

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH OF AUSTRALIA . PLAINTIFF ;

AND

THE OWNER OF THE MOTOR VESSEL }
“ ARMADALE ” } DEFENDANT.

H. C. OF A. *High Court—Admiralty—Practice and procedure—Evidence—Shipping—Collision*
1947. *—Depositions given on preliminary inquiry—Admissibility—Evidence Act 1938*
SYDNEY, (1 & 2 Geo. VI. c. 28) (Imp.)—Colonial Courts of Admiralty Act 1890 (53 & 54
May 21-23, Vict. c. 27) (Imp.), ss. 2 (2), 7—High Court Rules, Order XLIIA, r. 1.
26-28 ;
June 3, 4, 9.
Williams J.

Order XLIIA. of the *High Court Rules* is a complete code for regulating the practice and procedure of the High Court in its Admiralty jurisdiction and, by rule 1, has the effect of placing that practice and procedure on the same footing as the practice and procedure in any other action in the original jurisdiction. That rule is inconsistent with s. 2 (2) of the *Colonial Courts of Admiralty Act 1890* (Imp.) and impliedly repeals it.

ACTION.

In an action brought in the High Court the Commonwealth of Australia claimed damages from the owner of the motor vessel *Armada* alleging that because of the negligent navigation of that vessel whilst proceeding down Sydney Harbour at about 10-50 p.m. on 18th January 1944, it collided with the gate of the anti-submarine net in the eastern channel and caused considerable damage to the gate and net.

The defendant alleged that the collision was caused by the negligence of the plaintiff's servants and agents and counter-claimed in respect of damage sustained by the vessel as the result of the collision.

During the trial of the action and counterclaim before *Williams J.* counsel for the defendant tendered the sworn depositions of the Chief Officer of the *Armada* given on the preliminary inquiry held by the Harbour Master at Sydney, shortly after the collision. It

was admitted that at the date of the trial the Chief Officer was living in England and was employed by a railway company. It was submitted that the depositions were admissible in evidence by virtue of the joint operation of the *Evidence Act* 1938 (Imp.) and s. 2 (2) of the *Colonial Courts of Admiralty Act* 1890 (Imp.).

The relevant statutory provisions are set forth in the judgment of *Williams J.* hereunder.

Weston K.C. and *Macfarlan*, for the plaintiff.

A. R. Taylor K.C. and *Burdekin*, for the defendant.

WILLIAMS J. ruled as follows :—*Mr. Taylor* has tendered the depositions of the Chief Officer given on the preliminary inquiry. He relies on the English *Evidence Act* 1938. He submits this Act is applicable because this is an action in which the Court derives its jurisdiction from the *Colonial Courts of Admiralty Act* 1890. Section 2 (2) of this Act provides, so far as material, that such a court may exercise its jurisdiction under the Act in like manner and to as full an extent as the High Court in England. This provision makes the procedure of the High Court in England as it exists from time to time applicable to Colonial Courts of Admiralty to the extent to which this procedure is not replaced by the rules of a Colonial Court made under s. 7 which provides that rules of court regulating the procedure and practice in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice and procedure in the said court in the exercise of its ordinary civil jurisdiction are made; provided that the rules under this section . . . shall not come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act, and any enactment inconsistent therewith, shall, so far as it is so inconsistent, be repealed.

By Statutory Rules 1917 No. 322 dated 4th December 1917, Order XLIIA. was added to the rules of this Court and is headed "Practice in Admiralty Actions." The Statutory Rule provided that the Order should come into operation on the first day of the month succeeding the month in which the approval thereof by His Majesty in Council should be notified in the *Commonwealth Gazette*, and should apply to all Admiralty actions commenced on and after that day. The necessary notification appeared in the *Commonwealth Gazette* on 15th August 1918. By Statutory Rules

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1928 No. 118 the existing rules of this Court were repealed and new rules made except in the case of XLIIA. which is still in force. Rule 1 of Order XLIIA. provides that, except as by this Order otherwise provided, the rules of Court relating to the procedure of the Court in its original jurisdiction shall so far as they are respectively applicable apply to admiralty actions. Due weight must be given to the words in this rule "except as by this Order otherwise provided." These words show that it was intended that Order XLIIA. should be a complete code for regulating the procedure and practice of this Court in Admiralty. The effect of rule 1 is to place this procedure and practice on the same footing as the procedure and practice in any other action in the original jurisdiction. It is, therefore, inconsistent with the relevant provisions of s. 2 (2) of the *Colonial Courts of Admiralty Act* and impliedly repeals it. In my opinion Mr. *Taylor* cannot rely on the *English Evidence Act* 1938 so that the evidence is inadmissible.

Solicitor for the plaintiff, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.
Solicitors for the defendant, *Norton, Smith & Co.*

J. B.