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HARVEY v. DEVEREUX.

Appeal allowed. Order appealed from discharged. Motion for nonsuit dismissed with costs, and judgment restored. Respondent to pay costs of appeal.

Solicitors, for the appellant, *Dobson, Mitchell & Allport.*
Solicitor, for the respondent, *C. S. Page.*

B. L.

Appl *Joyce* v *Australasian United Steam Navigation Co Ltd* (1939) 62 CLR 160

[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN STEAMSHIPS LIMITED . APPELLANTS; DEFENDANTS,

AND

MALCOLM . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 3, 4, 5; *Nov.* 30.

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

Constitutional Law—Validity of Commonwealth legislation—Trade and commerce—Navigation and shipping—Accident to seaman—Compensation for injuries—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), (XXXIX.), 98—*Seamen's Compensation Act* 1911 (*No.* 13 *of* 1911), *sec.* 5.

Secs. 51 (I.) and 98 of the Constitution confer upon the Commonwealth Parliament power to legislate as to navigation and shipping so far as concerns foreign and inter-State traffic, and in particular to regulate the reciprocal rights and obligations of those engaged in carrying on that traffic by means of ships.

So *held* by *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting).

Held, therefore, by *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that the *Seamen's Compensation Act* 1911 is a valid exercise of the legislative power of the Commonwealth Parliament.

Federated Amalgamated Government Railway and Tramway Service Association v. *New South Wales Railway Traffic Employees' Association*, 4 C.L.R., 488, discussed.

APPEAL from a District Court of New South Wales.

An action was brought in the District Court at Sydney by Elizabeth Malcolm against the Australian Steamships Ltd., in which by the particulars of the plaintiff's claim it was alleged that the plaintiff sued the defendants for that "before and at the time of the happening of the grievances hereinafter alleged William Malcolm now deceased was a seaman in the employ of the defendants and a member of the crew of the steamship *Burwah* shipped under articles of agreement entered into in Australia and the defendants were the owners of the said steamship *Burwah* which was engaged in trade and commerce among the States of the Commonwealth and during a voyage of the said steamship *Burwah* from Sydney in the State of New South Wales to Rockhampton in the State of Queensland namely on 8th May 1913 personal injury by accident arising out of and in the course of his said employment was caused to the said William Malcolm deceased while so employed as aforesaid whereby death resulted to the said William Malcolm deceased and the plaintiff is the only dependent within the meaning of the *Seamen's Compensation Act* 1911 of the said William Malcolm deceased wholly or partially dependent on his earnings at the time of his death." The plaintiff claimed £500 as being the compensation provided for by that Act.

From the evidence it appeared that William Malcolm fell overboard from the *Burwah* at a spot which was outside the territorial limits of the Commonwealth, and was drowned.

The only material defence was that the *Seamen's Compensation Act* 1911 was invalid, as not being within the powers conferred upon the Federal Parliament under the *Commonwealth of Australia Constitution Act.*

The District Court Judge having given judgment for the plaintiff for £500, the defendants now appealed to the High Court on the ground of the invalidity of the *Seamen's Compensation Act* 1911.

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Knox K.C. (with him *Brissenden*), for the appellants. The *Seamen's Compensation Act* 1911 is invalid. The only power under which it can be contended that it is valid is the trade and commerce power in sec. 51 (I.) of the Constitution. One of the limits of that power is laid down in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (1), namely, that it does not extend to matters the effect of which upon inter-State trade and commerce is not direct, substantial and proximate. The provision in sec. 98 of the Constitution that the trade and commerce power extends to navigation and shipping does not enlarge the power. The *Seamen's Compensation Act* has no effect direct, substantial or proximate upon trade and commerce or upon navigation and shipping. It is not a shipping law but a social law. In the nature of things shipping laws commonly deal with seamen in a way that men engaged in employments on land are not dealt with. But the matters that are dealt with in such laws are matters arising exclusively out of the peculiar conditions of the service of the sea. The provisions in this Act would have as much relation to the building trade as to navigation and shipping. It might be a very different case if the liability were to depend upon the absence or presence of negligence on the part of the seaman, because it might then very well be said that anything which puts a premium on diligence has a direct, substantial and proximate effect upon navigation. But it cannot tend to the effective carrying on of navigation and shipping to provide that a man may be negligent or disobedient with impunity. *Patterson* v. *Bark Eudora* (2) is an authority for saying that in the case of seamen federal legislation may go further than in the case of other employees, but the legislation must always be subject to the limitation that it directly affects trade and commerce. [He referred to *The Employers' Liability Cases* (3); *Baltimore and Ohio Railroad Co.* v. *Inter-State Commerce Commission* (4); *Southern Railway Co.* v. *United States* (5); *The Second Employers' Liability Cases* (6).]

(1) 4 C.L.R., 488, at p. 545.
(2) 190 U.S., 169, at p. 175.
(3) 207 U.S., 463.
(4) 221 U.S., 612, at p. 618.
(5) 222 U.S., 20.
(6) 223 U.S., 1.

[ISAACS J. referred to *The Minnesota Rate Cases* (1).]

The American cases go to this extent: that in the case of a law dealing with instrumentalities engaged in inter-State trade or commerce there must be some substantial connection between the law and the efficiency and security of inter-State trade and commerce. A law dealing with the social relations of seamen and their employers is not such a law. [He also referred to *Hooper* v. *California* (2); *Johnson* v. *Marshall Sons & Co. Ltd.* (3); *Simmons* v. *Heath Laundry Co.* (4); *Merchant Shipping Act* 1894 (57 & 58 Vict. c. 60), secs. 160, 198, 200, 207; *Merchant Shipping Act* 1906 (6 Edw. VII. c. 48), sec. 34.]

[ISAACS J. referred to *Michigan Central Railroad Co.* v. *Vreeland* (5).]

E. M. Mitchell (with him *Hooton*), for the respondent. This case may be determined by considering what comes within the words "navigation and shipping" in sec. 98 of the Constitution. These words confer on the Commonwealth Parliament power to enact any provision which could properly come within a Commonwealth Act as to merchant shipping—that is, properly, having regard to the history of legislation as to merchant shipping. A peculiar characteristic of a Merchant Shipping Act is the taking effective care of seamen during their life and making provisions obligatory on owners after the death of seamen as well as during their life. Provisions similar to any that occurred in English laws as to merchant shipping at the time the Constitution came into existence might be enacted by the Commonwealth Parliament under the navigation and shipping power. [He referred to *The Employers' Liability Cases* (6); *Gibbons* v. *Ogden* (7); *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (8).] The *Seamen's Compensation Act* is intended to make owners of ships more careful, and so to make shipping more efficient. The safety of employees has a real relation to the subject matter of navigation and shipping, and therefore comes within the ambit of the power. The Act is within the trade and

(1) 230 U.S., 352, at p. 398.
(2) 155 U.S., 648.
(3) (1906) A.C., 409.
(4) (1910) 1 K.B., 543, at p. 551.
(5) 227 U.S., 59.
(6) 207 U.S., 463, at p. 530.
(7) 9 Wheat., 1, at p. 229.
(8) (1907) A.C., 65.

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commerce power. Under that power Parliament has authority to impose obligations upon common carriers of inter-State goods. It may impose obligations on owners of ships as to goods or passengers carried, or as to the men by whom the ships are worked. The Act imposes upon owners of ships in respect of seamen no greater liability than is imposed upon common carriers in respect of goods: *Coggs* v. *Bernard* (1). *The Railway Servants' Case* (2) is not a decision that the *Seamen's Compensation Act* was invalid, and that point was treated as being quite open in *Owners of s.s. Kalibia* v. *Wilson* (3).

Leverrier K.C. (with him *Flannery*), for the Commonwealth intervening. The effect of secs. 51 (I.) and 98 of the Constitution taken together is that in sec. 51 (I.) the words "trade and commerce with other countries, and among the States" are to be read as including shipping and navigation. In view of those large expressions the Commonwealth Parliament may enact any law in the same terms as the laws relating to merchant shipping in the Merchant Shipping Acts. They may also enact any law *in pari materiâ* with those laws. The Merchant Shipping Acts deal with in all kinds of ways, and regulate, the relations between owners of ships and seamen. Provisions for medical attendance on injured seamen are not different in principle from those in the *Seamen's Compensation Act.* Taking sec. 51 (I.) by itself, apart from sec. 98, it may be admitted that legislation under the trade and commerce power must have a real relation to trade and commerce. But it may have that relation either by its effect on the subject matter of trade and commerce, that is, the goods carried, or by its effect upon the instrumentalities, animate or inanimate, by which trade and commerce are carried on while engaged in carrying them on. The *Seamen's Compensation Act* has such a relation to trade and commerce because its effect is to introduce a term into the contract of employment of seamen while they are engaged in transportation. The provisions of the Act have a direct effect upon the employees by encouraging them to take risks for the benefit of the ship and that which is

(1) 1 Sm. L.C., 11th ed., 173, at p. 184.
(2) 4 C.L.R., 488.
(3) 11 C.L.R., 689, at p. 696.

carried on board, and upon the employer by inducing him to employ reliable men.

Knox K.C., in reply. The trade and commerce power only authorizes Parliament to prescribe rules by which trade and commerce shall be governed: *Gibbons* v. *Ogden* (1). If that be so, Parliament cannot make a regulation affecting the human instrumentalities engaged in trade and commerce, unless that regulation has relation to the conduct of those human instrumentalities in the course of the operations of trade and commerce. The conduct of the parties must be made the basis of the liability. [He referred to *Halsbury's Laws of England*, vol. xx., p. 172, note (*e*).]

Cur. adv. vult.

The following judgments were read:—

Nov. 30.

GRIFFITH C.J. The question raised in this appeal is whether the *Seamen's Compensation Act* (No. 13 of 1911) is within the competence of the Commonwealth Parliament. The Act is, in substance, but with one important variation, an adaptation of the English *Workmen's Compensation Act* of 1906 (6 Edw. VII. c. 58), which applies (sec. 7) to masters, seamen, and apprentices to the sea service, provided that they are members of the crew of a ship registered in the United Kingdom or any other British ship of which the owner or managing owner resides or has his place of business in the United Kingdom. The scheme of the Act is not to impose a new contractual obligation as between employers and employees, but to impose a statutory duty to pay compensation in the event of injury from accident in certain cases, irrespective of any act or default on the part of the employer or his agent. (See *per Collins* M.R. in *Darlington* v. *Roscoe & Sons* (2).) The earlier English Workmen's Compensation Acts passed before the establishment of the Commonwealth had not extended to seamen.

The Act now in question, by which compensation is payable in some cases for an injury attributable to the serious and

(1) 9 Wheat., 1.

(2) (1907) 1 K.B., 219, at p. 227.

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wilful misconduct of the seaman himself, was passed in the asserted exercise of the power conferred by sec. 51, pl. I., of the Constitution, by which the Parliament is authorized to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the States. By sec. 98 this power extends to navigation and shipping and to railways the property of any State.

The first observation which I have to make is that the ambit of the legislative authority of the Parliament in exercising this power, as well as all others, is restricted to the territorial limits of the Commonwealth. Any extra-territorial effect is to be sought in sec. V. of the *Constitution Act*, under which laws made by the Parliament of the Commonwealth (*i.e.*, of course, valid laws) are to be in force on certain British ships. The test to be applied in determining the validity of the Act is, therefore, whether, regarded as an Act relating to intra-territorial matters, it is within the ambit of power. The circumstance that many of the operations of inter-State and foreign commerce are carried on beyond the territorial jurisdiction of the Commonwealth is irrelevant. (See *Tomalin* v. *S. Pearson & Son Ltd.* (1).)

I proceed, therefore, to consider whether a law imposing upon employers an obligation to be answerable for accidents happening to their employees within the Commonwealth is a law relating to trade and commerce or to navigation and shipping. The solution of a problem may sometimes be made easier by reducing it to its simplest form. I will therefore suppose the case of a Commonwealth Statute imposing such liabilities upon the owners of ships engaged in foreign or inter-State commerce in respect of accidents happening while the ship is within a port of the Commonwealth.

In such a case the State would clearly have legislative power to deal with the matter. If the ship is registered in the United Kingdom the Act of 1906 already applies to it. If there is no State law on the subject the result will be that the obligation is imposed upon the owners of some ships and not upon the owners of others lying in the same port. This is, no doubt, an anomaly. If the Commonwealth Parliament has power to pass, and does

(1) (1909) 2 K.B., 61.

pass, a law on the subject, the anomaly may in the result be still greater, but this is irrelevant to the question of the existence of the power.

Precisely the same question would arise if a similar law were passed applicable to employees upon railways the property of a State, limited, as it would be, to accidents happening in the course of their employment in trade and commerce between the States.

In either of these cases could such a law be supported as a law with respect to trade and commerce, or should it be regarded as a law dealing with a subject matter which by sec. 107 of the Constitution is reserved to the States? In other words, does the power extend to impose any obligation whatever upon persons engaged in the operations of trade and commerce within the territorial jurisdiction of the Commonwealth as between them and their employees regarding anything that may happen in the course of such operations, or is it limited, and if so to what extent?

Under the Constitution of the United States of America Congress has power "to regulate trade and commerce." These words have been the subject of many decisions in the Supreme Court of the Republic both before and since the establishment of the Australian Commonwealth, some of which were referred to in argument. The words conferring the power are substantially the same as those in the Australian Constitution. These decisions are, of course, entitled to the greatest respect, both as arguments and as expressions of opinion by jurists specially conversant with the subject. Those delivered before the framing of the Australian Constitution are entitled to further weight as expressing the sense in which the words adopted by the framers were then understood by persons familiar with the subject. The term "trade and commerce" has in a series of decisions been defined as meaning intercourse and traffic, and that is the accepted meaning. In the early case of *Gibbons* v. *Ogden* (1) it was said that the trade and commerce power was "a power to prescribe the rule by which commerce is to be governed," a phrase which I understand as meaning rules of conduct to be

(1) 9 Wheat., 1, at p. 196.

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observed by those engaged in the operations of commerce with respect to those operations. In a recent case, *Howard* v. *Illinois Central Railroad Co.* (1907) (1) (sometimes called *The Employers' Liability Cases*), it was defined by *Moody* J. as including control of the conduct of persons engaged in commerce in respect of anything which directly concerns commerce, and also control of the instruments used in it. In the last-mentioned case, and also in others in which the question of the validity of Employers' Liability Acts was raised, the Supreme Court of the United States has held that the power extends to prescribing rules of conduct as to anything directly tending to promote the efficiency or safety of the operations of commerce. On this ground it has been held that laws abrogating the defence of common employment and the defence commonly expressed by the maxim *Volenti non fit injuria* are within the power. These laws are, in substance, laws imposing upon employers an absolute obligation to be answerable for, and therefore to prevent, negligence on the part of all their employees. This is, in one sense, to impose a rule of conduct upon employers themselves by identifying them with their agents. But Congress has never attempted to legislate as to any matter not directly concerning rules of conduct, and the American Courts have consequently never been asked to pronounce upon the question whether the power extends beyond prescribing such rules. I think, therefore, that no assistance in determining that point can be derived from these decisions, and *à fortiori* none from any expressions used *obiter* in the discussion of a different question. But before leaving these decisions I may be permitted to observe that the test of promoting the efficiency or safety of the operations of commerce is an unsatisfactory one. It may be that the object, avowed or unavowed, of the legislature is not to encourage but to discourage any particular branch of commerce, and that for this purpose they impose rules of conduct which, if observed, will render the operations less efficient and less safe than they would otherwise be. I cannot think that this would in any way affect the validity of the legislation. This was pointed out by the Judicial Committee in the case of *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (2).

(1) 207 U.S., 463.

(2) (1907) A.C., 65.

In *The Railway Servants' Case* (1) this Court laid down the proposition that the power now under consideration cannot, as a matter of construction, be held to have so wide an ambit as to embrace matters the effect of which upon trade and commerce is not direct, substantial and proximate, and that general conditions of employment are not of this character. The phrase "general conditions of employment" must be read with regard to the matter then under discussion, and as limited to matters not directly relating to the conduct of the operations of commerce. With this qualification I adhere to the rule there laid down.

It was contended that, even adopting the American construction, the unqualified liability of employers for accidents to their employees would tend to the efficiency and safety of the operations of commerce by inducing them to make greater efforts to prevent accident. The contrary view may be supported by equally weighty arguments. But, for reasons already given, I think that this is not a sound test to be applied in the construction of the power.

Some of the arguments addressed to us on behalf of the respondent are, in truth, based upon a fundamental fallacy, namely, treating the words "with other countries and among the States" as if they were words of extension. They are, in truth, words of limitation, limiting the ambit of power to a part only of the general subject matter of "trade and commerce." Similarly, it was contended that the words "navigation and shipping" are words of extension, enlarging the ambit of the power so as to include matters which are not, strictly speaking, matters of trade and commerce. Whether this be so or not, the limiting words "with other countries and among the States" are equally applicable, and the words "navigation and shipping" can only relate to the operations of navigation and shipping within that ambit. In short, the effect of sec. 98 is only to say that the power conferred by sec. 51, pl. I., extends within its ambit to trade and commerce whether carried on by land or sea, and even when carried on upon railways the property of a State. The substantial question, therefore, is whether a law imposing such an obligation upon the owners of ships engaged in foreign or

(1) 4 C.L.R., 488, at p. 545.

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inter-State trade or upon the State railways authorities is within the power.

The only British legislation on a similar subject earlier than the passing of the *Constitution Act* was contained in the Workmen's Compensation Acts of 1897 and 1900, which were strictly limited in their scope, and hardly, if at all, affected the operations of trade and commerce, using those words in their widest signification. They dealt with the obligations of employer and employee in the abstract, but, even so, were limited to certain kinds of employment. They were, in my opinion, a new kind of social legislation, and have always been so regarded.

Reliance is then placed upon pl. XXXIX. of sec. 51, which extends the power of Parliament to any matters incidental to the execution of any power vested by the Constitution in the Parliament. The meaning and effect of this provision were discussed by the Judicial Committee in the recent case of *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (1). Applying the rules there laid down, I ask myself what is the power to the execution of which such provisions as those now in question are incidental. The Act does not seek to execute any power at all relating to the operations of trade and commerce, but takes up a subject matter—accidents—which, so far as it can be regarded as incidental to anything, is equally incidental to all forms of manual labour, and says in effect: "This shall be regarded as an incident of trade and commerce, and we will therefore legislate upon it." In my opinion they cannot do so. The question whether one subject of legislation is incidental to another must be determined *ab extra*, irrespective of the assumption of incidentality by the Parliament. Moreover, the exercise of the incidental and supplemental power must be for the execution of some law passed under the principal power, and not, so to say, "in the air." To borrow a phrase from another branch of the law, it is not a power in gross, but a power appendant. Thus, if Parliament were to make special provisions for the safety of goods or passengers carried on ships or in trains, or of employees engaged in the transit, and for the better enforcement of these provisions

(1) (1914) A.C., 237; 17 C.L.R., 644.

imposed a new obligation upon the employers, the obligation might be reasonably thought incidental to the execution of the law. But a law which contains no principal enactment relative to carrying on the operations of trade or commerce, but merely professes to attach a new obligation to the relations of employers and employees engaged in those operations, cannot be said to be dealing with a matter incidental to the execution of the general power merely because the subject matter of the obligation is incident to those operations as well as to all other business operations of a like kind. When regard is had to the provision that an employer shall be liable to make compensation to his employee for injury sustained by the serious and wilful misconduct of the employee himself, it becomes almost impossible to regard such a provision as incidental to the execution of a power to make laws with respect to trade and commerce as such.

The case is very much as if the Parliament, assuming to exercise the power conferred by sec. 51 to make laws with respect to banking (pl. XIII.) or insurance (pl. XIV.), were to pass a similar law imposing upon bankers and insurers an obligation to pay to their clerks compensation in the event of injury from accident.

It was also contended that the inclusion of "navigation and shipping" in the definition of "trade and commerce" extends the meaning of that term in another sense, that is, so far as to include, at any rate, any matter which was in 1900 regarded as fit to be included in the Acts dealing with merchant shipping, and that analogous provisions are to be found in the Merchant Shipping Acts of the United Kingdom.

For reasons already given, I do not think that the definition extends the power so as to include matters which do not appertain to trade and commerce. Nor do I think that any of the provisions of the Merchant Shipping Acts which were referred to in argument are analogous to those of the Act now in question. All the provisions for the welfare of seamen contained in those Acts are based upon the special conditions of that branch of industry, in which the seamen find themselves isolated for the time being from the ordinary conditions of life, and to a great extent in the power of the shipowner, and were passed to protect

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them from the obvious dangers incident to such a state of things. These considerations do not apply to the present case.

Even if sec. 98 operated as an extension of the power to an additional subject matter, that is to say, navigation and shipping irrespective of trade and commerce, I think that the same considerations would be applicable. The question in either case would be whether the matter with which the law deals is really a matter incidental to the operations of navigation and shipping in the sense which I have explained.

There is still another argument which, although not pressed before us, seems to deserve consideration. Sec. 736 of the *Merchant Shipping Act* 1894 authorizes the legislature of a British Possession by an Act or an Ordinance to "regulate the coasting trade" of the Possession, subject to the conditions that the operation of the Act or Ordinance shall be suspended until His Majesty's pleasure has been signified in the Possession, and that all British ships shall be treated alike. The effect of this Act was to confer upon the legislatures of the Possessions legislative authority over ships engaged in the coasting trade of the Possession whether within or beyond territorial limits. It is suggested that this power would authorize the enactment of any law regarding persons engaged in the coasting trade which a legislature of plenary jurisdiction might enact as to persons within its territorial jurisdiction. I express no opinion on the point. But assuming that it would, and assuming that the Commonwealth is a British Possession within the meaning of sec. 736 of the *Merchant Shipping Act*, and that the expression "trade and commerce (including navigation and shipping) among the States" is coextensive, if not indeed synonymous, with the term "coasting trade of the Possession" as used in that section, the power would be one conferred by that Act and not by the Constitution of the Commonwealth. The Act now in question was not reserved for the signification of the Royal pleasure, and cannot therefore, in any view of the meaning of sec. 736, be supported on this ground.

I desire to add a few words on the supposed anomaly which would arise if the Commonwealth Parliament has not the power asserted. The creation of the anomaly was apparently inten-

tional. It must have been well known when the *Workmen's Compensation Act* of 1906 was passed that a large proportion of the British ships engaged in the local and oversea trade of some at least of the British Possessions, such as Australia, Canada and New Zealand, were registered in those Possessions. Yet the registration of the ship in the United Kingdom, or the fact that the residence or place of business of the owner or managing owner is in the United Kingdom, was made the test of applicability of the law to seamen. It cannot be implied from this limitation that the Imperial Parliament thought, or if they thought were right in thinking, that the Parliament of the Commonwealth already possessed power to legislate to the same effect. It is clear that the legislatures of all the British Possessions had such a power, limited to their own territorial jurisdiction. So far as extra-territorial jurisdiction was not conferred upon them the power remained vested in the Imperial Parliament alone. The only extra-territorial extensions of jurisdiction hitherto created are to be found in the provisions of the *Merchant Shipping Act* already quoted, and in sec. V. of the Australian *Constitution Act*, which does not extend the ambit of jurisdiction as to subject matter. There is perhaps a *casus omissus*, perhaps not. If there is, it is the province of the Imperial legislature, and not of the Court, to supply it. The anomaly will, in any view, still exist as to ships registered in other British Possessions.

For these reasons I arrive at the conclusion that the Act is not within the competence of the Australian Parliament. Even if the words relied upon were capable of the wide construction sought to be put upon them, it would be for those who support the extension to show that the case is within them (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (1)), which, in my opinion, they have failed to do.

In my opinion the appeal should be allowed.

BARTON J. The ship *Burwah*, owned by the defendants (now appellants), left Sydney on an inter-State voyage on 7th May 1913. The second mate, Malcolm, lost his life at sea on that date by an accident arising, it is now conceded, out of and in the

(1) (1914) A.C., 237; 17 C.L.R., 644.

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course of his employment. His widow brought this action in the District Court against his employers, the appellants, for compensation under the terms of the *Seamen's Compensation Act* 1911 (No. 13 *of* 1911), a Statute of the Commonwealth: for the second mate was a seaman within the definition expressed in the Statute.

The sole question is whether the Act, or the vital part of it, is valid.

The Constitution does not give the Commonwealth specifically any power to legislate as to industries or the persons engaged in them; but it does not follow that there are no cases in which the Commonwealth can pass laws affecting such concerns and persons.

The Commonwealth's authority to legislate upon a subject specified to be within its powers clearly includes matters without which the law would not have effective existence; but the range of matters expressly authorized includes those commonly called "incidental" or "ancillary": See sub-sec. XXXIX. of sec. 51, and *The Jumbunna Case* (1), where it was held that the Commonwealth, though without independent power to create corporations, except in certain cases there mentioned, could validly create a corporation as a means to the execution of an express authority, viz., sec. 51 (XXXV.), and confer on it such powers and functions as are incidental to the execution of that authority. The passage from the judgment of *Marshall* C.J. in *M'Culloch* v. *Maryland* (2), which is nearly always quoted in this connection, because it is both brief and compendious, was cited, viz., "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In the present case the only power invoked is that which gives the Commonwealth authority to legislate in respect of "Trade and commerce with other countries, and among the States" (Constitution, sec. 51 (I.), as explained in sec. 98 of the same Statute). The ambit of the power thus expressed and explained must be ascertained before the Court can determine whether the legislation now impeached is a valid exercise of it. The questions

(1) 6 C.L.R., 309.

(2) 4 Wheat., 316, at p. 421.

are therefore—(1) what is the extent of the power? and (2) does the power as ascertained authorize the passage of this legislation? Of course, it is not possible to maintain a rigid line of separation in discussing the answers to these questions.

A principle which must be kept in mind as to the second question is that in order to ascertain whether an Act is within the power of the Commonwealth the judicial interpreter is confined in his consideration to the terms of the Statute. When it plainly appears from these, of course including any clear inference from them, to be in substance an attempt to deal with a matter outside the ambit of the power conferred, the Court is entitled and bound to declare it invalid on that ground. An instance of an act found to be invalid on this principle is *The King* v. *Barger* (1); see also *Attorney-General for Quebec* v. *Queen Insurance Co.* (2).

The title of the Act now in question is "An Act relating to compensation to seamen for injuries suffered in the course of their employment." It applies (*inter alia*) to ships engaged in trade and commerce with other countries or among the States: See sec. 4 (1) (*c*).

Sec. 5, sub-sec. 1, enacts that "If personal injury by accident arising out of and in the course of the employment is caused to a seaman, his employer shall, subject to this Act, be liable to pay compensation . . ." If this sub-section is invalid the whole Act is inoperative.

Sub-sec. 2 consists of five paragraphs as provisoes to sub-sec. 1. Of these the only one cited in argument was adduced by Mr. *Knox*, for the appellant company, to enforce and illustrate his position. It reads thus: "(*c*) If it is proved that the injury to a seaman is attributable to his serious and wilful misconduct, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

Sec. 5, sub-sec. 1, interprets itself. I take sub-sec. 2, par. (*c*), in view of sub-sec. 1, to have the following meaning:—"If it is proved that the injury to a seaman is attributable to his serious and wilful misconduct, compensation shall be allowed only in the

(1) 6 C.L.R., 41. (2) 3 App. Cas., 1090.

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case of death or serious and permanent disablement resulting; for injury not so resulting compensation shall be disallowed." So that where there is serious and wilful misconduct there is not to be compensation for the ordinary run of resultant accidents, but there is to be compensation if the accident chances to prove fatal or to disable the seaman permanently, no matter how serious and wilful the misconduct causing the injury. Such a provision is not open to question in this Court except on the ground of the absence of power to enact it. We cannot examine questions of wisdom or policy.

The first ground on which Mr. *Knox* attacked sec. 5 was that it was not an exercise of the trade and commerce power at all. Here I express my agreement with him that sec. 98 is not intended to amplify the trade and commerce power beyond the spheres of inter-State and external trade, but to explain it as to the included subject matter by removing grounds for possible doubts of its extent. It puts into words, as to navigation and shipping, that which the reasoning of the United States cases amply demonstrates to have been included in the meaning of the trade and commerce power. It was argued that the words "navigation and shipping" in sec. 98 included power to deal with any matter such as, though not really inherent in or incidental to trade and commerce between the States or with other countries, had been embraced in the multifarious provisions of the Imperial Merchant Shipping Acts. I do not agree with this contention, for I cannot see how sec. 98 extends the trade and commerce power so as to import matters which are not in themselves substantially connected with trade and commerce. Nothing was quoted from the Merchant Shipping Acts which affords any true ground of comparison with the provisions now under examination. But if such comparisons were tenable I do not think they would show that the framers of the Constitution intended to include matters outside the ambit of trade and commerce—the power really to be construed—because it happened that a class of laws of wide extent which had received the general title of "Merchant Shipping" from a Parliament of plenary and unlimited powers, though that sovereign legislature had for convenience included, as it had a constitutional right to

include, such provisions within a measure of that designation. It would still have to be shown that the federal enactment impeached was the exercise of an authority incidental either to the powers of sec. 51 (I.) or to those of sec. 98. I shall presently show that in this case that was not established.

Mr. *Knox* said that, instead of being an exercise of the power invoked, sec. 5 was solely a measure of social reform for the benefit of seafaring men as portion of the industrial class. If, however, the provision is apparently such as the trade and commerce power enables Parliament to make, it is valid, whatever the motive, unless, within the principle I have quoted from *The King* v. *Barger* (1), the face of the measure discloses expressly or by clear inference that it is in reality and in substance "an attempt to deal with a matter outside the ambit of the powers conferred." In the last-named case we held that the measure itself disclosed such an attempt. In *Osborne* v. *The Commonwealth* (2) we held that the Act then in question did not disclose one, whatever its results in practical operation might be, for these were not the concern of the Court. Unless, then, the attempt appears on the face of the measure, the Court cannot declare it invalid on that ground, however the provision may in its result tend to advance some project of social reform. I shall return presently to the question whether the intention is to affect trade or to promote or affect social reform.

As to the ambit of the trade and commerce power, counsel quoted largely from the decisions of the Supreme Court of the United States. The following passage was extracted from the judgment of *Johnson* J. in *Gibbons* v. *Ogden* (3):—"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to

(1) 6 C.L.R., 41. (2) 12 C.L.R., 321.
(3) 9 Wheat. (22 U.S.), 1, at p. 229.

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regulate commerce. That such was the understanding of the framers of the Constitution is conspicuous from provisions contained in that instrument." A like understanding is apparent from the terms of the Australian Constitution.

In the case of *Hooper* v. *California* (1) *White* J., who delivered the opinion of the Court, said:—"If the power to regulate inter-State commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature." And the Court held that the business of insurance was not commerce, and that the contract of insurance was not an instrumentality of commerce. It held, further, that the making of such a contract was a mere incident of commercial intercourse. The passage last extracted supplies the necessary safeguard when we apply the statement of *Johnson* J. first quoted.

In *Mondou* v. *New York &c. Railroad Co.* (*Second Employers' Liability Cases*) (2) the Court held that the power over inter-State commerce (expressed in the United States Constitution in practically the same terms as in ours), authorized Congress to regulate the relation of inter-State common carriers by land and their employees while both were in the act of commerce, subject to the Constitution, and to the following important qualification: "that the particulars in which those relations are regulated must have a real or substantial connection with the inter-State commerce in which the carriers and their employers are engaged" (3). Hence the Court sustained a federal Act enforcing the liability of employers for accidents to their employees (while both were engaged in inter-State commerce) arising from the negligence of employers. This conclusion was deduced by the Court from considerations thus laid down by *Van Devanter* J., adopting the argument of the late Solicitor-General of the United States (4):—"Inter-State commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do

(1) 155 U.S., 648, at p. 655.
(2) 223 U.S., 1, at p. 49.
(3) 223 U.S., 1, at pp. 48-49.
(4) 223 U.S., 1, at p. 48.

anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of inter-State commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient." The argument adopted by the Court, as I condense it, went on to point out that the men and the things used in the act or operation of inter-State commerce were the agents or instruments of that commerce, and that their destruction during the act would stop, or their interruption would interrupt, that commerce. If they were not of the right kind or quality, inefficiency of some kind would ensue; and wrong or disadvantageous conditions of working would prevent or interrupt the act of commerce, or diminish its expedition, reliability, economy, or security. "Therefore," it was said (1), "Congress may legislate about the agents and instruments of inter-State commerce, and about the conditions under which those agents and instruments perform the work of inter-State commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the inter-State commerce act." The judgment must, of course, be read in relation to the character of the legislation discussed. The Statute there in question was on its face designed to secure greater care on the part of the common carriers and thereby greater safety to the employees in the operations of inter-State trade, and by such regulation of conduct to secure the safer, prompter, and more certain carriage of travellers and goods; and the ambit of the power was, of course, held to cover any such legislation. Had it been the intention of the Statute, in the endeavours of Congress to consult the public welfare, to impose restrictions on inter-State or foreign commerce to any extent which the legislature thought right in the circumstances, the same principles would have been applied. It is as well to quote two of the propositions of the Court bearing upon "the extent and nature of this power," which were considered "no longer open to dispute." They are as follows (2):—(3) "'To regulate,' in the sense intended" (and regulation is included in the term "to make laws"), "is to foster, protect, control and restrain, with

(1) 223 U.S., 1, at p. 48.

(2) 223 U.S., 1, at p. 47.

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appropriate regard for the welfare of those who are immediately concerned and of the public at large." It may be noted here that the power to regulate a matter does not *per se* include power to abolish, as it implies the continued existence of the matter to be regulated: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1). (6) "The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power." The Court was there speaking of the injuries for which the Statute offered a remedy, namely, those sustained by reason of the negligence of the employer in his transactions of trade, that is, by reason of some of the faults which, if unchecked, would affect commerce by rendering it "less expeditious, less reliable, less economical and less secure" (2). It will be a question whether the *Seamen's Compensation Act* purports primarily, as it is argued that it purports, to check any fault of such a tendency, or whether it deals merely with a "mere incident of commercial intercourse," as a means to social reform, or to any other end not authorized but apparent on its face.

A little earlier the Supreme Court had heard the case of *Southern Railway Co.* v. *United States* (3), and had decided that the Safety Appliances Acts of Congress were valid. *Van Devanter* J., through whom the Court again spoke, discussed the question whether the Statutes impeached were within the commerce power, "considering that they are not confined to vehicles used in moving inter-State traffic, but embrace vehicles used in moving intra-State traffic." The answer to that question, he said, depended on this other one: "Is there a real or substantial relation or connection between what is required by these Acts in respect of vehicles used in moving intra-State traffic, and the object which the Acts obviously are designed to attain, namely, the safety of inter-State commerce and of those who are employed in its movement?" Stating the question in an alternative form, he

(1) (1896) A.C., 348, at p. 363. (2) 223 U.S., 1, at p. 48.
(3) 222 U.S., 20.

answered it in both forms affirmatively, and it was held that the Statutes were within the commerce power. I mention this case because it is very explicit in requiring a real and substantial relation between the thing required or prohibited and the regulation of inter-State commerce, and of the actions of persons engaged therein, as the true test of the validity of the legislation.

With the exception of *Gibbons* v. *Ogden* (1), the American cases cited have all been decided since *The Railway Servants' Case* (2). Before leaving them I would point out their consistency one with another, and express the opinion that the reasoning I have quoted from them is sound and applicable to this case so far as it goes. I do not forget that we were not told of any decision of the Supreme Court of the United States upon any Statute which under the guise of the regulation of inter-State or foreign commerce purported to impose liabilities upon employers carrying it on irrespective of any conduct of theirs in relation to such commerce.

In *The Railway Servants' Case* (2) Association A had applied to the Registrar of the Commonwealth Court of Conciliation and Arbitration to be registered as an organization under the Act of 1904. The application was opposed by Association B, but was granted by the Registrar. Association B appealed to the President of that Court on the grounds (1) that Association A, being an association of State railway servants (N.S.W.), could not be registered under the Act, and (2) that the Act, in so far as it purported to include State railway servants within its provisions, was *ultra vires* and void. On a case stated by the President setting out these facts this Court held that the Act was invalid in so far as it purported to deal with the railway servants of a State.

In arriving at this conclusion the Court decided two questions, which were both fully argued. The first was whether the State-owned railways were exempt from federal control as instrumentalities of State government. This the Court answered in the affirmative. For reasons which are not material to the present case, it was held that the provision attacked could not be supported as a valid exercise of the powers conferred by sec.

(1) 9 Wheat., 1. (2) 4 C.L.R., 488.

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51 (XXXV.), so as to except State-owned railways from such immunity. The second contention, with which alone we are at present concerned, was that the enactment was a valid exercise of the power expressed in sec. 51 (I.), namely, the commerce power. It was pointed out that sec. 98 made it clear that State-owned railways were within the power, so far as they were instruments of inter-State commerce. The case of *Addyston Pipe and Steel Co.* v. *United States* (1) was referred to, as well as other American authorities cited in the argument in support of the enactment. The conclusion of the Court on this subject is summed up in the following words (2):—"We think that the power of the Commonwealth Parliament to regulate inter-State trade and commerce, although unlimited within its ambit, cannot as a mere matter of construction be held to have so wide an ambit as to embrace matters the effect of which upon that commerce is not direct, substantial, and proximate." Holding that such was not the effect of the enactment impeached, they considered that it was not covered by the power. (The words "direct," "substantial," and "proximate" are employed in the same connection in the judgment of the Supreme Court in *Hopkins* v. *United States* (3)). This Court said that it arrived at its conclusion upon the language of sec. 51 (I.), although it added that it was much fortified by the language of sub-sec. XXXII. of the same section, an express power difficult to reconcile with the implied existence under sec. 51 (I.) of a power which would undoubtedly, if the larger construction contended for were adopted, not only include that conferred by sub-sec. XXXII., but go far beyond it.

It will be seen that the decision in *The Railway Servants' Case* (4) is consistent equally with the American judgments which precede it and with those which follow it. Its reasoning, which need not be repeated now, is founded upon the former and supported by the latter decisions.

We arrive, then, at the position that the ambit of the commerce power does not embrace matters the effect of which, so far as inter-State commerce by land or sea is concerned, is not direct,

(1) 175 U.S., 211.
(2) 4 C.L.R., 488, at p. 545.
(3) 171 U.S., 578.
(4) 4 C.L.R., 488.

substantial, and proximate. Has the Act now under consideration such an effect on inter-State commerce? And further, supposing this question to be answered in the affirmative, and having due regard to the cases of *The King* v. *Barger* (1) and *Osborne* v. *The Commonwealth* (2), is the enactment on its face, when fairly construed, an attempt to deal with inter-State commerce, as delimited by the reasoning I have quoted, or is it an attempt at social reform, or any other "matter outside the ambit of the powers conferred"? If the three Australian cases I have mentioned are to remain authorities of this Court, the above seem to me to be the questions we are to deal with.

First, then, is the effect upon the operation of inter-State commerce direct, substantial, and proximate? This seems to me to depend upon the question whether it regulates that commerce so as really and substantially "to foster, protect, control," or "restrain" it "with appropriate regard for the welfare of those who are immediately concerned and of the public at large." I think we are not concerned in this case with the last eighteen words. At any rate, my conclusion is the same, whether they are material or not.

The argument in support of the enactment contends that its effect is, in the sense of these terms, to foster and protect the operations of commerce between the States.

The first sub-section of sec. 5 purports to render the employer liable to pay compensation if personal injury by accident arising out of and in the course of his employment is caused to a seaman. But by sub-sec. 2 (*c*) compensation, where the accident is caused by the serious and wilful misconduct of the seaman, is limited to cases in which the accident results in death or serious and permanent disablement. In the absence of such misconduct the liability purports to extend to all injuries, whether fatal or disabling or not, caused by any accident, and apart from any act or omission of the shipowner, to a seaman employed by him, so long as the accident has arisen out of and in the course of his employment.

In the case of injury by accident arising from the negligence of the employer, whether that negligence be his own or vicarious

(1) 6 C.L.R., 41. (2) 12 C.L.R., 321.

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(the negligence of the fellow-employee being imputed to the employer), *The Employers' Liability Cases* (1) in the United States afford reasons which I accept for the validity of the legislation under the inter-State commerce power. But the negligence of the employer or his agent cannot fail to affect the operation of commerce really and substantially if it is the *cause* of the injury to the employee. It is in respect of his conduct of that operation that the employer is guilty of a fault of commission or omission amounting to negligence and causing the injury. That is conduct inseparable from the act of commerce. That the Statute with which the Supreme Court of the United States was dealing put an end, in respect of inter-State trade, to the exemption of the employer from liability for injury caused by the negligence of his servant, where the servant was a fellow-employee of the servant injured, does not deprive the Statute of this intimate connection and effect. It left the act or default the basis of the liability when it applied to it the maxim *Respondeat superior*. For the exemption had been in respect of causal conduct constituting negligence, and the new liability was in respect of such causal conduct. It is not pretended that the connection cannot be afforded by any other cause than negligence, but we have not had cited to us from among the Statutes of the Congress of the United States any legislation by which liability is asserted against a person employing others in inter-State commerce except in respect of his act or default, whether negligence is made an essential or not. I do not think there is any such legislation under a power virtually identical with that conferred by sec. 51 (I.).

It seems that the question must be whether inter-State commerce can truly be said to be directly affected, so that a particular person is chargeable, unless there has been some act or default on the part of that person which itself directly, substantially and proximately affects such commerce. I do not think the affirmative answer can be maintained. It is the commerce itself that is to be regulated; it is an operation the statutory regulation of which consists of the command or prohibition of acts or omission directly affecting it; and unless the discernible

(1) 207 U.S., 463.

purpose of the legislation is such regulation, it is beyond the power, no matter how it describes itself.

Then what act or default is there on the part of the shipowner in the cases comprised in sec. 5, so that a connection by way of cause and effect may be established between his act or default and the operation of commerce? What has he done, or what has he failed to do, so that a liability may be laid upon him? This is not a case of legislation by a sovereign Parliament, but one of legislation which, in order to have life, must be within the power granted. If the legislation is to be a regulation of commerce, it must be in aid or hindrance of that commerce, or its agents or instruments, human or otherwise, in the prosecution of such commerce, and any liability which it institutes in respect of those persons or things must be in relation to the help or hindrance which they give to commerce. Legislation apart from acts or defaults in the employment of the instrumentalities of commerce does not deal with the help or hindrance of commerce. Sec. 5 seeks to impose upon the shipowner (the employer) a liability independent of help or hindrance to commerce. I take it, therefore, that it is not a regulation of inter-State commerce, and is outside the power.

I do not rest my judgment wholly on this ground, because I think it incumbent on me to give my opinion as to the other. This is whether the enactment, supposing it to be apparently such as sec. 51 (I.) of the Constitution enables Parliament to make, discloses on its face that it really and in substance is "an attempt to deal with a matter outside the ambit of the powers conferred." The motive with which Parliament acted is wholly irrelevant in this Court, but the object which its action discloses is vitally relevant.

Mr. *Knox* argued that sec. 5 in reality disclosed itself as a measure of social industrial reform and not of inter-State trade and commerce. If it did so disclose itself, it was an exercise of a police power not intrusted to the Commonwealth. In *United States* v. *E. C. Knight Co.* (1) *Fuller* C.J. said:—"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public

(1) 156 U.S., 1, at p. 11.

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morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

The power spoken of in that passage is generally called the "police power." As in the United States, so in Australia, it is not surrendered by the States to the general government, nor directly restrained by the Constitution, and is essentially exclusive. But in respect of the sea the police power of the States extends only to the territorial waters, commonly called "the three mile limit." Beyond that limit legislation is in the hands of the sovereign Imperial Parliament only, save so far as it is affected by the *Constitution Act*, covering sec. V. That provision makes "the laws of the Commonwealth" applicable to "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 section therefore gives force to Commonwealth laws in respect of inter-State voyages of Australian-owned ships, even when they are outside territorial limits in the passage from one Australian port to another. But the phrase "the laws of the Commonwealth" necessarily indicates only the valid federal laws. It enlarges the area of their operation if they are first validly enacted. It does not affect the limits of the exercise of the powers possessed by the State Parliament and the Imperial Parliament respectively. As the learned Chief Justice has observed, a federal law must be ascertained to be valid in its relation to intra-territorial matters before resort can be had to covering sec. V. of the *Constitution Act* for the extension of its applicability. That section may therefore be dismissed from present consideration. If the *Seamen's Compensation Act* is valid the covering section applies. If it is invalid the covering section does not affect matters. Its validity depends on its maintenance as an exercise of the inter-State commerce power, and that is primarily to be determined by the extent and exercise of the federal power itself.

As was said by *Fuller* C.J. in the judgment just quoted (1): "The

(1) 156 U.S., 1, at p. 13.

regulation of commerce applies to the subjects of commerce and not to matters of internal police." Things which are not part of inter-State trade or commerce are not the subject of such regulation. An enactment like the *Seamen's Compensation Act* passed by the Imperial Parliament, whether by itself or as part of a wide scheme of compensation for accidents to industrial employees (see the *Workmen's Compensation Act* of 1906), is obviously a measure of social or industrial reform. If the State Parliament passed such an enactment separately or as part of a general measure to the extent of its territorial jurisdiction, it would undoubtedly be spoken of and classed under the same head of legislation. In neither case would or could it be called a regulation of commerce. The meeting with an accident not caused by the act or default of some other person in his conduct of commerce is not commerce, though it may be in an indirect sense incident to it. It must always be remembered, as this Court said in *The King* v. *Barger* (1), that in determining whether it is or is not within the power of a legislature to enact a particular law, regard must be had to its substance rather than to its literal form. In pursuance of this principle the Privy Council, in the case of *Attorney-General for Quebec* v. *Queen Insurance Co.* (2) (a case already mentioned), held that an Act which purported to be a Licensing Act, was not such an Act in reality and substance, but was a Stamp Act, and was therefore, as a measure of indirect taxation, *ultra vires* of the provincial legislature.

The fact that the enactment is limited so far as its applicability under sec. 4 (1) (*c*) is concerned, only shows that its operation is confined to a certain part of the domain to which it belongs, whether that domain be inter-State commerce or social or industrial reform.

I do not find anything in sec. 5 of this Act which is referable to any authority but that which is called the police power. It deals with the subject of compensation for accidents, limiting its provisions to a small portion of the domain of that subject. It is true that the limitation is caused by the fact that the Commonwealth, having no legislative power in respect of the subject generally, applies itself to the regulation of that portion of it

(1) 6 C.L.R., 41. (2) 3 App. Cas., 1090.

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which concerns seamen in the inter-State trade. But where the Commonwealth has no power to deal with an entire subject matter, the fact that it only deals with a portion of it does not of itself help to render the legislation valid. Indeed, it is irrelevant to this question. There must be some power, specific or necessarily implied, which takes that portion within the competence of the Commonwealth. I cannot find, then, that compensation for accidents in the inter-State marine, to be awarded independently of any act or omission of the shipowner, is incidental to the regulation of commerce, though it may affect it remotely and indirectly. To make the shipowner answerable for occurrences with which neither he nor any agent of his has had anything to do, is no doubt legislation relevant to the subject of social or industrial reform, but it cannot be said to be valid as an attempt to regulate inter-State commerce. If it were so, there is scarcely any part of the functions of social legislation which could not be claimed as open to federal control. The argument for its validity rests upon methods which are not the true principles of construction. Its success would lead to the expansion beyond their assigned limits of this and other powers of the Constitution.

I am of opinion that the appeal ought to be allowed.

ISAACS J. The single question is whether the Commonwealth Parliament has power to enact sub-sec. 1 of sec. 5 of the *Seamen's Compensation Act* 1911. It has always been an accepted thesis of the Constitution that the Commonwealth is a political organism of enumerated powers, and to establish the lawfulness of any of its legislative enactments, if questioned, some one at least of those powers must be indicated as the authority to make it. The only relevant power is the trade and commerce power as contained in sec. 51 (I.) and sec. 98.

A passing reference was made to the insurance power, but the provision for compensation now under consideration is not what is ordinarily understood by "insurance," though in a sense employees are insured because the injury entitling them to compensation is independent of negligence or other wrongful conduct on the part of employers. The distinction was observed

upon by Lord *Lindley* in *Fenton* v. *Thorley & Co. Ltd.* (1), where he said: I cannot agree . . . that this Statute ought to be construed as if it were a policy of insurance against accidents."

The trade and commerce power is expressly declared by sec. 98 to *extend* to "navigation and shipping," which are limited, of course, to inter-State or foreign operations. That in itself is, in my opinion, an ample basis to support the legislation. As trade and commerce with other countries, and the greater part of mercantile inter-State trade, would in itself necessarily involve carriage by means of ships, it is difficult to see how the declaration of extension to "navigation and shipping" has any substantial meaning unless the subject matter of "navigation and shipping" so far as concerns foreign and inter-State traffic is to be included in the "trade and commerce" controllable by the Commonwealth.

It is necessary to see precisely what the challenged enactment provides. It says that if a seaman sustains personal injury by accident "arising out of and in the course of his employment" the employer shall compensate to the extent limited by the Act. Two circumstances, among others, are essential. The accident must arise both (1) out of the employment and (2) in the course of the employment. The case of *Kitchenham* v. *Owners of S.S. Johannesburg* (2) makes this position clear. And in all cases the employment must, by sec. 4, be while the ship is in fact engaged in trade and commerce with other countries or among the States. The principle laid down by the House of Lords and by *Fletcher Moulton* L.J. in the Court of Appeal is this: that to come within the section the seaman's accident must be "due to a danger incidental to his service in that ship." If, says the Lord Justice (3), it is "due to a danger to which he is exposed as a member of the public, and not as one of the crew of the ship," it "does not 'arise out of his employment,'" and he cannot obtain compensation even though, as in that case, the accident arose "in the course of his employment." In other words, the subject matter of the legislation is confined to what is embraced within the ordinary understanding of the subject of shipping. Why is

(1) (1903) A.C., 443, at p. 454. (2) (1911) 1 K.B., 523; (1911) A.C., 417.
(3) (1911) 1 K.B., 523, at p. 526.

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not that within the phrase "navigation and shipping" in sec. 98? The phrase is a well known and comprehensive phrase, as for instance in *Halsbury's Laws of England*, vol. XXVI., at p. 10, par. 1, and the heading of the article itself "Shipping and Navigation."

The test of the contents of the words "navigation" and "shipping" is what they ordinarily meant in the systems of law in Australia at the time of federation. That test has several times been applied by this Court, and has the concurrence of the Privy Council in a similar case (*In re Marriage Legislation in Canada* (1)). The English Merchant Shipping Acts which applied here and the local Statutes on navigation and shipping ranged over an area which, in principle, includes the matters said to be outside the ambit of the power.

The English *Merchant Shipping Act* of 1894 (following the Act of 1854) made provisions relating to the form, terms and conditions of the engagement of the crew (secs. 114 and following), their discharge (sec. 127), payment of wages (sec. 131, &c.), rescission of contract (sec. 168), protection and safeguarding of property of deceased seamen (sec. 169), relief and maintenance of distressed seamen (sec. 190, &c.), provisions, health and accommodation (sec. 198, &c.), protection of seamen from imposition (sec. 212), discipline (sec. 220, &c.), obligation of the owner to crew with respect to seaworthiness of ship (sec. 458), and other matters which concern the inter-relations of shipowners and crew.

By sec. 735 of the Act of 1894 (see also sec. 547 of the Act of 1854) a colonial legislature was empowered, subject to the conditions therein specified, to alter the provisions of the Act (except Part III. as to emigrant ships) relating to ships registered in the Possession. And by the next section (736) a colonial legislature could "regulate the coasting trade of that British Possession," subject to named conditions. I cannot doubt that secs. 735 and 736 extend to inter-relations and mutual obligations of shipowners and crew. Nor can I doubt that the power granted by the Constitution to legislate for the peace, order and good government of the Commonwealth with respect of trade and commerce

(1) (1912) A.C., 880, at p. 887.

with foreign nations and among the States, expressly declared to extend to navigation and shipping, is equally wide and extends to the same class of matters.

In New South Wales the *Seamen's Laws Consolidation Act of* 1864 made provision on subjects similar to those above enumerated relative to the English Act. In Queensland there is still in force (amended) the *Merchant Service Seamen's Act of* 1849, passed by the legislature of New South Wales, and making provisions of a similar nature. It is unnecessary to go further with examples of colonial legislation, some of which, though not specifically styled "Shipping Acts" since they were limited to some branch or branches of shipping, were plainly referable to shipping as ordinarily spoken of, and would be so understood.

There is no doubt the power to deal with the inter-State and foreign commerce of this country, situated as it is politically and commercially, and sharing the inheritance of an historic past upon the sea, would be fundamentally defective if the power contained no authority to encourage the vocation of seamen, in relation to that commerce, to stipulate for their protection from the risks of their hazardous calling, and to regulate their remuneration, their housing, their care in sickness, safeguarding them from perils of machinery, and, where these perils are unavoidable, providing a substitute for protection in case of accident. Where care is possible both duty and interest will impel the employer to observe it; and where risk is inevitable it is obviously a question directly affecting the subject of trade and commerce, if direct relation is necessary, and so is for the consideration of Parliament. Whether the trade and commerce are better carried on by sharing the risks, or compelling the seamen to bear them alone, is a matter of legislative discretion.

A sailor, as a necessary part of the equipment, is at least as much within the regulative power of Parliament as the vessel itself, and care for him as well as for the ship is a most material element in providing for the safety and convenience of all on board. He is also a person who, as a servant, is carried by the shipowners and required to obey orders which frequently involve considerable perils of various kinds and degrees, and it is inconceivable to me that the relations of master and servant either

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from the standpoint of discipline, on the one hand, or personal protection, on the other, can be excluded from the subject we are considering. And once the subject matter is within the ambit of power, and is free from any limitations or prohibitions found in the Constitution, the way in which it is dealt with is not for a Court to consider — that is political, and appertains to the legislature.

Moreover, unless the subject matter of this Statute be within the ambit of the Commonwealth power, it is not difficult to forsee a conflict between Commonwealth regulation of navigation and shipping and State provision for compensation for accidents, and other mutual rights and obligations of the marine service.

Sec. 107 of the Constitution was relied on as "reserving" this power to the States in the sense of excluding the Commonwealth. Sec. 107 is often referred to as having this excluding effect. But that section has no such effect. Of itself it "reserves" nothing. The word "reserve" is nowhere found. The section merely provides that unless any pre-existing State parliamentary power is either (1) *exclusively* vested in the Commonwealth Parliament (as in sec. 52), or (2) *withdrawn* from the State Parliament (as in sec. 115), the power still continues. It may continue concurrently, subject by force of sec. 109 to Commonwealth paramountcy, as in the case of the subject of bills of exchange, or marriage and divorce. But the point is that sec. 107 has nothing whatever to do with cutting down Commonwealth powers. Those powers find their creation and delimitation elsewhere. If elsewhere they are found to exist and be exclusive, sec. 107 does not operate to preserve them to the State; if they are not found elsewhere or are not exclusive, then unless withdrawn from the State without vesting them in the Commonwealth sec. 107 declares that the State still possesses them. I therefore consider sec. 107 of no effect in determining the extent of the Commonwealth power. The exclusive existence of the relevant power in the State Parliament must, if a fact, be due to the pure want of power in the Commonwealth, and would confuse the regulation of the subject of "Navigation and Shipping."

The complication, however, does not end there. No State law can claim operation under covering sec. V. of the *Constitution*

Act, and a gap may exist which no Australian legislature can fill, except to the extent that secs. 735 and 736 of the *Merchant Shipping Act* 1894 permit it, and even then with possible divergencies between the State enactments. The disconformity of purpose and provision would seriously embarrass the industry.

What I have so far said is sufficient to support the Act.

But the argument took on even wider scope. Apart from sec. 98, the words "Trade and commerce with other countries and among the States" are, it was urged, comprehensive enough in themselves to enable Parliament to pass the enactment. It is plain to me that *The Federated Railway Servants' Case* (1), if the language of the judgment is to guide us—and nothing else can,—expressly by the words "as at present advised" reserves this question for future final decision.

In America the Supreme Court has recently considered the question, and adopted and applied a test which, if correct, would certainly support the contention. I refer to the sixth proposition in *The Second Employers' Liability Cases* (2), which is in these terms:—"The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power." By "real or substantial relation to such commerce" I understand such a relation as really or substantially affects the commerce itself, and so that if the matter in question were not susceptible of control, the commerce itself would to that extent be left uncontrollable.

Now, it is evident to me that to leave outside the sphere of control, with respect to inter-State and foreign trade and commerce, all but the mere act of supply of commodity or service would practically nullify the power. Limiting my observations to present purposes, the class of vehicle to be employed, the appliances necessary for safety, the classes of individuals to be employed either in relation to race, language, age or sex, and perhaps to some extent the contractual rights and obligations of the carrier and the public, would all be outside the power. But

(1) 4 C.L.R., 488, at p. 545. (2) 223 U.S., 1, at p. 47.

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if not, then it is not easy to see why any modification of common law or Statute law affecting the relations of employer and employee, while engaged in co-operating in the trade and commerce, so as to conduce really or substantially to affect the service rendered to passengers or to shippers, is not part of the necessary control of the subject. If, for instance, a physical bar habitually stood on a ship between the sailors and the passengers so as to prevent timely aid in a moment of danger, no one would dispute the right of the Commonwealth Parliament to require its removal. And if the State law—whether common law or Statute law—so restricted a sailor's right to compensation in case of accident as to morally but most effectively act upon human nature by deterring him from rendering prompt and ready aid, it would, as I conceive, be no less an obstacle to the desired conduct of the trade and commerce placed under federal control. And if a physical obstacle can be removed, an incorporeal obstacle operating at times even more effectually on human nature may also be removed, and facilities may with equal authority be created. Mr. *Knox*, while not wholly accepting and still not actually disputing the accuracy of the American cases, sought to distinguish them by saying that they drew the line of delimitation at negligence. Of course, since the cases sustain concrete legislation which makes negligence the ground of liability, it could not be disputed that so much was within the power of Congress. But I can find no statement of principle that negligence is the limit of legislative power. The inference I would draw from such cases as *Seaboard Air Line* v. *Horton* (1) and *Illinois Central Railroad Co.* v. *Behrens* (2) is to the contrary. The power of the Commonwealth Parliament is to regulate a subject, and negligence is not that subject. Navigation and shipping in relation to inter-State and foreign commerce is part of the subject. If so, it is impossible to exclude the authority to legislate for compensation merely because it is irrespective of negligence. For negligence full damages are recoverable. For accidental injury the damages are limited—that is, the loss is shared. Whether this is prudential or advisable is a matter of parliamentary discretion, but the root of the matter is now an accepted economic position, and is this:

(1) 233 U.S., 492.

(2) 233 U.S., 473.

The relations of employers and employees in the actual conduct of inter-State and foreign commerce are the relations of essential, connected and closely related parts of the same mechanism.

Modern ideas recognize this fact more and more; and it is a recognized fact that the Employers Liability Acts, which include the Workmen's Compensation Acts, are, after all, only modifications of the common law as to the employer's liability to his servant for injury arising out of the risks incidental to the employment.

As far back as 1868, in *Wilson* v. *Merry* (1), the change proceeding in the mode of conducting private enterprises for the supply of public requirements was judicially recognized. Lord *Colonsay*, in speaking of the common law as to common employment, and the terms "fellow-workman" and "collaborateur," said (2):—"They are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organization that now exist." "We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge, for that is of the essence of such organizations."

Between the date of *Wilson* v. *Merry* and the time the Constitution was passed, the idea of industrial co-operation was even more distinctly appreciated. Employers Liability Acts, similar to the English Act of 1880 abolishing the doctrine of common employment as a defence, had found legislative expression in Australia.

In view of the argument, two observations are important. First, this Act prescribed no new primary duty upon the employer, but made the employer liable to his servant, although he, the master, was not personally guilty of any negligence whatever, and simply because, in the course of the master's business, another servant was negligent. Next, it did more than merely leave the servant who was injured in the position of a stranger to the business; it allowed him the same ground of

(1) L.R. 1 H.L. (Sc.), 326.

(2) L.R. 1 H.L. (Sc.), 326, at p. 345.

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complaint as a stranger, although he had become one of the "organization" or "force employed," as Lord *Colonsay* said, "to carry on the business." The step from that to the *Workmen's Compensation Act* of 1897 was therefore not so violent in fact as it has been represented. The personal negligence of the employer had already ceased to be material; the new Act merely abolished the essentiality of another person's negligence, which was legally though not actually imputable to the employer. The legal doctrine of imputed negligence—really a fiction—was thus cleared away to make room for the advancing recognition of the accepted solid economic fact. Thus the Act of 1897 simply marked another stage in the existing line of natural development. The scope and object of this Act was, in this view, stated by Lord *James of Hereford* in *Johnson* v. *Marshall Sons & Co. Ltd.* (1). His Lordship said:—"The main object was to entitle a workman who sustained injury whilst engaged in certain employments to recover compensation from the employer, although he (the employer) was guilty of no default. The intention was to make 'the business' bear the burthen of the accidents that arose in course of the employment, and relief from this liability is not found even if the injured workman be guilty of negligence. The doctrine of contributory negligence was superseded by the Act."

The underlying notion involved in that judgment is that the enterprise is in actual essence a co-operative service rendered to the public. The *Seamen's Compensation Act* 1911 is based upon that idea, and it makes the master bear part of the burden of an accident incidental to inter-State or foreign commerce, even where there is no negligence, and makes the workman bear the other part even if there was, by not getting full damages.

Tested from every standpoint, I am of opinion this Act is valid, and the appeal should be dismissed.

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

GAVAN DUFFY J. The question to be determined in this case is whether the provisions of the *Seamen's Compensation Act* 1911 are within the powers of the Commonwealth Parliament. It was urged by the appellants that sec. 51 (I.) of the Constitution

(1) (1906) A.C., 409, at p. 412.

authorizes only such legislation as prescribes, prohibits or regulates acts which are themselves part of the transactions constituting commerce, or, in the alternative, acts which promote, impede or otherwise directly affect commerce, and it was said that sec. 5 of the *Seamen's Compensation Act* is *ultra vires* because it does more than this. A passage from the judgment in *The Railway Servants' Case* (1) was cited as a direct authority in appellants' favour, in that it states that sec. 51 (I.) does not enable Parliament to deal with the general conditions of employment of employees engaged in inter-State commerce, and implies that sec. 98, so far as State-owned railways are concerned, does not change the nature of the power conferred by sec. 51 (I.), but only declares that that power shall be applicable to trade and commerce conducted by means of such railways. We do not propose to discuss the meaning or the authority of the passage relied on, and we think the validity of the *Seamen's Compensation Act* can be established without doing so.

Let us assume that sec. 51 (I.) has the limited meaning already suggested, what is then the meaning of the provision as to navigation and shipping contained in sec. 98? It was argued that it should be read as merely enabling the legislature to deal with trade and commerce when conducted by means of ships. But such a power is already necessarily implied in the language of sec. 51 (I.), and in any case the language of sec. 98 is inappropriate to express it. In our opinion sec. 98 has a quite different operation. It removes the very doubt that is raised in the present case. It says in effect that the power to make laws with respect to trade and commerce shall include a power to make laws with respect to navigation and shipping as ancillary to such trade and commerce. It authorizes Parliament to make laws with respect to shipping and the conduct and management of ships as instrumentalities of trade and commerce, and to regulate the relations and reciprocal rights and obligations of those conducting the navigation of ships in the course of such commerce both among themselves and in relation to their employers on whose behalf the navigation is conducted. Sec. 5 of the *Seamen's*

(1) 4 C.L.R., 488.

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Compensation Act does no more than this, and is therefore *intra vires.*

POWERS J. In this case the plaintiff's husband lost his life by an accident arising out of and in the course of his employment without any serious or wilful default on his part, and, so far as is known, without any negligence on his part. In an action brought against the defendant company under the *Seamen's Compensation Act* 1911 (Commonwealth), a verdict was given in favour of the plaintiff for £500. The defendant company appealed to this Court solely on the ground that "the *Seamen's Compensation Act* 1911 is invalid as the same is not within the powers conferred upon the Federal Parliament under the *Commonwealth of Australia Constitution Act.*"

The States of the Commonwealth, it is admitted, cannot pass such a law in respect of employees engaged in inter-State commerce or shipping. If the contention of the appellants is correct, sailors engaged in Commonwealth inter-State trade cannot get the protection afforded to sailors on British ships elsewhere, in case of accidents however arising, and to employees on land in Great Britain and Ireland and in Australia, unless the Imperial Parliament sees fit to specially legislate for the benefit of sailors engaged in Commonwealth inter-State trade, or until the Constitution is amended. Even if that is so, it cannot, of course, affect the decision in this case.

Mr. *Knox*, I understand, based his contentions principally on three grounds:—1st.—The Act was "social legislation" amounting to compulsory insurance, and not a law with respect to inter-State commerce, or navigation and shipping, in the limited sense in which those words were necessarily used in sec. 98 of the Constitution. 2nd.—The Commonwealth Parliament could not, under the powers given by sec. 51 (I.) or sec. 98, impose a liability on owners of vessels engaged in inter-State commerce or shipping to pay compensation for accidents unless caused through some negligence of the employer or breach of some duty legally imposed upon him to make commerce safe or efficient. 3rd.—Sub-sec. 5 (2) (*c*) clearly showed that Parliament intended to make owners of vessels liable to pay compensation, even if the accident

was caused by wilful and serious misconduct of the employee, and that could not be done by the Commonwealth Parliament in respect of inter-State commerce or shipping or navigation under sec. 51 (I.) or sec. 98.

The question raised has never been decided by this Court, although it was raised in *Clarke* v. *Union Steamship Co. of New Zealand Ltd.* (1), heard at the last sittings of this Court in Sydney. It was not necessary in that case to decide the question. Counsel for the appellants, however, relied on words in the judgment of the Court in *The Railway Servants' Case* (2) in support of his argument that the effect of legislation on inter-State commerce under sec. 51 (I.) or sec. 98, must be direct, substantial and proximate. The case referred to decided "that the *Commonwealth Conciliation and Arbitration Act* 1904, so far as it purports to affect State railways, is *ultra vires* and void, and, consequently, that an organization consisting solely of employees on State railways was not entitled to be registered under that Act": See head-note (3). I do not consider it necessary to decide in this case whether the opinion expressed by the Court in that case that "general conditions of employment" are not of such a character as to be included within the power of the Commonwealth Parliament to regulate inter-State trade and commerce—the effect of them upon that commerce not being direct, substantial and proximate—is sound.

In considering the question of the constitutionality of the Statute in question it is recognized that every authority given by the Constitution to legislate on specified subjects includes matters necessary to make the legislation authorized effective. It includes matters "incidental." See sub-sec. XXXIX. of sec. 51. In this connection, I adopt the words of *Marshall* C.J. in *M'Culloch* v. *Maryland* (4):—"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The question can only be answered by considering the effect of

(1) 18 C.L.R., 142.
(2) 4 C.L.R., 488.
(3) 4 C.L.R., 488, at p. 489.
(4) 4 Wheat., 316, at p. 421.

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the words used in the Constitution, by recognizing the object for which the power was conferred, and by interpreting the Constitution in the light of the meaning given to the words used when the Constitution was passed. As my brother *Isaacs* put it (1), "the test of the contents of the words 'navigation and shipping' is what they ordinarily meant in the systems of law in Australia at the time of federation."

The Constitution was passed by the Imperial Parliament, and, when the words "shipping" and "navigation" were expressly added in sec. 98, I take it that it must have been intended to include at least all that could be properly done under "shipping" and "navigation" laws in England at the time, so far as shipping and navigation used in connection with or as part of inter-State commerce are concerned. The power was conferred on the Commonwealth Parliament, and on the Commonwealth Parliament only, to deal with inter-State commerce, extending to shipping and navigation. Sec. 51 (I.) reads:—"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to (I.) Trade and commerce with other countries, and among the States." That admittedly conferred on the Commonwealth Parliament the power to legislate as to inter-State commerce, and, as shipping is necessary to carry it on, it necessarily included the right to legislate to some extent at least as to ships engaged in inter-State commerce.

It is, however, reasonable to suppose that the Imperial Parliament wished to avoid the difficulties that had arisen in the United States by a limitation of the power to deal with shipping and navigation under the power "to regulate inter-State commerce," and for that purpose, after passing sec. 51 (I.), added sec. 98, which reads:—"The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State."

It was contended on behalf of the appellants that the words "extends to navigation and shipping" were surplusage—that the Imperial Parliament had used the words quite unnecessarily, and that no additional power was intended to be given, or was given,

(1) *Ante*, p. 328.

to the Commonwealth Parliament by the use of the words. That contention I do not adopt.

It was contended on behalf of the respondent (plaintiff in the Court below) that the words in sec. 98 "navigation and shipping" were to be read as if a new placitum—"(XL.) Navigation and shipping"—had been added to sec. 51. That is, that power had been conferred on the Commonwealth Parliament to deal with "navigation and shipping," as with "trade marks," "aliens," &c.; and State rights to deal with navigation and shipping had been taken away. I do not adopt that contention either, nor is it necessary for the respondent's case, because this is not a case in which it is a question of Commonwealth or State rights: it is solely a question of Commonwealth power, or no power at all, to deal with the subject matter in question.

I agree with the contention put forward by Mr. *Leverrier*, counsel for the Commonwealth, namely, that the words "navigation and shipping" were used in sec. 98 to enable the Commonwealth Parliament to do all that could be done by the grant of the power to deal with navigation and shipping in the widest sense, so far as it was part of or used in connection with inter-State commerce. This view is confirmed by a consideration of the other words added to sec. 98, namely, "and to railways the property of any State." These words were added to extend the power given by sec. 51 (I.), namely, by extending it to railways which were *State instrumentalities.*

In the same way the words "extends to navigation and shipping" were used to extend the plenary power of the Commonwealth to pass laws in respect of all matters recognized as matters properly dealt with by navigation or shipping laws at that time where the navigation or shipping was used in connection with or as part of inter-State commerce. I cannot accept the contention that the British Parliament added these words in sec. 98 without any intention to add to a power previously conferred by sec. 51 (I.).

Holding, as I do, that sec. 51 (I.) and sec. 98 gave to the Commonwealth Parliament the fullest power to deal with inter-State commerce and with shipping and navigation so far as it is part of or used in connection with inter-State commerce, the

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question still arises: Does such a power enable the Commonwealth Parliament to pass the *Seamen's Compensation Act*?

The first objection raised was that it was "social legislation," and not directly connected with "shipping" or "navigation." I agree with the reasons given by my brother *Isaacs* why the objection fails.

Whether it is social legislation or not, it is valid if within the authority given by sec. 51 (I.), 51 (XXXIX.), and sec. 98. A perusal of the Merchant Shipping Acts (Imperial) will show that from 1854 to the present day "social legislation" has been included in shipping legislation, because of the protection it has been deemed necessary, for many reasons, to give to sailors. The Merchant Shipping Act in force at the date the Constitution was passed consists largely of social legislation, including provisions for health, accommodation, provisions, space for crew, form, period and conditions of agreement, load-line, life-saving appliances, and many other provisions undoubtedly social legislation. Such legislation was recognized as part of "shipping" law at the time the Constitution was passed, and the word "shipping" in the Constitution, when used in sec. 98, must, I think, be taken to authorize similar legislation in connection with shipping and navigation, as part of inter-State commerce.

The further objection was raised that even if social legislation could be passed the Commonwealth Parliament had no power to pass sec. 5, imposing a liability on an employer apart from some neglect or breach of some duty imposed by common or Statute law on the employer to make commerce safe or efficient. Many American cases were quoted in support of the appellants' contention; but I agree with the learned Chief Justice that those cases do not greatly assist in deciding the real question at issue here, and that "safety" or "efficiency" of commerce or "negligence of owners" are not the true tests of the constitutionality of the Act. The Statutes in question in the American cases differ from the Statute in question here, and the words of the American Constitution granting power only to regulate commerce differ materially from the words used in our own Constitution in sec. 51 (I.) and sec. 98.

Further, I hold that the legislation in question comes within

the sixth proposition laid down in *The Second Employers' Liability Cases* (1) quoted by my learned colleagues :—"The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."

If safety and efficiency had to be accepted as a test, I hold that the legislation in question is incidental to shipping, and does tend to efficiency and safety of those engaged in inter-State shipping. The social legislation accepted as part of the shipping law and incidental to shipping has done away with " coffin " ships and vile accommodation for sailors on ships. The liability to pay compensation in any event has caused shipowners to provide watertight compartments in large vessels. The liability to pay compensation in any event prevents the employment of cheap labor and careless employees.

Such a provision as the one in question will cause efficient men to engage more readily in Commonwealth inter-State commerce, and the omission to pay compensation in one branch of the service would cause men to prefer a service where they know that, if they lose their lives by accident arising out of and in the course of their employment, their widows will not have to prove that death was not caused through their own neglect, or wilful and serious default.

The objection is also answered by the *Merchant Shipping Act*, if the power to pass similar legislation has been conferred on the Commonwealth. The Imperial Parliament in the Shipping Act of 1906 passed a clause imposing a liability on employers for injury to seamen, however arising, with an exemption similar to the one in the *Seamen's Compensation Act*. I refer to sec. 34 of the *Merchant Shipping Act* 1906. In that section the Imperial Parliament enacted that, " If the master of, or a seaman belonging to, a ship receives any hurt or injury in the service of the ship, or suffers from any illness," the expense of surgical or medical advice and attendance, medicine, expense of maintenance until

(1) 223 U.S., 1, at p. 47.

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cure or death, or return to a proper return port, the expense of conveyance to port, and in case of death the expense of burial, shall be defrayed by the owner of the ship.

That provision is made however the accident arises, exactly as has been done in the Commonwealth *Seamen's Compensation Act*. The extent of the liability incurred under the circumstances is solely a question for Parliament, not for this Court. Sec. 34 exempts the owner of a vessel from liability in the case of illness if it is due to the sailor's own wilful act or default or to his own misbehaviour. In case of hurt or injury, however arising, and for illness not caused by the wilful act or default or misbehaviour of the sailor, the owner is still liable whether the owner has been negligent or not. That liability has been imposed in the *Merchant Shipping Act*, and the liability imposed on the owner in the Commonwealth *Seamen's Compensation Act* can, in my opinion, be imposed under the power contained in secs. 51 (I.) and 98 of the Constitution when the accident arises out of and in the course of a sailor's employment on a vessel engaged in inter-State commerce.

I hold that the *Seamen's Compensation Act* 1911 (No. 13 of 1911) is *intra vires*, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *F. O. Ebsworth.*

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

Solicitor, for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.