[HIGH COURT OF AUSTRALIA.]

THE FEDERATED SEAMEN'S UNION OF AUSTRALASIA . . . . . } CLAIMANT;

AND

THE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS } RESPONDENTS.

THE KING

AGAINST

THE PRESIDENT OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE FEDERATED SEAMEN'S UNION OF AUSTRALASIA.

EX PARTE THE COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION AND OTHERS.

H. C. OF A. 1922.

SYDNEY, *April* 10, 11, 13.

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

Industrial Arbitration—Commonwealth Court of Conciliation and Arbitration—Award—Validity—Inconsistency with Commonwealth statutes—Seamen's wages—Time for payment—"Monthly"—Navigation Act 1912-1920 (*No.* 4 *of* 1913—*No.* 1 *of* 1921), *secs.* 45, 46, 77, 83, 292, 393—*Commonwealth Conciliation and Arbitration Act* 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 18, 24.

Sec. 77 (2) of the *Navigation Act* 1912-1920 provides that "In cases where the seamen are engaged on time or running agreement on an Australian-trade or limited coast-trade ship, all wages earned shall be paid monthly not later than the first day of each month, or thereafter within twenty-four hours after the ship first arrives at any port in Australia at which there is a banking institution (other than a savings bank)." Sec. 77 (3) provides that "Every

master or owner who, without sufficient cause, fails to make payment at any prescribed time, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days during which payment is delayed beyond that time."

Held, by *Isaacs*, *Higgins* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that the words "all wages earned shall be paid monthly" impose a duty on an owner to pay the wages of seamen not less frequently than once a month, but do not prohibit him from paying them more frequently, and that the parties might agree, and, therefore, that the President of the Commonwealth Court of Conciliation and Arbitration might by an award direct, that wages be paid fortnightly.

Held, also, by *Isaacs*, *Higgins* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that for a similar reason the President might direct payment of wages within four hours after the ship's arrival in port.

Held, further, by the whole Court, that the President has no jurisdiction to make an award which is inconsistent with an Act of the Commonwealth Parliament.

CASE STATED and order *nisi* for prohibition.

On the hearing in the Commonwealth Court of Conciliation and Arbitration of an industrial dispute in which the Federated Seamen's Union of Australasia was the claimant and the Commonwealth Steamship Owners' Association and a number of companies owning ships engaged in inter-State trade in the Commonwealth were the respondents, *Powers* P. stated a case, which was substantially as follows, for the opinion of the High Court :—

(1) This industrial dispute was referred by me into the Court of Conciliation and Arbitration on 24th March 1922 in pursuance of sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921.

(3) Clause 2 of the claim of the said Union is as follows : "All wages shall accrue due and be paid on the first and fifteenth days of each month in any port where there is a bank."

(4) The claims in the log are for seamen employed by respondents, owners of steamers engaged in inter-State trade in the Commonwealth.

(5) The respondents admit that a dispute extending beyond the limits of one State exists as to claim 2 of the log, and as to all other claims in the log, and on the evidence submitted I am prepared to make an award.

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

(6) On the evidence submitted I consider claim 2 a reasonable one, and, if I have the power to do so, I propose to order that wages to seamen be paid, one-half of the month's wages on the first, and the other half on the fifteenth, of each calendar month.

(7) The respondents contend that under the *Commonwealth Conciliation and Arbitration Act* 1904-1921 the Court has no power to make any binding award on the respondents named in the order of reference ordering payment of wages other than monthly because of sec. 77 of the *Navigation Act* 1912-1920.

(8) The claimant organization contends that sec. 77 was only passed to protect seamen, and only requires employers of seamen to pay wages not later than once a month; that the section does not prevent the respondents paying them weekly or fortnightly, or prevent the Court from ordering rates to be paid on the first and fifteenth of the month.

(10) In connection with the hearing of the said dispute the following question, which in my opinion is a question of law, has arisen, and I submit the same for the opinion of the Full High Court:

> Has this Court power to make a binding award covering the said respondents and ordering payment of seamen's wages as claimed by the said clause 2 of the said claim or at any period except once a month in view of sec. 77 of the *Navigation Act* 1912-1920?

The Commonwealth Steamship Owners' Association and the other respondents in the dispute above referred to obtained an order *nisi* calling upon the President of the Commonwealth Court of Conciliation and Arbitration and the Federated Seamen's Union of Australasia to show cause why a writ of prohibition should not issue in respect of clause 2 of the same proposed award, it being alleged that the minutes of such proposed award had been signed by the President but that no award had yet been signed, sealed or issued.

The material portion of clause 2 was as follows: "All wages other than money for overtime shall be paid on the first and fifteenth or sixteenth of each calendar month respectively and one-half of each month's wages shall be paid on the dates mentioned or thereafter

within four hours after the ship's arrival at any port in Australia at which there is a banking institution other than a savings bank."

It was also alleged that all seamen on Australian-trade, or limited coast-trade, ships are engaged on running agreements.

The case stated was first argued.

Owen Dixon K.C. (with him *C. Gavan Duffy*), for the respondents. In sec. 77 (2) of the *Navigation Act* 1912-1920 the word "monthly" means once a month, and the sub-section requires payment to be made once a month on the specified date. The provision of the proposed award requiring payment to be made more often than once a month is inconsistent with the plain meaning of sec. 77 (2), and cannot be awarded.

Flannery K.C. (with him *Tucker*), for the claimant. The provision of the proposed award is not inconsistent with sec. 77 (2) of the *Navigation Act* in the sense that both cannot stand (see *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (1)). Sec. 77 (2) is aimed at protecting seamen, and fixes a limit of time within which wages must be paid. It does not prohibit the parties from agreeing to pay them more frequently, and therefore the Commonwealth Court of Conciliation and Arbitration may, by its award, direct more frequent payment. The only penalty provided is for delaying payment beyond the specified time (sec. 77 (3)). If the provision of the proposed award is inconsistent with sec. 77 (2), it is, nevertheless, valid; for the powers of the Commonwealth Court of Conciliation and Arbitration are legislative, and are not confined to declaring what are the rights of the parties under the law of the Commonwealth. That Court may make an award abrogating legislation of the Commonwealth Parliament dealing with the same matter unless the effect of the particular Commonwealth legislation is to limit the constitutional power of the Conciliation Court.

Owen Dixon K.C. Sec. 77 (2) is a direct command to owners to pay wages once a month, and not either more or less frequently. That is borne out by sec. 77 (1) (*a*), which was enacted later than sec.

(1) (1920) 28 C.L.R., 1.

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

77 (2). Sec. 77 (1) (*a*), which was intended to put seamen in foreign-going ships in the same position with regard to the time when wages shall be paid as seamen on Australian-trade or coast-trade ships, uses words which show that the payment is to be made monthly and not more or less frequently, namely, "the full amount of wages then earned shall be paid to every seaman monthly." Sec. 69 discloses a general policy that seamen shall be paid at fixed intervals. The provision in sec. 77 (3) is not a punishment for a breach of sec. 77 (2), but it is a compensation to seamen for delay in payment of wages. Any breach of sec. 77 (2) is punishable under sec. 393. The Legislature has expressed its view that it is for the benefit of seamen that their freedom to contract should be restricted in many ways, and it cannot be said that Parliament was not of the opinion that it was for their benefit that there should be a fixed period for payment of their wages. The provision is as much for the benefit of masters as for that of seamen. If that view is not correct, secs. 75 *et seqq.*, which deal with payment of wages, are intended to be a code exclusively regulating the method and times of payment of wages. The Commonwealth Parliament has occupied that field of legislation, and the Court of Conciliation and Arbitration cannot impose other obligations as to the method and times of payment of wages than are contained in those sections. (See *Houston* v. *Moore* (1).) If sec. 77 gives an option to the master to pay wages at periods more frequent or allows the parties to agree upon more frequent payments, that option or that freedom to agree cannot be interfered with by the Court of Conciliation. This view is borne out by sec. 46, which prescribes a form of agreement and lays down rules governing the contract to be made. It lays down the exact degree of freedom of contract which is allowed, and enacts that there is to be no freedom except with the approval of the superintendent. The whole of Divisions 9, 10 and 11 of Part II. shows the intention of the Parliament to regulate all the relations of the master and the seamen which, apart from them, might be regulated by contract.

[ISAACS J. referred to *Mercantile Steamship Co.* v. *Hall* (2); *Shelford* v. *Mosey* (3).]

(1) (1820) 5 Wheat., 1, at p. 23.
(2) (1909) 2 K.B., 423.
(3) (1917) 1 K.B., 154.

Those cases support the view that the provisions as to method and times of payment of wages are intended to be a code. The references to the Commonwealth Court of Conciliation and Arbitration in the *Navigation Act* show that the Parliament contemplated the Court of Conciliation having power to deal with the amount of seamen's wages in the coasting trade (see secs. 288-292), but there is nothing to indicate any intention that as to the method and times of payment that Court should have power to alter the provisions made by the Act.

Flannery K.C. Sec. 46 permits the master and the seamen to regulate their relations by contract and to vary any contract made between them so long as what they agree to is not prohibited by the Act. They might, under that section, agree for payment of wages fortnightly and, that being so, the Court of Conciliation may by an award direct that fortnightly payments be made. Sec. 83 shows that the provisions as to wages are for the protection of the seamen.

The order *nisi* for prohibition was then argued.

Owen Dixon K.C. (with him *C. Gavan Duffy*), for the prosecutors. As to the prohibition exactly the same point arises with regard to the payment within four hours after arrival in port as with regard to fortnightly payments. Either the Legislature has disclosed an intention to deal with the subject matter and has expressed its will that payment shall be made at a definite fixed time and has occupied the field, and the award is not consistent with that expressed will; or, if the Legislature has not expressed its will that payment shall be at a definite fixed time, it has expressed its will that the owner shall have liberty to pay at any time within twenty-four hours after arrival in port, and the award cannot restrict that liberty.

Flannery K.C. (with him *Tucker*), for the respondent. As to the question of four hours, sec. 77 (3) prescribes a minimum restriction upon masters for the protection of seamen, and the Court of Conciliation can say whether there shall be further restrictions.

Cur. adv. vult.

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

April 13.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. This is a case stated by the President of the Commonwealth Court of Conciliation and Arbitration. The industrial dispute was referred into the Court of Conciliation and Arbitration by the President on 24th March 1922 in pursuance of sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921. Clause 2 of the claim of the Union is as follows : " All wages shall accrue due and be paid on the first and fifteenth days of each month in any port where there is a bank." The claims in the log are for seamen employed by respondents, owners of steamers engaged in inter-State trade in the Commonwealth. The President states that on the evidence submitted he considers claim 2 a reasonable one, and, if he has power to do so, he proposes to order that wages to seamen be paid, one-half of the month's wages on the first, and the other half on the fifteenth, of each calendar month. He then states the conflicting contentions of the parties in the following words :—" (7) The respondents contend that under the *Commonwealth Conciliation and Arbitration Act* 1904-1921 the Court has no power to make any binding award on the respondents named in the order of reference ordering payment of wages other than monthly because of sec. 77 of the *Navigation Act* 1912-1920. (8) The claimant organization contends that sec. 77 was only passed to protect seamen, and only requires employers of seamen to pay wages not later than once a month; that the section does not prevent the respondents paying them weekly or fortnightly, or prevent the Court from ordering rates to be paid on the first and fifteenth of the month." The *Navigation Act* referred to is a general exercise of the power of the Parliament of the Commonwealth to legislate with respect to trade and commerce as extended by sec. 98 of the Constitution to " navigation and shipping," and constitutes a code founded on experience gathered during many centuries in the conduct of commercial navigation under the British Flag. It prescribes in the most minute detail rules of conduct founded on that experience refined in conformity with the most advanced humanitarian views. As no right, privilege or duty is too insignificant to have come within such experience, so none is too small to be the subject matter of legislation founded on such

experience. Part II. of the Act deals with masters and seamen, and determines their rights, privileges and duties both between themselves and in relation to their employers. Division 10 of Part II. deals with seamen's wages; and the sub-division with which we are concerned, beginning with sec. 75 and ending with sec. 81, deals with the payment of such wages. Sec. 77 (2) is as follows: "In cases where the seamen are engaged on time or running agreement on an Australian-trade or limited coast-trade ship, all wages earned shall be paid monthly not later than the first day of each month, or thereafter within twenty-four hours after the ship first arrives at any port in Australia at which there is a banking institution (other than a savings bank)."

In our opinion the word "monthly" in this section means once in every month. This, we think, is the invariable meaning of the word when used as an adverb. The sub-section therefore contains a direction that the wages to which it applies shall be paid once and once only in every month, and that each payment shall be made either not later than the first day of the month following that in respect of which the payment is to be made, or if on that date the ship is at sea, then, as an alternative to be exercised at the option of the payer, within twenty-four hours of the time of the ship's next arrival at a port in Australia at which there is a banking institution other than a savings bank. Counsel for the Union strongly urged on us that the duty intended to be imposed on the master or owner is, not to pay at the prescribed time, but merely to pay not later than at the prescribed time, and that the sub-section should be read so as to impose that duty and that duty only. He added that, on his construction of the sub-section, the master or owner might bind himself by agreement to pay earlier, and that what might be done voluntarily by agreement could be done compulsorily by award of the Court. He endeavoured to support his view by pointing out that the only express provision with respect to the consequences of neglect to comply with the direction of sub-sec. 2 is that contained in sub-sec. 3. It is true that no provision is made for compensating a seaman because he has been paid his wages at an earlier date than that at which he was entitled to payment, and probably no one in his right mind would have thought it necessary to make such

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

Knox C.J. Gavan Duffy J.

a provision, but the fact that compensation is provided for the only case in which the seamen can suffer pecuniary damage, namely, where payment has been delayed, does not justify us in cutting down the prescription in sub-sec. 2 so as to cover that case only.

In our opinion the words of sub-sec. 2 constitute a prescription formulated by the Legislature and expressing its will, and the Court of Conciliation and Arbitration has no power to make an award inconsistent with the expressed will of the Legislature.

Our answer to the question submitted to us must be that the Court has no power to make any binding award ordering payment of wages other than monthly.

It follows from what we have said that, in our opinion, the President cannot by his award provide that payment shall be made within four hours of the ship's arrival in port. As that is the only point arising on the application for prohibition and not on the special case, we think the rule *nisi* for prohibition should be made absolute.

ISAACS J. The learned President of the Commonwealth Court of Conciliation and Arbitration has stated a case in which he sets out that he considers claim 2 a reasonable one, and, if he has power to do so, purposes to direct it to be a term of the award. That claim is "all wages shall accrue due and be paid on the first and fifteenth days of each month in any port where there is a bank." We are not concerned with the reasonableness or practicability of the claim. All we have to consider is whether it is lawful for the learned President to award it.

The respondents contend that such a provision would be illegal, because inconsistent with sec. 77 of the *Navigation Act* 1912-1920. A question also arises whether, even if legal by way of agreement, it is within the competency of the Arbitration Court to award it. Sec. 77 of the *Navigation Act* 1912-1920 is not wholly new. It is of precisely the same general character as previously existing legislation on the subject of the payment of seamen's wages, as for instance, secs. 134 and 135 of the Imperial *Merchant Shipping Act* 1894, which was in force in some parts of Australia, and sec. 46 of the New South Wales *Seamen's Act* 1898 (No. 46 of 1898). But the crucial

words for us are new. Sec. 77 begins by placing on the master and owner of every foreign-going ship registered in Australia a personal obligation. He "shall pay, subject to all just deductions, the *wages due* to the crew as follows:—" Before referring to what follows, it is important to emphasize that it is a personal obligation, and in respect of "wages due." And further, it is important to remember that prior to this legislation, the corresponding Imperial provision operating in a great part of Australia (sec. 134 of the *Merchant Shipping Act*) said (*a*): "The owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds, or one-fourth of the balance of wages due to him, whichever is least; and shall pay him the remainder of his wages within two clear days . . . after he so leaves the ship." I can find no trace of any opinion that that was an inflexible legislative rule, not admitting of further benefit to the seaman by agreement.

Reverting to sec. 77, it proceeds in sub-sec. 1, par. (*a*), to define to some extent the personal obligation purposed in favour of the seamen. It says: "during any period the ship is engaged in the coasting trade, the full amount of wages then earned shall be paid to every seaman monthly." The respondents contend that the word "monthly" precludes payment fortnightly; that it would be incompetent so to alter it, even by mutual agreement, between master and seaman, with the consent of the superintendent, under sec. 46 (3). That sub-section permits of stipulations (not contrary to law) approved by the superintendent being introduced into the agreement (which must always be made) at the joint will of the master and seamen. "Monthly," it is said, is a rigid, inflexible term and means "once a month," and precludes twice or oftener in the month; and, therefore, no payment before or after the month —so far as that word is concerned—is permitted by the Legislature. Monthly has no such cast-iron meaning. Its exact connotation is controllable by the context and surroundings. In the *Oxford Dictionary* one definition given runs thus: "Once a month; in each or every month; month by month." In sec. 77 the word "monthly" harmonizes with the context and surroundings much more in the two latter significations than in the first. It appears

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

Isaacs J.

to me to convey the intention that when the wages due amount to a month's earnings the seamen is entitled to be paid them.

Sec. 393, provides that "any person who is guilty of any contravention or evasion of this Act for which no other penalty is provided shall be liable to a penalty of not more than ten pounds." If sec. 77 makes an earlier payment a breach or contravention, that would be very serious. Now sec. 77, after providing, with respect to foreign-going ships, that "the full amount of wages then earned shall be paid to every seaman monthly"—the "then" indicating the end of a month, after the applicable event, according to sec. 82—proceeds to add these words: "*not later* than the first day of each month," or, if the ship is not, "at the time when any monthly payment falls *due*, in a port in Australia where there is a banking institution (other than a savings bank), then within twenty-four hours of the ship's arrival at such a port." It is obvious, so far, that a seaman engaging to commence work on (say) 15th March would have earned a month's wages by 15th April. If "monthly" were rigid, why not pay him then? But "not later" &c. gives in that case two weeks later to the shipowners to pay, even in the absence of any special inconvenience to them.

There is, so far, an inconsistency with the argument of inflexibility. Still more is that the case with the immediately succeeding words. Par. (*b*) provides for the case of a foreign-going ship while outside the coasting limits, and enacts that "*three-fourths* of the amount of the wages then earned shall be paid to every seaman within twenty-four hours of the ship's arrival at any port at which cargo is to be loaded or discharged and at which there is a branch, agency or correspondent of the Commonwealth Bank." Par. (*b*), it will be observed, deals with *three-fourths only* of the "wages due"—mentioned in the dominating words at the head of sub-sec. 1. Consequently, in that case, *no statutory provision whatever* is made with respect to the remaining *one-fourth*. It could not, therefore, be disputed that as to the remaining fourth the seaman's agreement operates unaffected by sec. 77, and the Arbitration Court could act upon that fourth as before.

Then says the proviso to sub-sec. 1: "This provision shall not apply to cases where the seaman by the terms of his agreement is

wholly compensated by shares in the profits of the 'adventure.'" Here is a legislative declaration as to agreements for profit sharing. In that case also the Legislature imposes no obligation on the master and owner, and consequently leaves the matter entirely open to agreement and arbitration so far as sec. 77 is concerned.

Then comes sub-sec. 2, which deals with the cases where the seamen are engaged on time or running agreement on an Australian-trade or limited coast-trade ship. It says "*all* wages earned shall be paid monthly not later than the first day of each month, or thereafter within twenty-four hours after the ship first arrives at any port in Australia at which there is a banking institution (other than a savings bank)." Again, although introductory words similar to those in sub-sec. 1 do not appear, the same intention is unmistakable. It is personal obligation; sub-sec. 3 applying to both makes this clear. It penalizes a master or owner who, "without sufficient cause," fails to pay as prescribed. But the "sufficient cause" is from his standpoint; and consequently the general aspect of sec. 77 is this:—The master or owner, who is necessarily contemplated as having already made an agreement for wages, has in certain cases a personal obligation forced upon him, whether that obligation appears in his agreement or not. No seaman is to be kept waiting longer in the specified cases than the prescribed times mentioned. But, suppose the agreement has specifically provided for fortnightly payments, is that illegal? If not illegal, is the master or owner justified by sec. 77 in disregarding it and simply following sec. 77? In my opinion, both those questions must be answered in the negative.

Sub-sec. 3 enacts that "every master or owner who, without sufficient cause, fails to make payment at any prescribed time, shall pay to the seaman a sum not exceeding the amount of *two days' pay* for each of the days during which payment is *delayed* beyond that time, and that sum shall be recoverable in the same manner as wages." The claimant's contention is that these provisions are enacted as a necessary measure of protection to seamen against undue delay in obtaining wages earned, whatever the terms of agreement might otherwise provide or imply. And it urges that so long as that necessary measure of protection is maintained there

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

Isaacs J.

is no reason for supposing the Legislature intended that an earlier payment would be either injurious to the seamen or against public policy.

It is remarkable, if the word "monthly" meant a fixed moment which marks the legislative opinion of a point of extreme benefit to the seamen—departure from which either earlier or later meant some sort of disaster to them — that there were inserted words in favour of the shipowners only, giving them a further time to pay: the words are "not later than the first day of each month." No doubt they are a qualification in favour of the owners, but it is hard to suppose such a qualification if the "month" were thought to be so essential to the welfare of the sailor that he could not agree to shorten it. And then there are other words of qualification, still further extending the shipowner's relief from the original statutory liability to pay. When we observe, first that the policy of monthly payment varies in different cases, next that there is a complete absence of any words prohibiting an earlier payment in any case, such as we find in sec. 69 (1) and (2) with regard to an advance, or any words indicating the protected consequence of an earlier payment, which by the hypothesis is injurious, such as we find in sec. 69 (3) or sec. 77 (3), it is hard to conjecture that the Legislature adopted the word "monthly" as an inflexible period unalterable by agreement, or whatever the circumstances of the seamen might be, and, at the least, opening up a very serious question as to penal consequences under sec. 393 as a contravention of the Act.

The broad question, then, is: Would the proposed clause in the award be inconsistent with sec. 77, or "inconsistent with any provision of this Act" (sec. 83 (3)), or "contrary to law" (sec. 46 (3)), if agreed to by both parties and approved by the superintendent? In the first place, it does not surrender any protection which the Legislature for any assignable reason has cast around the seamen. No characteristic of Australian seamen can be suggested which leads to the supposition that payment of wages actually earned more frequently than at monthly intervals would be prejudicial to them or the community. No characteristic of Australian shipowners can be suggested that could lead to the supposition that they cannot be trusted in their own interests to

agree, if so willing, to more frequent payments. Nothing in fact can be suggested but the arbitrary will of Parliament that monthly payments generally—not in any case earlier, whatever the necessities of the seamen, but possibly later, according to the convenience of the shipowners—shall be rigidly adhered to notwithstanding both parties, the superintendent approving, desire otherwise. It is so extraordinary a conclusion that nothing but the most express direction of the Legislature could establish it. The finding by the Arbitration Court, after hearing evidence that it is beneficial, is strong proof that no known evil exists to exclude it.

It is desirable to consider for a moment the important fact that side by side with the *Navigation Act* stands the *Commonwealth Conciliation and Arbitration Act* empowering the Federal arbitration tribunal to arbitrate in inter-State industrial disputes. Inter-State sea traffic is one of the most essential industries of Australia, and nothing could be better known to the Parliament than the enormous resort to the Arbitration Court by the seamen's unions. It would require most precise language to convey the belief that Parliament intended to lay down a rule, or rather a varying rule and in two instances *negative* partial rules, which would deprive the Arbitration Court of the power of settling a dispute that might greatly disorganize the industrial portion of Australia. It was a maritime strike that played a great part in introducing Federal arbitration at all. If the respondents' view is correct, the Arbitration Court would be powerless to settle the dispute by doing what it finds to be in fact reasonable. But no express language in the *Navigation Act* leads to such a result. Secs. 45 (1A) and 292 are quite opposed to such an inference. Though these sections are directed to wages, they do not confer, but merely recognize, the outstanding power of the Arbitration Court. I entirely reject the contention of the claimant that the Arbitration Court can under its Act override any provision in the *Navigation Act*, nor can I find room for such an implication either in the statutory language or in judicial precedent.

In the absence of unmistakable language the only ground on which the Courts have gone in declaring illegality in cases of this kind is the ancient and continuous solicitude of the law for the protection of seamen. In *The Wilhelm Tell* (1) Lord *Gorell* (then *Gorell*

(1) (1892) P., 337, at p. 348.

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

Isaacs J.

Barnes J.) said :—"The policy of the law is to protect seamen from improvident arrangements, and to encourage their exertions to save life and property. An agreement which secures these objects appears to me to be unobjectionable." And so, though the *Merchant Shipping Act* 1854 annulled by sec. 182 every stipulation abandoning a right to salvage, it was held a bargain could be validly made to equitably apportion it. In *Mercantile Steamship Co.* v. *Hall* (1) Lord *Sterndale* (then *Pickford* J.) held invalid an agreement which exposed the seamen to greater disabilities than the Act provided for such a case. In *Shelford* v. *Mosey* (2) a sailor was held to be incapable of foregoing a bonus, even though the abandonment was a term of the original contract, because it was "wages" and wages are guarded by the Act from surrender. In *Attorney-General* v. *Fargrove Steam Navigation Co.* (3) *Bray* J. held the test of whether the seaman could validly agree to a term to be returned to one port was whether the Act had intended to secure to him as a statutory protection the right of being returned to another port. The decision was overruled (4), but only on the construction of the Act. The principle remains untouched. No such statutory protection can be shown here, and nothing more is relied on than the mere arbitrary will of Parliament, regardless of the wishes or needs of the parties. But, as shown, that arbitrary will is not on a proper construction of the Act to be deduced, and consequently there is nothing to prevent the parties taking advantage of sec. 46 (3) and so agreeing, if they can secure the approval of the superintendent. The very provision in that sub-section that the superintendent's approval must be obtained, and other provisions in that section, indicate the dominating element of the legislation with regard to the contractual relations of the parties, namely, the protection of the seamen. The agreement must in every case be made. Its form is to be "prescribed," which takes the place of the former statutory specification of particulars (*Merchant Shipping Act* 1894, sec. 114), and then may be added to pursuant to sec. 46. But nothing, not in the agreement and not specifically enacted, is to bind, not even a proved agreement for wages (*Thompson* v. *H. & W. Nelson Ltd.* (5)).

(1) (1909) 2 K.B., 423.
(2) (1917) 1 K.B., 154.
(3) (1906) 23 T.L.R., 230.
(4) (1908) 24 T.L.R., 430.
(5) (1913) 2 K.B., 523.

I am therefore of opinion that the provision in clause 2 of the claim mentioned in the special case could be validly made a term of the agreement. And, if that be so, it follows, from what has been said, that the provisions of sec. 46 for the presence and approval of the superintendent where the binding relations of any stipulation rest on joint agreement is merely for the protection of the seamen in that regard. That is, where both are willing to agree. No inference can be drawn that the equally protective influence of the Arbitration Court is to be shut out in case of a claim thought to be just and reasonable, as to which the agreement of the shipowners is refused. More particularly is this so, when it is borne in mind that the Arbitration Court is established for the public benefit, the peaceful continuance of industries serving the community, and not simply to advance the interests of disputing parties engaged in the industries. The Arbitration Court can do nothing contrary to Commonwealth law, and, if once it be shown that a claim is not merely different from but inconsistent with or contrary to any Commonwealth law, that claim cannot be validly awarded.

In the result, the answer to the question in the special case should be Yes.

There is one further question raised in connection with the arbitration proceedings. It is whether in connection with wages the award can validly contain a provision that one-half shall be paid within four hours after the ship's arrival at any port in Australia, where there is a banking institution other than a savings bank. The Legislature has, as already mentioned, by sec. 77 required the payment of three-fourths, to be paid within twenty-four hours. No doubt that, like the monthly provision, is a statutory duty, and the only obligation if nothing more appears. But while that *certain* minimum amount of protection to seamen was provided, there is nothing inconsistent in the parties agreeing, if they think fit, to shorten the time. Of course, if they did, the statutory penal consequence would not apply to the shortened period. Nevertheless, there is nothing, so far as I can see, to make the shorter period illegal, if the parties choose to adopt it. And once recognize that agreement may shorten it, it is clear that an industrial dispute may arise on the point, which either the Arbitration Court can settle by

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

Isaacs J.

awarding the claim, or it cannot. If it cannot, that must be because the Commonwealth Parliament has made the twenty-four hours inalterable as a minimum limit of duty, and has forbidden the shipowner from contracting for a less option. That, however, by what I have said is not the case either with regard to the "monthly" payment or the twenty-four hours' modification. And, if not, then the Commonwealth Parliament has not either expressly or impliedly repealed, in respect of either, the power of the Arbitration Court to settle industrial disputes by awarding terms not illegal. The two Acts can and are intended to stand and operate together where not inconsistent.

HIGGINS J. The question put by the learned President of the Court of Conciliation on case stated raises issues as to the relation of the *Navigation Act* 1912-1920, recently proclaimed, to the *Commonwealth Conciliation and Arbitration Act*; and, in particular, as to the construction of sec. 77 (2) of the *Navigation Act*. Does the provision of that section to the effect that the wages of seamen must be paid monthly not later than the first day of each month, prevent the Court from prescribing, by its award, that the wages shall be paid bi-monthly, in two half parts?

The meaning of sec. 77 (2) seems to me clear, especially when sec. 77 (3) is considered. Sec. 77 (2) imposes a duty on the employer to pay all wages earned "monthly not later than the first day of each month." "Monthly" means, I shall assume, once in every month; but there is nothing in the section forbidding him to pay the wages more frequently. The evil to be remedied was the intolerable postponement of the payment of wages, and the scandalous abuses to which such postponement led. They are, I think, common knowledge. That Parliament had in mind the delays in payment as the thing to be cured, and not any evil of too frequent payments, is shown by the sub-section immediately following, which merely punishes the employer for delay in payment (sec. 77 (3)): "Every master or owner who, without sufficient cause, fails to make payment at any prescribed time, shall pay to the seaman a sum not exceeding the amount of two days' pay *for each of the days during which payment is delayed* beyond that time." It is true that sec. 393 provides

that any person who is guilty of any contravention or evasion of this Act for which no other penalty is provided shall be liable to a penalty of not more than ten pounds; but the question here is, is there any contravention of the Act if an employer pay more frequently than once a month; and the fact that sec. 77 (3) refers only to *delays beyond one month* is surely a very strong indication of Parliament's intention. An employer who has agreed or is ordered to pay £1 per day is not guilty of a contravention of the agreement or of the order if he pay £2. No reason can be suggested for a prohibition of payment more frequently than once a month if the parties wish it; and, even if the words were equally susceptible of either construction—payment not to be withheld for more than a month, or payment to be withheld absolutely till a month has elapsed—it is our duty to accept that construction which is the more reasonable (*Boon* v. *Howard* (1)). So far as regards the meaning of sec. 77 (2) I am clearly of opinion, therefore, that section does not forbid the payment of wages more frequently than once a month, or on any two (or more) days "not later than" the first of the month.

But after the argument closed, this Court invited counsel to address themselves to a much more serious question arising under sec. 46. This section makes it imperative for the master, engaging a seaman, to enter into an agreement with him in a prescribed form in the presence of the superintendent (defined). The form prescribed contains certain fixed terms; but, under sub-sec. 3 (*a*), the agreement has to be framed so as to admit of stipulations (not contrary to law) approved by the superintendent being introduced therein at the joint will of the master and the seaman. It is said that this agreement, coupled with the expressed provisions of the Act, constitutes a complete code for the regulation of the rights and duties of seamen, and that the profane hand of the Court of Conciliation must not interfere with this code. Sec. 83, indeed, provides that "every stipulation in any agreement, inconsistent with any provision of this Act, shall be void." It is, in my opinion, a sufficient answer to this argument to say that secs. 46 and 83 refer only to agreements, and that the award proposed here is not

(1) (1874) L.R. 9 C.P., 277.

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

Higgins J.

an agreement. Under sec. 24 (2) of the Conciliation Act, if no agreement between the parties is arrived at, the Court must, by an award, determine the dispute; and the award will be a compulsory order, binding on the respondents.

There is nothing, from first to last, in the *Navigation Act* purporting to repeal any part of the Conciliation Act, or necessarily involving its repeal. The *Navigation Act* actually refers to the Conciliation Act, adopting any rates prescribed by the Court in industrial disputes to all shore labour at a port (sec. 45 (1A)), and making an award which is applicable to any seamen in the coasting trade *primâ facie* evidence of the ruling rates of wages (sec. 292). The two Acts are of equal standing and force, and must be reconciled as neither repeals the other. The Court of Conciliation under its Act (sec. 18) has jurisdiction to settle pursuant thereto "*all* industrial disputes," and it is not contended that there is not, in the matter now before the President, an industrial dispute as defined by that Act. Courts naturally and properly struggle against holding a previous Act to be repealed, or an exception grafted thereon, by mere implication.

I assume that if the *Navigation Act* forbade an award for bi-monthly payments, if it deprived the Court of Conciliation of the power to prescribe such payments, the award as proposed would not be binding. The Parliament which created the Court can put limits on the powers of the Court. I do not at all agree with the contention that the Court can make an award which is repugnant to, or contradicts, a valid Federal Act. If the employers in a two-State dispute were to claim that the wages shall be paid quarterly, the Court could not grant the claim in the face of sec. 77 (2). The ultimate question is, does sec. 77 forbid the payment of wages at intervals of less than one month; and, in my opinion, it does not. Many ships have voyages in which weekly or fortnightly payment would be possible and even convenient; but, as Mr. *Dixon* admits, his argument involves the conclusion that even the approval of the superintendent would not make an agreement, or an award, for such payments valid.

In my opinion, the question asked by the President should be

answered in the affirmative; and the rule *nisi* for a prohibition on the same subject should be discharged.

STARKE J. The question is the proper interpretation of sec. 77 (2) of the *Navigation Act*. This section deals with the payment of wages to seamen engaged on time or running agreement on an Australian-trade or limited coast-trade ship, and provides that all wages earned shall be paid monthly not later than the first day of each month or thereafter within twenty-four hours after the ship's arrival in any port in Australia at which there is a banking institution.

The Act is clear that payment of wages to seamen cannot be delayed beyond the times prescribed. It is said that it is equally clear that no power but Parliament itself can accelerate these times. If so, the Court must give effect to the statute, however unreasonable it may seem and whatever the consequences may be. Thus, if the statute be clear, it is quite an irrelevant consideration that a master or owner might be guilty of a contravention of the Act and liable to a penalty of not more than ten pounds if he dared to pay his seamen their wages more than once in a month. So we must turn to the very words of the statute itself. Under an agreement to the effect that "all wages shall be paid monthly," the only obligation would be to pay once in a month. The statute does not create the right to wages in the seamen; that depends upon the agreement made between the owners or master and the seamen — or upon the "articles," as they are called. It operates, however, upon this agreement and declares that whatever that may provide "all wages earned shall be paid monthly." But what is there in the statute to prohibit or make unlawful an agreement to pay wages more frequently, or to prohibit and make unlawful a payment more frequently than once a month? Nothing express to that effect is to be found in the statute, nor, to my mind, anything making such an implication necessary. Indeed, in my opinion, there are some indications in the statute to the contrary effect. Thus sec. 77 (3) recognizes that there may be some "sufficient cause" for non-payment within the month, and only awards compensation

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRAL-ASIA v. COMMON-WEALTH STEAMSHIP OWNERS' ASSOCIA-TION.

Starke J.

for delaying payment without sufficient cause. Again, the provisions in sec. 77 (1) and (2) as to payment of wages within twenty-four hours after the ship first arrives in port show that payment of wages once and once only in a month, as is the suggested interpretation of the earlier words in the section, is not so fixed a principle of public policy that this number of payments in a month ought never to be exceeded. The intent of the Act as gathered from its words and from the general considerations of policy adverted to in the opinion of my brother *Isaacs* is, to my mind, to prohibit delays in payment of wages beyond certain times, and not to prohibit any more beneficial agreement, approved by the superintendent, into which seamen might induce the owners to enter with them (sec. 46 (3)).

And if the statute does not make unlawful such an agreement, much less does it operate to make unlawful an award promulgated by the Court constituted under the *Commonwealth Conciliation and Arbitration Act*.

The argument urged before us that the Arbitration Court had legislative powers and could override by its awards the laws of the Parliament of the Commonwealth, unless Parliament made some statutory provision to the contrary, is quite untenable. In the cases before the Court the Arbitration Court is not acting in contravention of any law made by the Parliament of the Commonwealth, and it is because the Court is not so acting that the challenged clauses are valid and effectual in the award and proposed award now under consideration.

On the rule *nisi* for prohibition one further argument should be noticed. This contention was that the provision in an award directing payment of wages within four hours after the ship's arrival in port was in contravention of the provision in sec. 77 (2) fixing a period of twenty-four hours after the ship's arrival. But there is no difference in principle between the prescription to pay monthly and the provision to pay within twenty-four hours. In both cases the Act fixes the extreme limit within which the owner shall perform the obligation of his agreement to the seamen, and does not prohibit a more beneficial arrangement.

H. C. OF A. 1922.

FEDERATED SEAMEN'S UNION OF AUSTRALASIA v. COMMONWEALTH STEAMSHIP OWNERS' ASSOCIATION.

Question in case stated answered Yes. Order nisi for prohibition discharged. Parties to abide their own costs relating exclusively to the case stated. Prosecutors to pay costs of respondent of order nisi for prohibition except costs of case stated above mentioned.

Solicitors for the claimant and respondent, *Sullivan Bros.*

Solicitors for the respondents and prosecutors, *Malleson, Stewart, Stawell & Nankivell*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

SMYTHE . . . . . APPELLANT;
PETITIONER,

AND

SMYTHE . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *April* 11.

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

Husband and Wife—Restitution of conjugal rights—Bar to relief—Deed of separation—Repudiation of deed—Matrimonial Causes Act 1899 (N.S.W.) (*No.* 14 *of* 1899), *secs.* 5, 6, 7, 11.

A deed of separation between a husband and his wife which both parties have repudiated is not a bar to a petition for restitution of conjugal rights.

Wirth v. *Wirth*, (1918) 25 C.L.R., 402, distinguished.

Decision of the Supreme Court of New South Wales (*James* J.) reversed.