[HIGH COURT OF AUSTRALIA.]

SPAIN . . . . . APPELLANT;
PLAINTIFF,

AND

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 10, 11, 12.

MELBOURNE, *May* 24.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Industrial Arbitration—Award—Construction—Expenses incurred in service of employer—Inquiry as to shipping casualty—Inquiry not due to misconduct of employee—Recovery of expenses—Evidence of misconduct—Inquiry by Court of Marine Inquiry of New South Wales—Navigation Act 1901 (*N.S.W.*) (*No.* 60 *of* 1901), *secs.* 23, 24, 27, 30—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *secs.* 466, 470, 478—*District Court of New South Wales—Jurisdiction—Claim for debt or liquidated demand—Default summons—District Courts Act* 1912 (*No.* 23 *of* 1912), *sec.* 64.

A clause in an award of the Commonwealth Court of Conciliation and Arbitration provided that "the employer shall pay any reasonable expenses of an employee incurred in the service or in the interests of the employer. (a) This provision shall apply to (amongst other matters) inquiries as to casualties or as to the conduct of employees and to proceedings for an alleged breach of any maritime or port or other regulations unless the inquiry or the proceeding be due to the personal misconduct or negligence of the employee."

Held, that the clause applies to formal investigations as to casualties authorized to be made by some body or tribunal set up or sanctioned by statute for such purpose; and, therefore, that it applied to an inquiry into the cause of a wreck by the Court of Marine Inquiry under Part III. of the *Navigation Act* 1901 (N.S.W.), but not to a preliminary inquiry held by the Superintendent of Navigation into the same matter.

An action was brought in a District Court of New South Wales by the captain of a ship against the owner to recover the reasonable expenses incurred by him upon an inquiry by the Court of Marine Inquiry into the cause of the wreck of the ship. The action was dismissed on the ground that the clause of the award did not apply to such a case. There was, as on appeal to the High Court was found by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), no evidence before the District Court of any finding by the Court of Marine Inquiry as to whether the wreck had or had not been caused by the misconduct or negligence of the master.

Held, that the claim was for a "debt or liquidated demand" within the meaning of sec. 64 of the *District Courts Act* 1912 (N.S.W.), which permits a plaintiff in an action for the recovery of a debt or liquidated demand to cause to be issued a default summons.

Held, also, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that the question whether the inquiry was due to the personal misconduct or negligence of the master should be determined by the District Court.

Per Higgins J.: It is not advisable that the High Court, as an appellate tribunal, should decide intricate questions of fact as to which the District Court that has seen the witnesses has not yet made any pronouncement.

APPEAL from a District Court of New South Wales.

An action was brought in the District Court of the Metropolitan District, at Sydney, by Bayer Spain against the Union Steamship Co. of New Zealand Ltd., in which by his plaint (as amended at the hearing) the plaintiff alleged that he was employed by the defendant in the capacity of master of the British ship *Karitane* on the terms that the defendant should pay any reasonable expenses incurred by the plaintiff in the service and in the interests of the defendant and in relation to inquiries as to casualties to the said steamship or as to the conduct of the plaintiff; that the said steamship while on a voyage to a port within the State of New South Wales became a total wreck; that the plaintiff incurred expenses in the inquiry before the Court of Marine Inquiry and at a preliminary inquiry before the Superintendent of Navigation; and that the defendant had not paid such expenses and declined to pay the same or any portion thereof. The plaintiff claimed £63 18s., being the amount of costs paid by the plaintiff to his solicitors, Messrs. Sullivan Bros.

Upon this plaint the plaintiff, pursuant to sec. 64 of the *District Courts Act* 1912 (N.S.W.), caused to be issued a default summons. The defendant gave notice of the following defences: That the

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District Court had no jurisdiction to determine the claim; that the defendant was not liable to pay any portion of the money claimed since the costs were not, nor was any part of them, expenses incurred in the service or in the interests of the defendant; that the costs claimed were not reasonable expenses of the plaintiff inasmuch as the defendant offered to provide legal assistance for the plaintiff; that the amount of costs incurred was not reasonable; and that the inquiries in respect of which the said costs were incurred were due to the personal misconduct or negligence of the plaintiff.

The basis of the claim was an award made by the Commonwealth Court of Conciliation and Arbitration on a plaint in which the Merchant Service Guild of Australasia, of which the plaintiff was a member, was the claimant and the defendant was one of the respondents. Clause 8 of that award was as follows:—"The employer shall pay any reasonable expenses of an employee incurred in the service or in the interests of the employer. (a) This provision shall apply to (amongst other matters) inquiries as to casualties or as to the conduct of employees and to proceedings for any alleged breach of any maritime or port or other regulations unless the inquiry or the proceeding be due to the personal misconduct or negligence of the employee." At the hearing the District Court Judge held that that clause did not refer to the plaintiff's claim, and he gave a verdict for the defendant; and judgment was accordingly entered for the defendant, with costs.

From that decision the plaintiff now appealed to the High Court.

The other material facts appear in the judgments hereunder.

Piddington K.C. (with him *Collins*), for the appellant. Clause 8 (a) of the award applies to the inquiry before the Court of Marine Inquiry and also to the preliminary inquiry before the Superintendent of Navigation. The words "incurred in the service" mean incurred in consequence of being in the service or arising out of being in the service. On the evidence there was a finding by the Court of Marine Inquiry that the wreck of the ship was not due to the misconduct or negligence of the appellant. That finding is conclusive as between the parties (*Hutton* v. *Ras Steam Shipping Co.* (1);

(1) (1907) 1 K.B., 834.

The Arizona (1)). [Counsel also referred to the *Navigation Act* 1901 (N.S.W.), secs. 7, 11, 13, 20, 21, 23, 27, 30, 31 ; *Merchant Shipping Act* 1894 (57 & 58 Vict. c. 60), secs. 466 (11), 470.]

Broomfield K.C. and *H. E. Manning*, for the respondent. The amount claimed was not a " debt or liquidated demand " within the meaning of sec. 64 of the *District Courts Act* 1912 (see *Rogers* v. *Hunt* (2)). The claim is not for a debt, because the amount is not certain. If a plaintiff adopts a form of procedure which he is not entitled to adopt, the Court has no jurisdiction. The defendant has not waived this objection by appearing and putting in a defence (*Nelson* v. *Addison* (3)). Clause 8 (a) of the award does not apply to the preliminary inquiry, which was not authorized by the *Navigation Act*.

[KNOX C.J. referred to *Ex parte Setterfield* (4).]

In clause 8 the words " incurred in the service " mean incurred under the contract of service for the benefit of the employer or by his direction, and sub-clause (a) does not alter that meaning but is limited by it. There was no finding by the Court of Marine Inquiry that the wreck was not due to the misconduct or negligence of the appellant, and that Court was not bound to make a finding one way or the other on the inquiry as to the cause of the casualty. The Court which entertains the claim for money claimed under clause 8 (a) must determine for itself whether the casualty was due to the misconduct or negligence of the plaintiff. A finding by the Court of Marine Inquiry is not between the same parties as those to an action to recover expenses under clause 8 (a), and the subject matter in each case is different; so that there cannot be *res judicata*.

Piddington K.C., in reply. The preliminary inquiry was authorized by secs. 20 and 21 of the *Navigation Act*. It is the basis of the inquiry before the Court of Marine Inquiry, and expenses of the preliminary inquiry may be reasonably incurred in respect of the inquiry before the Court of Marine Inquiry. [Counsel referred to *Baker* v. *Owners of the Theodore H. Rand* (5).]

Cur. adv. vult.

(1) (1880) 5 P.D., 123.
(2) (1854) 10 Ex., 474.
(3) (1907) 24 N.S.W.W.N., 66.
(4) (1900) 21 N.S.W.L.R. (L.), 331.
(5) (1887) 12 App. Cas., 247, at p. 250.

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The following written judgments were delivered :—

KNOX C.J. AND STARKE J. The plaintiff sued the defendant in the District Court for £63 18s., representing the costs of his solicitors who appeared for him upon an inquiry, before the Court of Marine Inquiry in New South Wales, into the cause of the wreck of the s.s. *Karitane* on Deal Island in Bass Straits whilst the plaintiff was in charge as master, and also upon what he alleged was a preliminary inquiry held by the Superintendent of Navigation as to the same matter. The claim was based upon a clause of the award of the Commonwealth Court of Conciliation and Arbitration which is in the following terms :—" 8. The employer shall pay any reasonable expenses of an employee incurred in the service or in the interests of the employer. (a) This provision shall apply to (amongst other matters) inquiries as to casualties or as to the conduct of employees and to proceedings for any alleged breach of any maritime or port or other regulations unless the inquiry or the proceeding be due to the personal misconduct or negligence of the employee."

Process was issued under the provisions of the *District Courts Act* 1912, sec. 64, regulating actions for debts and liquidated demands in money; and it was said that this procedure was inappropriate because the plaintiff's right was to recover " reasonable expenses " and not a sum certain or any liquidated amount. The objection is untenable, even if it could be insisted upon at such a late stage as the hearing of the plaint (*Chitty on Pleading*, 3rd ed., vol. I., p. 105; *Stephenson* v. *Weir* (1)). As is well said by Mr. *Odgers* (*Pleading and Practice*, 5th ed., p. 41), " whenever the amount to which the plaintiff is entitled . . . can be ascertained by calculation or fixed by any scale of charges, or other positive data, it is . . . liquidated." A nice question would have arisen in this case if the award had simply prescribed the payment of expenses incurred in the service or in the interests of the employer. Such a provision might possibly have limited the expenses to those incurred for and on behalf of the employer. But, in the face of sub-clause (a), what room is there for doubt ? It applies the provision to inquiries as to casualties, &c., which are a well-known form of inquiry sanctioned by the shipping laws both of Great Britain and of the States of

(1) (1879) 4 L.R. Ir., 369.

Australia (*Merchant Shipping Act* 1894, Part VI., secs. 464 *et seqq.*; New South Wales *Navigation Act* 1901, Part III., secs. 23 *et seqq.*; Victorian *Marine Act* 1915, secs. 174 *et seqq.*).

Nevertheless, it was argued that the provisions of sub-clause (a) are limited by the general words in clause 8, namely, " in the service or in the interests of the employer." But such a construction renders the provision of sub-clause (a) useless, and merely illustrative instead of being, as we think it is, definitive.

Two points remain which are of some importance:—(1) Part of the moneys sued for was incurred at what is described as " the preliminary inquiry held by the Superintendent of Navigation." But there is no formal preliminary investigation provided for in the *Navigation Act* of New South Wales such as is to be found, for instance, in the *Marine Act* of Victoria (sec. 178). All that can be said, in the present case, is that the Superintendent of Navigation, having a general superintendence of the *Navigation Act*, made some departmental inquiries as to the subject of the casualty. That is not, in our opinion, the class of inquiry with which clause 8 of the award is concerned. It deals, we think, with those formal investigations as to casualties authorized to be made by some body or tribunal set up or sanctioned by statute for that purpose. Some doubt, apparently, exists whether the Superintendent had, on the facts of this case, any authority to make the departmental inquiry he actually did, but we do not regard it as necessary to consider the point, and should be somewhat loath in any event to deny that officer's power to conduct his department as he thinks fit. (2) The award provides that expenses are to be paid " unless the inquiry or the proceeding be due to the personal misconduct or negligence of the employee." This we take to mean that if a casualty is due to " the personal misconduct or negligence of the employee " then the employee shall not recover his expenses. But which tribunal determines whether there has been misconduct or neglect on the part of the employee—the Navigation tribunal or the tribunal before which the employee seeks to recover his expenses? (See *Mallinson* v. *Scottish Australian Investment Co.* (1).) It is not a

(1) (1920) 28 C.L.R., 66.

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matter of *res judicata* or estoppel, but simply what is the proper construction of the award. It seems inconvenient, on the one hand, that the same matter might fall for decision by two separate tribunals; but, on the other hand, it is not incumbent on the Navigation tribunal in many inquiries, particularly in preliminary inquiries, to find whether a particular casualty is or is not due to the misconduct or negligence of any particular person. In the end, we must return to the very words of the clause in the award. And where do we find in these words any limitation upon the powers of the ordinary Courts of law to inquire into the alleged misconduct, or any provision making conclusive the finding or the want of a finding on the part of the Navigation tribunal? Certainly nothing express is discoverable, and for any necessary implication we must look to the subject matter and the nature of the inquiries contemplated by the clause. But, in our opinion, surrounding circumstances are neutral, for they tell us as much in one direction as in the other. Moreover, such a construction is not necessary to give business effect and efficacy to the award (*The Moorcock* (1)). It is quite effective whichever construction is adopted. Therefore, we see no reason for concluding that the determination of the fact of misconduct is confided to the Navigation tribunal alone, and is necessarily excluded from the consideration of the ordinary Courts of law.

The appeal ought to be allowed, and the case remitted for rehearing.

ISAACS AND RICH JJ. This case arises out of a claim under a Federal award which by its terms (clause 19) was expressly limited in its operation from 1st October 1920 "to the end of 1921." The claim is in respect of events occurring after the end of 1921; but in the case of *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (2) this Court, by majority, decided that by force of sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act*, such an award, notwithstanding clause 19, still continues in force. This case must therefore be treated as if clause 19 were non-existent, and the award were indefinite as to time. So treating it, we agree that the appeal should be allowed; but

(1) (1889) 14 P.D., 64.

(2) (1920) 28 C.L.R., 209.

we regret that we take an entirely different view as to what is a proper direction to the District Court for rehearing the case.

The appellant is a master mariner, and a member of the Merchant Service Guild of Australasia. He sued the respondent Company in the District Court, Sydney, for £63 18s. costs paid by him to his solicitors in connection with an inquiry before the Marine Court of New South Wales (including an inquiry by the Superintendent) into the stranding of a steam vessel called the *Karitane*, on 24th December 1921, at Deal Island in Bass Strait, outside the territorial jurisdiction of New South Wales. The case was heard by Judge *Beeby* in June 1922. At the outset an objection was raised to the jurisdiction of the Court to entertain the cause. The summons was issued as a default summons under sec. 64 of the *District Courts Act* 1912. That section empowers a plaintiff to issue such a summons "for the recovery of a debt or liquidated demand." The defendant contended then, and again before this Court, that, inasmuch as the claim was made for a sum not certain at the time the obligation was created, but only for "reasonable expenses," it could not be regarded in law as either a "debt" or "a liquidated demand." The learned District Court Judge properly overruled the objection. It is really not arguable. If the appellant is entitled to anything, it is to a sum payable *instanter* before action and in law ascertained. The trial then proceeded. It appeared that the claim was rested on the terms of the Federal award referred to, which extends to respondents, private and public, in every State in Australia. The particular clause involved, so far as it is relevant to this case, is as follows:— "8. The employer shall pay any reasonable expenses of an employee incurred in the service or in the interests of the employer. (a) This provision shall apply to (amongst other matters) inquiries as to casualties or as to the conduct of employees and to proceedings for any alleged breach of any maritime or port or other regulations unless the inquiry or the proceeding be due to the personal misconduct or negligence of the employee." The evidence disclosed that on 24th December 1921, at 7 in the morning and during a fog, the vessel *Karitane* was wrecked at Deal Island, on its way from Devonport to Sydney. The captain, the present appellant, came to Sydney in another vessel. After he arrived, that is to say on 4th

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January 1922, Captain Cumming, the State Superintendent of Navigation, held what was called a preliminary inquiry into the casualty. The appellant was present, and was represented by counsel as well as solicitor. Then there was in January and February of the same year a formal inquiry by the Court of Marine Inquiry, Sydney. The appellant was subpœnaed to attend and to produce his certificate. He attended, was represented by counsel (Dr. *Brissenden* K.C. and one junior counsel, Mr. *Evans*), and produced his certificate. The inquiry lasted three days, and the Court reserved its decision. In direct examination the appellant stated, without objection: "Both of the inquiries were as to the casualty that occurred to the *Karitane and as to my conduct also.*" In cross-examination the appellant was asked several questions on the basis that his employer told him he would be sufficiently represented by the Company's solicitor. His reply to counsel, in effect, was that his personal interests were separate, and he intended to be separately represented. At one point in the cross-examination he was asked this question: "Would you have thought it proper to employ a leader of the Bar and two or three juniors to represent you on that inquiry?" His answer (unobjected to) was: "I considered it reasonable to employ one barrister and a junior. *My certificate was at stake.*" He was cross-examined at some length about his conduct during the fog, the obvious object being (as indeed was avowedly stated) to convince the Court that the inquiry before the Court of Marine Inquiry was, in the concluding words of clause 8 (a) of the award, "due to the personal misconduct or negligence of the employee"—that is, in this case, the appellant. The learned Judge at one stage interposed and asked of the respondent's counsel: "Am I to retry the issue of the Marine Court?" Learned counsel answered: "Yes." His Honor said: "I do not think it is relevant"; and read clause 8 (a). Nevertheless, counsel persevered, and cross-examined the appellant both as to his neglect of navigation rules, and as to departure from private regulations of the respondent Company. Being pressed as to the safety of the course of the ship, and how he accounted for the accident, the appellant said: "My case was held before a competent tribunal and *I was exonerated.*" Counsel said:—"I never asked you that. I ask that that be struck out of the

notes." His Honor said :—" I will allow it in cross-examination. I rule that the answer go down." Now, we may interrupt the narrative to say that, unless the finding of the Court of Marine Inquiry in all cases similar to the present is utterly irrelevant, the evidence was inherently admissible. As a matter of practice, whether it was to be allowed at the time and in the way it was given is another but wholly immaterial question. We are not now concerned with trivialities of that sort. But if a man in the position of the appellant is not to be allowed at all to prove his acquittal from any blame by the one expert and authorized Court of the State on the special subject, then his answer should be ignored. But if otherwise—and we hold that he was at liberty at some time in the case to prove the fact—then the respondent's counsel, after the Judge's ruling, had full opportunity, if it were untrue, to cross-examine as to its truth and, if he could, to prove its untruth. Indeed, the respondent's counsel proceeded to exercise his right to deal with the statement. He asked a little later :—Q. : " You said you had been exonerated by the Court ? "—A. : " Yes." Q. : " These regulations were not allowed to be given in evidence at that inquiry ? " (The regulations referred to were the Company's regulations.)—A. : " Yes." Q. : " There was no question in that Court as to whether you had broken the Company's regulations ? "—A. : " That is a matter for the Court—*for my certificate*—and not the Company's regulations." Q. : " The Company's regulations were not in question at all in that inquiry ? "—A. : " They were produced and rejected on the objection of my counsel." There was no attempt to disprove the appellant's statement as to his exoneration. There can be no doubt, on the evidence before us, that his statement was true, namely, that he had been exonerated by the Court of Marine Inquiry. The learned Judge gave judgment for the respondent on the one ground, that such claims do not come within the terms of clause 8 of the award.

There have been argued several questions of importance to all such cases as this ; and, in fact, all of them are essential to a determination of this present case one way or the other. They are (1) whether a formal inquiry into a shipping casualty comes within the scope of clause 8 of the award ; (2) whether a Superintendent's inquiry falls within it ; (3) whether the issue of personal misconduct

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or negligence of the employee is to be decided by the District Court in the first instance and, if necessary afterwards, by this Court, as if there had been no prior decision by the Marine Court of Inquiry; (4) whether departure from the Company's private regulations is "personal misconduct or negligence" within the meaning of clause 8 (a) of the award; (5) whether the "collision regulations" have any relevance to the present case; (6) how and by whom is the reasonableness of the expenses to be determined.

Before proceeding to express our opinion how this appeal should be decided, it is very important first to see how the facts stand in relation to the decision of the Marine Court. The inquiry was one held under sec. 27 of the New South Wales *Navigation Act* No. 60 of 1901. Sub-sec. 1 says: "A Court of Marine Inquiry is hereby authorized to make inquiries as to shipwrecks and other casualties affecting ships, or as to charges of incompetency or misconduct on the part of masters, mates, or engineers of ships in the following cases, namely"—then follow "cases" which include the shipwreck of the *Karitane* and the incompetency or misconduct of the master, if any, on that occasion. Sub-sec. 2 says: "The said Court shall have the same jurisdiction over the matter in question as if it had occurred within its ordinary jurisdiction, but subject to all provisions, restrictions, and conditions as would have been applicable if it had so occurred." Sub-sec. 4 says: "The said Court, holding an inquiry under this section, shall have the same powers of cancelling and suspending certificates, *and shall exercise those powers in the same manner as a Court holding a similar investigation or inquiry in the United Kingdom.*" Sub-sec. 5 says: "The said Court, for the purposes of any inquiry under this section, shall, so far as relates to the summoning of parties, and compelling the attendance of witnesses, have all the powers of the Supreme Court." As the wreck of the *Karitane* took place outside the territorial jurisdiction of New South Wales, the authority of the local Legislature to empower the Court to hold the inquiry is derived from the *Merchant Shipping Act* 1894, sec. 478. Sub-sec. 2 of sec. 27 of the local Act draws into consideration secs. 23 and 24. By those sections District Courts are to be proclaimed Courts of Marine Inquiry, and as such are to be Courts of record. Any one or more District Court Judges may sit as

such Court, and "shall be assisted by two . . . assessors" who are to advise but not adjudicate. Sub-sec. 2 of sec. 24 enacts: "*Where an inquiry involves or appears likely to involve* any question as to the cancelling or suspension of the certificate of a master, mate, or engineer, the Court *shall* hold the inquiry with the assistance of *not less than two assessors having experience in the merchant service.*" Sub-sec. 4 of sec. 27, above quoted, draws into consideration the English provisions regarding a similar inquiry in the United Kingdom, as well as whatever express provisions relevant to the case are found in the *Merchant Shipping Act* 1894. Sec. 478 of that Act, by sub-sec. 5, makes the same requirement as sub-sec. 4 of the New South Wales sec. 27 as already quoted. Sec. 466 of the Imperial Act regulates the manner in which the Court holding a similar investigation shall exercise its powers. Sub-sec. 4 of that section corresponds with sub-sec. 2 of sec. 24 of the New South Wales Act as already quoted. Sub-sec. 11 says: "Every formal investigation into a shipping casualty shall be conducted in such manner that if a charge is made against any person, that person shall have an opportunity of making a defence." Sec. 470 says: "The certificate of a master, mate, or engineer may be cancelled or suspended—(*a*) by a Court holding a formal investigation into a shipping casualty under this Part of this Act . . . if the Court find that the loss or abandonment of, or serious damage to, any ship, or loss of life, has been caused by *his wrongful act or default*, provided that, if the Court holding a formal investigation is a Court of summary jurisdiction, that Court shall not cancel or suspend a certificate unless one at least of the assessors concurs in the finding of the Court." Other provisions made are immaterial to this case.

Clearly, it is the duty of the Court in investigating the circumstances of the casualty to inquire whether the master has been guilty of what the Act calls "wrongful act or default." The Court of Marine Inquiry would not be performing its statutory duty unless it turned its attention to that subject. Thus, what the award calls "personal misconduct or negligence of the employee" (only another expression for his wrongful act or default) necessarily falls within the consideration and determination of the Court of Marine Inquiry. See note (*e*) to *Temperley's Merchant Shipping Acts*, 3rd ed., pp. 286-287.

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A reference is there made to a Scottish case—*Ewer* v. *Board of Trade* (1)—the case of a master improperly leaving the bridge. There may be charges of "incompetency or misconduct" under the Act quite apart from any casualty; but that is unimportant. Any inquiry into a casualty involves inquiry into the conduct of the officers, and when the tribunal in this case came to a conclusion so as to give what sec. 30 of the New South Wales Act calls "the decision of the Court" the tribunal must necessarily have concluded either that the master was not in fault or that he was in fault. There is no possible doubt which conclusion was in fact arrived at. The appellant's testimony that he was exonerated is uncontroverted. Indeed, the fact is to a great extent proved otherwise. He was in June 1922, as he has sworn, the master of the Patrick Steamships Co.'s vessel *Sealark*, a fact incompatible with cancellation of his certificate or really with any suspension.

The facts, then, in relation to the decision of the Court of Marine Inquiry are that that tribunal has found that the casualty was not due to any wrongful act or default—in other words, to any personal misconduct or negligence—of the appellant. In these circumstances it appears clearly (1) that there was an inquiry as to a casualty within the meaning of par. (a) of clause 8 of the award; (2) that the appellant incurred expenses in respect of that inquiry. The first of the questions formulated by us must therefore be answered in appellant's favour.

How does he stand with regard to the condition "unless the inquiry . . . be due to the personal misconduct or negligence of the employee"? Must he fight that over again if the employer contests it; or has it been finally settled for the purposes of the award by the Court of Marine Inquiry? There have been urged two competing constructions of that condition. The condition itself does not say "unless the *casualty*" be due to the personal misconduct or negligence of the employee, but says "unless the *inquiry*" be due to it. How can any tribunal but the one that has to consider it tell that? The inquiry is the act of that tribunal, and no one but that tribunal can, in the absence of appeal, say that its inquiry was due to any cause

(1) (1880) 7 Ct. of Sess. Cas. (4th ser.), 835.

other than the one it assigns. Nevertheless, as we say, two competing constructions are presented, and, as the award is a Federal award applying to every State in Australia, the relative values of those constructions cannot be appreciated until some general view is obtained of the Navigation Acts in force throughout Australia. It must not be imagined that the clause in the award is to be restricted in its scope to the New South Wales Act. The Acts in force, so far as we can gather with the materials at our command, are these, in order of date: Tasmania, 38 Vict. No. 2, amended by 59 Vict. No. 27; Queensland, 41 Vict. No. 3; South Australia, 44 & 45 Vict. No. 237; New South Wales, 1901, No. 60; Western Australia, 1904, No. 59, amended by 1918, No. 33; Victoria, 1915, No. 2688. Without entering unnecessarily into the details of these enactments, we may observe that there is a strong family resemblance in their main provisions with reference to inquiries into casualties and misconduct. Speaking generally, tribunals are created with powers practically identical with those possessed by the Court of Marine Inquiry in New South Wales. Speaking generally also, the decision, besides having effect as such, is made the subject of a "report." The report may be made to the Governor or a Board, but probably the intention is to communicate it in a case of this kind to the Board of Trade in England. That is expressly so provided in sec. 22 of the Tasmanian Act 59 Vict. No. 27. There are some provisions in some of the Acts which are not unimportant in this connection. In sec. 192 of the Victorian Act a Court of Marine Inquiry may reserve any question of law in the form of a special case for the opinion of the Supreme Court. By sec. 194 the Court of Marine Inquiry may make such order with respect to the costs of any investigation or any portion thereof as it deems just. So in sec. 27 of the Western Australian Act. The constitution of the Court differs in different States. In South Australia, in certain classes of cases where a certificate is in peril, there must be at least one Judge of the Supreme Court present with nautical or engineering assessors. In some of the States a preliminary inquiry is provided for as in England. That is not so in New South Wales in the sense in which a preliminary inquiry is regarded as a precedent stage to a formal inquiry. (See *Ex parte Setterfield* (1).)

(1) (1900) 21 N.S.W.L.R. (L.), 331.

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It is apparent, therefore, that whatever meaning was intended by clause 8 (a) must have been appropriate to the general system prevailing throughout Australia. We may now state the two competing constructions.

(1) For the respondent it is contended that whenever an inquiry into a casualty or a charge of misconduct is made by a Court of Marine Inquiry in any of the States, or where a penal charge for alleged breach of regulations is heard and determined (as to the latter the same considerations in effect apply though the tribunals are different), the decision counts for nothing when a claim for the reasonable expenses of the employee in relation to the matter is made by the employee. He may have been formally charged with misconduct either as a necessary part of a casualty inquiry or as a substantive independent charge when no casualty has occurred, or he may have been charged with a breach of some port regulations while promoting, as he thought, the interests of his employer. He may have had his certificate in peril, his future livelihood endangered, and, after considerable expense, which, for the sake of argument, may be assumed to have been reasonable in amount, he may have emerged with a clear acquittal or, as the appellant terms it, in this case, exoneration. Nevertheless, says the respondent, it is incumbent on him, if the respondent so desires, to fight the matter a second time before another tribunal, unequipped with the technical and special knowledge which the Legislature insists on for the Marine Inquiry. In other words, the respondent argues that the unfortunate officer, already weakened in resources and with the whole of his case exposed, must go through another fight, this time with his employer, and a second expenditure of costs in order to demonstrate that the first decision was right. The first decision may have been by a Court of three District Court Judges with the concurrence of assessors, and the second may be by one District Court Judge without any assessors. Considerations similar in principle, though varying in application, would govern the case of proceedings for breach of regulations.

(2) The second suggested construction, the one that was advanced on behalf of the appellant, is, in effect, that clause 8 (a) of the

award contemplated the possibility of these inquiries and proceedings under the various Navigation Acts of the States. It contemplated the liability of officers, either because casualties in fact occurred or because some charge of incompetency or misconduct or breach of regulations was preferred, to answer at the inquiry or to the charge and to defend themselves. It contemplated that the inquiry or other proceeding would settle the question of fault or no fault, and, if in the result the officer was found blameless, he should not be required to bear the costs of justifying the way in which his employer's business was carried on. If the result was that he was personally found to blame, he was to bear the burden of his costs. But, says the appellant in effect, the construction advanced for the respondent is an intolerable burden and goes far to defeat the chance of reimbursement which the clause was supposed to give.

The question for us is which of these competing contentions is correct. If the learned President who made the award were in a position to say precisely what he intended by it, we should feel ourselves bound to accept that as the true interpretation of the clause, but, as our learned brother *Higgins* very properly treats the paragraph as one to be construed by a Court in the ordinary way, we do so oblivious of who it was who framed it. Construing it, as every document has to be construed, according to its language as applied to the subject matter and with reference to the occasion on which it was drawn up, we feel no doubt as to the proper meaning to be attached to the clause under consideration. The occasion was that in an industrial dispute between the members of the Guild and the shipowners a claim was made by the former—for this is necessarily connoted by the award itself if it is to be valid—that in cases of such inquiries or proceedings reasonable expenses once incurred should be immediately paid. The employers were protected by the condition at the end of par. (a). We cannot read that condition as converting a right to be paid costs clearly incurred into a right to a law suit with an employer who could easily wear down the officer by protracted proceedings. We think that the condition as framed looks to the result of the inquiry or other proceeding as it has eventuated. If, in the event, it does not appear that the officer has been adjudged guilty by the appropriate tribunal of personal misconduct

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or negligence, he has an instant right to payment of whatever expenses he has incurred, and to the extent that they are reasonable in amount. The question of reasonableness of amount, as it could not be considered by the tribunal, is of course an open question, just as a reasonable sum for work and labour or for goods would be; but the right to instant payment of the reasonable sum is the same in both cases.

We therefore think that the issue as to the condition at the end of par. (a) of clause 8 should be determined by this Court on this appeal in favour of the appellant, and that the only question to be remitted to the District Court should be the reasonableness of the amount of expenses incurred in respect of the formal inquiry before the Court of Marine Inquiry.

As to the inquiry by the Superintendent, we do not think that, having regard to the nature of that inquiry under the New South Wales Act, it can properly come within par. (a) of clause 8. We do not say it was not a lawful inquiry nor that the appellant was not bound to attend, nor that his representation by counsel on that occasion was not reasonable. We offer no opinion as to those matters, but we are satisfied that *Setterfield's Case* (1) is correct, and that the place which the Superintendent's inquiry holds under the law of New South Wales is such that it is not a precedent stage of the formal inquiry, and that it is not sufficiently connected therewith to bring it within par. (a) of clause 8. It has not directly or indirectly any decisive effect.

The other questions, important though they are to the final determination of this case to the parties, we do not enter upon, as the views of a minority would be useless, though we recognize the necessity of an authoritative intimation to the District Court on all those points in order to avoid further litigation.

In our opinion, this appeal should be allowed simply on the ground that the expenses of the formal inquiry were recoverable, and that upon the evidence the learned Judge should have proceeded to award to the plaintiff what he found was a reasonable sum for those expenses.

(1) (1900) 21 N.S.W.L.R. (L.), 331.

HIGGINS J. Clause 8 of the award which is the subject of the proceedings has been set out. The plaintiff, late master of the s.s. *Karitane*, sued the Company, his employer, in the District Court for the costs which he had paid to his solicitors in relation to an inquiry before the Court of Marine Inquiry into the causes of the wreck of the vessel. The vessel was wrecked on Deal Island in Bass Strait on 24th December last. The action was dismissed by the learned Judge at the trial on the sole ground that the clause did not mean that a " claim of this nature " should be paid by the defendant Company. There was no finding that any of the expenses were " reasonable " or " unreasonable " ; nor was there any finding that the " inquiry or proceeding " before the Court of Marine Inquiry was " due to the personal misconduct or negligence " of the plaintiff as master.

We are not favoured with the reasons of the Judge for thinking that the clause does not apply to a " claim of this nature " ; and, after a close examination of the words of the clause, I cannot agree with this view. The master, as well as the Company and others, was duly notified, in pursuance of the New South Wales *Navigation Act* 1901, that the Court of Marine Inquiry would on 20th January 1922 " make inquiries into the circumstances attending the stranding and subsequent beaching " of the ship, and to produce any relevant documents. The plaintiff attended the inquiry, and gave evidence. Under clause 8 the Company has to " pay any reasonable expenses of an employee incurred in the service or in the interests of the employer."

The plaintiff was still in the service of the Company at the inquiry, and was expected by the Company to attend. It was even in the interest of the Company that the master should attend, so that the true cause of the disaster should be probed, and the blame, if any, sheeted home to the proper person. But as the master's certificate is also at stake in such an inquiry, and as there might be doubt whether any expenses of the master were not incurred rather for his own purposes than for the purposes of the Company, the clause proceeds to say expressly (a) that " this provision shall apply to (amongst other matters) inquiries as to casualties or as to the conduct of employees." I confess that I do not see what short form of

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words would more effectually indicate that the interest of the master in retaining his certificate was not to prevent him from recovering his reasonable expenses in connection with such an inquiry as this. The effect of sub-clause (a) is the same as if the parliamentary phraseology were used, as if the words were—"The reasonable expenses of an employee incurred in connection with inquiries as to casualties or as to the conduct of employees shall be deemed to have been incurred in the service or in the interests of the employer." I apply my mind to the construction of the words used, and to nothing else. The award was made by me, in my own words, when I was President of the Commonwealth Court of Conciliation; and I fully recognize that I have no right—as I have no desire—to import into the award my actual intention in framing the clause. The question is not what I meant, but what the words mean. Sitting in this High Court, my business is to interpret the clause on the usual principles of interpretation, with the same materials as are available for my learned colleagues.

In my opinion, therefore, it is clear that the clause does cover claims of this nature; and prima facie it is sufficient for us to say so, to allow the appeal, to reverse the judgment, and to remit the case to the District Court to do what is right. It has yet to be determined whether the expenses, in whole or in part, are "reasonable"; and whether the words of exception in sub-clause (a) exclude the application of the clause to this claim. That exception is that the provision for reasonable expenses is to apply to all such inquiries "unless the inquiry . . . be due to the personal misconduct or negligence of the employee." There would be no inquiry necessary if there were no wreck; and if the wreck, and therefore the inquiry, would not have occurred but for the master's own personal misconduct or negligence, the master has no right to his expenses. Although the Court of Marine Inquiry did not deprive the plaintiff of his certificate, the Company has not only (in accordance with its usual practice) dismissed the master, but also it contends that the wreck was due to his negligence. It has yet to be determined whether this contention is right; and I see no reason—at all events if the Court of Marine Inquiry made no finding on the subject—why the District Court should not apply itself to this question as well as to the question of

reasonable expenses. No doubt this Court has power to decide these questions itself, if it think best to do so; but it seems to me inadvisable that this Court, as an appellate Court, with its numerous responsibilities, should take on itself to decide intricate questions of fact as to which the District Court has not made any pronouncement, and is still free to do what is just. If we decide on these facts, we decide without the benefit of a previous consideration by an independent tribunal which has seen the witnesses.

But there is another reason in favour of remitting the case to the District Court, after stating that the award does cover "claims of this nature"; for the finding of the Court of Marine Inquiry was not put in evidence in the District Court. We should know what the finding was. We merely know, from statements of counsel at the Bar, which are not denied, that the certificate of the master was not cancelled; but we do not know whether any finding was made as to the conduct of the master, favourable or unfavourable. That Court was not bound to make any specific finding on the subject; for according to the notice of inquiry served, the Court was merely to "make inquiries into the circumstances attending the stranding and subsequent beaching of the British ship *Karitane*." There was no charge of misconduct within the meaning of sec. 27 (1); although it was probably within the competency of the Court of Marine Inquiry to include a finding as to conduct. But that Court was free to avoid any specific finding on the subject, free to leave the subject open. Counsel for the master have urged us to accept the statement made by the master in his cross-examination that he was "exonerated." The master volunteered the statement: "My case was held" (? heard) "before a competent tribunal and I was exonerated." Mr. *Rogers*:—"I never asked you that. I ask that that be struck out of the notes." His Honor:—"I will allow it in cross-examination. I rule that the answer go down." Probably the answer would have been admissible on cross-examination, if in answer to a question, but it was not. It was the duty of the Judge to refuse to accept the volunteered statement. This not uncommon device of partisan witnesses to go beyond the questions asked was promptly objected to in this case; and the objection ought, in my opinion, to have been allowed. Counsel for the respondent, the objection having been overruled,

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had to deal with it subsequently; and he naturally asked: "You said you had been exonerated by the Court?"—"Yes." "These regulations" (of the Company) "were not allowed to be given in evidence at that inquiry?"—"Yes." But this was no waiver of the objection. There has been a mistrial, and the finding of the Court of Marine Inquiry had better be ascertained properly, if justice is to be done. I desire to reserve my opinion as to the effect of the finding of that Court until I know what that finding is; it is not desirable to express an opinion on facts which have not been ascertained.

If, however, my colleagues think that our opinions should be expressed as to the construction of the award and of the Act (so far as the facts have been ascertained) for the guidance of the District Court in its further proceedings, I am free to say that, in my opinion, the preliminary inquiry held by the Superintendent on 4th January is not recognized by this New South Wales Act, and is not an inquiry as to a casualty or as to the conduct of employees within the meaning of sec. 8 (a) of the award. The award obviously refers to official inquiries of the nature sanctioned by Acts of the respective States, as usefully listed in the judgment of my brothers *Isaacs* and *Rich*; it does not include, for instance, inquiries before persons who have no power to give an official finding, such as an inquiry before fellow masters or before the Guild. At the same time, it is open to the District Court to decide whether expenses incurred by the master in paying counsel and solicitors to appear for him on this informal preliminary inquiry are or are not reasonable expenses incurred by him in connection with or in relation to the inquiry proper before the Court of Marine Inquiry. It is all a question of fact for the District Court, what expenses were reasonably incurred by the master as to that inquiry. It is easy to conceive cases in which expenses preparatory to the inquiry and for its purposes, even in the taking of counsel's opinion, might be justified as reasonable.

I concur with the opinion that the claim is for a "debt or liquidated demand" within the meaning of sec. 64 of the *District Courts Act* 1912; and that the learned District Court Judge rightly overruled this objection.

The appeal should, I think, be allowed, and the case remitted to the District Court with our opinion that the award does apply to a claim of this nature.

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Appeal allowed. Case remitted to District Court for rehearing.

Solicitors for the appellant, *Sullivan Brothers.*

Solicitors for the respondent, *Creagh & Creagh.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BOWES (CARRYING ON BUSINESS AS THE BRITISH TIE COMPANY) . . . DEFENDANT, APPELLANT;

AND

CHALEYER (CARRYING ON BUSINESS AS J. CHALEYER & COMPANY) . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Contract—Sale of goods—Indenting of goods—Conditions precedent—Time of shipment—Repudiation of contract—Excuse for non-performance of conditions—Repudiation not accepted—Subsequent tender of goods.

Practice—Pleading—Amendment—Amendment by one party—Right of other party to plead at large—Rules of the Supreme Court 1916 *(Vict.), Order XXVIII., rr.* 1, 6.

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MELBOURNE, *Mar.* 1, 2, 5, 6; *May* 11.

KNOX C.J., ISAACS, HIGGINS, RICH and STARKE JJ.

The plaintiff and the defendant entered into a contract by the acceptance by the plaintiff of an order given by the defendant in the following terms:— "Please indent for my/our account and risk from the manufacturer the undermentioned goods, the prices to be understood for goods taken at factory