Ross J. upheld an appeal by the defendant company against this decision. He found that the fire originated from a weakness or defect in one of the tubes of the refrigerator, and not from a weakness or defect in the kerosene burner which had been replaced. Since the defendant company was not the manufacturer of the appliance, the weakness or defect in the tube was something for which it should not have to answer. His Honour decided on the evidence that the explosion was equally attributable to defects or weaknesses in the construction of the refrigerator itself or to carelessness in the fitting and lighting of the burner by the plaintiff's wife, or to negligence by the appellant or its servants in repairing or adjusting the refrigerator.

The inapplicability of the maxim *"res ipsa loquitur"* was demonstrated by Chamberlain J. in the full Court.[3] The learned S.M. had sought to treat what is at most a procedural rule designed to prevent the injustices of an over-severe burden of proof, as a doctrine of substantive law. Some support for this approach might be gained from the decision of the English Court of Appeal in *Cassidy* v. *Minister of Health*[4] but it was now accepted in Australia as inaccurate. The cases of *Fitzpatrick* v. *Walter E. Cooper Pty. Ltd.*[5] and *Mummery* v. *Irvings Ltd.*[6] establish that in some cases a *prima facie* presumption of negligence is raised by the facts themselves in order to avoid the disadvantages flowing from, or paucity of evidence on, the precise cause of an accident, and this presumption will suffice to establish negligence if the defendant is not able to offer an adequate explanation of the cause of the accident.

It is perhaps a matter for some regret that the Court did not take this opportunity to elucidate the question of the duty and responsibility of reconditioners as opposed to manufacturers and repairers.

3. Law Soc. J. Scheme pp. 782-784.
4. [1951] 2 K.B. 343.
5. (1935) 54 C.L.R. 200.
6. (1956) 96 C.L.R. 99.

IMPERIAL LEGISLATION

Repugnancy with Commonwealth Legislation — Merchant Shipping Act, 1894

In *Bice* v. *Cunningham*[1] the question arose as to the extent of operation of s. 221(a) of the Imperial Merchant Shipping Act, 1894, in South Australia in the light of s. 62 of the Commonwealth Navigation Act, 1958, and more specifically whether a prosecution under the Imperial provision was still possible.

The defendant Cunningham was originally charged before a Special Magistrate with the offence of desertion under s. 221(a) of the old Act. Notwithstanding his plea of guilty, the learned Special Magistrate dismissed the complaint, holding that s. 221(a) no longer had any operation in South Australia since the Commonwealth Parliament by s. 62 of the Navigation Act had shown an intention to "cover the field" concerning the offence of desertion

1. [1961] S.A.S.R. 207.

in the relevant sense, and to that extent had impliedly negatived the application of s. 221(a) of the Imperial Act.

On appeal Mayo J., after hearing argument from the appellant (he only being represented), held, "not without doubt," that the learned Special Magistrate was not entirely correct in his conclusion and that the Imperial provision had not been repealed by the Commonwealth provision but simply amended by it. Thus to this extent s. 221(a) was held to be still effective in South Australia and a prosecution under it quite permissible.

The Merchant Shipping Act, 1894, by s. 221 makes desertion an offence under the Act and affixes certain consequent penalties. The original Commonwealth Navigation Act, 1912, the legislative forerunner of the Navigation Act in question in the instant case, provided for the same offence but affixed different penalties.

In view of the application in Australia in this period of the Colonial Laws Validity Act, 1865, s. 100 of the old Commonwealth Act, at least so far as the offence of desertion is concerned, would appear to have been "void and inoperative" by virtue of repugnancy to s. 221(a) of the Imperial Statute. Whilst not giving any definite opinion on this matter, Mayo J., by his reference to *Union Steamship Co. of New Zealand* v. *Commonwealth*[2], would seem to have tended to the above view: and if the language of Isaacs J.'s judgment[3] in that case (paraphrased by his Honour in the instant case) is regarded as the correct criterion for determining the question of repugnancy, then the above conclusion appears inescapable.

Mayo J., paraphrasing Isaacs J.'s judgment on the repugnancy point, says "Repugnancy is equivalent to inconsistency or contrariety. If there were an Imperial law and a colonial law on the same subject, but with contrary provisions the Imperial law would prevail. Where such laws deal with the same subject the same are either identical or they are in conflict."[4] Applying this test to the present consideration we find an Imperial law and a colonial law on the same subject (the offence of desertion) whose provisions are not identical: they are therefore in conflict and thus 'repugnant.' If this is regarded as the correct conclusion in the consideration of the 1912 Navigation Act s. 100, it is hard to see that his Honour's final conclusion regarding the 1958 Navigation Act s. 62, can be justified[5], unless the test of 'repugnancy' in the Colonial Laws Validity Act sense is actually different from the test of 'repugnancy,' constituting the implied repeal of a statute.

In 1942, as his Honour observes, the Statute of Westminster was adopted, revoking for present purposes the vitiating effect on 'colonial' laws of the Colonial Laws Validity Act[6]. And in 1952 the Commonwealth Parliament amended s. 100 of the 1912 Act.

2. (1925) 36 C.L.R. 130, which decided that the Navigation Act, 1912, was a colonial law within the meaning and operation of the Colonial Laws Validity Act and accordingly any part of that enactment which was repugnant to the provisions of the Merchant Shipping Act, 1894, was to the extent of the repugnancy void and inoperative.
3. As regards repugnancy—ibid. pp. 147-151.
4. [1961] S.A.S.R. 207, 210.
5. Since s. 100 of the 1912 Navigation Act and s. 62 of the 1958 Navigation Act are exactly similar in nature and scope.
6. This, of course, did not bring previously 'repugnant' provisions back into force, but merely applied to post-1942 legislation.

Assuming, then, that s. 100 was 'void and inoperative' by virtue of 'repugnancy,' the question immediately arises as to the legal effect of a valid amendment to a void Act.

Counsel for the appellant submitted that such an amendment could acquire no greater force than the original Act even though it was passed after the original vitiating cause had been removed. Whilst, as Mayo J. said, the point was not necessary for the instant decision (since the whole section was *re-enacted* in the 1958 Act) it is of some interest and warrants a short note.

S. 15 of the Commonwealth Acts Interpretation Act, 1901-1957, provides that "every Act amending another Act shall unless the contrary intention appears be construed with such other Act and as part thereof."

This, it is submitted, gives the necessary clue from which it is possible to determine the nature of an amending Act with respect to its principal Act (whether that be void and inoperative or not). Since an amendment is to be "construed with" its principal Act and "as part thereof"[7] there can, of necessity, be only two alternatives as to its nature in the above respect. Firstly an amendment may have a retrospective nature, i.e., it may have to be read back to its principal Act and be construed "as one" from the date of proclamation of that Act. If this were so, then the appellant's submission would probably be correct and the amending Act would acquire no greater force than the original Act. But it is to be remembered that there is both a common law,[8] and a statutory,[9] presumption against the retrospective operation of an Act: and an amending Act is no different in this respect.[10]

The second alternative is that the nature of an amendment may be one of attraction: i.e., it may be required to attract the principal Act forward in time to the date of its own proclamation and be construed "as one" from that date. This involves an incorporation of the principal Act and in effect, it is submitted, a re-enactment of it,[11] duly amended. There being a double presumption against the only other alternative, this would appear to be the correct approach to the problem.[12]

In the present consideration then, the conclusion is that the amendment is to be construed as a re-enactment of the principal Act and at the same time an amendment of it. The re-enactment would not, of course, suffer from the original vitiating fault, because of the Statute of Westminster.

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7. This can surely mean nothing less than that they are to be read as one Act.
8. E.g. *Gardner* v. *Lucas* (1878) 3 App. Cas. 582 (House of Lords); *Young* v. *Adams* [1898] A.C. 469 (Privy Council).
9. Commonwealth Acts Interpretation Act, 1901-1957, s. 5.
10. *Federal Commissioner of Taxation* v. *Reid* (1927) 40 C.L.R. 196; *Ex parte Sherry* (1909) 9 S.R. (N.S.W.) 261; *Smith* v. *Calder* [1941] S.A.S.R. 263.
11. *In re Woods Estate* (1886) 31 Ch.D. 607; *Perpetual Trustee Co. Ltd.* v. *Wittscheibe* 40 S.R. (N.S.W.) 501, 510.
12. It may be objected that the argument from s. 15 is not valid in this context, since the original Act is void and inoperative. This, however, is to overlook the fact that it is solely the nature of the amendment (valid in itself) that is being looked into. If its nature is found to be such as to re-enact the principal Act, well and good; the objection is not applicable to this.

Such a construction would give full effect to the obvious intention of the Legislature: and further as Bowen L.J. said in *Curtis* v. *Stovin*[13]: "If it is possible the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat.*"[14]

An amendment in the air is legally meaningless: a re-enactment with amendment is legally meaningful.

The main point for decision in *Bice* v. *Cunningham* was, however, as to whether s. 221(a) of the Imperial Act had been affected by s. 62 of the 1958 Navigation Act, and, if so, in what way.

S. 62 did not expressly repeal the old s. 221(a), but, as his Honour observes, repeal by implication is, of course, possible. There is, though, in the instant circumstance both a statutory presumption[15] and, generally, a common law presumption,[16] against such implied repeal. Thus the intention to repeal the Imperial provision, though it may be shown implicity, must be shown positively. Since there can be no argument as to any special sanctity of an Imperial provision, this intention to repeal will be determined by ordinary methods of statutory interpretation.

In *R.* v. *Youle*[17] Martin B. said: "If a statute deals with a particular class of offence and a subsequent Act is passed which deals with precisely the same offences and a different punishment is imposed by the latter Act, I think that, in effect, the Legislature has declared that the new Act shall be substituted for the earlier Act."[18]

In *Mitchell* v. *Scales*[19] Griffith C.J. said: ". . . when by a statute the elements of an offence are restated and a different punishment is indicated for it that is a repeal by implication of the old law."[20]

The law on this point would appear to be quite conclusive[21]: i.e., that an Act providing the elements of an offence and affixing certain penalties thereto, amounts to a positive, though implicit, repeal of any previous enactment providing different penalties for the same offence. What then, is the application of this proposition to the present problem?

S. 221(a) of the Imperial Act provides that if a seaman "deserts his ship he shall be guilty of the offence of desertion." It affixes certain penalties to the offence, summarized by his Honour thus—"all or any of the following; none of the same are limited to the alternative:

1. forfeiture of (a) all or any part of the effects the seaman leaves on board,
   (b) the wages he has *then* earned,

13. (1889) 22 Q.B.D. 512.
14. Ibid. 517.
15. S. 30(1) Commonwealth Acts Interpretation Act, 1901-1957.
16. *Hill* v. *Pannifer* [1904] 1 K.B. 811, 818 per Kennedy J.; *R.* v. *Halliday* [1917] A.C. 260, 305 (both quoted by Mayo J.).
17. (1861) 6 H. & N. 753.
18. Ibid. 764.
19. (1907) 5 C.L.R. 405.
20. Ibid. 412.
21. See also: *A.-G.* v. *Lockwood* (1842) 9 M. & W. 378; *Robinson* v. *Emerson* (1866) 4 H. & C. 352; *Whitehead* v. *Smithers* [1877] 2 C.P.D. 553; *Fortescue* v. *Vestry of St. Matthew, Bethnal Green* [1891] 2 Q.B. 170; *Goodwin* v. *Phillips* (1905) 7 C.L.R. 1; *McLachlan* v. *Parker* [1909] S.A.L.R. 36.

(c) the wages he may earn in any other ship until he returns to the United Kingdom,

2. reimbursement of any excess of wages over his own standard that may have been paid to a substitute, and
3. imprisonment not exceeding twelve weeks."[22]

S. 62 of the 1958 Commonwealth Act reads thus:—"100. A seaman . . . who commits an act or is guilty of an omission, specified in Column 1 of the following table is guilty of an offence against this Act punishable upon conviction by a penalty not exceeding the penalty specified in Column 2 of that table opposite to that act or omission." Opposite "Desertion" in Column 1 appears the words "Forfeiture of accrued wages not exceeding £40 or a fine of £40."

The conclusion that this legislative situation is within the application of the proposition of law arrived at above (i.e., that the second Act repealed the first Act by virtue of the fact that it provided different penalties for the same offence) seems difficult to avoid. His Honour, however, relying strongly on the double presumption against such repeal, held that s. 62 merely amended the old s. 221(a).

His Honour refers again to the judgment of Isaacs J. in *Union Steamship Co. of New Zealand* v. *Commonwealth*[23]: "neither statutory system is established as an addition to the other. Each assumes that it occupies the whole field."[24] This is of course the major premise of what is known as the "covering the field" test, propounded by Isaacs J. himself in reference to inconsistency under s. 109 of the Constitution[25] and now generally applied by the High Court in that respect.

Having referred to this, Mayo J. goes on: "if that be accepted at full value s. 221(a) has been repealed. But I am not sure that the words should be so applied."[27] This would appear, with respect, to be ambiguous. Does his Honour mean that the words of Isaacs J. (and thus presumably, the "covering the field" test) should not be applied generally to the question of implied repeal? Or does his Honour mean that they are generally applicable but are not to be applied specifically to the instant case since the Commonwealth Parliament has shown no intention to "cover the field"? His Honour appears not to provide the answer, for he states his conclusion against repeal without any further explanation. Thus the actual basis for the decision is hard to discern and it can only be surmised that his Honour held that the "covering the field" test was not applicable at all to the question of implied repeal. This would appear to be so, since if the test were applicable at all the reasonable conclusion would be that it was satisfied (as the learned Special Magistrate held in the first instance).[28]

His Honour seems, then, to have relied on no positive proposition of law for his decision, but rather to have based it on the negative postulation of a double presumption against implied repeal.

22. [1961] S.A.S.R. 207, 209.
23. (1925) 36 C.L.R. 130.
24. Ibid. 149.
25. *Clyde Engineering Co.* v. *Cowburn* (1926) 37 C.L.R. 466.
26. E.g., *Ex parte McLean* (1930) 43 C.L.R. 472.
27. [1961] S.A.S.R. 207, 214.
28. For an argument that the "covering the field" test should be applied to questions of implied repeal see an article by Alex C. Castles in 35 A.L.J. 402.

It may perhaps be fairly remarked in conclusion that it would be unfortunate if the courts were to develop a policy whereby they kept in operation old Imperial legislation, the preservation of which in Australia can have no more effect than to unnecessarily clog the law. It is to be hoped that *Bice* v. *Cunningham* is not indicative of such a trend in judicial decision.

ELECTRICITY TRUST OF SOUTH AUSTRALIA

Duties of Public Utilities

The dearth of modern decisions interpreting the statutory duties of public utilities towards their consumers makes the recent decision of *Bennett and Fisher Limited* v. *Electricity Trust of South Australia*[1] of considerable importance.

The plaintiff company made an application to the Trust for a supply of electricity to a building it has recently erected in Currie Street, Adelaide. The defendant Trust, the only supplier of electrical energy in the city, indicated its willingness to supply the plaintiff's building but only on the terms of its standard contract. This contract, which the Trust makes with all consumers, contains a condition in the following terms:

> "When in the opinion of the Trust, the supply of electric energy can most conveniently be effected by placing transformers and/or other equipment on the premises of the consumer, the consumer shall provide free of cost to the Trust, suitable accommodation for such equipment, in a position satisfactory to the Trust, in such manner as to allow free access to the equipment at any time by the Trust's representative(s).
>
> "The Trust reserves the right to supply other consumers from the said equipment.
>
> "Any such equipment erected by the Trust shall be under its sole control, and shall remain its property, and shall be removed by it on the termination of the agreement for the supply of electric energy to the consumer."

The Trust indicated that if the parties entered into the standard contract to supply electricity, it would demand considerable basement space in the plaintiff's building, free of cost, for the installation of a transformer from which the building would be supplied. The plaintiff accordingly sought declarations that the defendant Trust was not entitled to place a transformer in the building; and the plaintiff not obliged to provide space for the transformer, free of cost, as a condition precedent to supply. Should the defendant be entitled to install a transformer, the plaintiff claimed compensation.

The plaintiff's claim was dismissed in the Supreme Court by the late Mr. Justice Brazel.[2] The plaintiff appealed by special leave to the High Court.

Counsel for the appellant argued that the common law position was best expressed by the maxim *qui sentit commodum sentire debet et*

1. 35 A.L.J.R. 481.
2. Unreported.