was discussed in *The Thames* (6). Although such a person may be in a position analogous to a charterer by demise, he is not in fact a charterer by demise (*The Thames* (7)). The effect of the repeal by s. 70 of the 1906 Act of the proviso to s. 1 of the 1898 Act (extending the operation of s. 503 of the principal Act) is that a ship, whether registered or not, is entitled to protection and there is not any necessity to register the ship within a reasonable time or at all (*The Harlow* (8)). The words " parties interested " (to whom, by s. 1 of the 1898 Act, the application of s. 502 to s. 509 inclusive is extended) mean parties interested in the building or the launching of the ship : *Halsbury's Laws of England*, 2nd ed., vol. 30, p. 940 ; *Marsden's Collisions at Sea*, 9th ed. (1934), p. 169. The respondent is not a party so interested. If the view contended for on behalf of the respondent is correct, then *William Cory & Son Ltd.* v. *Dorman, Long, & Co. Ltd.* (2) and *The Thames* (6) could have been decided on the meaning of the words " parties interested."

Weston K.C., for the respondent. A charter by demise is a happening within the meaning of Part VIII. of the *Merchant Shipping Act* 1894, both independently of and by virtue of subsequent amending legislation. A person with possession and entire control of a ship

(1) (1908) A.C. 126.
(2) (1936) 155 L.T. 53.
(3) (1909) 9 C.L.R. 693, at p. 696.
(4) (1936) 155 L.T., at pp. 55, 56.
(5) (1879) 4 Q.B.D. 462, at p. 467.
(6) (1940) P. 143.
(7) (1940) P., at pp. 149 et seq.
(8) (1922) P. 175.

is an owner under s. 503 of the Act, as originally appearing and as amended by s. 71 of the 1906 Act. The 1898 Act deals exclusively with unregistered ships and the 1894 Act, with or without amendment other than that made by the 1898 Act, deals with registered ships so far as relevant: See *Halsbury's Statutes of England*, vol. 18, p. 163. In *Sir John Jackson Ltd.* v. *Owners of Steamship* "*Blanche*" (1), the House of Lords did not deal with the 1894 Act as amended by s. 71 of the 1906 Act, nor did it deal with s. 71 in isolation; it dealt with the 1894 Act as originally enacted (*William Cory & Son Ltd.* v. *Dorman, Long, & Co. Ltd.* (2)). The collision under consideration occurred prior to the passing of the 1906 Act and if s. 71 was not declaratory it would not be applicable to those proceedings. The position in this case was exactly put *in arguendo* in the "*Blanche*" *Case* (3). The criterion of protection under the Act is control and not the mode in which the control is acquired: the protection is given to the person who has the sole control of a ship (4), or, alternatively, has acquired in any manner whatsoever, a special and temporary ownership (5). A charterer by demise does not become liable because he is a charterer by demise as distinct from a charterer not by demise or a hirer, he becomes liable for the same and on the same ground. *Cory's Case* (2) proceeds upon the basis that (*a*) the plaintiff or the person seeking limitation was not an owner in the ordinary sense of that expression, it was a company; (*b*) the company seeking limitation had not complete control; (*c*) the company was not a charterer of any kind, whether by demise or not by demise, in writing or orally; and (*d*) the company was the servant of another entity. The observations about charters by demise being or not being in writing (6) were only expressions of doubt as to what is the law on the point and were not necessary to the decision in the case. There was not any finding in that case as to what the position would have been if the control had been in the principal company; the finding of fact upon which the court proceeded was that the lighterage company was owner in law, it was principal in relation to servant. Control means *de facto* control. The 1921 Act was introduced to enlarge the class of ships or to enlarge the class of craft to which the 1894 Act should apply and it proceeded upon the basis that there was not sole control in the person seeking to limit. It went upon the footing that the person seeking to limit had sole control with the subtraction of the right of the owner at will to reclaim the vessel and repair it, and

(1) (1908) A.C. 126.
(2) (1936) 155 L.T. 53.
(3) (1908) A.C., at p. 127.
(4) (1908) A.C., at pp. 130-132, 134.
(5) (1908) A.C., at p. 135.
(6) (1936) 155 L.T., at pp. 55, 56.

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therefore there had to be a decision that control less than sole control constituted him owner. The respondent is contending for ownership on the basis of sole legal control and if that were subject to subtraction something more would be needed than that for which the respondent contends. In *The Thames* (1), the decision went upon the 1894 Act and it was held that s. 71 of the 1906 Act was merely declaratory and declaratory of all persons who came within the definition of persons having legal control. In that case, the Court of Appeal was dealing with incomplete control (2). There may be a charter or a charter by demise without writing. Except in special types of cases, the necessity to have a transaction evidenced by writing must be created by legislation (*Calder* v. *Dobell* (3)). It is not necessary that a charter party should be in writing (*Lidgett* v. *Williams* (4)). Whereas " charter " originally may have connoted a writing, it has come to connote a very ordinary happening. The respondent was a charterer by demise. Whether the respondent was or was not a charterer by demise, it was in full legal control. Upon the repeal by the 1906 Act of the proviso to s. 1 of the 1898 Act, the proviso would not further assist in interpreting the statutory provisions. The decision in *The Harlow* (5) meets the position in this case and should be applied. The words " parties interested ", introduced by s. 1 of the 1898 Act, should be given a wide meaning ; there is no warrant for the suggestion that upon an application of the principle of the *ejusdem generis* rule the meaning of those words should be confined to persons interested in the building or the launching of a vessel.

Taylor K.C., in reply. Section 71 of the 1906 Act was not a declaratory section but was intended by the legislature to extend the definition of " owner " in s. 503 (*Sir John Jackson Ltd.* v. *Owners of Steamship " Blanche "* (6) ; *William Cory & Son Ltd.* v. *Dorman, Long, & Co. Ltd.* (7) and *The Thames* (8)). The legislature provided for the general case and, probably, on the assumption that any charter would be in writing, did not direct its consideration to charters by demise not in writing. The *Merchant Shipping* (*Liability of Shipowners*) *Act* 1898 was passed to deal with a very special position which had arisen, therefore the words " parties interested " in s. 1 of that Act must be considered in all the circumstances under

(1) (1940) P. 143.
(2) (1940) P., at p. 150.
(3) (1871) L.R. 6 C.P. 486, at pp. 492, 493.
(4) (1845) 4 Hare 456, at p. 462 [67 E.R. 727, at p. 730].
(5) (1922) P. 175.
(6) (1908) A.C. 126.
(7) (1936) 155 L.T. 53 at p. 54.
(8) (1940) P., at pp. 148, 149.

which that section was passed. Under the 1894 Act, persons interested who were not owners got no protection at all; under the 1898 Act, they got protection but in respect of unregistered British ships and until registration thereof. The statement in the "*Blanche*" *Case* (1) is not an exclusive statement of the circumstances under which the owner of a ship becomes liable. For very many years, and long prior to the 1921 Act, barges and lighters have been regarded as ships for the purpose of registration and also for the purpose of limitation (*The Mac* (2), *The Lighter No.* 3 (3), *The Mudlark* (4)). What is a ship was discussed in *The Harlow* (5). The Court below was wrong in holding that the respondent was entitled to limit.

Cur. adv. vult.

June 27.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales allowing an appeal from an order of *Halse Rogers* J. pronouncing that the respondent company, as the charterer of the steamship *Bonnie Bell*, was entitled to limit its liability under the *Merchant Shipping Acts* 1894 to 1940 (Imp.) to an amount of £8 for each ton of the registered tonnage of that steamship. The Full Court pronounced that the respondent was entitled so to limit liability in respect of the tonnage of the *Bonnie Bell* but together with the tonnage of a lighter which was lashed to the *Bonnie Bell* at the relevant time.

The appellant appeals to this Court under the provisions of s. 73 of the Commonwealth Constitution and s. 35 of the *Judiciary Act* 1903-1940, relating to appeals from judgments of the Supreme Court of a State. The respondent objects that this Court has no jurisdiction to hear the appeal on the ground that the appeal is not from the Supreme Court, but from a Colonial Court of Admiralty in New South Wales, and that the only appeal is therefore to His Majesty the King in Council.

The argument depends upon the *Colonial Courts of Admiralty Act* 1890 (Imp.). Before that Act was passed, there were Vice-Admiralty Courts in various parts of the Empire constituted under the *Vice Admiralty Courts Act* 1863 (Imp.). These courts were abolished by s. 17 of the *Colonial Courts of Admiralty Act*, except in the case of the British possessions named in the First Schedule to the Act—see s. 16. New South Wales and Victoria were among the

(1) (1908) A.C., at p. 136.
(2) (1882) 7 P.D. 126.
(3) (1902) 18 T.L.R. 322.
(4) (1911) P. 116.
(5) (1922) P., at p. 181.

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British possessions so named. Section 16 provided, however, that the Act should come into force in the scheduled British possessions when directed by an order of Her Majesty in Council. By an Order in Council dated 4th May 1911, the Act was brought into force in New South Wales and Victoria, so that admiralty jurisdiction is now exercised in New South Wales as in all other States of the Commonwealth by virtue of the *Colonial Courts of Admiralty Act*.

Section 2 of the Act provides :—" (1) Every court of law in a British possession, which is for the time being declared in pursuance of this act to be a court of admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of admiralty, with the jurisdiction in this act mentioned." Section 2 (2) provides that the jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of the Act, " be over the like places, persons, matters, and things, as the admiralty jurisdiction of the high court in England, whether existing by virtue of any statute or otherwise, and the colonial court of admiralty may exercise such jurisdiction in like manner and to as full an extent as the high court in England, and shall have the same regard as that court to international law and the comity of nations." Thus the jurisdiction of a Colonial Court of Admiralty is the same geographically and otherwise as the admiralty jurisdiction of the High Court in England—but only as it existed at the time of the passing of the Act—*The Yuri Maru and The Woron* (1).

Section 3 of the Act relates to the power of colonial legislatures as to admiralty jurisdiction. It provides that—" The legislature of a British possession may by any colonial law—(a) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a colonial court of admiralty, and provide for the exercise by such court of its jurisdiction under this act, and limit territorially, or otherwise, the extent of such jurisdiction ; and (b) confer upon any inferior or subordinate court in that possession such partial or limited admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit."

The *Judiciary Act* 1914 introduced s. 30A into the principal *Judiciary Act*. Section 30A was as follows :—" The High Court is hereby declared to be a Colonial Court of Admiralty within the meaning of the Imperial Act known as the *Colonial Courts of Admiralty Act*, 1890." The meaning of " British possession " in Imperial statutes, and therefore in the *Colonial Courts of Admiralty Act*, is defined by s. 18 of the *Interpretation Act* 1889 (Imp.) :—" The expression ' British possession ' shall mean any part of her Majesty's

(1) (1927) A.C. 906.

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." It has been decided that Australia is a British possession within the meaning of the *Colonial Courts of Admiralty Act*: *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1); *McArthur* v. *Williams* (2).

The result of the declaration contained in s. 30A of the *Judiciary Act*, in view of the terms of s. 2 (1) of the *Colonial Courts of Admiralty Act*, was that no other courts in Australia were Colonial Courts of Admiralty, so that the State Supreme Courts lost their jurisdiction in admiralty. Attention was called to the position which had thus been created in *McArthur* v. *Williams* (2); *Union Steamship Co. of New Zealand Ltd.* v. *The Caradale* (3); and see also *Nagrint* v. *The* "*Regis*" (4).

Section 30A, however, was repealed by the *Judiciary Act* 1939, s. 3. The present position, therefore, is that, there being no declaration in force in Australia under s. 2 of the *Colonial Courts of Admiralty Act*, all courts of unlimited civil jurisdiction in Australia are Colonial Courts of Admiralty within the meaning of the Act. The expression "unlimited civil jurisdiction" is defined in s. 15 of the Act to mean civil jurisdiction unlimited as to the value of the subject matter at issue or to the amount that may be claimed or recovered. The High Court and the Supreme Courts of the States satisfy this definition, and accordingly are all Colonial Courts of Admiralty.

It is true, as pointed out by Mr. *Evans*, that the result is that all these courts have jurisdiction which is unlimited geographically. It was suggested that difficulties might arise if the High Court, as well as the State Courts, were held to have such jurisdiction. But the State Courts have had this geographically unlimited jurisdiction in admiralty for many years, and no difficulties have arisen, and there is no reason to suppose that the added jurisdiction of the High Court as a Colonial Court of Admiralty will create any difficulties.

It is contended, however, that the *Colonial Courts of Admiralty Act* really created Colonial Courts of Admiralty as Imperial Courts in an Imperial system, so that when *Halse Rogers* J. sat in the exercise of the jurisdiction conferred by the Act he was not sitting as the Supreme Court, but simply as a Colonial Court of Admiralty. In order to support this objection, reliance is placed upon cases in which it has been held that the conferring of jurisdiction upon a judge may involve merely the selection of that judge as *persona designata*

(1) (1924) 34 C.L.R. 420.
(2) (1936) 55 C.L.R. 324.
(3) (1937) 56 C.L.R. 277.
(4) (1939) 61 C.L.R. 688.

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so that the judge exercising the new jurisdiction would not sit as the court which would be constituted by him in its ordinary jurisdiction : See, for example, *Holmes* v. *Angwin* (1) ; *C. A. MacDonald Ltd.* v. *South Australian Railways Commissioner* (2) ; *Medical Board of Victoria* v. *Meyer* (3) ; *Webb* v. *Hanlon* (4). It was also argued that the position of Colonial Courts of Admiralty was the same as that of the Vice-Admiralty Courts, of which it was said in *The Yuri Maru and The Woron* (5) :—" In practice, a judge of the Superior Court of the possession was always made judge of the Vice-Admiralty Court, but he held that office by virtue of an appointment from the British Admiralty, and not by virtue of his position as judge of the possession. His jurisdiction was vested in him personally, and not in the colonial court."

In my opinion, these objections cannot be sustained. Section 2 confers additional jurisdiction upon courts of law already existing. That jurisdiction may be full and complete admiralty jurisdiction as is at present the case in Australia, or it may be a limited jurisdiction conferred by a colonial legislature under s. 3, which has already been quoted. Under s. 3 (*b*) an inferior court, e.g. the District Court in New South Wales, might be given partial or limited admiralty jurisdiction. In the latter case, it could hardly be contended that the District Court, in exercising such partial or limited jurisdiction was not a District Court, but a new Imperial court. Similarly, in my opinion, it is not the case that the Supreme Court when exercising the jurisdiction under the Act is not the Supreme Court. The fact that the jurisdiction of the Colonial Courts of Admiralty may under s. 3 of the Act be defined by a colonial legislature supports the view that the courts which exercise jurisdiction under the Act are not regarded as Imperial Courts existing by virtue only of an Imperial statute. Reference may also be made to s. 7 of the Act, which provides that rules of court for regulating the practice, procedure, fees and costs in a court in a British possession in the exercise of the jurisdiction conferred by the Act may be made by the same authority and in the same manner as rules touching the practice &c. in the said court in the exercise of its ordinary civil jurisdiction. This provision assumes the continued existence of a court exercising ordinary civil jurisdiction and also exercising new jurisdiction conferred by the Act.

In relation to this argument, s. 2 of the Act may usefully be compared with s. 9. Section 9 (1) provides that it shall be lawful for

(1) (1906) 4 C.L.R. 297.
(2) (1911) 12 C.L.R. 221.
(3) (1937) 58 C.L.R. 62.
(4) (1939) 61 C.L.R. 313.
(5) (1927) A.C., at p. 912.

Her Majesty by commission under the Great Seal to empower the Admiralty to establish in a British possession any Vice-Admiralty Courts. Section 9 (2) provides that, upon the establishment of a Vice-Admiralty Court, the Admiralty may appoint a judge, registrar, marshal, and other officers of the court, &c. This section provides an illustration of the process of the creation of a court. Such a provision is very different indeed from a provision vesting additional jurisdiction in an existing court, which is what is done by s. 2.

This view is in line with references to Colonial Courts of Admiralty in *The Yuri Maru and The Woron* (1), where it is said of the Act that " its plain intent is the establishment as part of the machinery of self-government within each autonomous area of courts locally constituted, wherein judges locally nominated should exercise such a measure of jurisdiction in Admiralty within prescribed limits as the government on the spot might think convenient." See also at p. 914—" The Act of 1890 empowers the legislature in any of the dominions to determine by its own statute, subject to the Royal Assent on the prescribed special reservation," (a reference to s. 4) " what shall be the extent of the Admiralty jurisdiction of the Courts for which the local legislation provides."

Thus, in my opinion, a decision of the Supreme Court in the exercise of jurisdiction conferred by the *Colonial Courts of Admiralty Act* is a decision of the Supreme Court in every sense.

But it is further argued that, even if the Supreme Court acts as the Supreme Court when exercising admiralty jurisdiction, there is no appeal to this Court. This argument is founded upon ss. 5 and 6 of the Act. Section 5 provides :—" Subject to rules of court under this act, judgments of a court in a British possession given or made in the exercise of the jurisdiction conferred on it by this act, shall be subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction, and the court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by this act conferred upon a colonial court of admiralty." It is admitted that there is a local appeal in New South Wales to the Full Court of the Supreme Court from a single judge sitting in admiralty jurisdiction, and that the Full Court sitting in such an appeal has all the jurisdiction of a Colonial Court of Admiralty. But it is argued that such an appeal is an appeal within the juridical system of New South Wales, and that the section does not permit an appeal to the High Court, which is not a New South Wales court but an Australian court. The argument is reinforced, it is suggested, by consideration of s. 6 (1), which provides :—" The

(1) (1927) A.C., at p. 913.

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appeal from a judgment of any court in a British possession in the exercise of the jurisdiction conferred by this act, either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council." It may be added that the *Colonial Courts of Admiralty Act* was passed in 1890, and the High Court did not come into existence until 1903. The conclusion of this argument is that, though there may be an appeal from a single judge sitting in admiralty to the Full Court of the Supreme Court, and thence to the King in Council, there can be no appeal to the High Court.

In my opinion, there is no reason for limiting the application of the *Colonial Courts of Admiralty Act* to courts which existed at the time when the Act was passed. If the terms of the Act are such as to be applicable to courts which have subsequently been created (as in the case of the High Court), then the Act should be held to operate in relation to those courts according to its terms. The Act, in my opinion, becomes applicable to what, at the time of its passing, might be described as future possible courts in the same way as it may become applicable to what, at the time of its passing, might have been described as future British possessions.

I agree that the term "local appeal" in s. 5 refers to an appeal within a particular locality, namely the British possession within which the Colonial Court of Admiralty exists from which the appeal is brought. But in this case the British possession is Australia, not New South Wales: See *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1), and *McArthur* v. *Williams* (2). The High Court is a court within that British possession. "Local appeal" is defined in s. 15 of the Act as meaning an appeal to any court inferior to Her Majesty in Council. The High Court is such a court. Under s. 5, therefore, the High Court as a local court of appeal possesses, in the same manner as the Full Court of the Supreme Court when hearing an appeal, "all the jurisdiction by this act conferred upon a colonial court of admiralty."

It is true that s. 6 provides that *the* (not *an*) appeal from the judgment of any court in a British possession shall be to the Queen in Council. But that appeal is an appeal either where there is as of right no local appeal, or after a decision on local appeal. The decision upon an appeal in admiralty to this Court is, in my opinion, a decision on local appeal. Section 6 does not exclude any appeal which is a local appeal, but adds a right of appeal to Her Majesty in Council after a local appeal. It is not necessary in this case to consider whether this provision is still effective to give an appeal

(1) (1924) 34 C.L.R. 420. (2) (1936) 55 C.L.R. 324.

to the Privy Council from a judgment of the High Court upon an appeal in admiralty after the later enactment of s. 73 of the Constitution of the Commonwealth. Nor is it necessary to consider whether the provision is effective to give an appeal to the Privy Council from a judgment of the Full Court of the Supreme Court in admiralty after and notwithstanding the later enactment of s. 39 of the *Judiciary Act* 1903-1940. No question arises as to the effect of these provisions in the present case.

In my opinion, the objection to jurisdiction fails; the judgment appealed from is a judgment of the Supreme Court within the meaning of s. 73 of the Constitution and s. 35 of the *Judiciary Act*; and an appeal lies from it to this court.

I come now to deal with the merits of the appeal. The Shell Co. of Australia Ltd. was sued in an action *in personam* as the charterer of the tug *Bonnie Bell* for damages alleged to have been caused to the appellant's collier *Hetton Bank* by the negligent navigation of the *Bonnie Bell*. The Shell Co. was held to be liable. That company then brought this action against the appellant company, claiming that it was entitled to limit its liability under the *Merchant Shipping Act* 1894, s. 503. At the time when the damage was caused to the *Hetton Bank*, a lighter was lashed to the *Bonnie Bell*. *Halse Rogers* J. held that the lighter was an innocent vessel, and that the Shell Co. was entitled to limit its liability by reference to the tonnage only of the *Bonnie Bell*. Upon appeal to the Full Court of the Supreme Court, it was held that the damage to the *Hetton Bank* was caused by the improper navigation of both the lighter and the tug; that the Shell Co. was entitled to limit its liability, but by reference to the combined tonnage of the tug and the lighter and not to that of the tug only. Upon this appeal, no argument has been addressed to the Court for the purpose of displacing the finding of the Supreme Court that the damage was caused by the improper navigation of both ships.

Section 503 of the *Merchant Shipping Act* 1894 (Imp.) provides that the owners of a ship, British or foreign, shall not, in certain cases, including loss or damage caused to any other vessel by reason of the improper navigation of the ship without their fault or privity, be liable to damages beyond an aggregate amount not exceeding £8 for each ton of the ship's tonnage. Under s. 508, the benefit of this provision does not extend to any British ship which is not recognized as a British ship within the meaning of the Act. Section 2 of the Act provides that, if a ship required by the Act to be registered is not registered under the Act, she shall not be recognized as a British ship. The tug *Bonnie Bell* was a British ship registered

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under the Act, but the lighter was not so registered. Prima facie, the Shell Co. as owner of the lighter was therefore not entitled to the benefit of limitation of liability under s. 503. But the *Merchant Shipping* (*Liability of Shipowners*) *Act* 1898 (Imp.) extended the benefit of s. 503 to the owners, builders or other parties interested in any ship built at any port or place in Her Majesty's dominions from and including the launching of such ship until the registration thereof under s. 2 of the Act of 1894, with a proviso that such owners, builders or other parties should not benefit under the section for a period beyond three months after the launching of such ship. The proviso was repealed by the *Merchant Shipping Act* 1906 (Imp.), s. 70. The result was that the owners of a ship built within His Majesty's dominions became entitled to the benefit of s. 503, even though the ship was not registered during an indefinite period: See *The Harlow* (1).

It has not been disputed that the lighter was a ship. It was built at Sydney within His Majesty's dominions. If the Shell Co. was the owner of the lighter the company was entitled to limit its liability for the damage caused by the lighter.

The meaning of the word " owner " has been considered in a number of cases, and, in *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (2), and *Sir John Jackson Ltd.* v. *Owners of Steamship* " *Blanche* " (3), it was held that a person who had entire control of the ship was an owner within the meaning of that section. In the present case, the Shell Co. had a right to the entire control of the ship, and accordingly was an owner within the meaning of s. 503, and therefore was entitled to limit its liability under that section. The relevant legislation is fully stated and closely analysed in the part of the judgment of *Jordan* C.J. dealing with this aspect of the case, and I agree so entirely with what his Honour has said that I consider it unnecessary to do more than state my concurrence in his conclusion, and my agreement with the detailed argument whereby that conclusion is reached. I add, however, that the appellant contended that the presumed necessity of enacting s. 1 (2) of the *Merchant Shipping Act* 1921 (Imp.) showed that the word " owner " in s. 503 of the Act of 1894 should not be construed in the wide sense above stated—an argument with which the learned Chief Justice does not specifically deal. The Act of 1921 is limited in its application to barges &c. used in Great Britain. Section 1 (2) provides that in relation to such vessels the expression " owner " shall include any hirer who has contracted to take over the sole charge and management thereof and is responsible for the navigation,

(1) (1922) P. 175. (2) (1893) A.C. 8. (3) (1908) A.C. 126.

manning and equipment thereof. I agree that this provision was unnecessary if " owner " has the meaning above stated. But this fact, though of some weight, does not conclusively meet the arguments based upon the decisions cited—arguments which appear to me to be decisive. It therefore becomes unnecessary for me to consider whether the Shell Co. is also a " party interested " within the meaning of the Act of 1898 or a charterer to whom the ship was demised within the meaning of . 71 of the Act of 1906.

In my opinion, the appeal should be dismissed.

Starke J. Appeal from an order of the Supreme (Full) Court of New South Wales intituled in admiralty allowing an appeal from an order pronouncing that the respondent, the Shell Co. of Australia Ltd., was entitled to limit its liability according to the provision of the *Merchant Shipping Acts* 1894 to 1940 (Imp.) to an amount at the rate of £8 per ton for each ton of the registered tonnage of the s.s. *Bonnie Bell* with certain additions and in lieu thereof decreeing that the Shell Co. was entitled to limit its liability upon the aggregate tonnages of the s.s. *Bonnie Bell* and a lighter lashed to her.

The facts are that the *Bonnie Bell* with a lighter lashed alongside was proceeding up the Paramatta River, and made a sudden turn to starboard across the course of the s.s. *Hetton Bank* whereby that steamship, in attempting to avoid a collision, struck the Gladesville Bridge and damaged both herself and the bridge. The *Bonnie Bell* and the lighter were at the time of the collision in the possession, to use a neutral word, of the Shell Co., and the *Hetton Bank* was owned by the appellant. And in an action in the Supreme Court by the appellant against the Shell Co. the Court found that the *Bonnie Bell* had been negligently navigated and entered judgment for the appellant against the Shell Co. for damages to be assessed. Thereupon proceedings for limitation of liability pursuant to the *Merchant Shipping Acts* were brought in the Supreme Court intituled in admiralty by the Shell Co. against the owners of the s.s. *Hetton Bank*—the appellant—with the result already mentioned. The owners of the *Hetton Bank* have appealed to this Court against the decree or order of the Full Court and claim that a decree or order should have been made that the Shell Co. was not entitled to limit its liability for the damages done by the *Bonnie Bell* and the lighter.

A preliminary objection has been taken that no appeal lies to this Court from the decision of the Full Court, but only to His Majesty in Council.

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The limitation of shipowners' liability and the jurisdiction of the courts in relation thereto depend wholly upon statute. The history of the matter is set forth in *Marsden's Collisions at Sea*, 9th ed. (1934), pp. 161 et seq., but for present purposes it is unnecessary to go farther back than the *Merchant Shipping Act* 1854, 17 & 18 Vict. c. 104. That Act, in s. 514, provided that in cases where any liability was alleged to have been incurred by any owner in respect of loss of life, personal injury or loss of or damage to ships, boats or goods, and several claims were made or apprehended in respect of such liability then (subject to the right given to the Board of Trade of recovering damages in respect of loss of life or personal injury) it should be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent Court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability and for the distribution of such amount ratably amongst the several claimants. The *Common Law Procedure Act* 1860, 23 & 24 Vict. c. 126, conferred this jurisdiction also upon the Superior Courts of common law or any judge thereof. And the *Admiralty Court Act* 1861 (24 & 25 Vict. c. 10), s. 13 conferred this jurisdiction also upon the High Court of Admiralty whenever any ship or vessel or the proceeds thereof were under arrest of the High Court of Admiralty. And this authority was exercised when bail had been given in proceedings *in rem* (*The Northumbria* (1)). Jurisdiction was not, however, conferred upon Vice-Admiralty Courts under the *Vice Admiralty Courts Act* 1863 (26 & 27 Vict. c. 24) to entertain suits for the limitation of shipowners' liability: See s. 10.

The jurisdiction to entertain suits for the limitation of the liability of shipowners depends, therefore, in British possessions, upon the express grant of that authority in the *Merchant Shipping Act* to courts of competent jurisdiction. But the Act did not define those courts, though courts, however, in British possessions in which was vested the like authority and jurisdiction of the Court of Chancery and the Superior Courts of Common Law are necessarily within that description by reason of the unlimited and extensive nature of their jurisdictions. Long before the year 1854, the Supreme Court of New South Wales possessed and exercised the jurisdiction of all these Courts and was consequently a court of competent jurisdiction to entertain suits for the limitation of shipowners' liability: See 4 Geo. IV. c. 96, ss. II., IX.; 9 Geo. IV. c. 83, ss. III., XI. The *Supreme Court of Judicature Act* 1873 (36 & 37 Vict. c. 66), s. 16, now consolidated in the *Supreme Court of*

(1) (1869) L.R. 3 A. & E. 24.

Judicature (*Consolidation*) *Act* 1925 (15 & 16 Geo. V. c. 49), transferred to and vested in the High Court of Justice established under that Act the jurisdiction which at the commencement of the Act was vested in the High Court of Chancery, the Superior Courts of Common Law and the High Court of Admiralty.

In 1890, the *Colonial Courts of Admiralty Act* (Imp.) was passed and came into force in New South Wales on 1st July 1911 pursuant to an Order in Council dated 4th May 1911. Subject to the provisions of the Act, the *Vice Admiralty Courts Act* 1863 (Imp.) was repealed. Every court of law in a British possession which had unlimited civil jurisdiction was constituted a Court of Admiralty with the jurisdiction in the Act mentioned. Jurisdiction was conferred upon such courts over the like places, persons, matters and things as the admiralty jurisdiction of the High Court whether existing by virtue of any statute or otherwise (s. 2). And, subject to rules of court, judgments of a court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act are subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction, and the court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by the Act conferred upon a Colonial Court of Admiralty (s. 5). And the appeal from a judgment of any court in the exercise of the jurisdiction conferred by the Act where there is as of right no local appeal or after a decision on local appeal, lies to His Majesty in Council (s. 6). It was contended that this Act neither confers upon nor transfers to the Supreme Court of New South Wales as such the jurisdiction therein mentioned but constitutes another tribunal described in argument as an Imperial Court called a Colonial Court of Admiralty with the jurisdiction and authority in the Act mentioned. And that appeals to the High Court were only competent in cases provided by s. 73 of the Constitution. In my opinion, the effect of s. 2 of the *Colonial Courts of Admiralty Act* 1890, coupled with the Order in Council, was to vest in every court of law in a British possession, which had therein unlimited civil jurisdiction, admiralty jurisdiction as it existed at the time of the passing of that Act (*The Yuri Maru and The Woron* (1)), not as a separate and distinct tribunal called a Colonial Court of Admiralty, but as a part of the jurisdiction of the court in the British possession. The terms of the Act make this clear. Thus, in s. 2, every court of law in a British possession which has therein original unlimited civil jurisdiction is a Court of Admiralty with the jurisdiction in that Act mentioned and to this may be added

(1) (1927) A.C. 906.

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the provisions of ss. 3, 4, 11, 12. Before the passing of the *Judiciary Act* 1914, the Supreme Court of New South Wales also acquired admiralty jurisdiction under this Act, which, as already stated, included suits for the limitation of the liability of owners. Doubt, however, was expressed in this Court whether the passing of the *Judiciary Act*, ss. 30 (*b*) and 30A (1914 No. 11), conferring original jurisdiction upon the High Court in all matters of admiralty or maritime jurisdiction, had not deprived the State Courts of that jurisdiction. The reasoning of *Holroyd* A.C.J. in *In re McKelvey* (1) satisfies me that the doubts were not well founded. The States did not lose their character of British possessions because in a federal union they are also deemed to be one British possession. But be the doubts well founded or not, the repeal of s. 30 (*b*) by the *Judiciary Act* 1939 (No. 43 of 1939) has removed those doubts and revived, as I understand, admiralty jurisdiction conferred by the *Colonial Courts of Admiralty Act* 1890 upon the State Courts: See *McArthur* v. *Williams* (2); *Union Steamship Co. of New Zealand Ltd.* v. *The Caradale* (3). The result is that the Supreme Court of New South Wales has jurisdiction in suits for the limitation of owner's liability both in virtue of the *Merchant Shipping Act* 1894, s. 504, and its amendments so far as applicable (See for example, Act 1898 (61 & 62 Vict. c. 14); Act of 1906 (6 Edw. VII. c. 48) and Act 1900 (63 & 64 Vict. c. 32)), and the *Colonial Courts of Admiralty Act* 1890. And if so the *Colonial Courts of Admiralty Act* 1890, s. 5, gave an appeal in this suit from the trial judge to the Full Court of New South Wales and the Constitution (which took effect on 1st January 1901) provided in s. 73 that the High Court should have jurisdiction to hear and determine appeals from all judgments, decrees, orders, and sentences of the Supreme Court of any State. It may be that the judgments of the Supreme Court in its admiralty jurisdiction are also subject to appeal to this Court by reason of the provisions of s. 5 of the *Colonial Courts of Admiralty Act* 1890. But I doubt whether an appeal to this Court is a local appeal within the meaning of that section. The local appeal is, I rather think, an appeal to some tribunal within the possession in which the court is declared to be a Court of Admiralty or, in which the court, if no such declaration be in force in the possession, has therein original unlimited civil jurisdiction. The preliminary objection fails.

Consequently this appeal is competent.

It was not disputed that the damage to the *Hetton Bank* took place without the actual fault or privity of the Shell Co. and it was

(1) (1906) V.L.R. 304, at p. 310. (2) (1936) 55 C.L.R., at pp. 358-360.
(3) (1937) 56 C.L.R., at p. 280.

conceded, in this Court, that the damage sustained by the *Hetton Bank* was caused by the negligent navigation of the *Bonnie Bell* and the lighter lashed alongside.

The Supreme Court held that the Shell Co. was the owner of the *Bonnie Bell* and the lighter and therefore entitled to limit its liability pursuant to the provisions of the *Merchant Shipping Act* 1894 and its amendments to an amount at the rate of £8 per ton upon the aggregate tonnages of the *Bonnie Bell* and the lighter: See *The Harlow* (1).

The *Merchant Shipping Act* 1894, s. 503, provides that the owners of a ship, British or foreign, may limit their liability in the manner prescribed by the Act. The appellants contend that the Shell Co. was not the owner of the lighter lashed alongside the *Bonnie Bell*. The lighter was hired by the Shell Co. from George Hudson & Co. Ltd. under a parol arrangement for 10s. per day from 1st May 1941 to 31st May 1941 and if a continuance of the hire was desired a fresh request in writing was sent for each succeeding month. The Shell Co. thus obtained possession and control of the lighter and of her navigation. The appellant submits that the word "owners" means the persons or bodies in whom technically the right of property in a ship vests. That construction of the section cannot be adopted since the decision in *The "Blanche"* (2), for there it was held that the word included charterers by demise, reversing the decisions of the trial judge and of the Court of Appeal (*The Hopper No.* 66 (3)), and demonstrating that the amendment of the Act in 1906 (6 Edw. VII. c. 48, s. 71) declaring that the word "owner" should be deemed to include any charterer to whom the ship was demised, had been unnecessary. The word "owners" is therefore used in a sense larger than its technical sense. It may be that the Shell Co. was not a charterer by demise of the lighter in the strict sense (Cf. *Scrutton* on *Charter-parties and Bills of Lading*, 13th ed. (1931), pp. 5, 6). But the Shell Co. had possession and full control of the lighter, and of its navigation independent of the owner and without reference to it. And if it was not a charterer by demise of the ship in the technical sense nevertheless it was in an analogous position. The word "owners" is large enough, in my opinion, to include persons or bodies to whom is given for a limited time as full and complete control of the ship as an owner would have possessed (*Baumwoll Manufactur von Carl Scheibler* v. *Furness* (4)).

According to the decisions, the "lighter" was a ship within the meaning of the *Merchant Shipping Act* 1894 (*The Mac* (5); *The*

(1) (1922) P., at pp. 186, 187.
(2) (1908) A.C. 126.
(3) (1906) P. 34; (1907) P. 254.
(4) (1893) A.C., at p. 17.
(5) (1882) 7 P.D. 126.

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Harlow (1); *The Champion* (2)). She was built and launched, I understand, in Australia, but she was never registered and was therefore excluded from the benefit of limitation of liability under the Act (*The Andalusian* (3)). "But the *Merchant Shipping Act* of 1898" (61 & 62 Vict. c. 14), "as amended by the *Merchant Shipping Act*, 1906, s. 85, and Sch. II." (6 Edw. VII. c. 48), "extends the privilege of limitation of liability to the owners, builders and other parties interested in any ship built at any port or place in His Majesty's dominions from and including the launching of such ship until the registration thereof under s. 2 of the *Merchant Shipping Act*, 1894" (*The Harlow* (4)). The owners and others entitled to the benefit of the 1898 Act were required to register the ship within three months after the launching of the ship but that limitation was abolished by the 1906 Act. It was suggested that the 1906 Act did not "entirely abrogate" the requirements of the *Merchant Shipping Act* 1894 with regard to registration but "merely grants an extension of time for such period as might be required to complete the vessel and take the necessary steps to register her" (See *The Harlow* (5)). But the decision of the Court in *The Harlow* (6) was that "so long as a ship which has been launched remains capable of being registered under s. 2 of the *Merchant Shipping Act*, 1894, the amending enactments in their literal terms give her owners a right to claim limitation of liability for damages at any time after her being launched and before her being registered."

The result is that the decision of the Supreme Court of New South Wales was right and that this appeal should be dismissed.

DIXON J. The respondent in this appeal, the Shell Co. of Australia Ltd., is the plaintiff in the suit and the appellant, McIlwraith McEacharn Ltd., is the defendant.

The suit was brought in the Supreme Court of New South Wales in admiralty for the limitation of the plaintiff's liability in respect of a casualty in which the *Hetton Bank*, owned by McIlwraith McEacharn Ltd., was damaged by reason of the fault of the *Bonnie Bell*, a tug of which the Shell Co. had possession and control under charter. To the tug was lashed a lighter which, though not the property of the Shell Co., was also in its possession and control. The accident took place in the Parramatta River near the Gladesville Bridge, against which the *Hetton Bank* was forced in avoiding a collision with the *Bonnie Bell* and the lighter. The liability of

(1) (1922) P. 175.
(2) (1934) P. 1.
(3) (1877) 2 P.D. 231.
(4) (1922) P., at p. 182.
(5) (1922) P. *in arguendo*, at p. 179.
(6) (1922) P., at p. 183.

the Shell Co. was established in a suit in admiralty by McIlwraith McEacharn Ltd., a suit which, as I understand, was commenced as a suit *in rem* but proceeded *in personam*.

In the limitation suit, it was decided by *Halse Rogers* J. that the Shell Co. was entitled to limit its liability, notwithstanding that lighter was not its property and was not registered, and that it was entitled so to limit its liability by reference to the tonnage of the tug *Bonnie Bell* alone and not by reference to the combined tonnage of the tug and of the lighter. From his decree, McIlwraith McEacharn Ltd. appealed to the Full Court of the Supreme Court, which upheld the decision that the Shell Co. was entitled to limit its liability, but decided that the tonnage upon which the limitation should be calculated was the combined tonnage of the two craft, the tug and the lighter. From the decision of the Full Court that the Shell Co. is entitled to limit its liability, McIlwraith McEacharn Ltd. now appeal to this Court on the ground that the casualty was not attributable to the tug only, a craft admittedly qualified to limit liability, but was attributable to the tug and the lighter together, the lighter being a craft which the appellant contends is not so qualified.

From the part of the decision or decree of the Full Court increasing the tonnage on which the limitation is calculated by adding the tonnage of the lighter, the respondent, the Shell Co., has not cross-appealed. But the respondent objects that the appeal of McIlwraith McEacharn Ltd. to this Court is incompetent. The objection is based upon the fact that the decree appealed from was pronounced by the Supreme Court as a Colonial Court of Admiralty. The contention is that from the Supreme Court sitting as a Colonial Court of Admiralty no appeal lies to this Court.

Admiralty jurisdiction comes from the *Colonial Courts of Admiralty Act* 1890, an Imperial statute. By s. 2 of that Act, every court of law in a British possession which is for the time being declared in pursuance of the Act to be a Court of Admiralty or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty with the jurisdiction in the Act mentioned. There is not now any court of law in Australia expressly " declared " under this provision to be a Court of Admiralty.

Section 5 says that judgments of a court in a British possession given in the exercise of the jurisdiction conferred on it by the Act shall be subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction, and the court having cognizance of such appeal shall, for the purpose thereof, possess all the jurisdiction by the Act conferred upon a Colonial

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Court of Admiralty. Section 6 (1) provides that *the* appeal from a judgment of any court in a British possession in the exercise of the jurisdiction conferred by the Act, either where there is as of right no local appeal or after a decision on local appeal, lies to the Sovereign in Council.

The objection is based in part upon the view that New South Wales is the British possession and that an appeal to this Court cannot be a "local" appeal because it is an appeal to a court for Australia and not a court of New South Wales, the supposed "possession." For the purpose of confirming the view that New South Wales is the possession and not Australia as a whole, reliance is placed upon s. 16 (1) and the First Schedule of the Act. Proviso (*a*) of that sub-section is to the effect that the Act shall not come into force in the British possessions named in the schedule until an Order in Council so directs. The schedule in question is headed "British Possessions in which Operation of Act is Delayed," and it names New South Wales and Victoria, as well as two other colonies. The exception was made because Vice-Admiralty Courts existed in New South Wales and Victoria. It was not until twenty years later, more than ten years after the establishment of the Commonwealth, that the Order in Council was made directing that the *Colonial Courts of Admiralty Act* should apply in those "possessions" (as from 1st July 1911, Statutory Rules and Orders 1911 (Imp.) No. 440). In the meantime, New South Wales and Victoria had ceased to be colonies and had become States of the Commonwealth. It is said, however, that each of them continued to be "the possession" for the purposes of the Act. A grudging and critical recognition was given to the fact that, in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1), this Court had adopted the view that Australia was a British possession within the meaning of the *Colonial Courts of Admiralty Act* 1890, with the consequence that this Court in its original jurisdiction became a Colonial Court of Admiralty. But two answers by way of confession and avoidance were made.

First, it was said that, as *Holroyd* A.C.J. appears to have suggested in *In re McKelvey* (2), New South Wales might, for such a purpose retain her status of another and independent possession, notwithstanding that she now formed part of the new and larger "possession" (the Commonwealth), with the consequence that the appeal to this Court was not "local" in the sense of belonging to or being confined to that "possession" (New South Wales). Secondly, it

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

(2) (1906) V.L.R., at p. 310.

was maintained that a Colonial Court of Admiralty, though consisting of a Supreme Court, is a distinct juridical or judicial entity, so that the present proceeding could not be called an appeal from a judgment, decree, order or sentence of the Supreme Court of a State within the meaning of s. 73 (ii.) of the Constitution. In effect, the propositions of the respondent in support of the objection were that, notwithstanding the decision of this Court to the contrary in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1), the High Court has no jurisdiction in admiralty, whether original or appellate, but that, however that might be, the Supreme Court has since 1911 been a Colonial Court of Admiralty, that the path of appeal is set out by ss. 5 and 6 of the *Colonial Courts of Admiralty Act* 1890, namely a local appeal and then to the Privy Council, that the word " appeal " there means a single appeal, it is not a case of the singular including the plural, and that the plaintiff by appealing to the Full Court exhausted its rights of appeal within Australia, and, in any case, that the Constitution gives no further appeal to the High Court, because it does not cover Colonial Courts of Admiralty, which should be regarded as distinct courts outside the meaning of the references to the Supreme Court in the Constitution, references which ought not to be construed in such a way as to bring them into conflict with the *Colonial Courts of Admiralty Act.*

The whole matter appears to me to depend upon the definition of the expression " British possession " in s. 18 of the Imperial *Interpretation Act* 1889 and upon giving that definition its full application. Section 18 provides that in every Act passed after the commencement of the *Interpretation Act* the expressions that follow shall, unless the contrary intention appears, have the meanings thereby respectively assigned to them. " British possession " is the second in the list, and it is provided that the expression shall mean 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 the definition, be deemed to be one British possession. It seems obvious that, in the *Colonial Courts of Admiralty Act*, passed in the very year in which the *Interpretation Act* came into operation, the expression " British possession " was used in reliance upon this definition.

The definition of " British possession " in s. 39 of the *Fugitive Offenders Act* 1881 (Imp.) is to the same effect. Just as it was said, in *McArthur* v. *Williams* (2), with reference to that statute, that a complete and unqualified application of the definition was

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

(2) (1936) 55 C.L.R., at p. 352.

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required and that from it no difficulties arose which a proper understanding of our legal system would not remove, so, in dealing with the *Colonial Courts of Admiralty Act*, it appears to me that once the definition is applied without reservation no difficulties will be found to remain, except such as come from confusion about the legal consequences of a federal form of government and, it must be added, except some real or apparent difficulties concerning the restriction imposed upon appeals to the Privy Council from judgments given in the exercise of the judicial power of the Commonwealth. It may be said that the decision of this Court in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (1) requires that this course should be followed. Indeed, in dealing with that decision in *McArthur* v. *Williams* (2), in the judgment of *Evatt*, *McTiernan* JJ. and myself, we explained its operation in overcoming the difficulties produced by some of the reasoning in *McKelvey* v. *Meagher* (3), and, subject to the repeal or invalidation of s. 30A of the *Judiciary Act* 1903-1937, its effect in establishing this Court and the Supreme Courts of the States as Colonial Courts of Admiralty. Fortunately, s. 30A has now been repealed : s. 3 of the *Judiciary Act* 1939. The result is to allow full application to Australia of so much of s. 2 (1) of the *Colonial Courts of Admiralty Act* 1890 as provides for the case of the legislature of a British possession making no declaration that a particular court in that possession shall be a Colonial Court of Admiralty. Section 2 (1) enacts that every court of law in a British possession which, if no such declaration is in force in the possession, has therein unlimited civil jurisdiction shall be a Court of Admiralty with the jurisdiction in the Act mentioned. Section 15 defines "unlimited civil jurisdiction" to mean civil jurisdiction unlimited as to the value of the subject matter at issue or as to the amount that may be claimed or recovered. The High Court as well as the Supreme Courts of the States are courts of unlimited civil jurisdiction within this definition. No doubt it is also true of the Supreme Courts of the Territories.

Australia is one of His Majesty's dominions, parts of which are under both a central and a local legislature. The definition in the *Interpretation Act* of "British possession" says that in such a case all parts under the central legislature, that is, in our case, the Commonwealth Parliament, shall, for the purposes of the definition, be deemed to be one British possession. The Commonwealth of Australia is therefore the "possession," that is the unit of jurisdiction, for the purposes of the *Colonial Courts of Admiralty Act* 1890. The High Court and

(1) (1924) 34 C.L.R. 420.
(2) (1936) 55 C.L.R., at pp. 358-361.
(3) (1906) 4 C.L.R. 265.

the Supreme Courts alike fill the description of courts of law in the British possession, that is in the Commonwealth, having therein original unlimited civil jurisdiction, and there is no reason why they should not as a result all be Colonial Courts of Admiralty.

The fact that the jurisdiction of the Supreme Courts is in some sense confined territorially to the respective States, while that of the High Court extends throughout Australia, does not matter. Nor does it matter that the source of the authority of the Supreme Court in its ordinary jurisdiction may be said to be "State law," while that of the High Court is "Federal law," including in those expressions constitutional provisions resting on the authority of the Imperial Parliament. "Federal law" and "State law" represent two components of the law of Australia and we are concerned here, as we were in the case of the *Fugitive Offenders Act*, only with the content, and not with the source, of the law of this country.

The foregoing reasoning is of the same kind as that used in *McArthur* v. *Williams* (1), and it now has the support of the Court of Appeal of New Zealand, in *Godwin* v. *Walker* (2). That Court, in consequence of the judgments delivered in this Court in *McArthur's Case* (1), reconsidered the New Zealand cases of *Re Munro and Campbell* (3), and *Re Munro* (4), and overruled the first and dissented from the reasoning of the second, as well as dissenting from the reasons of *McKelvey* v. *Meagher* (5). *Myers* C.J. adopted the view that, as on the establishment of the Commonwealth the Federal parliament became the central legislature and the State parliaments local legislatures, the Commonwealth of Australia would automatically take the place of the separate colonies as a "British possession" (6). See, too, the judgments of *Kennedy* J. (7), *Fair* J. (8), *Callan* J. (9).

In its application to the Colonial Courts of Admiralty, this view removes most of the difficulties which form the basis of the objection to the competency of the appeal. On the establishment of the Commonwealth, Australia became the British possession for the purposes of the operation of the Act. It is perhaps possible that, as a result of s. 16 (1), the Act did not immediately "come into force" in New South Wales and Victoria though otherwise attaching to the Commonwealth but, if so, the making of the Orders in Council directing that it should do so as from 1st July 1911 gave it an

(1) (1936) 55 C.L.R. 324.
(2) (1938) N.Z.L.R. 712.
(3) (1935) N.Z.L.R. 159.
(4) (1935) N.Z.L.R. 271.
(5) (1906) 4 C.L.R. 265.
(6) (1938) N.Z.L.R., at pp. 731, 732, 733.
(7) (1938) N.Z.L.R., at p. 743.
(8) (1938) N.Z.L.R., at pp. 745, 746.
(9) (1938) N.Z.L.R., at pp. 750, 753.

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unqualified operation throughout the Commonwealth. Thereupon, in statutes dealing with admiralty jurisdiction, references to that jurisdiction in England were to be read for our purposes as if Australia were named: See proviso (*a*) to s. 2 (3).

In s. 5, there is no difficulty in treating the local appeal referred to as including an appeal to the High Court where otherwise one lies. That is true also of s. 6. The contention that the reference to "local appeal" allows of only one appeal is perhaps founded on, or at all events supported by, the use of the indefinite article in the expression in s. 6 (1) "after a decision on local appeal." But the general principle disclosed by ss. 5 and 6 is that the appellate process of "the possession" in ordinary civil matters should apply in admiralty, and there is no sufficient indication of an intention to limit the number of successive appeals. The word "local" means "within the unit of jurisdiction," that is, the possession, and an appeal from the Supreme Court to the High Court is an appeal within Australia as a unit of jurisdiction. These views are borne out by the language of the definition, in s. 15, of the expression "local appeal." It is defined to mean an appeal to any court inferior to Her Majesty in Council. The language of s. 6 (1) appears to give an appeal as of right to the Privy Council from the last "decision on local appeal." Under s. 73 of the Constitution, the judgment of the High Court given in the exercise of its appellate jurisdiction is final and conclusive and accordingly an appeal to the Sovereign in Council can be brought only by special leave, the prerogative to admit such an appeal being preserved by s. 74. The apparent conflict between these provisions cannot, I think, be resolved by reading s. 6 (1) as not necessarily going beyond an appeal by special leave. In *Richelieu and Ontario Navigation Co.* v. *Owners of S.S. Cape Breton* (1), s. 6 (1) was held to confer a right of appeal which overrode a Canadian statute expressed to make the judgments of the Supreme Court of Canada final and conclusive and without appeal, saving any right exercised by the Sovereign by virtue of the royal prerogative. In the present case, the Constitution is, like the *Colonial Courts of Admiralty Act* 1890, an Imperial statute, but later in point of date, and the solution of the conflict must be found in the principles of interpretation. But, whichever should be held to prevail, the existence of the apparent conflict supplies no reason for saying that under the *Colonial Courts of Admiralty Act* an appeal cannot lie to this Court.

The argument that the Supreme Court exercises its admiralty jurisdiction as a distinct court is, in my opinion, opposed to the

(1) (1907) A.C. 112.

provisions of the statute. Section 2 says that a court, filling the description it gives, shall be " a court of admiralty . . . and such court in reference to the jurisdiction conferred by this act is in this act referred to as a colonial court of admiralty." It is clear enough that a new court is not created ; a new jurisdiction is given to existing courts, which, for convenience of legislative expression, are then referred to by a single descriptive name. I therefore think that the *Colonial Courts of Admiralty Act* contains nothing which prevents the Supreme Court exercising jurisdiction in admiralty, an appeal lying to the Full Court of the Supreme Court from an exercise of that jurisdiction and an appeal thence to this Court.

There are, however, some further questions arising from s. 39 of the *Judiciary Act* 1903-1940. But, before dealing with these, it is desirable to refer to the special position occupied by limitation proceedings. Section 2 (2) of the *Colonial Courts of Admiralty Act* provides that the jurisdiction of a Colonial Court of Admiralty shall, subject to the Act, be over the like places, persons, matters and things, as the admiralty jurisdiction of the High Court in England. The High Court in England is, of course, the product of the *Judicature Act*, which combined many jurisdictions in one court and some difficulty exists in being sure of the precise extent of the expression " admiralty jurisdiction of the high court." But it has been held that the expression does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court or may be conferred by statute giving new admiralty jurisdiction to the High Court of England : *Bow, McLachlan & Co. Ltd.* v. *The* " *Camosun* " (1). See further *The Yuri Maru and The Woron* (2).

The principle of limiting a shipowner's liability by reference to the value or tonnage of his ship was introduced into England by statute. " When the principle of thus limiting the liability of shipowners was established by the Legislature, it became necessary to provide some method of distributing the proceeds proportionately, in cases where there should be more claimants than one ; because it is obvious that in such cases, if the proceeds were all paid out to satisfy the first action, suitors in subsequent actions would have little chance of obtaining any recompense. Accordingly, by the *Merchant Shipping Act* 1854, power was given to the Court of Chancery to adjust claims arising out of damage by collision " (*Williams and Bruce, Admiralty Practice*, 3rd ed. (1902), p. 90).

Then the *Admiralty Court Act* 1861 (Imp.), s. 13, provided that whenever any ship or the proceeds thereof are under arrest of the

(1) (1909) A.C. 597, at p. 608. (2) (1927) A.C. 906.

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High Court of Admiralty the said court shall have the same powers as are conferred upon the High Court of Chancery by the ninth part of the *Merchant Shipping Act* 1854 (Imp.). Under the *Judicature Act* 1873 (Imp.), ss. 16 and 76, this jurisdiction of the High Court of Chancery and of the High Court of Admiralty passed to the High Court, but, by the *Rules of the Supreme Court (Merchant Shipping)* 1894 (Imp.), dated 10th December 1894, the jurisdiction was excepted from that assigned to the Probate, Admiralty and Divorce Division.

The decision of *The Yuri Maru and The Woron* (1) requires that the jurisdiction shall be treated as fixed as at the date of the *Colonial Courts of Admiralty Act.*

It would seem that a Colonial Court of Admiralty can entertain a limitation suit in its admiralty jurisdiction only when the vessel is under the arrest of the Court or has been released on bail, though, of course, like the High Court in England, the other jurisdiction of such a court may enable it to deal with suits where neither of these conditions is fulfilled. Whether they were fulfilled in this present case does not appear, though from what was said at the Bar I was disposed to infer that the conditions were not satisfied.

It may be, therefore, that the case is not one within the admiralty jurisdiction conferred by the *Colonial Courts of Admiralty Act* 1890. Further, even if it were, it is presumably also within the ordinary jurisdiction of the Supreme Court, and as the casualty did not occur " outside the body of a county or other like part " of Australia, s. 2 (4) of the *Colonial Courts of Admiralty Act* would not make it necessary to regard the exercise of jurisdiction over the suit as an exercise of jurisdiction under that Act : See *Union Steamship Co. of New Zealand* v. *The Caradale* (2) (where, however, " county " is misprinted " country "). After all, s. 504 of the *Merchant Shipping Act* 1894 authorizes an application to any competent court in a British possession.

The jurisdiction of the Court under the *Colonial Courts of Admiralty Act* may not be co-extensive with the jurisdiction that s. 76 (iii.) of the Constitution empowers the Commonwealth Parliament to confer upon this Court. The power given by that provision is to make laws conferring original jurisdiction on the High Court of Australia in any matter of admiralty and maritime jurisdiction. The observations made by *Isaacs* J. in *John Sharp & Sons Ltd.* v. *The Katherine Mackall* (3) indicate on the one hand the objections that exist to following American doctrine and treating the words as covering a wide field of maritime causes, and on the other hand the

(1) (1927) A.C. 906.
(2) (1937) 56 C.L.R. 277, at p. 280.
(3) (1924) 34 C.L.R., at pp. 426, 428, 433.

grounds that may be urged for not confining them to the narrow jurisdiction conceded by the common law courts to admiralty.

If the case is outside the jurisdiction conferred by the *Colonial Courts of Admiralty Act* and outside that which can be conferred under s. 76 (iii.) of the Constitution, it is quite clear that an appeal would lie from the original judgment or decree to the Full Court of the Supreme Court and thence to this Court. But if the case falls within the class of matters covered by s. 76 (iii.), then prima facie it falls within the operation of s. 39 of the *Judiciary Act* 1903-1940.

The purpose of that provision is to transform the jurisdiction of State courts over the matters described in ss. 75 and 76 of the Constitution into Federal jurisdiction so far as might be and, as to the rest, at least to confer Federal jurisdiction upon State courts. Conditions are then attached to the exercise of the jurisdiction so bestowed or transformed. The process by which this is done has been explained and justified in this Court on several occasions: *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1); *Lorenzo* v. *Carey* (2); *Commonwealth* v. *Limerick Steamship Co. Ltd. and Kidman* (3) (discussed in the Supreme Court of Victoria in *Bardsley* v. *The Commonwealth* (4)); *Pirrie* v. *McFarlane* (5); *Commonwealth* v. *Kreglinger & Fernau Ltd. and Bardsley* (6); and see the judgment of *Macarthur* J. in *Booth* v. *Shelmerdine Bros. Pty. Ltd.* (7), giving literal effect to dicta in *Lorenzo* v. *Carey* (2); compare *Ffrost* v. *Stevenson* (8).

One of the so-called conditions and restrictions attached is expressed in par. (*a*) of sub-s. 2 of s. 39, which says that every decision of the Supreme Court of a State, or any other court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court.

This provision was held to be void by the Privy Council (*Webb* v. *Outrim* (9)), but in this Court, which considered that by reason of s. 74 of the Constitution it was not a matter for the Privy Council to decide, the provision has been treated as valid: See *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (10); *Commonwealth* v. *Limerick Steamship Co. Ltd.* (11); *Pirrie* v. *McFarlane* (12); *Commonwealth* v. *Kreglinger & Fernau Ltd. and Bardsley* (13).

(1) (1907) 4 C.L.R. 1087, at pp. 1137-1140, 1141-1145.
(2) (1921) 29 C.L.R. 243.
(3) (1924) 35 C.L.R. 69, at pp. 87-93, 113-118.
(4) (1926) V.L.R. 310, at pp. 312-319, and 323-327.
(5) (1925) 36 C.L.R. 170, at pp. 198, 223, 225.
(6) (1926) 37 C.L.R. 393, at pp. 407 et seq., 430.
(7) (1924) V.L.R. 276.
(8) (1937) 58 C.L.R. 528, at p. 573.
(9) (1907) A.C. 81.
(10) (1907) 4 C.L.R. 1087.
(11) (1924) 35 C.L.R. 69.
(12) (1925) 36 C.L.R. 170.
(13) (1926) 37 C.L.R. 393.

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Treating the provision contained in s. 39 (2) (*a*) as valid, accordingly, the Supreme Court of Victoria has recently decided that, when a single judge sits as the Supreme Court, his judgment is a decision of the Supreme Court and as such is made final and conclusive, except so far as an appeal may be brought to the High Court, and accordingly that an appeal from his judgment cannot be brought to the Full Court of the Supreme Court: *Cook* v. *Downie* [*No.* 2] (1). If this view were applied to the present case, it would mean that the appeal by McIlwraith McEacharn Ltd. to the Full Court of New South Wales was incompetent.

I am of opinion, however, that, assuming all else in favour of the correctness and the applicability of the view adopted by the Supreme Court of Victoria, it would not govern a cause or matter heard and determined by the Supreme Court in the exercise of the admiralty jurisdiction conferred by the *Colonial Courts of Admiralty Act* 1890. When s. 39 was passed, the *Statute of Westminster* 1931 (Imp.) had not been enacted, and, having regard, not only to the many inconveniences that would result, but also to the conflicts with the provisions of the *Colonial Courts of Admiralty Act* which would ensue from an attempt to make the jurisdiction thereunder of this Court exclusive of that of the Supreme Courts and then to invest them with Federal jurisdiction of the same character as would otherwise belong to them as Colonial Courts of Admiralty, I do not think that the general words of s. 39 should be interpreted as applying to the special case of the jurisdiction of Colonial Courts of Admiralty. In any case, from the decision already cited, viz. *Richelieu and Ontario Navigation Co.* v. *Owners of S.S. Cape Breton* (2), it follows that par. (*a*) of sub-s. (2) of s. 39 could not operate against s. 6 of the *Colonial Courts of Admiralty Act*. If, therefore, the cause falls within the jurisdiction conferred by the *Colonial Courts of Admiralty Act*, which in effect means if it is one which would have been brought within the jurisdiction of the High Court of Admiralty by s. 13 of the *Admiralty Court Act* 1861, then, in my opinion, it is not affected by s. 39 and the appeal to the Full Court was competent.

As the record before us assumes that the matter is one of admiralty jurisdiction, I shall not pursue the question further. But if the assumption were mistaken then, subject to the question whether s. 76 (iii.) included all limitation proceedings under the words " any matter of . . . maritime jurisdiction," the same question would arise as in *Minister of State for the Army* v. *Parbury Henty & Co. Pty. Ltd.*; *Minister of State for the Army* v. *Carrier Air Conditioning Ltd.*; *Brickworks Ltd.* v. *Minister of State for the Army* (3), cases heard

(1) (1945) V.L.R. 95. (2) (1907) A.C. 112. (3) (1945) 70 C.L.R.

at the same sittings of the Court. Otherwise I am of opinion that the appeal to the Full Court of the Supreme Court of New South Wales was competent and that from the judgment of the Full Court an appeal lies to this Court.

I think that the objection to the competence of the present appeal should be overruled.

I am, however, of opinion that the appeal should be dismissed upon the merits. The contention of the appellant begins with a proposition of fact which appears to me to be correct. It is that the cause of the damage to the *Hetton Bank* was the improper navigation, not of the tug *Bonnie Bell* alone, but of the *Bonnie Bell* and the lighter, lashed to her starboard side, in combination, and that the improper navigation was done aboard the tug by the servants of the Shell Oil Co. The fact is that the casualty arose from the great width presented by the combined beam of the two craft, the manner in which they steered in combination, and the improper manoeuvring of the two by the navigator of the tug to get them both through a wide enough span of the bridge.

Adopting or adapting the language of par. (*d*) of s. 503 (1) of the *Merchant Shipping Act* 1894, McIlwraith McEacharn & Co. contend that the loss or damage was caused to their vessel, the *Hetton Bank*, by reason of the improper navigation of the tug *Bonnie Bell* and the lighter, and that it would be incorrect to say simply that it was by reason of the improper navigation of the tug. As the instrument of damage was what may be called a navigable unit composed of the two craft under the control of the Shell Co.'s servants, the consequence is said to follow that, unless that company is entitled to limit its liability by reference to both vessels, its liability must remain unlimited.

In *The Harlow* (1), Sir *Henry Duke* P. said that, the damage done in that case having been caused by the negligent navigation of three vessels jointly, a tug and two dumb barges all owned by the plaintiffs, he would have thought on principle that each vessel might be proceeded against *in rem* in respect of such damage and that the plaintiffs, as the employers of all the negligent persons, might be held liable for all the damage, not only in each action *in rem*, but in proceedings *in personam*. He accordingly decided that the plaintiffs were entitled to limit their liability in respect of the improper navigation of the tug and her tow, the two dumb barges, to an aggregate amount made up of £8 per ton of the several tonnages of the three vessels (2). If the plaintiffs in that case had been disentitled to limitation in respect to any one of the three craft,

(1) (1922) P., at p. 185.

(2) (1922) P., at pp. 186, 187.

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the result must have been, it is argued, that the plaintiffs remained responsible in proceedings against them *in personam* to the full amount of the damage. I am prepared to accept this view.

That the Shell Co. would be entitled to limit liability in respect of damage done by reason of improper navigation of the tug *Bonnie Bell* alone is not denied. It is conceded because the tug was under charter by demise to the Shell Co. But the title of the company to limit in respect of the lighter is contested on the ground that it was neither the owner nor the charterer by demise of the lighter, nor did it stand in the relation to it of a " party interested " who may claim limitation. In fact, the lighter was in the possession and control of the Shell Co. under a verbal contract of hire with the owner, renewed from month to month, at a rate of ten shillings a day.

Under s. 503 of the *Merchant Shipping Act* 1894, it is the owner of a ship that it is entitled to limit. Independently of the question whether the Shell Co.'s possession and control of the lighter were enough to support a claim to be, *pro hac vice*, its owner, they could not obtain the protection of s. 503 without more because the lighter, though not a foreign ship, was not registered. Section 2 of the Act of 1894 says that every British ship, unless exempted, shall be registered and that otherwise she shall not be recognized as a British ship. Section 508 provides that nothing in Part VIII., which relates to limitation of liability and includes s. 503, shall be construed to extend to any British ship which is not recognized as a British ship within the meaning of the Act. Section 742 defines " ship " to include every description of vessel used in navigation not propelled by oars. Apparently the lighter comes within this definition : See *The Mac* (1) ; *The Lighter No.* 3 (2) ; *The Mudlark* (3) ; *The Harlow* (4). At all events, the ground of the contention that the case falls outside s. 503 is not that the lighter is not a ship, but that she is an unregistered British ship and that the party seeking limitation is not her owner. Later legislation deals specially with the consequences in limitation proceedings of failure to register, and the next step in the argument on behalf of McIlwraith McEacharn Ltd. is to contend that the description of persons entitled to the benefit of that legislation is not filled by the Shell Co. in relation to the lighter. The relevant provisions are contained in s. 1 of the *Merchant Shipping* (*Liability of Shipowners*) *Act* 1898 (Imp.), and s. 70, s. 85 and the Second Schedule of the *Merchant Shipping Act* 1906 (Imp.). The purpose of s. 1 of the Act of 1898 was to give protection in the

(1) (1882) L.R. 7 P.D. 126.
(2) (1902) 18 T.L.R. 322.
(3) (1911) P. 116.
(4) (1922) P. 175.

case of ships newly launched, and perhaps not completed or fitted. It provided that ss. 502 to 509 of the Act of 1894 should extend and apply to the owners, builders and parties interested in any ship built at any port or place in the King's dominions from and including the launching of such ship until the registration thereof. Then followed a proviso restricting the benefit of the section to a period of three months from the launching of the ship. The proviso was repealed by s. 85 of the Act of 1906 and by the Second Schedule. Section 70 more specifically enacted that the proviso should cease to have effect, but that s. 1 of the Act of 1898 should not be construed so as to extend s. 502 to the owners of any ship, or any share therein, after the ship has become a foreign ship.

As a result of the repeal of the proviso, or the termination of its operation, it has been held that ss. 502 to 509 enable the owners, builders and parties interested in any ship built in the King's dominions to claim limitation of liability with reference to her, once she is launched, until she is registered: *The Harlow* (1). It seems that upon registration " parties interested " as distinguished from " owners " lose their right to limit.

In support of the appeal, it is contended that the Shell Co. is neither an owner of nor a party interested in the lighter within the meaning of s. 1 of the Act of 1898. In the case arising from a collision between *Hopper No.* 66 and the ship *Blanche*, it was decided on 21st December 1905 by *Bargrave Deane* J. (2) that a charterer by demise was not an owner within the meaning of ss. 503 and 504 of the *Merchant Shipping Act*, where, his Lordship said, " there is in contemplation the liability of the registered owner for damage caused by the res, and the action is one in rem, and the cause of action is tort not breach of contract." His decision was affirmed on 25th March 1907 by the Court of Appeal: *Gorell Barnes* P., *Fletcher Moulton* and *Kennedy* L.JJ. (3).

In the meantime, on 21st December 1906, the *Merchant Shipping Act* 1906 was passed, and by s. 71 it enacted that ss. 502 to 509 should be read so that the word " owner " should be deemed to include any charterer to whom the ship is demised. In his judgment, Sir *Gorell Barnes* said, " I suppose that since the Act of last year such a point could hardly arise " (4). But the charterers by demise of *Hopper No.* 66 appealed to the House of Lords against the denial of their claim to limit liability and their appeal succeeded: *Sir John Jackson Ltd.* v. *Owners of S.S. Blanche* (5). The House held that a charterer by demise was an " owner " within s. 503 because

(1) (1922) P., at p. 183.
(2) (1906) P., at p. 46.
(3) (1907) P. 254.
(4) (1907) P., at p. 255.
(5) (1908) A.C. 126.

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for the time being he was in possession and control of the ship and hired and employed the master and crew (1). Lord *Atkinson*, after remarking that the full owner becomes liable, not because he is owner, but because he is the master or employer of the persons whose negligence causes the damage, said :—" The charterer by demise becomes liable precisely for the same reason, and on the same ground " (2). Lord *Loreburn* L.C. said : " We must, I think, conclude that the policy of the present section " (viz. s. 503) " was simply to prevent ruinous damages from being inflicted upon an innocent principal as the consequence of an error of judgment in a difficult and dangerous business by his agents in charge of a vessel. I can perceive no reason why the present appellants should be subject to an unlimited liability that does not equally apply to the registered owner " (3).

For McIlwraith McEacharn Ltd., it is contended that the Shell Co. was not a charterer by demise of the lighter within the meaning of s. 71 of the Act of 1906, and that the measure of control that company had over the lighter was insufficient to bring it within the conception of " owner " which these judgments indicate.

The absence of any formal demise, particularly of a written charter, is the chief reason upon which reliance is placed for this contention. It is said that a charter party comes into the common law from the law merchant and that, as its name and the derivation of its name suggest, a writing is necessary, and reference is made to what was said by *Slesser* and *Romer* L.JJ. in *William Cory & Son Ltd.* v. *Dorman, Long, & Co. Ltd.* (4). On the footing that, for the foregoing reasons, the Shell Co. was not a charterer by demise within s. 71, it is further contended that the effect of that section is to declare legislatively what is the true extension of the primary meaning of " owner " for the purposes of s. 503, and that s. 503 should not be regarded as covering others in possession and control of ships and responsible for the defaults of their servants in their navigation or management. In confirmation of this view, the fact is relied upon that, in relation to Great Britain, it was thought necessary or desirable to enact s. 1 (2) of the *Merchant Shipping Act* 1921 (Imp.), which provides that, in the application of Part VIII. of the Act of 1894 to every description of lighter, barge or the like vessel, navigated in Great Britain, the expression " owner " shall include any hirer who has contracted to take over the sole charge and management thereof and is responsible for the navigation, manning and equipment thereof.

(1) (1908) A.C., at p. 132.
(2) (1908) A.C., at p. 136.
(3) (1908) A.C., at p. 131.
(4) (1936) 155 L.T. 53.

There is, I think, some weight in these contentions. But I think that in the case of the *Blanche* and *Hopper No.* 66 (*Sir John Jackson Ltd.* v. *Owners of S.S. Blanche* (1)) the House of Lords gave to the word " owners " in s. 503 a meaning which proceeded upon a principle, and that the position of the Shell Co., with reference to the lighter, fairly falls within that principle. The decision clearly showed that the enactment of s. 71 of the Act of 1906 was superfluous. That provision cannot be taken as recognizing the correctness of the general interpretation of s. 503 by *Bargrave Deane* J. and providing against a part only of its consequences. Indeed, if that were the case, the House of Lords could hardly have decided as they did, at all events without noticing the argument flowing from the fact.

The provisions relating to barges &c. in the Act of 1921 deal generally with the application of Part VIII. and it may be that it was thought safer to cover the whole ground in connection with craft about which in practice very loose and indefinite relations obtain.

Notwithstanding the special provisions relied upon, I think it remains correct that in s. 503 of the Act of 1894, or, more accurately, in relation to this case, s. 1 of the Act of 1898, " owner " includes a person who has immediate and exclusive possession of a ship either indefinitely or for a term and has the responsibility of its control and management by himself and his servants. In other words, it includes as well the special property as the general property in a ship. There is an abundance of authority for the application in various connections of the word " owner " to the charterer of a ship whose hiring means that he has possession and control and employs the master and crew : See particularly *Colvin* v. *Newberry* (2) ; *Newberry* v. *Colvin* (3) ; *Colvin* v. *Newberry* (4) where *Tindal* C.J. says : " We think the effect of this charter-party was to make the freighter the legal owner of this ship *pro tempore*" (5), and *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (6), and the cases cited in the argument of that case (7), and by Mr. *Hamilton* in the case of *The Blanche* (8). The ground for treating as owner the person thus in possession of a ship is not that he has a written charter party amounting to a " hull charter " or " demise charter," though that is to be expected, but that he has been placed in exclusive control

(1) (1908) A.C. 126.
(2) (1828) 8 B. & C. 166 [108 E.R. 1005].
(3) (1830) 7 Bing. 190 [131 E.R. 73.]
(4) (1832) 6 Bligh (N.S.) 167 [5 E.R. 562].
(5) (1830) 7 Bing. 190, at p. 210 [131 E.R. 73, at p. 81].
(6) (1893) A.C. 8.
(7) (1893) A.C., at pp. 11-13.
(8) (1908) A.C., at pp. 127-129.

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with full possession so as to exercise as against all but the full owner the rights which property gives.

In the present case, I think that the proper inference is that the lighter was entrusted to the Shell Co. to use for the time being as if it were their own, assuming exclusive possession, control and management, and that that is enough to constitute the company "legal owner *pro tempore*."

In my opinion, the appeal should be dismissed.

McTIERNAN J. I agree with the reasons of the Chief Justice for dismissing the respondent's objection that it is not within the Court's jurisdiction to entertain this appeal. In my opinion, the appeal should be dismissed : I agree with the reasons for judgment of *Jordan* C.J.

WILLIAMS J. On the question of jurisdiction, I agree with the conclusions and reasons of the Chief Justice and of my brother *Dixon*, including their opinion that, since the repeal of s. 30A by s. 3 of the *Judiciary Act* 1939, this Court and the Supreme Courts of the States are all Colonial Courts of Admiralty within the meaning of the *Colonial Courts of Admiralty Act* 1890 (Imp.).

On the merits, I agree with the judgment of the Chief Justice of the Supreme Court. I only wish to add a few words with respect to the contention of the appellant not adverted to in that judgment that, if the meaning of the word "owner" in s. 503 of the *Merchant Shipping Act* 1894 (Imp.) is wide enough to include a hirer under an oral agreement who has contracted to take over the sole control and management of a vessel and is responsible for her navigation and manning, it was unnecessary to provide for the inclusion of such a hirer in its meaning by the *Merchant Shipping Act* 1921 (Imp.). Section 71 of the Act of 1906 had already provided that the meaning should include any charterer to whom the ship is demised, although this definition was subsequently found to be unnecessary in the light of the decision of the House of Lords in *Sir John Jackson Ltd.* v. *Owners of S.S. Blanche* (1) that the word in the context of the Act of 1894 included such a charterer. A charterer by demise must, I think, refer to a hiring under a charter, or, in other words, to a hiring under a written document, so that an oral hiring would not be included in the definition in s. 71. The nature of such a charter is explained by *MacKinnon* L.J. in *Sea and Land Securities Ltd.* v. *William Dickinson & Co. Ltd.* (2). It was therefore open to question, in the absence of judicial interpretation, whether the word, in the

(1) (1908) A.C. 126.

(2) (1942) 2 K.B. 63, at pp. 69, 70.

context of the Act of 1894, did include oral hirings giving the hirer complete control and management of the ship and her navigation and crew. There was also the decision of the Court of Appeal in *William Cory & Son Ltd.* v. *Dorman, Long, & Co. Ltd.* (1), the effect of which is, I think, accurately summed up in the headnote, in which the Court of Appeal had expressed a doubt whether the definition in the Act of 1906 would include such an oral hiring, although the Court was careful not to express an opinion that such a contract could not operate as a transference of ownership within the meaning of the Act of 1894. There was every reason, therefore, why the legislature in 1921, when it was expressly providing that s. 503 should operate as if the expression " ship " included every description of lighter, barge, or like vessel used in navigation in Great Britain, however propelled, should also provide that in the application of s. 503 to any such vessel the expression " owner " should include any hirer who had contracted to take over the sole charge and management thereof and was responsible for the navigation, manning and equipment thereof. But the fact that the legislature deemed it advisable to provide in the Act of 1921 that such hirers, for the purposes of that Act, should be included in the expression " owners " in s. 503 does not relieve the Court from the duty of determining whether the meaning does not include such hirers without any statutory definition, and I venture to think that Sir *Wilfrid Greene* M.R. was only referring to the statutory definitions in the Acts of 1906 and 1921 when he said in the case of *The Thames* (2) that " the Legislature apparently was seeking for a form of words in relation to a class of vessel which is not ordinarily subject to charter, still less to charters by demise, which would describe in appropriate language a degree of control and a position analogous to that enjoyed by a charterer by demise," and that this statement was not intended to mean that, prior to the Act of 1921, hirers in such an analogous position were not owners within the meaning of the word in s. 503. But declaratory provisions in amending Acts to the effect that a word in the original Act is to include certain meanings, which, like the word include, do not indicate, expressly or by necessary implication, an intention to confine the full meaning that should be attributed to the word upon its proper construction in the context of the original statute to those meanings, cannot restrict that full meaning to such statutory inclusions.

In the instant case, therefore, there is nothing in the declaratory sections in the Acts of 1906 and 1921 to prevent the Court, without any assistance from those Acts, giving to the word " owner " in

(1) (1936) 155 L.T. 53.

(2) (1940) P. 143, at p. 150.

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s. 503 a sufficiently wide meaning to include charterers by demise and hirers under oral contracts acquiring the same temporary rights and obligations of ownership, if it is proper to attribute such a meaning to the words in the context of the Act of 1894. Primarily, the words of an Act should be given the ordinary natural grammatical meaning which they bore at the date the Act came into force, but it is apparent from the statement of Lord *Herschell* in *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1), cited by Lord *Atkinson* in *Sir John Jackson Ltd.* v. *Owners of S.S. Blanche* (2), that, with respect to a ship, the word in its popular sense had at that date both a narrow and a broad meaning, the narrow meaning applying to the proprietary owner, and the broad meaning to a person to whom all the rights of ownership had been given for a limited period, so as to make him the principal of the master and crew of the vessel and responsible for their negligence. Since the latter form of ownership can be created by a written or an oral contract, it is reasonable and indeed necessary to give effect to the policy of the Act, which Lord *Loreburn* L.C. in the same case stated to be " simply to prevent ruinous damages from being inflicted upon an innocent principal as the consequence of an error of judgment in a difficult and dangerous business by his agents in charge of a vessel " (3), that the word " owner " should be construed in the broad sense to include both classes of limited owners.

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

Appeal dismissed with costs.

Solicitors for the appellant, *Ebsworth & Ebsworth.*
Solicitors for the respondent, *Dudley Westgarth & Co.*

J. B.

(1) (1893) A.C., at pp. 16, 17. (2) (1908) A.C., at pp. 132, 133.
(3) (1908) A.C., at p. 131.