McTIERNAN J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with it.

In my opinion the appeal should be allowed with costs, and the suit dismissed with costs.

Appeal allowed with costs. Suit dismissed with costs.

Solicitor for the appellant, *N. K. P. Cohen.*

Solicitors for the respondent The Citizens and Graziers' Life Assurance Co. Ltd., *Pigott, Stinson, McGregor & Palmer.*

Solicitor for the respondent The Commonwealth Life Assurance Society Ltd., *G. W. Mitchell.*

J. B.

Dist *Liosatos v Australian National Line* (1964) 111 CLR 282

[HIGH COURT OF AUSTRALIA.]

BURNS PHILP & COMPANY LIMITED . . APPELLANT; DEFENDANT,

AND

MYRHE . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Shipping and Navigation—Seaman incapacitated by illness—Articles of agreement—Illness contracted on board of the ship or in the service of the ship or her owner—Seaman employed by same owner for successive voyages—Separate articles signed for each voyage—Illness contracted during currency of articles for previous voyage—Effect.

The articles of agreement under which a seaman was employed by a shipowner contained a clause which provided that if the seaman were landed and left at a port by reason of illness or accident in the service of the ship incapacitating him from duty, he was entitled to certain wages and benefits. The clause

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further provided that the illness, hurt, or injury, "shall so far as can be ascertained, be an illness contracted on board of the ship, or a hurt or injury sustained in the service of the ship or her owner."

The seaman signed the articles on 10th January 1933, and on 20th April of the same year was landed at a port, having become incapacitated two or three days before, by an illness, pernicious anæmia. He sued the owner of the ship for wages. The medical evidence showed that the disease had been contracted some time prior to the signing of the articles, although it did not manifest itself until a few days before 20th April 1933. The seaman had prior to 10th January 1933 been in the service of the owner under previous articles, separate articles being signed in respect of each voyage.

Held, (i.) that an illness may be contracted within the meaning of the clause before the incapacitating results occur or are experienced:

(ii.) that in order to succeed in his claim for wages the seaman must show that the illness was contracted during the currency of the articles, it being insufficient that the illness was contracted in the service of the ship or her owner under previous articles.

Decision of the Supreme Court of Queensland (Full Court): *Myrhe* v. *Burns Philp & Company Limited*, (1934) 28 Q.J.P.R. 49, reversed.

APPEAL from the Supreme Court of Queensland.

An action was commenced in the Magistrates Court of Queensland at Brisbane, by George Myrhe against Burns Philp & Co. Ltd., in which he claimed £72 8s. 3d. as wages due to him as an able-bodied seaman landed at Brisbane, whilst in the service of the company on s.s. *Mataram* under articles of agreement, by reason of illness contracted in the service of the ship and which wholly incapacitated him from following his duty. The claim extended over a period from 21st April 1933 to 16th October 1933. The articles were signed on 10th January 1933. Two or three days before 20th April 1933, Myrhe became incapacitated by illness and on arrival of the ship at the port of Brisbane, which was not his home port, he was landed there on 20th April 1933. The illness was then found to be pernicious anæmia. The medical evidence showed that the illness had been contracted some time before 10th January 1933, but did not manifest itself until shortly before 20th April 1933. Myrhe had previously made many successive voyages in the service of the ship and her owner. Separate articles were signed by him in respect of each voyage.

The Magistrate gave judgment for the plaintiff Myrhe for the amount claimed and costs. The defendant, Burns Philp & Co. Ltd., then appealed to the Supreme Court of Queensland (Full Court) which dismissed the appeal: *Myrhe* v. *Burns Philp & Company Limited* (1).

From that decision the appellant pursuant to special leave of the High Court granted on 23rd April 1934, now appealed to the High Court.

Fahey (with him *O'Connor*), for the appellant. There is no evidence from which the inference could be drawn that the seaman was left at any port by reason of illness or accident in the service of the ship. In order to succeed the seaman must show that the illness was contracted, that is, infection took place, during the currency of the articles in which the incapacity became manifest. In clause 22 (*c*) (3) of the articles the word "contracted" means not the manifestation of the illness, but the infection with the illness. A disease is contracted when the infection takes place, not when the illness manifests itself (*Herbert* v. *Inter-State Steamships Pty. Ltd.* (2); *M'Cafferty* v. *MacAndrews & Co.* (3)). The infection must take place at a time when the seaman is under articles in a ship on which he is serving at the time of the incapacity. Both the contracting of the illness and the incapacity must occur during the current articles. The parties to the articles make a contract with regard to the future. The articles relate to diseases to be contracted after the signing of the articles. When the seaman was discharged there was a release signed which settled all claims (sec. 80 of the *Navigation Act* 1912-1926). The words "So far as can be ascertained" mean "so far as can be reasonably ascertained" (*Whicker* v. *Hume* (4); *Jex* v. *McKinney* (5)). It cannot be reasonably ascertained from the evidence that the illness was contracted in the service of the ship or her owner.

Matthews (with him *Copley*), for the respondent. The agreement made between the seaman and the owner of the ship contemplates continuous service. The seaman is not discharged from the ship

(1) (1934) 28 Q.J.P.R. 49.
(2) (1931) S.A.S.R. 393.
(3) (1929) S.C. 529.
(4) (1852) 21 L.J. Ch. 406, at p. 409.
(5) (1889) 14 A.C. 77.

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until the agreement comes to an end. At the time of the illness the seaman had not been discharged. When he commenced work on his first voyage on the s.s. *Mataram* he was in good health. His employment was continuous even though fresh articles were signed for subsequent voyages. The words of clause 22 (*c*) (3) are wide enough in their ordinary meaning to include illness contracted on the ship under previous articles, or in the service of the ship or her owner previously to the signing of the current articles. There is nothing to show that the parties contracted only as to future illness. Clause 22 (*c*) (3) of the agreement is very wide, and includes every kind of illness except those mentioned in the proviso (*Mullins* v. *Treasurer of Surrey* (1)). Even though the articles have expired, the seaman is still in the employment of the owner, as he has not been discharged in accordance with the agreement. There is evidence to show that the illness was contracted in the service of the ship or her owner. There are no words in the agreement to show that the illness must be contracted during the currency of the articles. Typhoid fever is an illness for which compensation may be received (*M'Cafferty* v. *MacAndrews & Co.* (2); *Smith* v. *Australian Woollen Mills Ltd.* (3)). The findings of the Magistrate should not be disturbed.

Fahey, in reply. There must be some causal connection between the illness and the ship. The articles speak of the service of the ship or her owner. " In the service of the ship " means by reason of the service and not during the service. There is no evidence that the disease was contracted on the ship or in the service of the ship or her owner.

Cur. adv. vult.

Aug. 10.

THE COURT delivered the following written judgment:—

The appellant was sued by the respondent in the Magistrates Court of Queensland for the sum of £72 8s. 3d. wages, which he alleged he was entitled to receive under articles of agreement, signed by him on 10th January 1933, whereby he engaged to serve as a seaman on board the appellant's ship *Mataram*.

(1) (1880) 5 Q.B.D. 170, at p. 173. (2) (1930) A.C. 599.
(3) (1933) 50 C.L.R. 504.

Judgment was given in favour of the plaintiff for the amount claimed, and on appeal to the Full Court of the Supreme Court of Queensland the judgment was affirmed. The present appeal is brought by special leave against the order of the Supreme Court.

The articles in question incorporate the terms of an agreement made on 6th August 1925 between the Federated Seamen's Union of Australia and the Commonwealth Steamship Owners Association.

Clause 22 of that agreement which became part of the articles under which the respondent served, is in these terms :—

"SICKNESS AND ACCIDENT.

22. If a seaman belonging to a ship for which articles are signed in Australia is landed and left at any port by reason of illness or accident in the service of the ship, incapacitating him from following his duty, he shall be entitled :—(*a*) If landed at his home port, to receive wages at the rate fixed by his agreement up to the expiration of one week after the date of his recovery, as certified by his medical attendant or by a Medical Inspector of Seamen if the employer at his own expense requires an examination. Provided that in cases where his engagement expires within one month from the date he was left on shore, the time for which he shall be so entitled to be paid shall not exceed a period of one month, and in other cases it shall not exceed a period of three months from the date he was left on shore. (*b*) If landed and left at a port other than his home port, to receive wages until his recovery, certified as provided in the preceding sub-clause (*a*), and until arrival at his home port at the rate payable to him when he was landed and after his recovery (certified as aforesaid) to a free passage to his home port. Provided that if after recovery the seaman rejoins his ship or takes other employment or is offered and refuses employment on some other vessel proceeding to his home port at a similar rate of pay to that received by him immediately prior to his being left on shore, and with the right of discharge from that vessel on arrival at his home port his right to continue to receive wages under this sub-clause shall then cease. (*c*) The illness, hurt, or injury which shall entitle a seaman to the benefits provided for in this clause shall :—(1) Be such as wholly to incapacitate him from performance of his duty. (2) Be, or appear to be, of such a nature that it is considered by the

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Master advisable in the interests of the seaman to leave him ashore. (3) So far as can be ascertained, be an illness contracted on board of the ship or in the service of the ship or her owner, or a hurt or injury sustained in the service of the ship or her owner. Provided that if the illness is due to his own wilful act or default or to his misbehaviour, or is venereal disease, the seaman shall not be entitled to the benefits provided for in this clause. (*d*) The expense of providing the necessary medicines, surgical and medical advice, and attendance to a seaman belonging to a ship while suffering from the effects of sickness contracted or injury received in the service of the ship or of the owner, or from any illness not being venereal disease or an illness due to his own wilful act or default, or to his own misbehaviour, and of the seaman's conveyance to the home port after recovery, shall be paid by the employer without any deduction from wages on that account—until he is cured or dies or is brought or taken back to the port where he is entitled to be discharged or such other port as is mutually agreed upon with the approval of the proper authority. This sub-clause is subject to the proviso to sub-clause (*b*) of this clause. (*e*) While being returned to the port above referred to under the provisions of this clause, the seaman, if he is not being maintained by or at the expense of the employer, shall be entitled to sustenance allowance recognised by this agreement."

During the currency of these articles, that is, two or three days before the 20th April 1933, the respondent, while on board the *Mataram*, became incapacitated by illness, pernicious anæmia, from performing his duty as a seaman, and on 20th April 1933, when the ship arrived at Brisbane, he was landed and left there, having been conveyed to hospital. Brisbane was not his home port. The respondent, under the terms of clause 22 as incorporated in the articles, claimed wages from 21st April 1933 to 16th October 1933. It is not disputed that if his claim is rightly founded he is entitled to the sum for which he received judgment. It is also common ground that the illness from which the respondent suffered answers the description both in 22 (*c*) (1) and 22 (*c*) (2). The question on which the parties are at issue is whether the illness which incapacitated the respondent from following his duty was " so far as can be

ascertained " an illness " contracted on board of the ship or in the service of the ship or her owner " (22 (*c*) (3)). This issue was, indeed, narrowed by Mr. *Matthews* conceding that the time at which an illness is contracted may precede the time when it incapacitates the seaman. Mr. *Fahey* relied upon the decision of *Angas Parsons* J. in *Herbert* v. *Inter-State Steamships Pty. Ltd.* (1). Mr. *Matthews* did not question the correctness of this decision. Referring to sec. 132, sub-sec. 5 of the *Australian Navigation Act* 1912-1920, the learned Judge said at page 402 :—" It seems that when the section under consideration speaks of an illness having been contracted, it refers to the origin or source of it. Whether for this purpose infection is a proper expression or not, a person would be said to have contracted the disease when he was infected with the cause. For example, in the case of smallpox, a seaman, who, in this sense, contracted smallpox before signing on, cannot be said to contract the disease when it manifests itself and incapacitates him from doing his work." See also decisions cited at pp. 402-405. This Court refused an application for special leave to appeal against this judgment (*Herbert* v. *Inter-State Steamships Pty. Ltd.* (2)). The Supreme Court of Queensland in the present case held that it was erroneous to say that " an illness was ' contracted ' within the meaning of clause 22 when the incapacitating results are experienced." We agree that an illness may be contracted within the meaning of the clause before those results occur. Two of the conditions expressed in clause 22, upon which the rights of the seaman thereunder depend, are that the illness should incapacitate him from duty, and should have been contracted on board of the ship or in the service of the ship or her owner. The latter condition relates to the contracting of the illness, the former to its subsequent effect; that is, incapacity for work. In the present case the Magistrate found that the illness which incapacitated the respondent was contracted by him during the period he was in the service of the ship or her owner, and that " the illness of 20th April 1933 was that stage of the disease which caused his total incapacity for work." The period of such service commenced long before 10th January 1933. It is impossible to deduce from the Magistrate's finding that the illness was contracted after the 10th of January 1933, which is the day on which the articles were signed, and there is no evidence upon which such a conclusion could be supported.

(1) (1931) S.A.S.R. 393.

(2) (1932) 47 C.L.R. 639.

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It was contended by the appellant that a seaman is not entitled to any benefit under clause 22 unless the illness which incapacitated him was contracted while the articles, during which the incapacity occurred, were current. For the respondent it was contended that the conclusion of the Supreme Court was right, namely, that the words " illness contracted on board the ship or in the service of the ship or her owner," as the Court said, " are wide enough in their ordinary meaning to include illnesses contracted on the ship under previous articles, or contracted in the service of the ship or her owner previously to the signature of the current articles, and that there is nothing in the nature of the service of a seaman such as to show that the parties must necessarily have been contracting with reference only to illnesses thereafter to be contracted."

The respondent worked on various ships for the appellant since 1919, and since 1928 did not work for any shipowner other than the appellant. He said in evidence: " You sign off of every ship." In the intervals between his discharge and entering into fresh articles he often worked for the appellant. The clauses incorporated in the articles on which the respondent founds his claim are taken from an agreement made between unions of employees and employers respectively, in an industry where employment may in the case of some workers be in fact continuous. But the evidence shows that, even in such cases, articles of agreement are formally ended and again entered into. The articles which are entered into between the seaman and the employer determine, subject to the *Navigation Act*, their respective rights and obligations for the period provided for by the agreement, namely, the period during which the articles are in force. The articles measure prospectively these rights and obligations. The assumption upon which articles embodying clause 22 appear to speak is that the seaman who is engaging is then free from illness and fit for duty, but may contract an illness on board the ship or in the service of the ship or her owner, and become incapacitated as a result of such illness from performing his duty. The intention of the conditions upon which the respondent relies was to entitle the seaman to the benefits thereby prescribed, should he contract an illness on board the ship or in the service of the ship or her owner during the period for which he engages to serve, if such illness should have the character and consequences mentioned in the conditions. This, in our opinion, is the natural and reasonable construction of the clause. The respondent's contention would

involve the result that if a seaman contracted an illness in the past while in the service of an owner, and thereafter served other owners before re-entering the service of the former owner, and then became incapacitated by the illness, he would be entitled to receive all the benefits, provided by these conditions of the agreement, from such owner. In this view the agreement makes no provision for adjusting the burden, although the intervening service may have caused or accelerated the development of the malady. But if the seaman was incapacitated by the illness before re-entering the service of the first owner, the respondent's contention would not admit of his recovering any benefit under the clause. It is only by reading the words relating to the onset of the illness in "a spirit of meticulous literalism" (see per Lord *Shaw of Dunfermline* in *McDermott* v. *Owners of S.S. Tintoretto* (1)), that clause 22 can be held to have any operation in the case of an illness contracted before the articles began. Clause 22 upon its true construction was intended to determine the rights and obligations of the parties in case the respondent might contract an illness during the currency of the agreement entered into on 10th January 1933, whether the illness was contracted on board the ship or not on board, but in the service of the ship or her owner, as contrasted with illness contracted in other circumstances during that period.

The appeal should be allowed and the judgment of the Supreme Court and the Magistrates Court discharged. The appellant will, pursuant to the terms of the order granting special leave to appeal, pay the respondent's costs of the appeal.

Appeal allowed. Orders of the Supreme Court and of the Magistrate discharged. In lieu thereof order nevertheless that the appellant in accordance with its undertaking given on the application for special leave, do pay the amount awarded to the plaintiff by such judgment in the action so discharged, and the respondent's costs in this Court.

Solicitors for the appellant, *Thynne & Macartney.*
Solicitor for the respondent, *J. S. Gilshenan.*

(1) (1911) A.C. 35, at p. 46.

B. J. J