[HIGH COURT OF AUSTRALIA.]

THE OWNERS OF THE S.S. KALIBIA . APPELLANTS;

AND

ALEXANDER WILSON . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDN

Dec. 1, 2, 5, 17.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Seamen's Compensation Act 1909 (*No.* 29 *of* 1909), *secs.* 4, 13—*Order for detention of ship—Power of Judge in Chambers to set aside ex parte Order—Appeal to High Court—Judicial order—Appeal—Ship engaged in coasting trade—Cargo—Goods carried without freight—Validity of Federal Statute—Applicability of American decisions in construction of Commonwealth Constitution—Severability—The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (1), 76 (III.), 98 *—Regulation of internal trade of a State—Trade and commerce clause—Navigation and shipping—Laws of admiralty and maritime jurisdiction.*

A Judge in Chambers has power to set aside an order made *ex parte* by another Judge under sec. 13 of No. 29 of 1909. An order made for the detention of a ship under that section is a judicial order, from which an appeal lies to the High Court.

Per Griffith C.J.—A power conferred upon a judicial officer, *eo nomine*, to make an order to the prejudice of another, is *primâ facie* judicial.

When a judicial order has been obtained *ex parte*, the party affected by it may apply for its discharge.

A ship was chartered to carry cargo from New York to Australian ports. While the ship was at Adelaide, the chief officer, at the request of the charterers' agent, agreed to take charge of a small package, which had been consigned from New York to Brisbane by another ship, and had been discharged at Adelaide by mistake.

The chief officer carried the package in his cabin from Adelaide to Brisbane, and delivered it there to the charterers' agents. The package was not entered in the ship's manifest, no bill of lading or shipping note was signed in

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respect of it, and no freight was paid for it, the transaction being treated as a voluntary courtesy on the part of the chief officer. *Held*, that the package was not cargo within the meaning of sec. 4 of No. 29 of 1909.

Decision of *Gordon*, J., *In re Wilson*, 27 W.N., 73, reversed on this point.

The provisions of sec. 4 of the *Seamen's Compensation Act* 1909, in so far as they purport to regulate purely intra-State trade, are *ultra vires* sec. 51 (1) of the Constitution.

Sec. 98 of the Constitution does not enlarge the ambit of the trade and commerce clause in sec. 51 (1), but is merely explanatory of the trade and commerce powers.

Per Griffith C.J., *Barton* and *Isaacs* JJ.—The validity of these provisions of sec. 4 cannot be supported as being an exercise of the jurisdiction conferred upon the Parliament by sec. 76 (III.)

Per Barton and *Isaacs* JJ.—The rule of construction adopted by the American Courts as to the jurisdiction conferred by Art. 3, sec. 2 of the American Constitution, is not applicable to the construction of sec. 76 (III.)

Per Griffith C.J., *Barton*, *O'Connor* and *Isaacs* JJ. (*Higgins* J. dissenting) that, the Parliament having in plain language expressed its intention that the test to be applied in determining what ships come within the *Seamen's Compensation Act* 1909 is whether the ship is engaged in trade between port and port, and not whether she is engaged in trade between State and State, the valid and invalid provisions of the Act are inseparable, and the whole Act is invalid.

Per Isaacs, J.—The valid and invalid provisions of the Act as to the coasting trade being inseparable, the Act so far at least as it refers to that trade is invalid.

Per Higgins J.—The Act having prescribed a duty as to individual seamen, some of whom are within, and some of whom are without the power of Parliament, the Act is invalid so far as regards the seamen who are outside the power. But as there is no reason for thinking that if Parliament had understood the limits of its power it would not have passed the Act so far as regards the seamen who are within the power, the Act is valid as to these seamen. It is not a matter of the words that happen to be used, but of substance—are the things severable? There is no difficulty in this case in severing the valid from the invalid prescription—even verbally.

Decision of *Gordon* J. : *In re Wilson*, 27 W.N. (N.S.W.), 73, reversed.

APPEAL, by special leave, by the owners of the s.s. *Kalibia*, from the decision of *Gordon* J. of 28th May 1910, refusing to set aside an order made *ex parte* by *Street* J., under sec. 13 of the *Seamen's Compensation Act* 1909, No. 29, for the detention of the s.s.

Kalibia until security was given for payment of any compensation that might be awarded against the owners of the vessel in an action for injuries caused to a seaman: see *In re Wilson* (1) where the decision of *Gordon* J. is reported.

The facts are stated in the judgment of *Griffith* C.J.

Brissenden and *Bavin*, for the appellants. The small package carried by the chief officer from Adelaide to Brisbane was not cargo within sec. 4 of No. 29 of 1909. It was carried by him as a gratuitous bailee. Cargo connotes a contractual relationship on the part of the owner of the ship. The word "trade" governs the section. There is no trading where there is no contract to pay.

The Act is *ultra vires* the Constitution. Provision for payment of compensation to seamen for accidents arising in the course of their employment does not come within the trade and commerce clause of sec. 51 of the Constitution. The Act purports to impose a compulsory system of insurance. It operates irrespective of the duty of the master and seamen. If the seaman suffers serious and permanent disability he is insured against the consequence of his own wilful misconduct: sec. 5 (*c*). It does not directly or proximately deal with commerce: *R.* v. *Barger* (2).

[They also referred to the *Employers' Liability Cases* (3); *Johnson* v. *Southern Pacific Co.* (4); *Schlemmer* v. *Buffalo, Rochester and Pittsburg Railway Co.* (5); *Paul* v. *Virginia* (6); *Hooper* v. *California* (7).]

The Act is also *ultra vires* upon the ground that it purports to deal with intra-State trade. The intra-State provisions are not severable. The Act intentionally deals with the whole coasting trade, inter-State and intra-State, without discrimination. The Court would have to import words to limit the generality of the challenged words.

[ISAACS J. referred to *Trade Marks Case* (8).]

The present Act, both from its general and special provisions,

(1) 27 W.N. (N.S.W.), 73.
(2) 6 C.L.R., 41.
(3) 207 U.S., 463.
(4) 196 U.S., 1.
(5) 205 U.S., 1.
(6) 8 Wall., 168.
(7) 155 U.S., 648.
(8) 100 U.S., 82.

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intended to deal with the whole coastal trade. The invalid part is therefore not severable: *The Bootmakers' Case (No. 2)* (1).

Watt, for the respondent. The Court will not entertain the appeal on the first ground submitted. The order made by *Street* J. under sec. 13 was ministerial and not judicial, and the application to *Gordon* J. to set aside that order should have been refused on that ground. In any event no appeal lies to this Court from the order made in the Court below. The Judge under sec. 13 decides only as to the probability of liability. He was not acting as the Court, but as an officer of the Commonwealth. His decision is not open to review: *Moses* v. *Parker*; *Ex parte Moses* (2); *Ex parte Yates* (3).

The Kalibia was engaged in the coasting trade because she was trading between ports, irrespective of whether she carried cargo or not. Sub-sec. 1 (*b*) of sec. 4 can be read without reference to sec. 4 (2), which is not intended to give an exclusive definition of coasting trade. Trading does not connote the carrying of cargo: *The Rutland* (4). The intention of the Act was to include any ship trading in Australian waters which engages Australian seamen at ports in Australia. The package taken on board at Adelaide was cargo. It had been landed by mistake from *The Den of Crombie*, and until it reached its destination was still cargo *in transitu*. It was put on *The Kalibia* by the charterers' agents, who were also the agents for *The Den of Crombie*. These agents showed by their conduct that they treated the package as still *in transitu* and regarded the passage from Adelaide to Brisbane as part of the transit. It is immaterial that the package was carried *in invitum* the owners. It is the ship and not the owner that the Act requires to be engaged in the coasting trade. The captain or mate, by any act of volition in this respect, can bind the ship for the purposes of the Act. The mate did not act for himself, but for the ship. The package was taken on board to be carried and landed under circumstances to which secs. 68 and 74 of the *Customs Act* applied. This affects the ship irrespective of the terms upon which the parcel was taken on board.

(1) 11 C.L.R., 1.
(2) (1896) A.C., 245.
(3) 7 S.R. (N.S.W.), 217.
(4) (1897) A.C., 333.

The Act is *intra vires* the Constitution.

[GRIFFITH C.J.—The main question is whether the intra-State portion is severable. It is unnecessary to decide in this case whether the Act is valid in respect of inter-State trade under sec. 51 (1).]

The portion of sec. 4 (2) that is alleged to be *ultra vires* can be severed by omitting the words "in the same State or Territory or": *Macleod* v. *Attorney-General for New South Wales* (1); *The Bootmaker's Case* (2). The Act then would still deal with the same subject matter. The scheme of the Act is in no way altered by excluding certain persons from its provisions.

Armstrong and *Flannery*, for the Commonwealth, intervening. It is sufficient if the words "State or" are excised from sec. 4 (2), as the Parliament has plenary powers to deal with territories. The subject matter of the Act then still remains the same. The alteration merely reduces the area to which the Act is applicable. The validity of the Act can be supported under sec. 76 (III.) of the Constitution, which provides that the Parliament may make laws in any matter of admiralty and maritime jurisdiction. That subsection is analagous to Art. 3 sec. 2 of the American Constitution, and should be construed in the same way: *D'Emden* v. *Pedder* (3). In *In re Garnett* (4) it was held that the admiralty and maritime jurisdiction of the United States extends to all public navigable lakes and rivers. A similar construction was adopted in *The Kestor* (5); and *New Jersey Steam Navigation Co.* v. *Merchants' Bank of Boston* (6), and other cases decided under this section in the United States.

[They also referred to *Harrison Moore on the Commonwealth of Australia*, 2nd ed., p. 560.]

The provision in sec. 98 of the Constitution, that the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, is an extension of the trade and commerce powers.

Brissenden, in reply, referred to *The Lottawanna* (7).

Cur. adv. vult.

(1) (1891) A.C., 455.
(2) 11 C.L.R., 1.
(3) 1 C.L.R., 91, at p. 113.
(4) 141 U.S., 1.
(5) 110 Fed. Rep., 432.
(6) 6 How., 342.
(7) 21 Wall., 558.

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The following judgments were read:—

GRIFFITH C.J. This is an appeal from an order of *Gordon* J., refusing to discharge an order made *ex parte* by *Street* J., on the application of the respondent, a seaman, for the detention of a ship under the powers conferred by sec. 13 of the *Seamen's Compensation Act* 1909, which provides that, if it is alleged that the owner of a ship actually within the territorial waters of Australia is liable as such to pay compensation under the Act, a Justice of the High Court or a Judge of the Supreme Court of the State may, upon its being shown to him by the applicant that the owner is probably liable to pay compensation and does not reside in Australia, issue an order for detention of the ship until security has been given for payment of any compensation that may be awarded.

The appeal is brought on two grounds, (1) that upon the undisputed facts the Act did not apply to the ship on which the respondent was employed at the time of the injury, and (2) that the Act itself is not within the powers of the Parliament of the Commonwealth. The first point only was taken before *Gordon* J. A preliminary objection was taken before him by the respondent that he had no jurisdiction to entertain the application to discharge the *ex parte* order. He held, and I entirely agree with him, that when a judicial order has been obtained *ex parte* the party affected by it may apply for its discharge. This is an elementary rule of justice, of the application of which familiar instances are afforded by writs of *ca. re.* and *ex parte* injunctions. But the learned Judge thought that the facts of the case were not sufficiently clearly established upon the evidence before him. If he was right in this conclusion he was also right in refusing to make the order asked upon the ground taken. Before dealing with this question, which is a question partly of fact and partly of construction of the Statute, I should advert to an objection raised by Mr. *Watt* that the powers conferred by sec. 13 of the Act are not judicial. In my opinion there is no foundation for the objection. A power conferred upon a judicial officer *eo nomine* to make an order to the prejudice of another is *primâ facie* judicial, and it would need very clear words to show that it was intended to be dictatorial and unappealable. So far from any

such words being used in sec. 13, the whole tenor of the section shows that the proceedings are judicial proceedings. That being so, an appeal to this Court lies under the Constitution.

The question of construction arises upon sec. 4, which provides that the Act applies in relation to the employment of seamen on ships engaged in the coasting trade. Sub-sec. (2) declares that a ship shall be deemed to be engaged in the coasting trade "if she takes on board passengers or cargo at any port in a State . . . to be carried to and landed or delivered at any port in the same State . . . or another State."

The relevant facts of the case are not in dispute. *The Kalibia* was chartered to carry cargo from New York to Australian ports, which were appointed under the charter to be Adelaide, Melbourne, Sydney and Brisbane. No other trading was contemplated by the charter. While the ship was lying at Adelaide the chief officer was asked to take charge of a small package, 7 pounds in weight, which had been part of the cargo of another ship and had been inadvertently left behind at Adelaide, and to take it to Brisbane. This he agreed to do, and did. The package was not entered in the ship's manifest, no bill of lading or shipping note was signed in respect of it, no charge was made for the carriage, and the transaction was treated as a voluntary courtesy on the part of the chief officer. The respondent shipped at Sydney as a seaman for the voyage to Brisbane and back, and was injured by an accident before the ship reached Brisbane, where he was discharged. The question is whether under these circumstances the package was cargo taken on board at Adelaide to be delivered at Brisbane within the meaning of sec. 4 (2) of the Act. In my judgment it is impossible to answer this question in the affirmative. I think that as a general rule a ship cannot become engaged in the coasting trade or any other trade without the knowledge and volition of the owner or some person for whose acts he is responsible. There may be exceptions to this rule, *e.g.*, if a stolen ship is actually engaged in trade, but there is nothing in this case to take it out of the general rule. There is nothing to suggest that the chief officer or the master, who offered no objection, had any authority on behalf of the owners to engage the ship in the Australian coasting trade, even

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if the isolated transaction were otherwise within the words of the section. I think also that the words "taken on board" and "to be carried" import a contract of carriage made on behalf of the ship, and do not include a promise made by a passenger, or any other person not authorized to bind the owners, to carry on board the ship goods as to which the owner does not incur any responsibility. I think, therefore, that on this ground *Gordon* J. should have made the order asked for.

Under ordinary circumstances we should go no further, and should decline to express an opinion upon the validity of the Statute itself. But the circumstances of this case are exceptional. A motion for a *rule nisi* for a prohibition raising the same question is now before the Court, and is standing over until this case has been disposed of. The Commonwealth have intervened by leave of the Court, the matter has been fully argued, and we are told that many other cases are dependent upon our opinion. Under these circumstances I think that we are justified in departing from the general practice and expressing our opinion on the validity of the Act.

Two objections are made to its validity: (1) that provisions for compensation to seamen for accidents arising in the course of their employment cannot under any circumstances fall within the trade and commerce clause, as it is called, of sec. 51 of the Constitution, and (2) that, if they do, this particular Act is invalid for another reason.

The first question is, to a certain extent, of an abstract character, and I do not think that the Court would be justified in deciding it except in a case in which the actual provisions of some Commonwealth Statute require a determination of their validity.

The other ground taken is of a concrete nature, and may be shortly stated.

Sec. 4 (1) provides that the Act applies in relation to the employment of seamen (*a*) on any ship registered in the Commonwealth when engaged in the coasting trade . . . (*b*) on any ship (whether British or foreign) engaged in the coasting trade if the seamen have been shipped under articles of agreement entered into in Australia.

The term "coasting trade" is a familiar one, and means trade between different ports of the same country, using the word "country" in a political sense. In sec. 4 (1), therefore, the term *primâ facie* applies to all trade between different Australian ports. If there were any reason to doubt this meaning, and to limit the term to trade between ports of different States, it is removed by sub-sec. (2), which expressly declares that a ship is to be deemed to be engaged in the coasting trade within the meaning of the section if she takes on board passengers or cargo at any port in a State to be carried to and landed or delivered at any port in the same State.

The subject matter of the Act therefore expressly includes all coasting trade in Australia, whether within the limits of a State or extending from one State to another.

The appellants object that the authority of the Federal Parliament does not extend to trade conducted within the limits of a State. It is not now open to argument in this Court that the power to make laws with respect to trade and commerce with other countries and among the States (Constitution, sec. 51 (1)) does not authorize the Parliament to legislate with respect to the internal trade of a State. It is not, and cannot be, contended that sec. 98 of the Constitution, which declares that the power in question extends to navigation and shipping, enlarges the ambit of the power, or does anything more than explain the meaning of the words "trade and commerce" as applied to matters within that ambit.

It follows that the provisions of sec. 4 go beyond the limits of the constitutional power of the Parliament in so far as they purport to deal with purely internal coasting trade, and are to that extent invalid.

The next step in the argument is that the invalid provisions are so intimately bound up with the valid as to be inseverable, and that the whole must therefore fail. The principles to be applied in dealing with this argument were considered by this Court in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1) and *The Bootmakers' Case* (No.

(1) 4 C.L.R., 488, at p. 546.

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2) (1). In the former case we referred to the recognized doctrine of the Supreme Court of the United States of America, that when in the attempted exercise of a power of limited extent an Act is passed which in its turn extends beyond the prescribed limits, the whole Act is invalid unless the invalid part is plainly severable from the valid. In the latter case I suggested a test for determining whether the invalid part is severable from the valid, which was in entire accordance with the language of the Supreme Court in *United States* v. *Reese* (2): "To limit this Statute in the manner now asked for would be to make a new law, not to enforce an old one."

In the present case the Federal Parliament have defined in plain and unmistakeable language the test to be applied for determining whether the Act is to apply to a ship, and have declared that that test is not to be whether a ship is engaged in trade between State and State but whether it is engaged in trade between port and port. To hold that the Act should be treated as a law applying the former test would be, in my opinion, to make a new law and not to enforce an old one.

We were invited to apply the principle of the case of *Macleod* v. *Attorney-General for New South Wales* (3) in which it was held that a law of the Colony of New South Wales providing that an act "wherever committed" should be an offence, must be construed as applying only to acts committed within the territorial jurisdiction of the legislature. The question is not one of words, but of intention. In that case there was no doubt tha the legislature of New South Wales intended that the law should be in force as to all acts committed within their jurisdiction, whether they did or did not think it would apply to acts committed elsewhere.

The test which I suggested in *The Bootmakers' Case* (1) was whether the Statute with the invalid portions omitted is substantially a different law as to the subject matter dealt with by what remains from what it was while the omitted portions formed part of it. Applying this test to the present case, it is clear that a Statute which deals with all persons carrying on

(1) 11 C.L.R., 1, at p. 27.
(2) 92 U.S., 214, at p. 221.
(3) (1891) A.C., 455.

a trade on the same footing is substantially a different law from one which differentiates between them, which would be the effect of holding the Act in question valid, but applicable to inter-State trade only. A conspicuous instance of the differentiation which would be thus effected is afforded by the Queensland coasting trade.

When a legislature assumes jurisdiction over a whole class of ships over some of which it has, and over others of which it has not, jurisdiction, and plainly asserts its intention to put them on the same footing, the Court would be in effect making a new law if it gave effect to the Statute as a law intended to apply to part only of the class. Whether the legislature would or would not have imposed disabilities upon some only of the class if they had applied their mind to the subject is entirely problematical. It is sufficient to say that the law as sought to be enforced is substantially a different law from that actually enacted.

For these reasons I am of opinion that the Act was not within the powers of the Parliament and is wholly invalid.

I have not thought it necessary to refer to the argument based on pl. iii. of sec. 76 of the Constitution, which I think is quite untenable.

BARTON J. On the preliminary questions I agree, and add nothing. On the merits, the first question is whether the small case or package put on board the ship by the charterers' agents at Adelaide, and delivered to the charterers' agent at Brisbane, was "cargo" taken on board "at any port in a State . . . to be carried to and landed or delivered at any port . . . in another State." If it was such cargo, the ship must be deemed to have been engaged in the coasting trade, at any rate until she reached the port at which the package was to be delivered. *Seamen's Compensation Act* 1909, sec. 4 (2). I am clearly of opinion that the facts before us do not bring the ship within this section. They might—I do not say they would—have done so if the package carried under the circumstances proved had been "cargo." That word is not defined in the Act, and we must therefore treat it in its ordinary everyday sense unless it has acquired some other meaning, as by mercantile usage. I do not know of any

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difference between the everyday and the mercantile meaning of "cargo." But its meaning may differ, as may that of most words, according to the document in which it is used. In a charter-party, for instance, such as that in evidence, it is used as equivalent to loading—sometimes it means the whole loading. The whole cargo of a ship will mean the whole loading on which ordinarily freight is paid—and a contract of affreightment is one by which a shipowner undertakes to carry cargo, whether a full cargo or not, in his ship for reward. But I think the usual meaning of "cargo" is any kind of goods put on board a trading vessel to be carried from one port to another for reward, which the shipowner or master accepts for their carriage, just as a "passenger"—a term used in this sub-section in juxtaposition with "cargo"—ordinarily means a person by whom a fare is paid or payable for his passage: and see *The Lion* (1).

If, in the widest acceptation of the word, it could in some circumstances include a single package taken on board without any bill of lading, it would not, in my judgment, be included unless it were taken for reward. So to include it would make it the mere equivalent of the words "goods carried in a ship," and as Parliament has chosen the word cargo, it seems to me that it must mean goods carried in a ship in such circumstances as make it part of the loading on which freight is paid or chargeable, that is, there must be something to show, however little is taken on board, that in respect of it the vessel was trading. That Parliament used the word "cargo" to connote the trading that it usually connotes is clear from the whole scope of the Act. Here there was nothing but a gratuitous bailment, and it would be altogether too much to say that this ship had taken on board cargo to be carried from Adelaide to Brisbane because of such a transaction.

These considerations are sufficient to dispose of the case, but the question of the validity of the whole Act, or at least of sec. 4, sub-sec. 1 (*b*) and sub-sec. (2), has been raised by the appellants and fully debated before a full Bench, and counsel for the Commonwealth, intervenant, pressed us to decide it. Under the circumstances, perhaps it is in the public interest, as well as in

(1) L.R. 2 P.C., 525.

that of the parties, that a decision should be given now, especially as there is litigation pending for the settlement of which a decision will become imperative.

The question of the constitutional validity of the whole Act, however, is one which in my judgment goes beyond the necessities of the case, even if the failure of the whole may be a possible consequence of the invalidity of the parts impeached. I therefore proceed at once to consider those parts of the Act.

Sub-sec. 1 (*b*) purports to make the Act apply to the employment of seamen "on any ship (whether British or foreign) engaged in the coasting trade, if the seamen have been shipped under articles of agreement entered into in Australia." What does the expression "coasting trade" mean? In its ordinary sense, and here there is no ambiguity, it means trade between any ports on the coast. It implies no limitation as to the States in which such ports may be. That is a meaning too large to be carried by the terms in which the power of Parliament in this regard is conferred, namely, power to make laws with respect to "trade and commerce with other countries, and among the States." Trade among the States does not include trade confined to the coast of a single State. But the term "coasting trade" does include it. There can be no severance of the valid from the invalid where a collective expression such as "coasting trade" is used. To recall a suggestion made during the argument, it is not as if Parliament had enacted that certain specified things, say A, B, and so on down to Z, might lawfully be done, the first half-dozen being within its legislative power and the remainder outside it. There the bad can be separated from the good and excised, and if there be left a law not substantially or radically different, dealing effectively with so much of the subject matter as is within the legislative power, the Act will be good, minus the invalid provisions eliminated. See *The Bootmakers Case* (1). But if you try to deal in that way with the term "coasting trade," you meet at once with the insuperable difficulty pointed out by the Supreme Court of the United States (*per White*, J.), in *The Employers' Liability Cases* (2), in these words: "Of course, if it can be lawfully done, our duty is to construe the Statute so as to render it

(1) 11 C.L.R., 1.

(2) 207 U.S., 463, at p. 501.

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constitutional. But this does not imply, if the text of an Act is unambiguous, that it may be re-written to accomplish that purpose. Equally clear is it, generally speaking, that where a Statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which was indivisible may be divided." The Court went on to say that even where provisions are severable, the legal from the illegal, the rule stated does not save the legislation unless it is plain that the Statute, with the unconstitutional provisions left out, would still have been enacted. But in *The Bootmakers' Case* (1) cited just now we were of opinion that this is to put federal enactments to too severe a test, and one not warranted by the principles of construction, and we laid down the safer test which I have re-stated from that case. But I adopt without qualification the passage I have placed within quotation marks as a correct statement of the duty of the Court.

Now it is plain that the term "coasting trade" is an indivisible one. It does not in its ordinary meaning separate itself into two parts. It may be used as it is in sub-sec. 1 (*a*) in contrast with foreign trade. In that contrast its inclusive meaning is brought into strong relief. But I do not see how it can be used to distinguish inter-State trade from the domestic trade of a State unless you find something in the context on which to base the distinction. Here it is all the other way. It is true that words in a Statute are sometimes construed in restriction of their apparent meaning, where it would follow from the unrestrained construction that the Statute was *ultra vires*. That is done in obedience to the principle contained in the maxim, *extra territorium jus dicenti impune non paretur*. *Macleod* v. *Attorney-General for New South Wales* (2). But that cannot be done in the present case, as appears when we turn to the language of sub-sec. (2). Sub-sec. (2) is framed for the purpose of bringing ships under the Act if, though not actually engaged in the coasting trade—presumably on some voyage of which the concluding stages only are on the

(1) 11 C.L.R., 1. (2) (1891) A.C., 455.

Australian coast—they take passengers or cargo on board to be carried between Australian ports. It is the extension of the term "engaged" that is primarily aimed at. A ship chartered for a single voyage to Australian ports, like *The Kalibia*, could scarcely have been held to be "engaged" in that trade because on that one voyage she took a passenger or a little cargo between two Australian ports in addition to what she had brought from abroad, since, even if the word "trade" does not imply a degree of habit, the term "engaged" as applied to a trade does. It was to get over this difficulty that it was provided that under such circumstances the ship, although not really engaged in the coasting trade, should be deemed to be so. But it is plain from this sub-section that Parliament meant to give "coastal trade" the same meaning that it would ordinarily bear as used in sub-secs. 1 (*a*) and (*b*), namely, trade between "any port in a State, or in a Territory under the authority of the Commonwealth," and "any port in the same State or Territory, or in another State or Territory." This is using the term "coasting trade" in the widest sense of which it is capable—a sense quite exceeding the limits of the legislative power. And it is a reiteration of the meaning conveyed by sub-secs. 1 (*a*) and (*b*) so as quite to preclude the interpretation of the term in the restricted sense so as to bring it within the Constitution. Further, if the term in sub-secs. 1 (*a*) and (*b*) bore the restricted meaning of inter-State trade alone it must also bear it in sub-sec. (2). But the attempt to apply it in that sense in sub-sec. (2) only makes nonsense. Thus it is clear that Parliament meant the term to have that wider meaning which it ordinarily conveys, and in legislating in that sense it has exceeded its powers.

An endeavour was made to bring the legislation within the Constitution by the aid of sec. 76 (III.), authorizing the Parliament to make laws conferring original jurisdiction on the High Court in admiralty and maritime matters. Although this power is in terms confined to the making of laws to give original jurisdiction to this Court, it was argued that it necessarily implied a power on the part of the Commonwealth to legislate substantively as to admiralty and maritime law generally. Cases were cited to show the adoption of that construction in the United States.

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Whatever might be the force of the reasoning of those cases, if Australia were in the same position as the United States at the time of the making of their Constitution—namely, that of a separated nation of independent sovereignty in its relation to the United Kingdom—the reasoning has no force here, where the implication from imperative necessity cannot be drawn. The power to legislate on matters of admiralty and maritime laws, if it existed in the several States at the time of federation, remains reserved to them by force of sec. 107 of the Constitution. But there would be, and there is, an over-riding power to legislate on the subject in the Parliament of the United Kingdom, and the grant in sec. 76 (III.) cannot be construed as an implied transfer, or even delegation, of that legislative power to the Parliament of the Commonwealth in respect of Australia. Such an argument, as will easily be seen, differs radically from that on which the American cases were decided, for the necessity on which they are avowedly stated to be founded does not exist here. The power is merely given *qua* the restricted subject matter to which it is in terms confined, namely, the conferment of jurisdiction in a particular class of controversies.

For the above reasons I am of opinion that the appeal must be allowed and the order of *Street* J. rescinded. I should add that the question of the validity of the legislation impeached does not appear to have been argued before *Gordon* J.

O'CONNOR J. Mr. Justice *Street* made an order *ex parte* under sec. 13 of the *Seamen's Compensation Act* 1909, directing the Collector of Customs at Newcastle to detain the ss. *Kalibia* until security was given. An application made to Mr. Justice *Gordon*, to set aside the order, was dismissed. From the learned Judge's order, dismissing the application, this appeal has been brought. The appellants' objections, which I shall take in their order, were twofold. First, that there was not sufficient evidence to justify an order under sec. 13 of the Act. Secondly, that the Act, under which the order purported to have been made, is unconstitutional, as having been enacted by the Commonwealth Parliament in excess of its powers. To justify an order under section 13 the respondent must show to the Judge, amongst other

things, that the owner as such is probably liable to pay compensation under the Act. One essential of the owner's liability is that the Act applied to the ship at the time when the seaman was injured. The respondent claimed that the ship came within the provisions of section 4 (1) (*b*). Although the ship was prosecuting a voyage under charter from New York to Brisbane, viâ certain Australian ports, the respondent had been shipped under articles entered into in Australia, and if, when the accident happened, she was "engaged in the coasting trade" within the meaning of sec. 4, the provisions of the Act will apply. For the purposes of an order under sec. 13, it was not necessary to establish to the Judge's satisfaction that the ship was engaged in the coasting trade, but there must certainly be before him evidence from which the inference can legally be drawn that she was so engaged. If the facts are such that the inference could not be legally drawn, it would be impossible for the Judge to determine that the owner was probably liable to pay compensation under the Act. It must be conceded that the ship was not engaged in the coasting trade, in the ordinary sense of those words. She was in fact engaged in delivering her oversea cargo, in accordance with her charter, at different Australian ports, on her way to Brisbane. The isolated transaction from which it is sought to infer that, in the course of that voyage, she was engaged in the coasting trade, may be described in a very few words. The chief officer, with the captain's knowledge, took charge of a small package in Adelaide, and carried it in the ship to Brisbane. It was not taken as cargo, no freight was charged, it was kept in the chief officer's own cabin, and taken by him to Brisbane, entirely as a personal favour to the agent of the ship in Adelaide.

Such being the real transaction, the fact that the package had come to Adelaide as cargo in another ship, and had been landed in Adelaide by mistake is immaterial, as is also the circumstance that the Customs authorities at Brisbane issued a transit permit to allow it to be taken from *The Kalibia*, and shipped to Townsville. If it were not for the explanation contained in sub-sec. 2, of what is meant by the words "engaged in the coasting trade," it could hardly be contended, with any seriousness, that the facts which I have stated afforded any evidence to bring the ship

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within the section. Reading material words only, the sub-section is as follows:—"A ship shall be deemed to be engaged in the coasting trade, within the meaning of this section, if she takes on board . . . cargo at any port in a State . . . to be carried to, and landed or delivered at any port in the same State . . . or in another State." The expression "takes on board cargo," in its plain ordinary meaning, describes one of the every-day operations of the shipping trade, that is to say, the business of earning freight in carrying by sea. The words "to be carried to and landed or delivered at any port," &c., imply in themselves a contract to carry and deliver, and are further explanatory of the same business operation. The intention of the whole sub-section is surely to explain the kind of shipping business of which Parliament is thinking, when it uses the expression "engaged in the coasting trade," not to alter the ordinary meaning of those words so as to include a class of isolated transactions, which have in them no trace of either trade or business. In my opinion the object of the sub-section was to explain the word "coasting," and not to import to the words "engaged in a trade" a sense which would omit altogether the element of trade as necessarily involved in their meaning. I have therefore no difficulty in coming to the conclusion that the section was never intended to apply, and cannot be applied to facts such as have arisen in the present case, and that Mr. Justice *Street* could not on that ground legally find under sec. 13 that the owner was probably liable, as such, to pay compensation.

But assuming that the ship was in fact engaged in the coasting trade within the meaning of the section, there is another objection on the facts equally unanswerable. Liability is imposed by the Act on the shipowner, and it must be shown that the ship was engaged in the trade in such a way as to bind her owner. Having regard to the settled definite purpose of the voyage authorized by the owner of *The Kalibia*, as shown by her charter-party, there is, in my opinion, no evidence whatever that either the captain or the chief officer had authority to bind the owners by engaging in the coasting trade on that voyage, even in the ordinary way in which such trade is usually carried on. *A fortiori* there is no evidence of authority to bind the owners as

having engaged their ship in the coasting trade by reason of the fact that a parcel was carried on the ship by the chief officer gratuitously, as a personal favour, and in his own cabin. It follows that on all these grounds Mr. Justice *Gordon* ought to have set the order aside, and that this Court should now set the matter right. That is enough to dispose of the case. But the objections on constitutional grounds were fully argued, and, in view of another case pending which involves the same objection to the Act, I agree that the members of the Court ought to express their opinions on the important questions raised.

It was properly conceded by the appellants' counsel that there was no need in this case to further pursue the far-reaching objection, taken in the beginning of the argument, which challenged the right of Parliament to enact the class of legislation embodied in the Act, even with respect to inter-State trade. The constitutional question, upon which the opinion of the Court is asked, is narrowed down to this:—Is the Act rendered invalid by sec. 4 which, on the face of it, makes its provisions applicable, as well to ships engaged in coasting trade, carried on entirely within the limits of one State, as to ships engaged in inter-State trade? It must now be taken in this Court, as settled law of the Constitution, that trade carried on entirely within the limits of one State cannot be brought under the control of the Commonwealth power. That limitation applies equally whether the trade is by land or by sea.

Section 98 of the Constitution, which declares that the power of the Parliament with respect to trade and commerce extends to navigation and shipping, is plainly explanatory of the trade and commerce powers. It does not, as has been contended, extend them indefinitely with respect to navigation and shipping. I therefore take it as clear that it is not within the power of the Commonwealth Parliament to legislate with respect to the relation of employer and employé on ships trading entirely within the limits of one State. In determining whether the Commonwealth Parliament has crossed that line of limitation in the Act now under consideration, we must ascertain, by construing the Act itself, what the legislature has really enacted. In construing the Act for this purpose, no special method of ascertaining the

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intention of the legislature can be adopted. Its intention is to be ascertained by construing the words in their fair, ordinary meaning. The Court always leans against declaring that an Act is unconstitutional. It will always assume, where the language of Parliament is ambiguous, that it did not intend to exceed its powers, and will construe ambiguous expressions so as to maintain the validity of the legislation, if it is possible to do so without doing violence to the language used. But the Court is not justified in saving the constitutionality of an Act by giving to the words of the legislature a meaning which they cannot reasonably bear.

Bearing those principles in mind, when I turn to sec. 4 of the Act I can find no room for doubting that it expresses the clear intention that its provisions shall apply to ships engaged in the coasting trade entirely within the limits of one State, as well as to ships engaged in the coasting trade between State and State. The general words of sub-secs. (*a*), (*b*) and (*c*) certainly include all such ships, and sub-sec. (2), intended to explain and make clear the application of the Act, puts the matter beyond all doubt. The whole elaborate provisions of that sub-section, dealing as it does expressly with the shipping of passengers or cargo from port to port in the same State, are quite inconsistent with the intention to legislate only with respect to inter-State trade. The respondent's counsel and those representing the Commonwealth endeavoured to overcome the objection in two ways, or, rather, put forward the same answer under two different aspects. It must be assumed, they say, that Parliament did not intend to apply the Act to purely State trade, because to do so would be to exceed their powers. The general words they have used must therefore be read as limited to ships engaged in inter-State trade. In *The Employers' Liability Cases* (1) a similar method of getting over the same kind of difficulty was advocated by those engaging in upholding the constitutionality of the Act, but without success.

In delivering the judgment of the Court Mr. Justice *White* refers to the argument in these terms :—

"So far as the face of the Statute is concerned, the argument

(1) 207 U.S., 463, at p. 500.

is this, that because the Statute says carriers engaged in commerce between the States, etc., therefore the Act should be interpreted as being exclusively applicable to the inter-State commerce business and none other of such carriers, and that the words 'any employé' as found in the Statute should be held to mean any employé when such employé is engaged only in inter-State commerce. But this would require us to write into the Statute words of limitation and restriction not found in it."

In the interpretation of the section in question it would be necessary to supply the word "inter-State" before "coasting trade" wherever it occurs. It seems to me that to read those words into the section would be to make a new enactment with limitations in its application which the legislature never intended. It is further argued that even if the words of the section are to be given their ordinary meaning, and in so far as the section purports to affect the owners of ships engaged in purely State trade, the section must be held to be unconstitutional, still the unconstitutional part may be severed from the constitutional, leaving the latter part only in operation. But where general words are used which include both what is within as well as what is outside the power, how is that severance to be effected? The only answer which the respondent can make to that very essential question is to read the section as if the word "inter-State" were inserted before the words "coasting trade" throughout the section, which is only the suggested expedient of interpretation in another dress. If the section is bad as controlling purely State coasting trade, as well as inter-State coasting trade, it must, in my opinion, be declared bad altogether. If the separation of the valid from the invalid portion can be effected only by interpolating the words suggested, then the separation cannot be effected by any decision of a Court. For a Court to uphold the law with respect only to ships engaged in inter-State trade would be to take upon itself the power of making a new law, not of determining the constitutionality of the law which Parliament has enacted.

I therefore agree that the *Seamen's Compensation Act* in the form enacted is void as being in excess of the powers of the Commonwealth Parliament, and that Mr. Justice *Street's* order made under it must go with it.

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ISAACS J. I agree that this appeal must succeed both because the facts do not bring the case within the Act, and because the Act itself, so far at least as it applies to the coasting trade, exceeds the powers of the Parliament. As to the facts Mr. *Watt* very properly argued that the Court would not at this stage decide the issues to be determined at the trial. But, even at this stage, there are certain issues to be determined. Sec. 13 casts upon the person applying for the order the burden of showing that the owner is probably liable *as such* to pay compensation, and the facts must be looked at to ascertain whether he has discharged that burden. So far from showing that, I have no hesitation in saying that at least the evidence shows very distinctly he is probably not liable.

The voyage was a chartered voyage and ended only on 30th April, at Brisbane. Wilson was injured the day before. Assuming the case was taken or carried on by direction of the captain, or what is equivalent, with his knowledge and permission, how did his act bind the owner "*as such*"? The captain had apparently, and presumably, no authority from the owner to engage in a coasting trade voyage, or any but the chartered voyage, until at least that was at an end: *Burgon* v. *Sharpe* (1); *Grant* v. *Norway* (2), the latter case approved in *Whitechurch* v. *Cavanagh* (3). It is sworn that the case was taken only as a matter of favour and not for reward, in short, that it was not taken in the ordinary way in which cargo is taken when carried as a matter of trade. And although it is true the Court would not now prejudice any issue which properly appertains to the trial, yet it must be remembered that what the Statute requires the Court to ascertain at this stage are the probabilities; and according to the probabilities the story is true.

If then the case was probably so carried, how does the matter fall within sub-sec. (2) at all? A series of cases beginning with *The Agricola* (4) and ending with *Phillips* v. *Born* (5), show what is meant by being employed in the coasting trade within the meaning of the English Shipping Acts for pilotage purposes.

(1) 2 Camp., 529.
(2) 10 C.B., 665, at p. 687.
(3) (1902) A.C., 117, at p. 125.
(4) 2 Wm. Rob., 10.
(5) 93 L.T., 634, at p. 638.

A few words of Lord *Alverstone* C.J. in the last mentioned case are important. He uses the expressions "engaged in the coasting trade" and "engaged in a coasting trade," and then says:—"I am clearly of opinion that a vessel is not a coasting vessel simply because she happens to have on board of her a cargo which she has taken on board at one place in the United Kingdom, and which she is going to discharge in another place in the United Kingdom, whether it is a full cargo or not."

Apart from any special legislative direction, therefore, a single instance of taking in cargo at one home port, and discharging it at another, would not be sufficient to establish that a foreign-trade ship was "engaged" in the coasting trade.

Sub-sec. (2) was obviously inserted to overcome this view, and to impose upon any ship entering into but one single transaction of the necessary kind, whatever her employment otherwise, the statutory character of "engaging" in the coasting trade. But the transaction must be such as if habitually repeated would constitute a regular coasting trade. That cannot be said of the act here in question. The case of *The Lion* (1) is greatly in point. The Act exempted from compulsory pilotage—"British and foreign ships employed in the coasting trade of the United Kingdom when not carrying passengers." The captain carried two persons, his wife and father-in-law, but said nothing to them about paying fares. A collision occurred, and after that the captain did arrange with them about fares, which they then paid to him, and he to the owners on arrival. Still, held the Privy Council, they were not passengers within the meaning of the Act, and the reason given is important. Lord *Romilly* said:—"They were on board on the invitation of the captain without the privity of the owners, who had not contracted any obligation to have them carried in the vessel, and no duty was imposed on the owners in relation to these two persons." His Lordship continued: "The meaning of particular words in an Act of Parliament, to use the words of *Abbott* C.J. in *Rex* v. *Hall* (2), 'is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used.'"

(1) L.R. 2 P.C., 525, at p. 530.

(2) 1 B. & C., 123, at p. 136.

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And it was held these persons were not "passengers" within the meaning of the Act.

Again, in *The Clymene* (1) Lord *Gorell* (then *Gorell Barnes* J.) held that "passenger," according to the ordinary acceptation of the term, involved "the principle of an agreement to carry and a payment of fare." And so with regard to the word "cargo." The Privy Council said in *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.* (2) "the word 'cargo' is a word susceptible of different meanings and must be interpreted with reference to the context." In this Act of Parliament its connotation is, of course, similar to that of "passengers," and being used in connection with trade, and with a view of making the owners "as such" responsible in consequence of the trade, the principles acted on in *The Lion* (3) and *The Clymene* (4) are those which are properly applicable here.

It follows that a case of goods taken under the circumstances here deposed to is not "cargo" for the purpose of affixing to the ship a character she does not really possess, and so as to attract the compensation clauses of the Act.

Next, as to the validity of the coasting trade provisions. I entertain no doubt the expression "coasting trade" as used in the Act means the whole coasting trade of Australia, from any one port to any other port, and regardless of whether it is intra-State or inter-State. Sub-sec. (2) is an extension certainly of previous provisions, but only as to the meaning of the word "engaged." As already stated, one instance is made to suffice for the purpose of establishing the fact of "engaging" in the trade. But just as the character of the particular transaction aimed at is the same, whether it is one isolated instance, or one of a constantly recurring number, so is the character of the trade referred to. Sub-sec. (2) alters neither the one nor the other It recognizes therefore that the previously mentioned "coasting trade" is regarded as if the Commonwealth were a unitary State, and not only does it recognize this, but it takes great pains by affirmative words to make its recognition plain beyond possibility of error.

(1) (1897) P., 295, at p. 300.
(2) 12 App.Cas., 128, at p. 134.
(3) L.R. 2 P.C., 525.
(4) (1897) P., 295.

This is admittedly beyond parliamentary power, so far as the trade and commerce clause of the Constitution is concerned—and sec. 98 is limited to inter-State operations of navigation and shipping.

Separability is urged. In *The Bootmakers' Case* (1) I said:—"If good and bad provisions are wrapped up in the same word or expression, the whole must fall. Separation is there from the nature of the case impossible, and as it is imperative to eject the bad—and this can only be done by condemning the word or phrase which contains it—the good must share the same fate." This follows a strong and consistent line of American authority such as the *Trade Mark Cases* (2), and *United States* v. *Ju Toy* (3).

But American authorities, though more prominently cited in connection with legislation, are founded upon and in accordance with well-established British principles and precedents. In *R.* v. *Co. of Fishermen of Faversham* (4), Lord *Kenyon* C.J., speaking of a bye-law, said:—"Though a bye-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other." In *Blackpool Local Board of Health* v. *Bennett* (5) *Watson* B. says:—"Although the old rule of law to be found in *Com. Dig.* 'Bye-law' (c. 7), which says that a bye-law bad in part is bad in the whole, is qualified to this extent that, if the good part is independent and unconnected with the bad, the good part would be valid and binding," and he cited *R.* v. *Faversham* (4). So *per Quain* J. in *Hall* v. *Nixon* (6):—"But it is also clear on the authorities that a bye-law may be good in part and bad in part, provided the parts are separable." No distinction can be made in this respect between a bye-law and a Statute, because, although very different considerations apply in determining the extent of the power granted, when it is given to a municipal corporation, or a Parliament, yet once the limits of the power are ascertained the excess is as unlawful in the one case as in the other, and the partial validity of the act done must depend upon the same principles. A valid corporation bye-law is a law, and as Lord *Abinger*

(1) 1 C.L.R., 1, at p. 54.
(2) 100 U.S., 82.
(3) 198 U S., 253.
(4) 8 T.R., 352, at p. 356.
(5) 4 H. & N., 127, at p. 137.
(6) L.R. 10 Q.B., 152, at p. 160.

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C.B. said in *Hopkins* v. *Swansea Corporation* (1), it "has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an Act of Parliament has upon the subjects at large."

The Privy Council seem to have taken the same view in *Macleod* v. *Attorney-General for New South Wales* (2) because the question turned on the meaning of one word "wheresoever." If it were construed to mean "wheresoever within New South Wales" it would be *intra vires*, and if "wheresoever universally" it would be beyond the competency of the local Parliament. And Lord Chancellor *Halsbury* uses the very largest words. Speaking of the latter construction he says (3):—"If that construction were given to the Statute, it would follow as a necessary result that the Statute was *ultra vires* of the Colonial legislature to pass." No doubt the question of separability was not specially under consideration, and therefore the language cannot be pressed too far, but the form of the expression is consistent with the authorities I have cited as to bye-laws, and though a more limited meaning might have been intended, one would have expected to find it indicated by saying that the Statute would be *ultra vires* to the extent that it exceeded the jurisdiction.

However that may be, the Privy Council there found itself able to give the limited meaning to the word "wheresoever" which at all events saved the Statute. But that conclusion was reached by the aid of other Statutes, and other provisions in the same Statute, tending to cut down the larger primary meaning of the word. Here it is impossible to save the phrase "coasting trade" by means of the doctrine of *Macleod* v. *Attorney-General for New South Wales* (2) because the presumption of a valid limited meaning is excluded by sub-sec. (2), and as it is physically incapable of division, it must be rejected altogether.

The Parliament has dealt with the "coasting trade" as a trading along the coast of Australia from any one port to any other port as if it were a whole. It has enacted one uniform rule with respect to it, and I must presume it did so for some reason which to it seemed desirable. We cannot then say whether or

(1) 4 M. & W., 621, at p. 640. (2) (1891) A.C., 455.
(3) (1891) A.C., 455, at p. 459.

not Parliament would or would not in its discretion have made a separate provision placing the seamen engaged in inter-State, foreign and territorial trade in a better position than those engaged in intra-State trade. It is enough to say Parliament up to the present has not seen fit to do so. It would therefore be exceeding our functions as interpreters of the law to change the character of the legislation, and in effect to enact it separately. We cannot say of the enactment as to the coasting trade that part is good and part is bad, because there are not two parts of the enactment, it is one. The coasting trade may be divisible, but the enactment is not, and therefore the doctrine of preserving one part of it, though condemning the other, is impossible of application.

An attempt was made by Mr. *Armstrong* to support the legislation under the phrase "admiralty and maritime jurisdiction" in sec. 76 of the Constitution. The American Courts have found in a somewhat similar provision in the United States Constitution a very large power, and judging by the observations of *Fuller* C.J. in *Lehigh Valley Railroad Co.* v. *Pennsylvania* (1), the doctrine appears now to have become settled law.

Our circumstances, however, are not the same, we are not confronted with the necessity of implying the power from the scanty words used, and I see no justification for applying the same rule of construction to our own Constitution. Sec. 76 relates solely to original judicial jurisdiction and enables Parliament to confer it on the High Court. Whatever is incidental to that it likewise has power to enact (sec. 51 (xxxix.)). But beyond that it cannot go. The interpretation and enforcement of admiralty and maritime law, as it is found to exist, is one thing; the alteration of that law is quite another. Nor can the legislation be supported under sec. 735 of the *Merchant Shipping Act* 1894. One reason suffices, the conditions prescribed by that section have not been observed. Whether the Commonwealth is a "British Possession" for the purposes of sec. 735 is a question I have not considered.

It is unnecessary to determine, and I accordingly leave undetermined, another very important question which was contingently debated, whether, if limited to inter-State coastal trade, the provisions of sec. 13 would be valid.

(1) 145 U.S., 192.

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I agree with what the learned Chief Justice has said with respect to the competency of this appeal.

HIGGINS J. In my opinion the appeal should be allowed on the first ground stated in the notice, and the order made by *Street* J. should be discharged—the order of 16th May last for the detention of the ship.

I concur in the view that the ship was not "engaged in the coasting trade" within the meaning of the *Seamen's Compensation Act* (No. 29 of 1909). Unless the ship was so engaged, the Act does not apply, and there is no power to detain the ship.

The discharge of the order does not mean that *Street* J. was wrong in making the order on the facts put before him *ex parte* on behalf of Wilson. The affidavits on which he acted stated that the ship was carrying cargo from Adelaide to Brisbane, and horses from Melbourne to Brisbane; but it turns out, from the affidavits put in subsequently by the owners of the ship, that the statement was wrong. It is admitted that the ship was not carrying horses from Melbourne to Brisbane; and it appears that the single case carried from Adelaide to Brisbane was not cargo carried by the ship at all. The position is very like that of an application to discharge an *ex parte* injunction on the ground that the facts alleged by the plaintiff in support of the injunction are untrue.

I think that, according to the undisputed facts before *Gordon* J., the ship was not engaged in the coasting trade. This British ship was under charter to take on board cargo at New York, and to discharge it at certain ports in Australia, "and so end the voyage." But it appears that a small case consigned from New York to Brisbane in a previous steamer called *The Den of Crombie* had been discharged by mistake at Adelaide; that the charterers' agent informed the first officer of *The Kalibia* of the fact, and requested that the case should be taken on by *The Kalibia* to Brisbane; that the chief officer told the master of *The Kalibia*; that the case was put into the first officer's room, and was carried as a matter of favour, in pursuance of the request; and that at Brisbane the charterers' agent at that port took charge of it. No freight was paid for the carriage; no bill of lading for the

case was signed; and no mate's receipt was given. When the case came to Brisbane, the Customs officer, as requested by the charterers' agent, and acting, as it seems, under sec. 74 of the *Customs Act* 1901, permitted the case to be shipped for transit to Townsville. The transaction, such as it was, was a transaction between a charterers' agent and the first officer throughout—not a matter of money, but of favour. The case was not put on board by or on behalf of the merchant, but by the charterers' agent at Adelaide.

It cannot be said that these facts support the statement that the ship was "engaged in the coasting trade." The unfortunate accident which is the subject of the plaintiff's claim for compensation took place on 29th of April, during the journey from Sydney to Brisbane, while the case was still on board. There are no other facts of any sort to support the allegation that the vessel was engaged in the coasting trade. The charterers did not even try to get cargo in Australia; and they were not entitled to take such cargo under their charter.

It is not necessary, for the purposes of this case, to ascertain the precise bounds of the expression "engaged in the coasting trade." But, having regard to sec. 4 of the Act, I think I may assume that "engaged" means occupied—actually occupied—whether in breach of charter-party or not—in carrying cargo or passengers from one port in Australia to another. In this case the ship was not so engaged. If an officer were to carry a gold pencil in his waistcoat pocket, as a favour—even with the consent of the master—from a friend in Adelaide to the friend's son in Brisbane, it would be absurd to say that the vessel was engaged in the coasting trade.

As this ground is sufficient for the purpose of discharging the order, and as the members of this Court are unanimous with regard thereto, it is not strictly necessary, in this case, to consider the constitutionality of the Act. It is the wise practice in the United States, a practice uniformly followed, and justified by experience, never to enter into the consideration of the constitutionality of an Act of Congress unless it becomes impossible to do justice between the parties, in the case before the Court, without deciding whether the Act is valid or invalid. Personally,

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I should prefer to adhere rigidly to this practice. But we are informed that there are other cases pending in which the question of the validity of this Act is vital to the decision, and that the Federal Government desires the ruling of this Court for its guidance; and it is the opinion of my learned colleagues that we should, under the circumstances, make an exception to the rule. I shall, therefore, state my conclusion; although I cannot but admit the danger—in my own case—of a certain relaxation of the sense of responsibility and of attention where the mind is satisfied otherwise that the plaintiff must, for other reasons, fail.

There is no doubt that under sec. 4 of the Act the legislature intended the Act to apply to vessels engaged in the coasting trade, within the limits of any one State as well as between State and State. Under sec. 4 of the *Seamen's Compensation Act*, the Act applies to seamen employed "on any ship (whether British or foreign) engaged in the coasting trade," &c.; and a ship is to be deemed to be engaged in the coasting trade "if she takes on board passengers or cargo at any port in a State, or in a Territory under the authority of the Commonwealth, to be carried to and landed or delivered at any port in the same State or Territory, or in another State or Territory." Now I cannot find in the Constitution any power for the Federal Parliament to legislate as to vessels trading within a single State. There is no power to legislate as to any trade and commerce except trade and commerce between the States or with foreign countries; and when sec. 98 provides that *the* power to legislate as to trade and commerce shall apply to navigation and shipping, it means *the* power conferred by sec. 51 (1)—the power which is confined to inter-State and foreign trade and commerce. In my opinion, therefore, sec. 4 of the Act, so far as it relates to the coasting trade within the boundaries of one State, is invalid.

Then the next question arises—is the Act invalid as to seamen on ships engaged in the coasting trade between States because it is invalid as to seamen on ships engaged in the coasting trade within the boundaries of a single State? If we are free to exercise mere common sense, without being fettered by certain legal decisions in the United States, I should say not, without any hesitation. The Act prescribes a duty as to individual

seamen A, B, C and D, and a duty as to individual seamen E, F, G and H. The duty as to each seaman, the interest of each seaman, is separate and distinct. If the legislature is empowered to prescribe a duty as to A, B, C and D, but not empowered to prescribe a duty to E, F, G and H, the order prescribing a duty with regard to A, B, C, D, E, F, G and H ought to be valid as to A, B, C and D, invalid as to E, F, G and H. *Primâ facie*, there is no reason why the Act should not be operative as far as it can be made operative. Of course, if there were any reason to believe, from the nature of the case, that the Act would not have been passed with regard to A, B, C and D unless it were also operative with regard to E, F, G and H, the position would be different. If an Act authorized a magistrate, or a policeman, to direct school children, if of Christian parentage, to enter a certain room for religious teaching, and if he ordered all the boys and girls in the playground of whatever faith to enter the room, the order would surely be invalid as to such children as are Mahometans or Jews or Buddhists, but valid as to the others. If, in pursuance of a power to prescribe the dress for charity boys, the master were to tell all whom he saw in an enclosure to discard all caps, or to wear yellow stockings, the charity boys would be bound by the order, but the others would not. On the other hand, if it were evident that the order would not have been given except for the purpose of securing uniformity of dress among all the boys in the town, it would follow that it would not be binding even on the charity boys. The only object—uniformity in dress of all the boys in the town—being apparent, and being impossible by virtue of the limited authority of the master, the order would not be binding on anyone. If the same words or expressions are applied to a mixed number—some within the ambit of the power, and some not—the order would be binding on those within the power, unless it is clear that the order would not have been given at all unless it could be binding on the whole number to whom it was addressed. It is not a matter of words—of mixing up a good order and a bad order in the same words—it is a matter of facts. Let those wear the cap whom the cap fits. Those whom it does not fit need not wear it.

This is the position as laid down by Mr. Justice *Cooley* in his

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book on *Constitutional Limitations*, 7th ed., 1903, p. 250, when he says: "A legislative Act may be entirely valid as to some classes of cases, and clearly void as to others. A general law for the punishment of offences, which should endeavour to reach by its retro-active operation, acts before committed, as well as to prescribe the rule of conduct for the citizens in the future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control. . . . If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the Statute and of the purpose to be accomplished by it, that *it would not have been passed at all except as an entirety, and that the general purpose of the legislature would be defeated if it should be held valid as to some cases and void as to others.*" I have dealt with this subject at some length in *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1); and I understand that substantially the same view was taken on the appeal. In the *Arbitration Act* Parliament had defined "industry"—so it was urged—in such a way as to include forms of employment which were not within the competence of Parliament under the Constitution (sec. 51 (xxxv.)); but it was held that even if the Act was *pro tanto* invalid, sec. 55 and the other sections were valid as applied to "industry" so far as it was within the competence of Parliament (2). Some of the learned Judges in the Supreme Court of the United States have, indeed, lately used language which seems to imply that the question of severability is a mere question of words, and of striking out or inserting words; and also that the burden always lies on those who maintain the validity of an Act which transgresses the legislative power to show that it would have been enacted even if it had been limited to the area of the power: See *The Employers' Liability Cases* (3); *El Paso and Northeastern Railway Co.* v. *Gutierrez* (4). This position seems to be inconsistent with that laid down in *Warren* v. *Charlestown* (5); *Commonwealth* v.

(1) 6 C.L.R., 309, at pp. 315-319.
(2) 6 C.L.R., 309.
(3) 207 U.S., 463, at pp. 501-502.
(4) 215 U.S., 87, at p. 97.
(5) 2 Gray (Mass.), 84.

Hitchings (1); *In re Middletown* (2); *Railroad Companies* v. *Schutte* (3); *Huntington* v. *Worthen* (4); *Jaehne* v. *New York* (5); *Field* v. *Clark* (6); and by Mr. Justice *Cooley* at p. 250 of his 7th edition. It is also contrary to the principles adopted by the British Courts in cases where the donee of a power transgresses his power of appointment. The results of the recent mode of reasoning in the United States are not very reassuring; for an Act of Congress which purported to make common carriers liable for damages to a servant resulting from the negligence of a fellow servant, and which transgressed the federal powers by dealing with carriers when engaged in commerce within a single State, has been held to be invalid as to carriers when engaged in inter-State commerce: (*Employers' Liability Cases* (7)), and valid as to carriers when engaged in commerce for the district of Columbia and in the territories: *El Paso and Northeastern Railway Co.* v. *Gutierrez* (8)). I feel strongly that it is our duty to rely more on our own Constitution, and to blaze a track for ourselves after duly considering to what the American track leads. But, even if the dicta of the learned Judges of the United States are to be applied to this case, I am satisfied—to use the words of *White* J. (9)—that it "is plain that" Parliament "would have enacted the legislation with the unconstitutional provisions eliminated." It is obvious, on the face of this Act, that the Federal Parliament was straining to include all the seamen that it could thereunder; that it felt the fetters of its constitutional limitations, and endeavoured to give compensation to all seamen who might possibly be found to be within its purview. The Act is "An Act relating to compensation to Seamen for injuries suffered in the course of their employment." On its face, this would apply to all seamen, whether engaged in inter-State commerce or not. But in sec. 4 the pressure of the restriction of power appears; and the Act is made to apply only to merchant seamen in the service of the Commonwealth, to seamen on ships registered in the Commonwealth when engaged in the coasting trade or in trade with other countries; and to sea-

(1) 5 Gray (Mass.), 482.
(2) 82 N.Y., 196.
(3) 103 U.S., 118.
(4) 120 U.S., 97.
(5) 128 U.S., 189.
(6) 143 U.S., 649.
(7) 207 U.S., 463.
(8) 215 U.S., 87.
(9) 207 U.S., 463, at p. 501.

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men on ships (whether British or foreign) engaged in the coasting trade, if shipped under Australian articles; and the section then proceeds to say when a ship is to be deemed to be engaged in the coasting trade. The intention to cover all the seamen who are actually, or may possibly be regarded as being, within the scope of the federal power, is obvious; and it would be ridiculous to suppose that the Act would not have been passed at all unless it could apply in its entirety. I feel no doubt that, if Parliament had clearly and beyond doubt understood the limits of its power, it would have passed the Act as to seamen who are within its power. There is no difficulty in disentangling the Act so far as it is *ultra vires* from the Act so far as it is *intra vires*. The provisions as to inter-State seamen are not in any way dependent or conditional on the provisions as to the intra-State seamen. I am, therefore, of opinion that the second ground of the appeal fails.

Appeal allowed.

Solicitors, for appellants, *Spark & Millard*, Newcastle, by *A. P. Sparke*.

Solicitors, for respondent, *Sullivan Brothers*.

C. E. W.