[HIGH COURT OF AUSTRALIA.]

BRUHN . . . . . APPELLANT;
PLAINTIFF,

AND

AUSTRALIAN STEAMSHIPS PROPRIETARY LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1922.

MELBOURNE, *Nov.* 22.

SYDNEY, *Dec.* 12.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Ship—Seaman incapacitated by accident—Left ashore at port other than home port—Wages—Period for which payable—Navigation Act 1912-1920 (*No.* 4 *of* 1913—*No.* 1 *of* 1921), *secs.* 50, 85, 127, 130, 132.*

Held, that the wages to which, under sec. 132 (1) (*b*) of the *Navigation Act* 1912-1920, a seaman is entitled are wages for the period beginning on the date at which he was left on shore and ending either on his arrival at his home port or on the happening of one of the events mentioned in the proviso.

Decision of the Supreme Court of Victoria: *Bruhn* v. *Australian Steamships Proprietary Ltd.*, (1922) V.L.R., 755; 44 A.L.T., 61, reversed.

* Sec. 132 of the *Navigation Act* 1912-1920 provides that "(1.) Where a seaman . . . belonging to a ship registered in Australia is left on shore at any place in Australia, in any manner authorized by law, by reason of illness or accident in the service of the ship incapacitating him from following his duty, he shall be entitled—(*a*) if landed at his home port, as specified in the agreement, to receive wages, at the rate fixed by his agreement, up to the expiration of one week after the date of his recovery, as certified by his medical attendant or by a medical inspector of seamen: Provided that, in cases where his engagement expires within one month from the date he was left on shore, the time for which he shall be so entitled to be paid wages shall not exceed a period of one month, and in other cases, it shall not exceed a period of three months, from the date he was left on shore; or (*b*) if landed at a port other than his home port, to receive, after his recovery, certified as provided in the last preceding paragraph, a free passage to his home port, with wages, at the rate fixed by his agreement, until arrival at that port: Provided that if, after recovery, the seaman . . . rejoins his ship, or takes other employment, or is offered and refuses employment on some other vessel proceeding to his home port, at a similar rate of pay to that received by him immediately prior to his being left on shore, and with the right of discharge from that vessel on arrival at his home port, his right to continue to receive wages under this sub-section shall then cease."

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court by Ernest Bruhn against the Australian Steamships Proprietary Ltd. a special case, which was substantially as follows, was stated by the parties for the opinion of the Court:—

1. On 13th July 1921 at Port Adelaide, South Australia, the plaintiff Ernest Bruhn signed ship's articles of agreement whereby he agreed to serve as one of the crew on board the steamship *Chronos* (port of registry, Melbourne, hereinafter called the said ship) in the capacity of a trimmer on voyages from Newcastle to Melbourne, thence to any port or ports in Australia trading to and fro for any period not exceeding six calendar months or until the first arrival at Newcastle after the expiry of that term, and the master of the said ship agreed to pay the plaintiff wages at the rate of £14 10s. per calendar month.

2. The defendant was at all times material the owner of the said ship.

3. The plaintiff entered upon such service, and on 14th July 1921 during the continuance thereof was promoted fireman, the rate of wage payable under the said articles for persons serving in such capacity being £16 10s. per calendar month.

4. During the continuance of his service on the said ship the plaintiff on 29th August 1921, when in the Port of Melbourne, slipped on a wire rope when passing along the ship's deck and sprained one of his ankles.

5. (a) As a result of the said accident the plaintiff was wholly incapacitated from the performance of his duties from the said 29th August 1921 to 10th October 1921. (b) The said injury was or appeared to be of such a nature as to require or be likely to require medical treatment for a period of not less than fourteen days. (c) The said injury was sustained in the service of the said ship.

6. On 2nd September 1921 the plaintiff, being then unable to perform his duty on the said ship, was landed at the Port of Melbourne and was discharged from the said ship before the Superintendent and handed a certificate of discharge in the prescribed form authenticated by the Superintendent, and accepted such certificate and was paid by the defendant, in full, all wages due to

H. C. OF A. 1922.

BRUHN v. AUSTRALIAN STEAMSHIPS PROPRIETARY LTD.

him to that date and signed before the said Superintendent a release of the ship, master and owner from all claims. The said release contained the words "Discharged without prejudice to the rights under sec. 132 of the *Navigation Act* 1912-1920."

7. From the said 2nd September 1921 to 10th October 1921 the plaintiff at his own election resided at the Sailors' Home, Melbourne, and the defendant paid for the maintenance of and medical attendance upon him.

8. The plaintiff's medical attendant certified that the plaintiff had recovered on 10th October 1921, and on the said 10th October 1921 the defendant procured for and delivered to the plaintiff a railway ticket entitling the plaintiff to travel to Adelaide on such last-mentioned date, and offered the plaintiff the necessary money for his maintenance on such journey and also the plaintiff's wages at the rate fixed by his agreement from the time of his said recovery until arrival at his home port, Port Adelaide, all of which said moneys the plaintiff refused to accept.

9. The parties have agreed to state the above facts in the form of a special case for the opinion of the Supreme Court upon the following question of law arising therein, namely :—

Is the plaintiff entitled under the provisions of sec. 132 of the *Navigation Act* 1912-1920 to payment from the defendant of any and what sum by way of wages for the period from 2nd September 1921 to 10th October 1921, or for any and what part of such period ?

10. On the judgment of the Court being given in the affirmative, judgment for the sum so ascertained by the Court to be due by the defendant to the plaintiff shall be entered in favour of the plaintiff with costs under the special scale of costs in Appendix N; and on the judgment of the Court being in the negative, judgment shall be entered for the defendant with costs under such scale.

The Full Court of the Supreme Court answered the question above set out by saying that "the plaintiff is not entitled to payment of any sum by way of wages for the period above mentioned," and ordered that judgment be entered for the defendant with costs

in accordance with par. 10 of the special case: *Bruhn* v. *Australian Steamships Proprietary Ltd.* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

Latham K.C. (with him *Gregory*), for the appellant.

Hogan, for the respondent, referred to *Anderson* v. *Rayner* (2); *McDermott* v. *Owners of Steamship Tintoretto* (3).

Cur. adv. vult.

Dec. 12.

The following written judgments were delivered:—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The appellant was employed as a fireman on the steamship *Chronos* belonging to the respondent company, and, while the vessel was lying in the Port of Melbourne, sprained an ankle during the performance of his service. On 2nd September 1921 the appellant, being then unable to perform his duty on the ship, was landed at the Port of Melbourne, and on the same day was discharged from the ship, and was paid in full all wages then due to him in accordance with the provisions of sec. 130 of the *Navigation Act* 1912-1920. From 2nd September to 10th October 1921 he remained at the Sailors' Home, Melbourne, and the respondent company paid for his maintenance and medical attendance as provided by sec. 127. On 10th October the respondent company offered him a free passage to his home port, Adelaide, the necessary money for his maintenance on the journey, and wages from the time of his recovery until his arrival at Adelaide. He contended that under sec. 132 he was entitled to wages from the time of his being landed at the Port of Melbourne until his arrival at Adelaide; and that is the question which we have now to consider.

The relevant portions of the section are as follows:—"(1) Where a seaman or apprentice belonging to a ship registered in Australia is left on shore at any place in Australia, in any manner authorized by law, by reason of illness or accident in the service of the ship

(1) (1922) V.L.R., 755; 44 A.L.T., 61. (2) 1903) 1 K.B., 589.
(3) (1911) A.C., 35, at pp. 39, 44.

H. C. OF A. 1922.

BRUHN v. AUSTRALIAN STEAMSHIPS PROPRIETARY LTD.

Knox C.J. Gavan Duffy J. Starke J.

incapacitating him from following his duty, he shall be entitled— . . . (*b*) if landed at a port other than his home port, to receive, after his recovery, certified as provided in the last preceding paragraph, a free passage to his home port, with wages, at the rate fixed by his agreement, until arrival at that port: Provided that if, after recovery, the seaman or apprentice rejoins his ship, or takes other employment, or is offered and refuses employment on some other vessel proceeding to his home port, at a similar rate of pay to that received by him immediately prior to his being left on shore, and with the right of discharge from that vessel on arrival at his home port, his right to continue to receive wages under this subsection shall then cease."

The Supreme Court of Victoria thought that the liability directly imposed on the ship owner by par. (*b*) was to pay him wages for the period from his recovery until his arrival at his home port. We are unable to agree with this view, because we think the words "after his recovery" in the first part of the paragraph do not limit or qualify the period in respect of which wages are to be received, but merely postpone the receipt of both the free passage and the wages until after the seaman has been cured. In par. (*b*) as in par. (*a*) the landing of the injured man at the specified port is assumed to fix the beginning of the period in respect of which wages are to be paid. The seaman takes nothing under par. (*b*) unless and until he recovers his health, and even then he takes nothing if he comes within the terms of the proviso. The terms of the proviso assisted the Supreme Court to arrive at a conclusion as to the meaning of the paragraph itself.

The judgment says (1):—"This construction, based on the actual language used, is strengthened by a reference to the language of the proviso. This language refers to his losing his right to the wages given by the section if, after recovery, he rejoins his ship, or takes other employment, or is offered and refuses employment on some other vessel proceeding to his home port at a similar rate of pay to that received by him immediately prior to his being left on shore. The final words of this proviso seem to indicate that the last wages he actually had been receiving would be the wages he received immediately before being left on shore." It is true that the Legislature

(1) (1922) V.L.R., at p. 758; 44 A.L.T., at p. 63.

thought it necessary to refer to the rate of pay received by the seaman immediately prior to his being left on shore, but it did so because that would be the last pay which he had in fact received if the contingency contemplated by the proviso arose after the seaman's recovery and before he had received any part of the wages payable under par. (*b*). This would be the ordinary case, and in such a case the proviso declares not that the seaman's right to receive wages, but that his right to continue to receive wages under the sub-section, shall then cease. The expression " right to continue to receive wages " connotes prior wages already received or a right to receive prior wages. All this is inconsistent with the view that wages under the paragraph are payable only with respect to a period commencing from the recovery of the seaman. Probably the expression in the proviso " right to continue to receive wages " means the right of the seaman to continue to receive after his discharge the same wages which he was receiving under the agreement, because the right is not destroyed but only made to cease. If not, it must mean his right to receive, after the contingency contemplated by the proviso has arisen, the same wages as he was receiving before it arose, and either meaning is inconsistent with the contention of the respondent company.

In our opinion the appeal should be allowed.

ISAACS J. In my opinion this appeal should succeed. When sec. 132, under which the question directly arises, is read by the light of the law as previously existing (by which I mean the common law as stated in *Horlock* v. *Beal* (1)) and the statute law affecting this question (by which I mean the sections replaced by sec. 132 and the group with which it is connected) the effect is to uphold the appellant's claim.

In my opinion the Legislature, taking into consideration the views expressed in the House of Lords and the then existing relevant enactments, intended that in a case like the present the rights of the seaman should be reduced to certainty and not left to be determined in a conflict of whether his contractual relations with the

(1) (1916) 1 A.C., 486.

H. C. OF A. 1922.

BRUHN v. AUSTRALIAN STEAMSHIPS PROPRIETARY LTD.

Isaacs J.

ship were severed or not. When Bruhn was landed at Port Melbourne on 2nd September 1921 in consequence of his accident, he was "left behind" on the ground of his "inability to go to sea" within the meaning of sec. 130. That section being duly complied with, he was thereby, when the circumstances of his accident are considered, within the words of sec. 132, sub-sec. 1, namely, "left on shore at any place in Australia, in any manner authorized by law, by reason of . . . accident in the service of the ship incapacitating him from following his duty." Thereupon he became "entitled" to whatever benefits the section provides according to the place where he was landed.

In order to understand par. (*b*) it is necessary to read par. (*a*). A seaman landed at his "home port" is entitled to receive "wages at the rate fixed by his agreement," but only up to the expiration of one week after the certified date of his recovery. That is the extreme limit possible. It may be less, according to the time occupied in recovery and according to the date of the expiry of his engagement. The main part of par. (*a*) does not expressly say from what period the wages are to be paid. The implication is from the date the seaman was left on shore. The proviso, however, expressly in two places refers to "the date he was left on shore" as the starting point of the statutory right to wages.

Then the Legislature turns to the alternative case in par. (*b*), namely, "if landed at a port other than his home port." In that case the legislative intention is not happily expressed. The respondent contends, and the Supreme Court has held, that the words "to receive, after his recovery," govern both the free passage to his home port and wages, and that, as the right to free passage does not arise till recovery, neither does the right to wages. In other words, it is held that the words "after his recovery" mark the beginning of the right to get wages.

Now, in the absence of any express statement to that effect as to "wages" either in the main part of par. (*b*) or in the proviso thereto, it is difficult to give effect to that contention. "After his recovery" as applied to the free passage is the complement to sec. 127. It seems that the seaman is not to be forced to accept or refuse a free passage home until he has had the benefits of being cured. So

used, it has no relation to a continuous period. If there were no proviso, what would be the proper commencing point for "wages," having regard to all that had gone before in secs. 130, 131 and 132? I should say that the words "the date he was left on shore" used in connection with "wages" in par. (*a*) is the implied commencing point of "wages" in par. (*b*). The cessation of wages in the two paragraphs is differently stated. In (*b*), it is "until arrival" at the home port. And I should be disposed to read par. (*b*) as if it were written thus (going back first to the governing words of sub-sec. 1):—"He shall be entitled, if landed at a port other than his home port, to receive, (i.) after his recovery, certified as provided in the last preceding paragraph, a free passage to his home port, with (ii.) wages, at the rate fixed by his agreement, until arrival at that port." That all assumes that "after recovery" the seaman accepts the "free passage" home, and is not in employment till he gets there.

But suppose he does not wish to avail himself of this statutory provision as to free passage, what is to happen? Clearly, as to "free passage," it speaks for itself—he simply does not ask for it. But, as to wages, can he continue to claim them? The proviso answers this by saying that if "after recovery" he either rejoins his ship or takes other employment, or is offered and refuses employment on some other vessel proceeding to his home port at a similar rate of pay to that received by him "immediately prior to his being left on shore" and with the right of discharge from that vessel on arrival at his home port, then his right—not to *receive*—but "to *continue* to receive wages under *this sub-section*" shall then *cease*. Observe it is not "under this paragraph" but "under this sub-section."

I think, from the collocation of the whole sub-sec. 1, that the "landing" is the commencing point of wages. This is necessary to avoid an erratic and unreasonable and unjust intention being imputed to the Legislature. Especially am I fortified in that contention by the word "continue." The right to *continue* to receive the wages is to *cease* "after recovery" in certain cases. If "after recovery" is to be a starting point, then it marks the starting of ceasing "to continue" to receive the wages. But "continue" implies necessarily the pre-existence of the right to "receive" and

H. C. OF A. 1922.

BRUHN v. AUSTRALIAN STEAMSHIPS PROPRIETARY LTD.

Isaacs J.

if "after recovery" also, as contended, marks the initial point of the right to receive, how can the "*continuance*" also cease after the identical point of time?

One point I may refer to as it was mentioned in argument. The appellant was "discharged" in Port Melbourne. He was discharged without prejudice to his rights under sec. 132 of the *Navigation Act* 1912-1920. I do not question the advisability of inserting those words, but, on the principle I stated in *Federated Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1), I should be prepared to hold that even an unqualified discharge would not affect the statutory right.

HIGGINS J. This is a question as to the construction of the *Navigation Act* 1912-1920; but ultimately as to the construction of sec. 132.

Bruhn, a seaman of an Australian ship, had an accident on board on 29th August 1921, an accident which incapacitated him for duty. On 2nd September he was landed at the Port of Melbourne —Adelaide being his home port—and was discharged "without prejudice to the rights under sec. 132 of the *Navigation Act*." The employer paid for his maintenance and medical attendance, but no wages as for the time since 2nd September. On 10th October, Bruhn having recovered, the employer tendered to him a railway ticket for Adelaide, the necessary sum for maintenance on the journey, and wages from the recovery—10th October—until the due time for arrival at Port Adelaide. Bruhn declined to accept the money tendered, claiming that he was entitled to wages as from 2nd September until arrival at Port Adelaide.

The precise words to be construed are that the injured man "shall be entitled . . . (*b*) if landed at a port other than his home port, to receive, after his recovery, certified as provided in the last preceding paragraph, a free passage to his home port, with wages, at the rate fixed by his agreement, until arrival at that port." The Supreme Court has construed these words just as if the words "after his recovery" were inserted before "until arrival at that" (the home) "port"—as if the words were "with wages . . . after his recovery

(1) (1922) 30 C.L.R., 144, at p. 158.

until arrival at that port." That is to say, the right to wages, which under the ship's agreement would have ceased by reason of the discharge on 2nd September, is to be deemed to have ceased on that date and then to have suddenly arisen again on the man's recovery. No one suggests any reason, from the nature of the case, that the man should get wages for the day or so spent in going from Melbourne to Adelaide, and not for the period before recovery. But, of course, if the Act gives no more, that concludes the matter. I accept the position as stated by *Vaughan Williams* L.J. in *Anderson* v. *Rayner* (1), that the Act is not to be construed liberally in favour of seamen, and it "ought not to be construed as imposing upon" the employers "any liability that is not clearly indicated by its language."

The essential point is that the phrase "after his recovery" is attached to the word "receive," and not to the word "wages." Par. (*b*) deals with the case of a man landed at a port other than his home port, and provides that such a man shall get something more than wages until arrival at the home port—that he is to get a free passage to that port, and that free passage is to be received "after his recovery." The *terminus ad quem* of the wages is clearly expressed; but the *terminus a quo* is not specifically mentioned in par. (*b*)—it has to be ascertained by a comparison with par. (*a*)—"if landed at his home port, as specified in the agreement, to receive wages, at the rate fixed by his agreement, up to the expiration of one week after the date of his recovery, as certified by his medical attendant or by a medical inspector of seamen." There can be no doubt, in the case of a man landed at his home port, that his wages continue, discharge or not, from the time of the injury until one week after landing; and, as there are no clear words to the contrary in par. (*b*), the *terminus a quo* for the wages in par. (*b*) should be treated as being the same as in par. (*a*). The only difference between the case of a man landed, and a man not landed, at his home port is that the latter must get a free passage to his home port after recovery, and wages until arrival only, instead of wages till the expiration of one week after recovery. The object of the section being to provide for the seaman's wages during illness or injury in

(1) (1903) 1 K.B., at p. 591.

H. C. OF A. 1922.

BRUHN v. AUSTRALIAN STEAMSHIPS PROPRIETARY LTD.

Higgins J.

the service of the ship, until his recovery, so as not to leave the man helpless to provide for his dependants (if any), one may fairly invoke the principle of *Heydon's Case* (1), and say that to achieve that object a provision for wages before recovery is as essential as a provision in the case of a man landed at a port not being his home port, as in the case of a man landed at his home port.

I regard the word " with " in the words " receive after his recovery . . . *with* wages . . . until arrival at that port " as not meaning that the wages are to be paid at the same moment as the free passage is tendered (for it is not necessarily known how long the passage will take), but as meaning " in addition to " wages, or " as well as " wages.

This view is, to my mind, strengthened by the words of the proviso to par. (*b*). It is provided that if the man landed at a port other than his home port rejoins his ship, &c., " his right to *continue to receive wages* under this sub-section shall *then* cease." This language involves the position that if, on recovery, instead of accepting a free passage to his home port, he rejoin his ship, he is to *continue* to receive wages; whereas, according to the decision on appeal, the right to receive wages does not begin until the free passage has been offered.

So far as to the literal construction of the section itself. I think that, on its strict construction, there is no justification for treating the words " after his recovery " as if they were inserted before the words " until arrival at that port," as if they prescribed a *terminus a quo* for the wages instead of providing the point of time at which a free passage to his home port is to be received or offered. But it is fair to consider the whole Act, in order to find whether there is anything in the scheme of the Act which conflicts with this strict construction. In place of finding anything conflicting, I find sections which positively support it by analogy; for instance, secs. 50 and 85. Under sec. 85 in the case of a man's service terminating by wreck, &c., he is entitled to conveyance at the cost of the owner to the proper port of discharge, and to wages " until his arrival at the proper port." But the total period for wages is not to exceed three months (as in sec. 132 (1) (*a*)); and if the man refuse to accept

(1) (1554) 3 Rep., 7.

the first reasonable means of conveyance he shall not be entitled to receive wages thereafter. That is to say, treating the time and waiting at the place of wreck as parallel with the time before recovering from injuries under sec. 132, the man is entitled to wages for all the time and not merely for the time of conveyance. Then, under sec. 50, in the case of men discharged on the ground that the ship is not proceeding to the port of discharge mentioned in the agreement, the seaman is entitled to receive a free passage to a proper return port, and wages until his arrival, as well as an allowance for victualling and accommodation (or victualling) in the meantime.

In my opinion, the appeal should be allowed, and the special case answered in the affirmative.

Appeal allowed. Judgment appealed from discharged. Question stated in special case answered Yes. Judgment for appellant for the amount of wages from 2nd September 1921 *to 10th October* 1921 *at* £16 10*s. per calendar month with costs in the Supreme Court under the scale in Appendix N and in this Court.*

Solicitors for the appellant, *Maddock, Jamieson & Lonie.*

Solicitors for the respondent, *Hamilton, Wynne & Riddell.*

B. L.