supported by Beale.[4] In such a case as s. 17 "where the law under which the decree was granted imposes a restraint on both parties and it is merely in order to provide against a remarriage before the time for appealing has expired, the restraint is then regarded as a temporary qualification of the effect of the decree and as entitled to extra-territorial recognition . . . .".[5]

A short chain of English authority was discussed by the Court, all of which pointed to a proposition, first enunciated by Hannen P. in *Warter's* case[6] that such a statutory limitation on remarriage is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage.

The principle adopted is, it is submitted, sound. It would be ludicrous, as Kitto J. remarked in a short separate judgment, if the Courts of one country (such as New South Wales), while recognizing the jurisdiction of Courts of a "foreign country" (such as South Australia) to give a judgment dissolving a marriage, did not also recognize the jurisdiction of a foreign appellate Court to reverse that judgment. The section of the South Australian Act protected the right of appeal—it prevented a party to a divorce entering into a valid marriage for three months after the decree absolute in order to allow appeal. The High Court was right, it seems, in holding that this prohibition should be recognized in New South Wales.

PETER L. WALLER

[4] *Conflict of Laws*, (1935) 685-6.
[5] [1954] A.L.R. 1109, 1113.
[6] (1890) 15 P.D. 152.

CONSTITUTIONAL LAW—TRADE AND COMMERCE—INCONSISTENCY BETWEEN COMMONWEALTH AND STATE LAWS

The decision of the High Court in *O'Sullivan v. Noarlunga Meat Limited*[1] has re-opened discussion on two very important questions in Australian constitutional law (a) the characterization of the Commonwealth powers enumerated in s. 51 of the Constitution; (b) the interpretation of s. 109 of the Constitution, which invalidates a State law inconsistent with a law of the Commonwealth. Both questions are at the very basis of Commonwealth-State relations in the Australian federal structure.

The facts of the case were as follows.[2] The Noarlunga Company held a licence in the form prescribed by the Meat Export Control (Licences) Regulations of the Commonwealth by which it was licensed to export meat, and the Company's premises were registered under the Commerce (Meat Export) Regulations[3] in respect of the

[1] [1955] A.L.R. 82.
[2] They are set out *ibid.* 83.
[3] A complete summary of the Regulations will be found in the judgment of Fullagar J. *ibid.* 95-96.

slaughtering and freezing for export of mutton and lamb. Under s. 52a of the South Australian Metropolitan and Export Abattoirs Act, the Minister for Agriculture was empowered to issue licences authorizing the use of premises outside the metropolitan area for the slaughtering of stock for export as fresh meat in a chilled or frozen condition.[4] The Conpany's application for a state licence had been refused and proceedings were taken against it for operating in contravention of the section in question. The questions for the High Court were two in number: (a) Were the Commonwealth Regulations and s. 52a of the State Act inconsistent? (b) Were the Regulations a valid exercise of the trade and commerce power conferred on the Commonwealth by s. 51 (i) of the Constitution?

Dixon C.J., Fullagar and Kitto JJ. decided that s. 52a was invalid as being inconsistent with the Commerce (Meat Export) Regulations, which they held were a valid exercise of the trade and commerce power. McTiernan, Webb and Taylor JJ. held that no inconsistency existed. Having regard to the provisions of s. 23 of the Judiciary Act (there being an equal division of opinion), the question was answered in accordance with the opinion of Dixon C.J.

The State legislation was designed not only to ensure adequate standards of cleanliness etc. in slaughter-houses, but also to provide for other circumstances such as the personality of the operator and the location of the premises – in other words the intention was that the community should not suffer through any of these reasons. By ss. 2 of s. 52a a discretion was conferred on the Minister for Agriculture to refuse a licence for any of three reasons – (a) the personality of the occupier (b) the suitability of the locality (c) the nature of the premises.[5] On the other hand, the Commonwealth Regulations, which were based on a system of registration (regs. 5 and 6), contained a comprehensive scheme designed to ensure that acts antecedent to the export of meat were carried out in accordance with a variety of conditions in order to achieve a high standard in the purity and quality of the goods. The Regulations covered ground similar to that comprised in s. 52a of the State Act.

The divergence between the attitude of the members of the Court to the question of inconsistency can be best illustrated by reference to the judgments of Fullagar and Taylor JJ. Fullagar J. (with whom Dixon C.J. agreed) based his view on the "covering the field" test.[6] His Honour stated that "applying this test it appears to me

[4] The section in its actual terms prohibited the use of premises to all except holders of licences.

[5] See footnote [1955] A.L.R. 106.

[6] This test was formulated by Isaacs J. in *Clyde Engineering Company v. Cowburn* (1926) 37 C.L.R. 466, 489, and followed by Dixon J. (as he then was) in *Ex Parte Maclean* (1930) 43 C.L.R. 472, 483. The test was stated there in the following terms:

"The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of

impossible to deny that the regulations evince an intention to express completely and exhaustively the requirements of the law with respect to the use of premises for the slaughter of stock for export".[7] He attached great importance to reg. 6(2) which authorized the issue of the certificate of registration. In his opinion the certificate meant that the operations referred to therein could lawfully be conducted on the premises. His Honour rejected the argument of counsel for South Australia[8] that the purpose of s. 52a was different from that of the Regulations in that the former was concerned with suitability of proprietor and premises in so far as these affected the community as a whole while the latter were concerned with the quality of goods for export.

On the other hand, Taylor J. thought that no inconsistency existed: "the regulations, in the main, present themselves not as *rules of conduct* with which the regulations imperatively require compliance, but as the *antecedent specification of conditions* the fulfilment of which will entitle an applicant to the issue of an export permit at the appropriate time."[9] Further down His Honour says. "the regulations merely prescribe conditions designed to secure standards of purity, quality and condition at the *point of export,* and these are the conditions which, if observed, will entitle an applicant to an export permit."[10]

The argument of Taylor J. is convincing. It is difficult to discover a definite intention of the Commonwealth Parliament to supersede or replace the State legislation.[11] Indeed, counsel for the Commonwealth was only concerned with pressing the validity of the Regulations. Fullagar J. and the concurring judges seem to have allowed the Commonwealth legislation a wider operation than the draftsman intended.[12] In the words of McTiernan J. who agreed with Taylor J., "Regulation 5 [the regulation requiring registration] applies to an establishment, in which slaughtering for export is conducted, as an instrument or agency of trade and commerce with other countries."[13] According to this view, the distinction between the regulations primarily designed to secure the quality of the goods at the time

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the paramount Legislature to express by its enactment, completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed." [7] [1955] A.L.R. 82, 98.

[8] Counsel contended that the Commonwealth was only interested in export while the State was concerned with health, nuisance and the like.

[9] [1955] A.L.R. 82, 105. Italics supplied. [10] *Ibid.* Italics supplied.

[11] The short judgment of Webb J. is relevant to this point. His Honour stated that reg. 103 which authorized the adoption of State inspection and approval of meat for export indicated that the Regulations were not intended to be exclusive of State law.

[12] It might be said that a definite statement in the Regulations should be required before a comprehensive state system followed for many years is superseded.

[13] [1955] A.L.R. 90.

of export and s. 52a of the State Act which prescribes the requisite conditions for carrying on the slaughtering-for-export industry can in the last resort be made.[14]

The determination of the inconsistency issue by the Court was complicated by another important question which received the attention of only Fullagar and McTiernan JJ., namely, the extent of the trade and commerce power contained in s. 51 (i) of the Constitution under which the Meat Export Regulations were made. S. 51 (i) contains no criterion of how closely related to trade and commerce the particular law must be in order to fall within that category. Both Fullagar and McTiernan JJ. were unwilling to discuss at length the wider problem involved – that of characterization[15] – but examined only the particular legislation before the Court. McTiernan J. thought that the regulations which established the standards for registered establishments had a causative relation to the final despatch of meat abroad and consequently fell within the power.[16] Fullagar J., in mentioning certain American cases, stated that the early cases decided there showed a distinction between preparation and manufacture on the one hand and commerce on the other hand. But later cases, he said, established that legislation with respect to preparation and manufacture fell within the broad category of commerce. "It is undeniable that the power with respect to trade and commerce with other countries includes a power to make provision for the condition and quality of meat or of any other commodity to be exported. Nor can the power, in my opinion, be held to stop there. By virtue of that power all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth."[17] The trade and commerce power, according to Fullagar J., refers back to antecedent acts such as the preparation of commercial goods intended to reach the general stream of commerce at a later stage.

The importance of this case can hardly be denied, for it would seem to open up a wider scope for Commonwealth activity than existed previously. The characterization question involved in the ascertainment of the content of the various *placita* of s. 51 of the Constitution has still not been solved, while the method of procedure to be followed when an apparent conflict between Commonwealth and State legislation arises is still undecided. It would seem that the first question to be answered should be the extent of the particular

[14] To Taylor J. the "pith and substance" of the Regulations would seem to be the securing of export quality; Fullagar J., on the other hand, regarded them as an extensive code, an essential part of which was the supervision of abattoirs generally.

[15] For the nature of this problem, see the judgment of Latham C.J. in the *Uniform Tax Case* (1942) 65 C.L.R. 373, 405.

[16] [1955] A.L.R. 89.

[17] *Per* Fullagar J. *ibid.* 101.

category of legislative power involved. At the outset the Court should ask whether the category of legislative power extends to the particular act or regulation impugned. It is only when this question has been decided that the inconsistency problem should be dealt with. In the *Noarlunga* case, the approach of the judges was diverse. The majority examined the claim of inconsistency before they dealt with the actual scope of the trade and commerce power.[18]

Unfortunately, the result of the case has been to deny to the States authority over particular operations more amenable to State than to Commonwealth control. The future of Commonwealth-State relations depends on the extent to which the classification and inconsistency problems are treated in a more defined manner by the High Court.

R. D. LUMB

[18] It seems that the question of the actual scope of the powers in question must logically precede the question whether the purported exercises of these powers conflict with one another.

CRIMINAL PROCEDURE – BAIL IN MISDEMEANOURS – DISCRETIONARY POWER OF SUPREME COURT

In December 1953 William Light was alleged to have committed the misdemeanour of attempted armed robbery. On December 14th he was charged in a Court of Petty Sessions. On an adjournment Light was released on bail of £300. On December 23rd the charge was again adjourned and Light was once more released on £300 bail, although this time bail was opposed by the police. At the hearing on January 15th 1954 he was remanded in custody, bail being refused. On January 18th he was committed for trial and once more bail was refused. He then made an application for bail to a Supreme Court Judge sitting in Chambers, and his application was based on two contentions; first, that in the Supreme Court, bail should be granted as a matter of right to a person charged with a misdemeanour; and second, that if bail could be refused, such a refusal in this case would be prejudicial to the preparation of his defence. It was held by Sholl J. that bail in these circumstances was a matter of discretion and not of right; and that in the exercise of this discretion bail should not be granted to this particular applicant – *R. v. Light.*[1]

It is submitted that *Light's* case is of exceptional interest, not only because of the law applied but also because it raises nice points as to the theoretical validity of an *argumentum ab inconvenienti* decision, and as to the question of whether this is a leading case, and if so what parts of the decision constitute it a leading case. If we follow the train of thought which Sholl J. used to reach his

[1] [1954] V.L.R. 152.