INCONSISTENCY WITH PARAMOUNT LAW.

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By what criteria is it to be established that an otherwise valid legislative enactment must be treated as inoperative, in whole or in part, because "inconsistent" with another law possessing overriding effect? The problem arises frequently in Australia—a federal Dominion in the British Commonwealth of Nations, to which the Statute of Westminster does not yet apply. A law "inconsistent" with a later law emanating from the same legislature will be impliedly even though not expressly repealed; a by-law "inconsistent" with the general law will be *pro tanto* invalid; so, under s.109 of the Commonwealth constitution, will a State law that is "inconsistent" with a law of the Commonwealth; and so also, under s.2 of the Colonial Laws Validity Act, 1865, will a law either of State or of Commonwealth that is "repugnant" to an Act of the Parliament of the United Kingdom.

The importance need hardly be emphasised of a clear answer to the question put. The frequency with which the problem arises in litigation and the continued diversity of judicial opinion are in themselves sufficient to suggest the difficulties experienced by practitioners in advising their clients, and the desirability of achieving simplicity and coherence in the rules, and of avoiding so far as possible both subtlety on the one hand and vagueness on the other. From the citizen's point of view, the question of "inconsistency" is perhaps more generally important than the question of *ultra vires*, though it raises only questions of intention—i.e., of interpretation or construction. The difficulties would no doubt be lessened if draftsmen gave as detailed attention to the question of inconsistency as they do to the question of power. But analysis must, as ever, be the first instrument of reform. To the task of analysis therefore the writer, rather apprehensively, addresses himself.

Etymologically the meaning of "inconsistency" is plain and undisputed. It denotes contrariety, contradiction, repugnancy, discordance: such a contrariety between two propositions, for example, that they cannot both stand, or be true together. But may not the word have rather different connotations in the different contexts in which it is used? There have been suggestions in the affirmative. *In dubio* a court will certainly lean more strongly in some contexts than in others against an interpretation which would involve inconsistency. There are, for example, no general considerations of policy which would operate to prevent the implied repeal of an earlier Act by a later Act of the same legislature.[1] In questions arising under the Colonial Laws Validity Act, however, the growth of Dominion status, the almost interstitial character of the action of the Parliament at Westminster, throws the whole emphasis on the policy of leaving as full autonomy as possible to the local legislatures.[2] Very much the same thing is true in the sphere of municipal government,

1. *Per* Evatt, J., *Victoria v. Commonwealth* (1937) 58 C.L.R. 618, 634.
2. *In re Reg v. Marais* (1902) A.C. 51, 54 (Halsbury L.C.).

in the relation between by-laws and the general law.[3] In questions between Commonwealth and State laws under s.109 however it has been suggested that the natural emphasis is not on leaving scope for the inferior legislatures but on giving full scope to the action of the national legislature itself: that the courts should therefore be more ready to find inconsistency.[4] This tendency has found its most significant expression in some of the judgments of Dixon J., who has in several recent cases found inconsistency where the majority of High Court did not. The whole matter however resolves itself at last into the ascertainment of the intention of the relevant legistlation; and when the work of interpretation has been completed the proposition of law remains, in the writer's submission, identical in all cases: that there is inconsistency between the two laws when one contradicts the other.[5]

This, of course, is only to restate the problem and not to solve it. When *does* one law contradict another? To resort to synonyms will not supply the answer, though special mention might perhaps be made of the vivid metaphor—"direct collision"—that commended itself particularly to Higgnis J.[6] But a metaphor, or even a paraphase, may be misleading; analysis is the safer resort. The classical exposition is that of Channell J. in *Gentel v. Rapps,*[7] a case of alleged repugnancy or inconsistency between a tramway by-law, which made punishable the use of obscene language in trams, and a local Act which made punishable the use of obscene language "to the annoyance of the inhabitants or passengers within the city." A conviction under the by-law was sustained, Channel J. remarking:[8] "A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which its general law says is unlawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land."

In this case the Act was not to be interpreted as making *lawful* the use of obscene language in trams so long as no annoyance was caused to 'inhabitants" or "passengers." The by-law could therefore validly make unlawful the use of such language, irrespective of such annoyance.

The passage just quoted does not of course attempt to supply a definition; but it does attempt to explain what criteria are to be applied, even though in language limited (as judicial dicta very naturally are) by the facts of the particular case. There, both the Act and the by-law

3. *See e.g. Matthews v. Prahran* (1925) V.L.R. 469, 474-6 (Irvine C.J.); *Hallion v. Eade* (1938) V.L.R. 179, 181-2 (Macfarlan J.).
4. The difference is indicated concisely, though possibly not with complete accuracy, by Irvine, C.J., in *Matthews v. Prahran* (1925) V.L.R. p. 474, in the proposition that under s. 109 inconsistency includes "what may be called inconsistency of policy as distinguished from what may be called inconsistency of obedience."
5. There are many judicial pronouncements that either express or rest upon this proposition; cf. *per* Isaacs J., A. G. (*Queensland*) *v.* A-G. (*Commonwealth*) (1915) 20 C.L.R. 148, 168; Higgins, J., *Union Steamship Co. of New Zealand v. Commonwealth* (1925) 36 C.L.R. 130, 154-8 (suggesting the lines of a possible distinction, though for himself rejecting it); Evatt, J., *Ffrost v. Stevenson* (1937) 58 C.L.R. 528, 602-3; in the same case Dixon J. (at p. 572) suggests that the tests under the Colonial Laws Validity Act and under s. 109 of the constitution may not be the same, but does not base his decision on that ground.
6. (1925) 36 C.L.R. p.156; see also his statement in A.G. (*Queensland*) *v.* A-G. (*Commonwealth*), (1915) 20 C.L.R. 148, 178.
7. (1902) 1 K.B. 160.
8. ibid., p.166.

created offences, i.e., imposed duties of abstention from certain conduct, and fixed penalties for breach. Applying Channell J.'s criteria, the validity of the by-law could be plainly seen. By way of contrast, Channell J. referred to the travelling-without-a-ticket cases. There, the relevant Acts made intent to defraud an ingredient of the offence created, while the by-laws made punishable the mere act of travelling without a ticket, irrespective of intent. By reason of the place of *mens rea* in the criminal law, it is hard to avoid treating the Act as having by necessary implication made *mens rea* an essential element in penal liability for travelling without a ticket. The by-laws thus made "unlawful" what—by necessary implication—the Act has made "lawful" or at any rate not unlawful.[9]

What has been called the "obedience test" may best be approached in the light of these considerations. It appeared to have been laid down decisively in the *Bootmakers'* case[10] that there was no inconsistency between a State law fixing a minimum wage and a Commonwealth industrial award fixing a higher minimum. The question, it was said, was *whether both laws could be obeyed*: i.e., whether both laws could be enforced together without involving the employer concerned in a conflict of duties. Here the employer could "obey" the federal award without "disobeying" the State law, for the latter fixed no maximum, and conduct which would infringe the State law would *a fortiori* be a breach of the Commonwealth award also. Such a test has of course proved decisive in many cases. It is in fact little other than Channell J.'s analysis, with verbal differences. Where, for example, regulations having the force of an Act required motor vehicles to slow down and proceed at a reasonable speed in passing a stationary tram, and a municipal by-law prohibited such vehicles from passing a stationary tram at all, it was held that there was no inconsistency.[11] It was contended in vain that "stopping" was inconsistent with "proceeding at a reasonable speed;" the driver could stop, as required by the by-law, without committing an actual offence against the regulation.

To this mode of determining inconsistency, Higgins J. remained faithful throughout his judicial career.[12] It may be conceded that wherever there is impossibility of obedience, in the sense indicated, the two laws will necessarily be held inconsistent. But the converse proposition is by no means always true. The real difficulty is concealed by the simple Austinian concept of law which the phraseology involves—a series of commands to be "obeyed." As Knox C.J. and Gavan Duffy J. said in *Cowburn's* case:[13] "Statutes may do more than impose duties. They may for instance confer rights and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it."

9. For a recent example see *London Passenger Transport Board v. Sumner* (1935) 52 T.L.R. 13.
10. *Australian Boot Trade Employees' Federation v. Whybrow* (1910) 10 C.L.R. 266.
11. *Matthews v. Prahran* (1925) V.L.R. 469.
12. *See e.g.* his dissenting judgments in *Union Steamship Co. of New Zealand v. Commonwealth* (1925) 36 C.L.R. 130; *Clyde Engineering Co. v. Cowburn* (1926) 37 C.L.R. 466; he recognised the verbal inadequacy of the test, but maintained that in substance it was in all cases decisive; 37 C.L.R. pp. 503-4.
13. (1936) 37 C.L.R. 466, 478.

Thus in *Cowburn's* case itself a Commonwealth award fixed minimum weekly rates of wages, and directed that the ordinary hours of work should not without payment for over-time exceed 48. The Forty-four Hours Week Act, 1925 (N.S.W.) enacted that the ordinary hours of work under such an award should not exceed 44, that the worker should be entitled if he worked for 44 hours to payment of the minimum weekly wage fixed by the award and, if he worked for 48 hours, to overtime payment at a prescribed rate. Higgins J. pointed out that an employer who complied with the requirements of the State Act would not commit any breach of the award. The other members of the Court, while agreeing that this was so, held that the Act was nevertheless inconsistent with the award. For in their view by linking the maximum hours of work with a minimum weekly wage and with provisions for overtime payments the award by necessary implication excused the employer from paying overtime rates until 48 hours had been worked. The Act took away that right and was to be treated as contradicting the award.

Once, however, the mind leaves the limited but reasonably certain criterion of "inconsistency of obedience," it encounters the greatest difficulties in deciding precisely when two laws *do* enact propositions that contradict each other. In *Stock Motor Ploughs Ltd. v. Forsyth,*[14] Dixon J. remarked that as interpreted in the High Court s.109 of the constitution "invalidates a law of a State *insofar as it would vary detract from or impair the operation of a law of the Commonwealth.*" This formula does justice to the complexity of the problem. But of course no formula can operate automatically or dispense with the necessity of deciding what, on the true construction of any particular Act, Parliament did intend. There is often trouble enough in deciding, even when express words are in issue.[15] But the cases of inconsistency turn more frequently still upon the *implications* of what is expressly laid down. No doubt even an affirmative can quite properly be regarded as implying certain negative propositions; but a liberal resort to that method of construction would tend to produce inconsistency on an extensive scale. Under any circumstances the problem of discovering the implications of a statute is almost bound to lead to diversity of opinion.

What, for example, will be the position when, under different enactments, different powers exist in regard to the same subject matter? *The Kakariki,*[16] for example, was wrecked in Port Phillip Bay, in the channel used by all vessels entering or leaving the port of Melbourne. The port authorities proposed to remove the wreck, in the exercise of powers conferred by the Marine Act, 1928 (Victoria). A like power of removal was however conferred upon the relevant Commonwealth authority by the Navigation Act. Fearing lest the cost of removal might prove irrecoverable from the owners, the State sought a declaration that (*inter alia*) the State authority could lawfully remove the wreck, at any rate unless and until the Commonwealth authority exercised its

14. (1932) 48 C.L.R. 128, 136.
15. To grasp the ratio of Schutt J., in *Jenner v. Mildura* (1926) V.L.R. 295 has always given the writer (and his classes) much difficulty; see too *Matthews v. Prahran* (1925) V.L.R. 469; *Tasmanian Steamships Pty. Ltd. v. Lang* (1938) 60 C.L.R. 111.
16. *Victoria v. The Commonwealth* (1937) 58 C.L.R. 618.

powers under the Navigation Act. The High Court held that the mere co-existence of the two different powers of removal did not make the State Act inconsistent with the Federal Act. There was nothing in the express terms of the Commonwealth law to prevent the removal of wrecks under other powers, and there was nothing in the nature of the subject matter or anywhere else to require an implication in that sense.

In *Ffrost v. Stevenson*[17] on the other hand opinion was sharply divided. An order was made by a magistrate in New South Wales for the return to the Territory of New Guinea of a fugitive offender. The magistrate was authorised to make such an order both by the Fugitive Offenders Act, 1881 (United Kingdom) and by the Service and Execution of Process Act, 1901 (Commonwealth); but the Acts differed both with regard to the formalities required and with regard to the appeals provided. Latham C.J. and Evatt J. held that there was no repugnancy. The magistrate could easily make clear under which Act he was proceeding (though he had not altogether done so in this case), and there was nothing either in the object of powers of rendition, or in the terms in which the Imperial Act had conferred them, to give rise to an implication prohibiting the exercise of alternative powers. There was no repugnancy between the two Acts—they merely provided alternative modes of securing the same object. Dixon and McTiernan JJ., on the other hand, held that the provisions of the Commonwealth Act were repugnant to the Imperial Act—that there were insuperable practical difficulties in treating the two procedures as alternatives, and that insofar as it varied the procedure laid down by the Imperial Act the Commonwealth Act was invalid.

With these two cases may be contrasted *Daw v. Metropolitan Board of Works,*[18] in which the Court of Common Pleas found inconsistency between two Acts of the Parliament of the United Kingdom, each of which gave—but to different bodies—a power to number the houses in the same streets. The Commissioners designated under the earlier Act had exercised their powers; the Board of Works effaced these numbers and re-numbered the houses on a different system. The Commissioners failed in a claim for damages, Erle C.J. holding that the exercise of these powers concurrently by both bodies would be entirely destructive of the object for which they were conferred; they could not therefore exist together. Hence the later Act was treated as impliedly repealing the earlier. The Court expressly left open the question whether the Commissioners could still validly exercise their powers in the absence of action by the Board. But once the Board exercised its powers the Commissioners' powers ceased to operate. Parenthetically, it may be observed that this decision seems to reject the simple "consistency of obedience" criterion. As a practical matter, it would no doubt have been quite possible (though rather inconvenient) for dwellings to bear two different sets of numbers.[19] But the nature and object of the later Act sufficed

17. (1937) 58 C.L.R. 528.
18. (1862) 12 C.B.(N.S.) 161.
19. This was the view of Isaacs J.; see *Clyde Engineering Co. v. Cowburn* (1926) 37 C.L.R. 466, 492; *contra, per* Higgins J., *ibid.* at p. 511.

to ground an implication with which the earlier Act was *pro tanto* inconsistent.

Perhaps the most illuminating case in this group is *Stock Motor Ploughs Ltd. v. Forsyth.*[20] The Moratorium Act 1930-1 (N.S.W.) required *inter alia* that the leave of the Court must be obtained before the commencement of proceeding for the recovery of any instalment under a hire-purchase agreement. The plaintiff was the holder of promissory notes made by the defendant by way of collateral security under a hire-purchase agreement, and it was held that the Moratorium Act applied to proceedings upon the notes. The Commonwealth law however—the Bills of Exchange Act—provided (*inter alia*) by s.43 that the rights and powers of the holder of a note should include the power to sue on the note in his own name and to enforce payment against all parties liable on the note. The High Court (Gavin Duffy C.J., Starke, Evatt and McTiernan J.J., Dixon J., dissenting) held that the Moratorium Act was not inconsistent with the Bills of Exchange Act. It was common ground that there was nothing inconsistent with the Bills of Exchange Act in the various State laws affecting the acquisition of rights under negotiable instruments in relation to certain transactions such as money-lending or gaming. The majority of the Court regarded the Moratorium Act as falling into the same category—i.e., as validly determining the extent to which, and the circumstances under which, negotiable instruments should have effect in the particular transactions of mortgage and of hire-purchase. Just because the Commonwealth law did not attempt to give to the holder of a note a statutory "right of continuous recourse" against the maker irrespective of the relationship between the parties, they found it impossible to treat s.43 of the Bills of Exchange Act as either expressly or by necessary implication excluding such an exercise of State powers.[21] Dixon J. on the other hand held that on its true construction the federal law did by implication prohibit a State from suspending extinguishing or otherwise impairing a right to sue which had accrued to a holder under the provisions of the federal law. There could be no clearer illustration of the inherent difficulty of determining in any particular instance when one law does contradict another.

So far, we have confined ourselves to cases in which the alleged inconsistency was to be found in what may be called the substantive requirements of the two laws concerned—the duties imposed, the penalties prescribed, the rights or powers conferred. But there have been cases in which the paramount legislature has evinced the intention "to express by its enactment completely exhaustively or exclusively what shall be the law governing the particular conduct or matter to which its attenion is directed."[22] When a valid federal Act evinces such an intention, a State Act purporting to govern the same matter is, by its mere existence as a law and irrespective of its content, inconsistent with the federal Act. Such an intention is to be found, for example, in s.30 of the Commonwealth Conciliation and Arbitration Act: "When a State law

20. (1932) 48 C.L.R. 128.
21. See especially *per* Evatt J., *ibid* pp. 149-50.
22. *per* Dixon J., in *ex. p. McLean* (1930) 43 C.L.R. 472, 483.

or an award order or determination of a State industrial authority is inconsistent with, or deals with any matter dealt with in, an award or order lawfully made by the (Commonwealth Arbitration) Court or by a Conciliation Commissioner, the latter shall prevail and the former shall to the extent of the inconsistency, or in relation to the matter dealt with, be invalid." This intention to exclude from the subject matter all legislation by the other body concerned is usually described, metaphorically, as an intention to "cover the field." Any entry by State law into the "field" so covered will be invalid, no matter what the terms of the State laws may be.

The classical exposition of this phase of the law is to be found in the judgment of Dixon J. in *ex p. McLean.*[23] Under s.4 of the Masters and Servants Act 1902 (N.S.W.), McLean, a shearer, had been convicted of neglecting to fulfil a contract of employment. The contract was in writing, as required by a Commonwealth arbitral award, which expressly required of both parties performance of the contract. The Commonwealth Arbitration Act provided penalties for breach of awards, and (by s.30) expressly purported to invalidate any State law dealing with matters dealt with in the award.[24] The High Court in effect quashed the convicition of McLean under the State Act. The Commonwealth Parliament had made the award the exclusive measure of industrial rights and duties between the parties, and the State law could therefore not validly apply to them.

Though the Arbitration Act is the most emphatic case of an express intention by the Commonwealth Parliament to cover the field, it stands by no means alone. The Bills of Exchange Act,[25] for instance, provides that specified State laws shall cease to apply to instruments made after the commencement of the Act, and it may be supposed, as Evatt J. has said, that this by implication excludes from any operation whatever State laws which could be properly described as laws "with respect to" bills of exchange or promissory notes.[26] The Bankruptcy Act[27] proceeds, though indirectly, to a very similar result: the Act "shall not affect any provision in any State Bankruptcy or Insolvency Act relating to matters not dealt with either expressly or by necessary implication in this Act." The intention is clear that the Commonwealth law shall be the exclusive regulation of all the subject-matters dealth with therein.

So long as, in a valid Commonwealth Act, an intention to "cover the field" is evinced expressly, no great difficulty arises. But in a number of cases such an intention has been found to have been evinced by implication only. "Implication," as we have already seen, is a logical instrument capable of the most diverse results. At one end of the scale, a strict adherence to "necessary implication" will permit only such inferences as are required to avoid contradicting what is expressed. At the other end of the scale, one may easily fall into a general assumption

23. (1930) 43 C.L.R. 472, 481 sqq. It is not clear whether the doctrine there expressed has Dixon J.'s personal concurrence or is based on acceptance of the maxim *"stare decisis."*
24. For some reason s.30, though referred to by Starke J. during the argument, does not appear to be mentioned in terms in any of the judgments.
25. s.7.
26. (1932) 48 C.L.R. 128, 143.
27. s.6.

that the paramount legislature always intends to "cover the field" unless it discloses some indications to the contrary. In the United States indeed the orthodox doctrine is that in certain cases (especially under the commerce power) congress may, even by its silence, forbid to the States the regulation of a matter which is within a federal "concurrent" power. The ultimate question in all cases of alleged inconsistency has been stated to be "whether the particular State regulation unduly burdens or interferes with the realisation of the national policies intended to be protected or promoted by the grant of powers to the national government."[28] Doctrines of this kind have given to the constitutional law of the United States its extraordinary flexibility, and have entrusted to the judiciary a much more active role in the fashioning of the constitution than is customary with us. It is not surprising that decisions are to be found on the one hand nullifying exercises of power by the States even in the absence of Congressional action and on the other hand allowing the States at least as wide a freedom of action as was conceded by the majority of the High Court in *Stock Motor Ploughs Ltd. v. Forsyth.*[29] The United States decisions clearly cannot be taken as a direct guide for the Australian constitution.[30]

The writer's submission is that in determining inconsistency in Australia an intention to "cover the field" should never be imputed save as may be required by express declaration or by necessary intendment. Only on that basis can anything like certainty be maintained. That rule moreover would have the salutary effect of throwing upon the paramount legislature the responsibility in all cases of indicating clearly just how far it did intend to leave the field open. Is the suggested rule, however, consistent with the authorities? In the writer's submission it is—with all the decisions at any rate, though not perhaps with all the judicial opinions expressed.

Curiously enough the doctrine of an "intention to cover the field" made its first appearance in Australian constitutional law in aid of the States against the Commonwealth. In the *Bootmakers'* case[31] it was argued, on the footing that the Commonwealth Arbitration Court could not make an award inconsistent with a State law, that there was inconsistency, without more, "where the Court forms the view from the language of the paramount legislature that they intended their law to be the only law on the particular point."[32] Griffith C.J. accepted this test as a proper one, but found no intention in the State legislation to "cover the field."[33] Isaacs J., in a judgment prophetic of many future developments, attacked the fundamental proposition that federal awards were subject to State law, but stated that if he were wrong on that point, he would be inclined to accept the test proposed. He added, significantly,

28. See Rottschaefer, *Constitutional Law* (1939), 88-91, 167-9.
29. (1932) 48 C.L.R. 128; see *Cooley v. Board of Wardens* 12 How. 299; *Leisy v. Hardin* 135 U.S. 100; *Sinnot v. Davenport* 22 How. 227; *Reid v. Colorado* 187 U.S. 137; *Wynes, Supremacy of Commonwealth Law under the Constitution* (1933) 7 A.L.J. 174, 176.
30. Nor, though for different reasons, can the decisions on the Canadian constitution. The problem of paramountcy does arise there—but in relation to two sets of exclusive designated subject-matters, in which the primary consideration is whether a law is in pith and substance a law with respect to a Dominion or a Provincial subject-matter.
31. (1910) 10 C.L.R. 266.
32. *ibid.* p. 272 (Mitchell K.C. and Starke); *cf.* p. 274 (Irvine K.C. Blacket and Harrison Moore).
33. *ibid.* p. 286.

that if such an intention did not give rise to inconsistency, it would be difficult ever to hold a State law inconsistent with federal law under s.109. But the terms in which Isaacs J. himself stated the doctrine should be carefully noted: "Any State Act which *expressly or by necessary implication* assumes to occupy the field, whether the regulations it affirmatively enacts be many or few, is inconsistent with any federal award whatsoever."[34]

The imputation of an intention to exclude all other legislative regulation of the subject-matter is next found in the High Court in four cases decided during 1925 and 1926: *Union Steamship Company of New Zealand v. Commonwealth*,[35] involving repugnancy between the Merchant Shipping Act and the Commonwealth Navigation Act; *Clyde Engineering Co. v. Cowburn*[36] and *McKay v. Hunt*,[37] involving inconsistency between the Commonwealth Arbitration Act, together with an award thereunder, and a State Act; and *Hume v. Palmer*[38] involving inconsistency between the Navigation Acts of the Commonwealth and of New South Wales. But the part played by the imputation of an "intention to cover the field" in leading to the actual decisions (in each case that inconsistency did exist) seems to the writer to have been over-estimated. In the *Union Steamship Co.'s* case, *Isaacs J.* did express the view that by necessary implication the Merchant Shipping Act evinced an intention to cover the whole field so far as concerned the engagement and discharge of seamen, and that it was not necessary to concentrate attention on "mere minute verbal expressions or individual differences of requirements."[39] The decision as a whole however seems rather to rest on the presence of contradictory requirements in the substance of the two Acts, *Higgins J.* finding inconsistency with respect to the discharge but not with respect to the engagement of seamen. If the decision is to be treated as based on the implied intention of the Parliament of the United Kingdom to exclude all Dominion legislation regarding the engagement and discharge of seamen, some doubt may be entertained as to the soundness of that interpretation.[40]

Cowburn's case,[41] again, is far from supplying a clear illustration of the proposition that a State law may be inconsistent with a federal law by its mere existence and entirely without regard to its terms. Five Justices held the Forty-four Week Act (N.S.W.) invalid by reason of inconsistency with a federal award, all of them emphasising the contradiction in substance between the requirements of the two instruments. Isaacs J. did indeed find there was inconsistency not only by comparison of detailed provisions but also by the mere existence of the two sets of provisions.[42] But in his summary of his conclusions Isaacs J., like the rest of the majority, held that the State law, on the true construction of the award, purported to alter or vary or destroy the adjustment made by

34. ibid., p. 330; italics by the writer.
35. (1925) 36 C.L.R. 130.
36. (1926) 37 C.L.R. 466.
37. (1926) 38 C.L.R. 308.
38. (1926) 38 C.L.R. 441.
39. (1925) 36 C.L.R. 130, 148-151.
40. See Sir Robert Garran's evidence before the Royal Commission on the Constitution of the Commonwealth: Minutes of Evidence, pp. 61-64.
41. (1926) 37 C.L.R. 466.
42. *Ibid.*, p. 490 sqq.

the award.[43] The writer submits moreover that, as the Commonwealth Arbitration Act then stood, it is difficult to interpret the Act, and the award which the Act made binding, as having intended to invalidate all State enactments dealing with the subject-matter, even if not in substance contradictory of the award. The Act by s.30 declared that a State law "inconsistent" with an award should "to the extent of the inconsistency" be invalid. But the necessary implication of these words seems to be that a State law *can* enter the field and yet remain consistent with the award. If, therefore, *Cowburn's* case did declare invalid by mere existence a State law dealing with a matter covered in an award, there would appear to be some ground for contending that the case had not been rightly decided.[44] It was not till the amending Act of 1928, declaring that a State law should be invalid *insofar as it dealt with a matter dealt with in a federal award,* that the paramount law did definitely express its intention to "cover the field." The result we have seen in the case of *ex p. McLean.*[45]

McKay v. Hunt[46] is indistinguishable from *Cowburn's* case, and adds nothing. In *Hume v. Palmer*[47] however Commonwealth regulations under the Navigation Act, for preventing collisions at sea, were held to invalidate State regulations verbally identical in the rules laid down. Both legislatures have in fact adopted the code enacted under the Merchant Shipping Act. With the exception of Higgins J., the High Court treated the Comonwealth Act as having evinced an intention to deal completely and exclusively and uniformly with the subject-matter and to leave no room for any State enactment whatever. It was therefore held that the master of a vessel could not be validly convicted of an offence under the State Act. The judgments are brief and state their conclusions rather than explain the reasoning upon which they rest. But presumably the intention to exclude all State laws from the subject-matter rests at highest on necessary implication—drawn partly perhaps from the nature of the subject-matter,[48] partly from the fact that the Commonwealth regulations were expresed to apply "to all ships (British and foreign) wherever the Commonwealth has jurisdiction, whether upon the high seas or in waters connected therewith and navigable by sea-going vessels";[49] partly perhaps also (though the point is not taken in the judgments) from the fact that Art. 30 of the rules themselves did expressly create an exception, in favour of any "special rules made by local authority for the navigation of any harbour, river or inland waters." The writer's sub-

43. *ibid,* p. 499.
44. A similar view of *Cowburn's* case was taken by the Commonwealth Court of Arbitration itself in *Corke v. Australian Timber Workers' Union* (1929), 28 C.A.R. 365. Isaacs J., would perhaps have replied, however, that although the Act contemplated the possibility of State laws consistent with the award, the award itself did purport to deal exclusively with the matters in dispute.
45. (1930) 43 C.L.R. 472.
46. (1926) 38 C.L.R. 308.
47. *ibid,* 441.
48. This is one explanation suggested by Evatt J. in *Stock Motor Ploughs Ltd. v. Forsyth* (1930) 48 C.L.R. 128, 147. "The nature of the subject-matter" is, however, an insecure basis. Any suggestion for instance that Australian coastal shipping must "of its nature" be subject to uniform treatment runs counter to the historical fact that, prior to federation, the six colonies had each the same powers to vary the rules laid down in or under the Merchant Shipping Act as since federation the Commonwealth has had (Merchant Shipping Act, 1894, ss. 735-6). The decision therefore in *Hume v. Palmer,* that the Commonwealth regulations by their mere existence prevented the (identical) State regulations from applying to interstate or overseas ships, cannot properly be based on this ground.
49. Navigation (Collision) Regulations s.2.

mission is that only on such grounds can the decision be supported. To impute an intention to exclude State law otherwise than by express statement or necessary implication is in his view to enter upon the dangerous task of speculating upon the policy of the Legislature. It may even, as Evatt J. has said, lead to a vague general doctrine of Commonwealth paramountcy. "Sec. 109 is not to be invoked as embodying the old rule in *D'Emden v. Pedder*, dressed up as a rule of general Commonwealth suzerainty instead of a rule of mutual non-interference."[50] If the paramount legislature does intend to lay down the exclusive rule on the subject-matter, it is surely not too much to expect so drastic an intention to be exhibited clearly.

If the paramount legislature does intend to lay down the sole rule on the subject-matter, so that any subordinate law is inconsistent even though identical in terms, it can make no difference whether the sanctions provided are same or different. In *Hume v. Palmer*[51] and in *ex p. McLean*,[52] indeed, some emphasis was placed on the fact that the State law provided, in respect of the same conduct, penalties different from those of the Commonwealth law. But if the rule of conduct itself be invalid, no penalty can be suffered for breach thereof.[53] What is the position in regard to different penalties, however, where the paramount legislation does *not* "cover the field"? There seem to be three possible positions (1) that the mere assertion of jurisdiction by a tribunal under the inferior law is a denial of the jurisdiction of a tribunal under the paramount law—hence necessarily manifesting inconsistency;[54] (2) that penalties are recoverable under both Acts;[55] (3) that penalties are recoverable under either Act but not both, each Act being interpreted as penalising only conduct not punishing under the other.[56]

In the writer's submission the third position is the correct one. As between two Acts of the same legislature indeed that rule (that proceedings may be taken under either Act but not both) has in many jurisdictions been expressly adopted by Parliament, the principle being that no person shall be liable to be punished more than once for the same offence—i.e., inrespect of "the same conduct."[57] This rule disposes of questions of "implied repeal," and also of the possibility of inconsistency in such cases between by-laws and the general law.[58] In terms, it does not apply to Acts emanating from different legislatures. But the statutory rule appears to have been declaratory only[59] and, if it is so, is ample warrant for applying the same contruction to Acts of two different

50. *The Kakariki* (1937) 58 C.L.R. 618, 637.
51. (1926) 38 C.L.R. 441.
52. (1930) 43 C.L.R. 472.
53. See the argument of Brissenden, K.C., Evatt, K.C., and Nicholas in *ex p. McLean*, ibid, p. 475.
54. See counsel's argument *loc. cit.*; *Ffrost v. Stevenson* (1937) 58 C.L.R. 528, 573 (an illuminating comment by Dixon J. on *Lorenzo v. Carey*).
55. This was the view of Higgins J. in *Hume v. Palmer* (1926) 38 C.L.R. 441, 458-9.
56. See Evatt J.'s interpretation of the Commonwealth's powers to remove wrecks, under the Navigation Act: *The Kakariki* (1937) 58 C.L.R. 618, 637.
57. Acts Interpretation Act, 1889 (U.K.) s. 33; 1901-34 (Commonwealth), s. 30; 1928 (Vic.) s. 27.
58. Reference to the Acts Interpretation Act, 1928, supports the conclusion reached on principle by Macfarlan J. in the Supreme Court of Victoria in *Hallion v. Eade* (1938) V.L.R. 179; a by-law was sustained which enacted for drivers making a right-hand turn a rule identical with that enacted in the general law, but which embodied a scheme of penalties slightly different.
59. Cf. Hawkins, *Pleas of the Crown* 8th edn. 1824, Book 2, Chap. 25, s.4.

legislatures, unless, of course, the contrary appears from the terms in which the penalties are provided. In *Hume v. Palmer*[60] therefore, if the Commonwealth law had not been held to "cover the field," the mere exhibition of different penalties would not have created inconsistency. Each Act could be interpreted as imposing penalties only if no conviction had taken place under the other. But of course the penalties may very well be imposed in terms that do involve contradiction—as in the travelling-without-a-ticket cases, referred to above.

If these submissions be correct, the position as to penalties therefore supports the writer's general contention: that if paramount legislation is to have overriding operation, care will be needed to express clearly an intention to that effect, and that, in particular, attention must be given to what is left to implication. The draftsman of a new Commonwealth law however who gives close consideration to the extent to which it will or should invalidate inferior legislation or exclude the action of inferior legislatures will very soon find himself confronted by questions of *power* as well as of intention. The Commonwealth legislature being limited in point of subject-matter, all its laws must be supportable as legislation with respect to one or more of its enumerated powers. The result is, as Evatt J. has emphatically stated, that "attempts by the Commonwealth Parliament to manufacture inconsistency between its own legislation and that of the States will often be essayed only at the price of making the Commonwealth legislation *ultra vires*."[61]

This proposition may be illustrated from a number of instances given by Evatt J. Thus the power to make an electoral law supported a law prohibiting the holding of State elections or referenda on the day of a federal election:[62] but in his view it would obviously not support a Commonwealth law forbidding the holding of State elections within six months of a federal election. The defence power might well be held to support in time of war, but not in time of peace, a grant by the Commonwealth to military officers of complete immunity from the operation of State traffic legislation.[63] So also under the trade and commerce power "the selection by the Commonwealth of small portions of a subject in which it may legislate, especially where such subjects, if systematically regulated at all, cannot admit of more systems than one, readily results in the avoidance of State legislation which, though capable of being simultaneously obeyed, deals with the same small portion of the given subject."[64]

Precisely how far the Commonwealth may go however in excluding State laws is a matter of great difficulty, upon which judicial opinion

60. (1926) 38 C.L.R. 441.
61. *West v. Commissioner of Taxation* (N.S.W.) (1937) 56 C.L.R. 657, 707. Evatt J. has also pointed out, in *Stock Motor Ploughs Ltd. v. Forsyth* (1930) 48 C.L.R. 128, 146-9, that the Commonwealth Parliament cannot with all the powers under s. 51 do even by express words what it has done under pl. xxxv. by means of s. 30 of the Arbitration Act.
62. (1937) 56 C.L.R. 707: citing *R. v. Brisbane Licensing Court; ex p. Daniell* (1920) 28 C.L.R. 23.
63. *ibid*, 708-9; commenting on dicta in *Pirrie v. McFarlane* (1925) 36 C.L.R. 170.
64. *Stock Motor Ploughs Ltd. v. Forsyth* (1932) 48 C.L.R. 128, 148; referring especially to navigation, as dealt with in *Hume v. Palmer* (1926) 38 C.L.R. 441; but see note 48 *supra*.

was recently divided. In *West v. Commissioner of Taxation (N.S.W.)*[65] the High Court was unanimous in holding that a general undiscriminating State income tax could validly include federal salaries and pensions, and was not inconsistent with the federal law fixing their amounts. The decision of a majority of the Court, in the particular circumstances of the case, rested on the further proposition that the State income tax law could have such an effect only in the absence of Commonwealth legislation prohibiting State taxation in whole or in part, and that the relevant Commonwealth legislation did not extend to protect the pension which was the subject of the litigation. Evatt J. on the other hand held that the Commonwealth Parliament had no power to grant to its officers or ex-officers any immunity whatever from payment of non-discriminatory State taxation.[66] His powerful dissenting judgment in this case is in clear accord with the emphasis he has placed throughout his judicial career on the ever-present necessity of showing that a purported exercise of Commonwealth powers is a law with respect to one of the enumerated powers, and with the very strict view he has taken of the "incidental" powers included under s. 51 (xxxix.).

The cases on the Commonwealth's industrial powers exhibit another instance of the limits within which alone the Commonwealth may validly make a law which will "cover the field." The paramountcy of federal awards depends upon the force attributed to them by the Commonwealth Arbitration Act, and (as Dixon J. said in *ex p. McLean*[67]) s. 30 of the Act should presumably be interpreted as confining their exclusive authority "to the regulation of industrial relations and, moreover, to the regulation of industrial relations which are in dispute." The mere fact therefore that a State Act dealt with the specific conduct which is dealt with by an award would not suffice of itself to invalidate the State law. The example given by Dixon J. is that a clause in an award forbidding shearers to injure sheep would not necessarily exclude a State law making punishable the act of maliciously or unlawfully wounding an animal. In *Corke v. Australian Timber Workers' Union*, again, it was contended[68] that s.30 of the Commonwealth Arbitration Act invalidated as to all employees of the respondent employers, whether parties to the award or not, certain provisions dealing with holidays, which were dealt with in the federal award. It was held by the Arbitration Court however that s.30 should not be construed as including State laws which, even though in relation to matters covered by the award, dealt with persons to whom the award did not apply. Dethridge C.J. and Beeby J. suggested grave doubt whether such an intention, if it had been expressed, would have been within the constitutional powers of the Commonwealth. As always, the final question in the case of a Commonwealth Act is whether it falls within the scope of one of the enumerated powers.

65. (1937) 56 C.L.R. 657. *Deakin v. Webb* (1904) 1 C.L.R. 585 and *Baxter v. Commissioner of Taxation* (1907) 4 C.L.R. 1087, which were explained in the *Engineers'* case (1920) 28 C.L.R. 129 as resting on inconsistency were therefore on this point overruled. It is interesting to note that the Supreme Court of the United States has recently taken an identical view, and has overruled the line of cases that depended on *Collector v. Day* (1870); see *Graves v. State of New York* (1939) 83 S.C. (L.ed.) 577.
66. (1937) 56 C.L.R. 657; contrast the observations of Latham C.J. at pp. 670-2 with those of Evatt J. at pp. 684-7, 707-9.
67. (1930) 43 C.L.R. 472, 485-6.
68. (1929) 28 C.A.R. 365, 366-8.