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precisely the same way as the earlier survey, and there is not in their Lordships' opinion any difference between the two portions of the boundary in respect of their authority and finality.

It is unnecessary, therefore, for their Lordships to consider that portion of the respondents' case which rests upon the length of time during which the boundary line has been in fact accepted in practice by both Colonies. Similarly they do not think it necessary to deal with the somewhat refined considerations arising from the fact that the Victorian electoral districts have been statutably mapped out on the basis of this boundary line in the Statutes creating them, nor to consider whether the Royal Prerogative to fix boundaries can be treated as being in abeyance so far as these Colonies are concerned. They therefore express no opinion on these points.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

[HIGH COURT OF AUSTRALIA.]

CLARKE . . . . . APPELLANT;
PLAINTIFF,

AND

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM A COUNTY COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *April* 21, 22, 23, 24; *May* 12.

Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Ship—Application of Commonwealth Acts to—Ship whose first port of clearance and port of destination are in Commonwealth—Seaman—Personal injuries—Claim for compensation—Commonwealth of Australia Constitution Act 1900 (63 & 64 *Vict. c.* 12), *sec. V.—Seamen's Compensation Act* 1911 (*No.* 13 *of* 1911), *sec.* 5.

The plaintiff, a member of the crew of a ship registered outside the Commonwealth and engaged in regular trading between Sydney and San Francisco, Sydney being her "home port," was injured after the ship had left San Francisco on her return to Sydney.

Held, on the evidence, that at the time the injury was received the ship was not one whose first port of clearance and whose port of destination were within the Commonwealth, within the meaning of sec. V. of the *Commonwealth of Australia Constitution Act*, and therefore that the plaintiff was not entitled to claim compensation under sec. 5 of the *Seamen's Compensation Act* 1911.

APPEAL from a Judge of a District Court of New South Wales exercising the jurisdiction of a County Court.

In the District Court at Sydney a plaint was heard by a Judge of the District Court exercising the jurisdiction of a County Court, whereby the plaintiff, Lincoln Clarke, alleged that he being a seaman in the employment of the defendants, the Union Steamship Co. of New Zealand Ltd., on 16th October 1912 received personal injuries on board the defendants' ship the *Moana*, by an accident arising out of and in the course of his employment, and claimed compensation pursuant to sec. 5 of the *Seamen's Compensation Act* 1911.

On the hearing of the plaint the following admissions (*inter alia*) were made :—

1. That at the time of the accident the plaintiff was a seaman on the articles of the steamship *Moana*, belonging to the defendant Company, and engaged in trading between Sydney and San Francisco and between San Francisco and Sydney, calling at ports outside the Commonwealth.

2. That the plaintiff entered into his articles of agreement in Sydney.

3. That the plaintiff met with the accident from which the injuries arose in respect of which he is claiming compensation on the said ship when she was within 200 miles of San Francisco and after leaving San Francisco for Sydney, such accident happening on 16th October 1912.

4. That the said ship obtained her certificate of clearance from the Customs at Sydney on 7th September 1912 and at San Francisco on 15th October 1912. The said ship arrived at Sydney on 13th November 1912.

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5. That passengers may book a return passage from Sydney to San Francisco, but on arrival at San Francisco all cargo and all passengers are discharged there, and any passenger having a return ticket must book a berth back to Sydney, but without payment of any booking fee.

6. That Sydney was the plaintiff's proper home port as appeared by the articles.

7. That the said ship was registered out of the Commonwealth.

Other facts are stated in the judgments hereunder.

The District Court Judge having given judgment for the defendants, the plaintiff now appealed to the High Court.

Watt and *Bavin*, for the appellant.

Knox K.C., *Brissenden* and *Bloomfield*, for the respondents.

Cur. adv. vult.

May 12.

The following judgments were read:—

GRIFFITH C.J. This case affords an instance in which the rules in *Heydon's Case* (1) are pre-eminently applicable as supplying the key to the interpretation of the law which the Court is called upon to construe.

Sec. V. of the *Commonwealth of Australia Constitution Act* enacts that "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth."

The defect or mischief to be provided for arose from the fact that, owing to the geographical configuration of the continent of Australia, the separation of Tasmania from it by 50 leagues of ocean, and the distribution of population, intercourse between different parts of the Commonwealth was largely dependent

(1) 3 Rep., 7.

upon ocean carriage, during which the ships would from time to time pass out of the territorial jurisdiction of the Commonwealth, and would consequently cease for a time to be governed by its laws. For remedy of this inconvenience sec. V. was enacted, which provides, in substance, that British merchant ships while wholly employed in Commonwealth waters shall be subject to Commonwealth laws. The words of the section are, if I may say so, admirably adapted to express that idea.

Intercourse by sea between different parts of the Commonwealth is, and was at the date of its establishment, carried on in vessels engaged in three different classes of voyages (I use the term " voyage " as a neutral word, not used in the section) :—

(1) Vessels wholly engaged in what is commonly called the " coasting trade," including Tasmania ;

(2) Vessels coming from parts beyond the seas and calling at several ports of the Commonwealth before reaching their final destination in the Commonwealth ;

(3) Vessels making a round voyage from a port in the Commonwealth, such as Sydney, Melbourne or Hobart, to a port or ports in New Zealand, and thence to another port in the Commonwealth.

The test applied for determining whether the laws of the Commonwealth shall be applicable to such vessels is twofold. The first condition is that the first port of clearance must be in the Commonwealth. There is no ambiguity in these words. According to the universal usage of civilized nations every ship before beginning its voyage must obtain what is called a " clearance " from the Customs authorities. The form in which the clearance or permission to sail is expressed varies in different countries, but the substance is the same. When cargo is laden, the place to which it is to be carried is always specified, either in the document of " clearance " itself, or in documents attached to it, or in both. The port or place of final destination of the ship and cargo is also specified. The first port of clearance is, therefore, the port at which the ship, as an empty ship, begins its voyage. This condition consequently excludes from the operation of sec. V. all ships sailing from England to Australian ports, although they may call at several Australian ports in the course

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Griffith C.J.

of their single voyage. The second condition is perhaps not equally free from ambiguity, but it clearly includes ships wholly engaged in the coasting trade, and, as clearly, excludes ships beginning their voyage at an Australian port and bound for England, although calling at several Australian ports on the way to their ultimate port of destination.

The suggestion that "port of destination" should be construed as "immediate" or "next" port of destination, which was discussed during the argument, and which, if accepted, would cover the case of such ships as I have last mentioned until they left their last Australian port of call, is attractive, but will not, I think, bear examination.

In my judgment the second condition also excludes all ships which, although beginning their voyage at an Australian port, carry passengers or cargo for a port beyond the Commonwealth, whether the final port of destination is or is not within the Commonwealth. In order that a ship may fulfil the prescribed condition it is, in my opinion, necessary that it can be predicated of it at any and every moment of the single voyage that it is not bound during that voyage for a port which is not within the Commonwealth.

In the present case the ship in question was engaged in trade between Sydney in New South Wales and San Francisco in the United States of America. On its arrival at the latter port the ship landed and discharged all its passengers and cargo, and took in fresh passengers and cargo for Sydney. It is contended for the appellant that, as it was intended when the ship left Sydney that it should ultimately return to that port, Sydney is the real port of destination. In my opinion this contention has no foundation. If accepted, it would in effect make the section apply to all ships of which an Australian port is the home port, in whatever part of the world they may for the time being be trading.

The accident on which the appellant's claim is based occurred during the return voyage from San Francisco to Sydney, at which time the laws of the Commonwealth were not in force on the ship.

On the question whether the Commonwealth Act on which the

action is founded is within the competency of the Commonwealth Parliament I express no opinion. It is desirable that a decision on that point, which is one of importance, should be given in a case on which such a decision is necessary for the determination of the case, so as to afford an opportunity for appeal if the decision is wrong.

The appeal must therefore be dismissed.

BARTON J. There are two questions in this appeal, namely, (1) whether the *Seamen's Compensation Act* 1911, a law of the Commonwealth, was (if valid) in force on the steamship *Moana* when the plaintiff, now appellant, met with his accident; and (2) whether sec. 5 of the Act mentioned, under which he claims, is valid. It will be necessary to consider the first of these questions only.

The District Court dealt with the matter upon admissions between the parties. The plaintiff was a seaman on the steamship in question, which belonged to the Company, and which at the material time was trading between Sydney and San Francisco and between San Francisco and Sydney, calling at ports outside the Commonwealth. The voyage described by the articles signed by the plaintiff in Sydney was "from Sydney to any port or ports between 65 degrees North and 65 degrees South latitude, trading to and fro, returning to Sydney, thence if required to Newcastle and back to Sydney. The crew to be discharged at Sydney."

The actual trading of the ship was as first described. The ship cleared at the Customs at Sydney on 7th September 1912, and at San Francisco on her return on 15th October. When within 200 miles of San Francisco on this return trip the plaintiff, on the 16th October, met with the injuries the subject of his claim. Although passengers may book a return passage, all passengers and cargo are discharged at San Francisco on arrival there, while of course the ship is similarly discharged of cargo and passengers on her arrival back at Sydney. The ship was registered outside the Commonwealth, namely, at Dunedin in New Zealand. Sydney was the first port from which the *Moana* cleared after the signing of the articles.

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Barton J.

The learned Judge of the District Court at Sydney gave judgment for the defendants.

The first question in the case arises under the fifth section of the Imperial Act covering the Constitution. It was and is for the appellant to establish that the first port of clearance and the port of destination of the vessel were both in the Commonwealth when he sustained his injuries. If San Francisco was her first port of clearance for the voyage, passage or trip during which the accident took place, the case is not within that section, and the Compensation Act does not apply.

On the facts it is clear that the accident occurred when the ship had cleared from San Francisco bound to Sydney *viâ* intervening ports. On her outward voyage she had been bound for San Francisco, which was then her port of destination. On the homeward voyage her clearance was from San Francisco and her port of destination was Sydney. Empty at Sydney, the ship took in passengers and cargo for San Francisco. Discharging them there, she became again an empty ship; there again she loaded and cleared, to empty again at Sydney. No construction of covering sec. V. has been suggested which could alter the meaning of these facts, and convert these two journeys or enterprises into one for the purpose of making it a journey from her first port of clearance in the Commonwealth to a port of destination within it. Of course it was the intention when the *Moana* cleared from Sydney that she should ultimately return to the same port, but if London had been substituted for San Francisco, the remaining facts being as admitted before us, the absurdity of contending that the Commonwealth Statute applied, in the case of an accident to a seaman when the ship was less than a day out from London on her return to Sydney, would have been manifest.

It is probable that the mischief which the last branch of covering sec. V. was designed to remedy was nothing more than this: that in voyages limited to ports of the Commonwealth, vessels would necessarily pass now and again beyond the territorial limits, being under one law while within them and under another law while outside them; so that without some such provision there would be confusion and embarrassment. To

provide against these evils, was it necessary to employ the terms used in the covering section in any wider sense than would secure the application of Commonwealth laws throughout these voyages along the Commonwealth coast? (Cf. *Ex parte Oesselmann* (1)—the judgments of *Owen* and *Pring* JJ.). That question does not demand an immediate answer, for it is not at present necessary to place so limited a construction on the enactment, seeing that there is no reasonable construction at all which would sustain the appellant's claim.

I am of opinion that the appeal must be dismissed.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ. was read by

ISAACS J. The parties desired, whatever view of the facts the Court might take, that the questions of law should be determined. Arguments proceeded on that basis.

It is obvious that such a course would set at rest a doubt now affecting large bodies of employers and employees. One consideration, and that alone, leads us to acquiesce in deciding only the question of fact. It is this: We were informed that another case in which the facts necessarily involve the questions of law is ready for hearing. Having regard to that circumstance, and therefore to the early assistance which further argument might possibly afford, we think the important questions of law should in this case be passed by. No decision, or even opinion, whatever is therefore to be regarded as contained herein as to the object or interpretation of covering sec. V. or the validity of the *Seamen's Compensation Act*.

The facts, in our opinion, do not show that the voyage of the ship *Moana* at the time when the plaintiff met with the accident was one in which the ship's first port of clearance was in the Commonwealth, because it was not a voyage from Australia. The vessel had left San Francisco for Sydney on 15th October 1912, and although she had previously left Sydney for San Francisco on 7th September the evidence does not establish that the return to Sydney from San Francisco was part of the same voyage which was undertaken by her on 7th September. The ship was

(1) 2 S.R. (N.S.W.), 438, at pp. 442, 443.

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engaged in regular trading between these two terminal ports, and there were only two portions of the evidence which were relied on specifically to prove the unity of the return to Sydney with the outward passage to San Francisco as one voyage. They were the passenger's ticket and the articles, including the fact of Sydney being the plaintiff's "home port" according to the articles.

As to the passenger's ticket, it speaks of a "passage" from Sydney to San Francisco, and return to Sydney—and adds "*per* R.M.S. *Moana* to sail 16th May 1913." And it states that "The journey called for by this ticket must be completed within ." The blank after the word "within" appears because the exhibit is only a type and not an actual ticket. In practice the space may be filled up with any period the parties might agree upon. One passenger's ticket might be "immediate return," another "twelve months," and so on; consequently, as the ship can have only one voyage at a time, the time mentioned in the passenger's ticket cannot determine the voyage of the vessel. The words "passage" and "journey" both refer to the passenger, not the ship. The mere fact of "return" cannot establish unity of voyage, because a "return" ticket issued at San Francisco would reverse the voyage; and it is at least clear that the ship cannot at the same moment be engaged in two contrary voyages.

Mr. *Bavin* gallantly met this difficulty by referring to Sydney as the plaintiff's "home port" as the determining factor. But that is not necessarily the ship's "home port" for her voyage. She was and is registered out of the Commonwealth. The articles, the other relevant piece of evidence, provide for a "voyage from Sydney to any port or ports between 65 degrees North and 65 degrees South latitude, trading to and fro, returning to Sydney, thence if required to Newcastle and back to Sydney . . . . The term of service not to exceed six calendar months." That covers practically the whole civilized or trading world, and might embrace many distinct enterprises or expeditions.

At the end of the voyage within the meaning of the articles the appropriate columns were filled up, showing Sydney to be

the port where that voyage commenced and Sydney as the port where that voyage terminated.

But that was a " voyage " of the ship in relation to the crew only, that is, not a voyage of the ship generally, and they are not necessarily identical any more than a voyage of a passenger is coterminous with that of the ship or of any other passenger.

On the whole, therefore, so far as regards the " voyage " of the ship in the sense necessary for the application of covering sec. V., whichever of the conflicting views as to its meaning be the right one, the evidence does not establish that the voyage of the *Moana* on 16th October 1912 was one of which the first port of clearance was in the Commonwealth.

The appeal should therefore be dismissed.

POWERS J. I have had the privilege of reading the judgment delivered by the learned Chief Justice, and I agree, for the reasons given by him in his judgment, that the port of destination when the vessel left Sydney was San Francisco (calling at intermediate ports), and that the accident on which the appellant's claim is based occurred during the return voyage from San Francisco to Sydney at a time when the laws of the Commonwealth were not in force on the ship, and that the appeal must therefore be dismissed.

As to the effect of sec. V. on voyages of other vessels I express no opinion. On the question whether the Commonwealth Act on which the action is founded is within the competency of the Commonwealth Parliament, for the reasons given by the Chief Justice, I express no opinion.

Appeal dismissed.

Solicitor, for the appellant, *P. H. Sullivan.*

Solicitor, for the respondents, *W. J. Creagh.*

B. L.