[HIGH COURT OF AUSTRALIA.]

JOYCE . . . . . APPELLANT;
PLAINTIFF,

AND

THE AUSTRALASIAN UNITED STEAM NAVIGATION COMPANY LIMITED . } RESPONDENT.
DEFENDANT,

ON REMOVAL, AND APPEAL, FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1939.

SYDNEY, *Aug.* 14.

MELBOURNE, *Sept.* 21.

Latham C.J., Rich, Starke, Evatt and McTiernan JJ.

Seamen's Compensation—Recovery of compensation under Commonwealth Act—Recovery of compensation independently of Act excluded—Meaning of "compensation"—Constitutional validity of legislation—Limits inter se of powers of Commonwealth and States—Removal of cause—Decision on whole cause—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (i.), 98—*Seamen's Compensation Act* 1911 (*No.* 13 *of* 1911), *sec.* 5 (2) (*b*)—*Judiciary Act* 1903-1937 (*No.* 6 *of* 1903—*No.* 5 *of* 1937), *sec.* 40A.

Sec. 5 (2) of the *Seamen's Compensation Act* 1911 provides that "a seaman shall not be entitled to recover compensation both independently of and also under this Act; but subject to this paragraph this Act shall not affect any civil liability of an employer under any other law."

Held:—

(1) That the term "compensation" in this section includes damages recoverable at common law.

(2) That, so construed, the section is not an *ultra-vires* interference by the Commonwealth Parliament with common-law rights, but is an ancillary provision of a valid scheme for the compensation of seamen injured in the course of their employment in inter-State or overseas trade.

Australian Steamships Ltd. v. *Malcolm*, (1914) 19 C.L.R. 298, applied.

(3) That a contention that the section was *ultra vires* as above mentioned raised a question as to the limits *inter se* of the constitutional powers of the

Commonwealth and the States. Upon such contention being made in a cause pending in the Supreme Court of a State the whole of such cause, and not merely the specific question, was removed by force of sec. 40A of the *Judiciary Act* 1903-1937 into the High Court.

Order of the Supreme Court of New South Wales: *Joyce* v. *The Australian Union Steam Navigation Co. Ltd.*, 39 S.R. (N.S.W.) 84; 56 W.N. (N.S.W.) 27, standing over further argument of a demurrer until the constitutional question had been determined, set aside, and judgment on the demurrer given by the High Court.

ACTION removed under sec. 40A of the *Judiciary Act* 1903-1937, and APPEAL from the Supreme Court of New South Wales.

In an action brought by him in the Supreme Court of New South Wales Thomas Joyce sought to recover from the Australasian United Steam Navigation Co. Ltd. damages in the sum of £3,000 for injuries alleged to have been sustained by him as the result of alleged negligence on the part of the defendant.

The declaration contained three counts. The first two counts were based upon an alleged failure to comply with certain provisions of an award made by the Commonwealth Court of Conciliation and Arbitration; the third count was a claim at common law for damages for negligence.

In its second plea, which was general and was therefore directed to all the counts, the defendant alleged that "at all relevant times the plaintiff was a seaman within the meaning of the *Seamen's Compensation Act* 1911" (a Commonwealth statute) "and was employed by the defendant and that the injuries referred to in the declaration were sustained by the plaintiff during such employment and were injuries for which compensation was payable by the defendant to the plaintiff under the said Act, and a long time prior to the institution of this action the plaintiff had duly applied for and recovered from the defendant compensation under the said Act in respect of the said injuries."

The plaintiff demurred to the plea.

Upon the hearing of the demurrer before the Full Court of the Supreme Court it was stated on behalf of the plaintiff that if the court should be of opinion that sec. 5 (2) (*b*) of the *Seamen's Compensation Act* 1911 operates to bar an action at common law when

H. C. OF A. 1939.

JOYCE v. AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD.

compensation had been recovered under the Act, he formally submitted that that provision was *ultra vires* of the Commonwealth Parliament because it interfered with the plaintiff's rights at common law, whereupon the court, being of opinion that the submission raised a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of New South Wales, referred to sec. 40A of the *Judiciary Act* 1903-1937 and intimated that, apart from the constitutional question, it was of opinion that there should be judgment for the defendant on the demurrer. The court ordered that the further argument of the demurrer should stand over generally until the constitutional question had been determined, with liberty to either party to restore the demurrer to the list on notice to the other party: *Joyce* v. *The Australasian United Steam Navigation Co. Ltd.* (1).

From this decision the plaintiff appealed, *in forma pauperis*, to the High Court.

Dwyer, for the appellant. The word "compensation" in sec. 5 (2) (*b*) of the *Seamen's Compensation Act* 1911 should be construed as referring only to moneys payable under a workers'-compensation scheme of a State or any other country whatsoever by reason of an injury arising out of or in the course of employment. It does not purport to mean, and should not be construed as meaning, damages in the wider sense (*Australian Steamships Ltd.* v. *Malcolm* (2); *Dixon* v. *Calcraft* (3)).

[EVATT J. referred to *Murray* v. *Schwachman Ltd.* (4).]

The intention of the legislature was that compensation in the nature of compensation under the Act should not be obtained twice by the same person in respect of the same injury. If the word "compensation," as used in sec. 5 (2) (*b*), does include damages at common law, then an *inter-se* question arises. If, on the proper construction of the paragraph, it applies in such a way as to cut down common-law rights, it is *ultra vires* of the Commonwealth Parliament. The appeal was brought *ex majore cautela*.

(1) (1939) 39 S.R. (N.S.W.) 84; 56 W.N. (N.S.W.) 27.
(2) (1914) 19 C.L.R. 298, at p. 332.
(3) (1892) 1 Q.B. 458, at pp. 463, 464.
(4) (1938) 1 K.B. 130, at p. 151.

Wallace (with him *Bridge*), for the respondent. An *inter-se* question within the meaning of the authorities does not arise in this matter. The question is whether the Commonwealth Parliament had power to enact sec. 5 (2) (*b*). However, in the circumstances of this case, the question whether or not an *inter-se* question arises is unimportant. The intention of the legislature as expressed in sec. 5 (2) (*b*) was to make alternative the right to compensation under the Act and the right to compensation under any other Act, or, in the broad sense, by way of damages at common law. The word " compensation " in sec. 5 (2) (*b*) should be defined as including compensation for injuries under the general law, reference to an action at common law for damages being frequently so made: See *Employers' Liability Act of* 1897 (N.S.W.) and *Compensation to Relatives Act* 1897-1928 (N.S.W.). In granting the right under the Act the Parliament was entitled under the " trade and commerce " power to exclude all other rights.

Cur. adv. vult.

Sept. 21.

The following written judgments were delivered :—

LATHAM C.J. The appellant sued the defendant in the Supreme Court of New South Wales for damages for personal injury. The declaration contained three counts. In the first and second counts the plaintiff alleged breach of certain provisions of an award made by the Commonwealth Court of Conciliation and Arbitration ; the third count was a common law claim for damages for negligence. To these counts the defendant pleaded that at all relevant times the plaintiff was a seaman within the meaning of the *Seamen's Compensation Act* 1911 (a Commonwealth statute) and was employed by the defendant, and that the injuries referred to in the declaration were sustained by the plaintiff during such employment and were injuries for which compensation was payable by the defendant to the plaintiff under the said Act, and that prior to the institution of the action the plaintiff had duly applied for and recovered from the defendant compensation under the said Act in respect of the said injuries. This plea was based upon sec. 5 (2) (*b*) of the *Seamen's Compensation Act* 1911. The plaintiff demurred to the plea. The Full Court was

H. C. OF A. 1939. JOYCE v. AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. Latham C.J.

prepared to overrule the demurrer, but as the plaintiff relied upon a contention that sec. 5 (2) (*b*) was invalid as being *ultra vires* of the Commonwealth Parliament the court, being of opinion that this contention raised a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, made an order or pronouncement in the following form : " This court doth intimate that apart from the constitutional question arising herein this court is of opinion that there should be judgment for the defendant on the said demurrer and this court doth order that the further argument of the said demurrer stand over generally until the said constitutional question has been determined " with liberty to either party to restore the demurrer to the list on notice to the other party. The plaintiff has appealed from this order *in forma pauperis*.

If a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States has arisen in this case, then, under sec. 40A of the *Judiciary Act*, " the cause " has " by virtue of this Act " been removed into the High Court. If, on the other hand, no such question has arisen, the cause has not been removed and it is still in the Supreme Court. It is, therefore, necessary first to consider whether the cause is in this court by reason of an automatic removal under sec. 40A or whether, on the other hand (as must be the case if no question of limits *inter se* has arisen), it is still in the Supreme Court so that all that this court could do upon the present proceeding before it would be to abstain from making any order and to leave it to the Supreme Court to complete its task of deciding upon the demurrer by making an order after consideration of all the questions raised, including the constitutional question, that not being an *inter se* question.

I therefore proceed, in the first place, to inquire whether an *inter-se* question has arisen. The *Seamen's Compensation Act* 1911, sec. 5, provides that if personal injury by accident arising out of and in the course of the employment is caused to a seaman his employer shall, subject to the Act, be liable to pay compensation in accordance with the First Schedule to the Act. Sub-sec. 2 contains five provisos. The second of these is the provision upon which the defendant relies. It is in the following terms : " A seaman shall not be entitled to recover compensation both independently of and

also under this Act; but subject to this paragraph this Act shall not affect any civil liability of an employer under any other law."

The contention of the plaintiff is that, on the true construction of this provision, it does not deprive any person of any rights under State statutes or under the common law except rights which are rights in the nature of worker's compensation as distinct from rights to damages, as, for example, at common law for negligence. Secondly, the plaintiff contends that, if the section does operate to deprive seamen of such rights, it is invalid because it deals with a matter which is not within the power of the Commonwealth Parliament but is within the exclusive power of the State Parliament. This second contention raises a question as to the relative limits of Commonwealth and State constitutional powers. The question is not one of inconsistency between Commonwealth law and State law in a case where each Parliament admittedly has power to legislate. In such a case a question as to inconsistency would arise under sec. 109 of the Constitution, but there would then be no question as to the relative boundaries of State and Commonwealth constitutional powers. But in the present case a question of this character does arise. The areas of Commonwealth and State constitutional power will be contracted or expanded in relation to each other according to the answer given to the question (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1)). Accordingly, in my opinion, the Full Court was right in declining to make any order on the demurrer. Thus the whole case (not merely the constitutional question) is now before this court by virtue of sec. 40A of the *Judiciary Act*, quite apart from any appeal by the plaintiff.

The first contention of the plaintiff is that the word "compensation" in sec. 5 (2) (*b*) refers only to compensation in the sense of worker's compensation, that is, to a pecuniary remedy awarded irrespective of any default in the employer. The provision is of a character which is common in workers'-compensation Acts in both Australia and in England. The provision assumes various forms, but it is directed towards the protection of an employer against double proceedings or double recoveries in respect of the same injury of an employee. In a State statute there is hardly any room for

(1) (1917) A.C. 528; 24 C.L.R. 396.

H. C. OF A. 1939.

JOYCE v. AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD.

Latham C.J.

doubt that the word "compensation" would be construed as covering a remedy in damages in respect of an injury suffered by a worker. I can see no reason for limiting the meaning of the term in a Federal statute. The word is wide enough in its ordinary significance to include compensation by way of damages for the injury suffered by the seaman, whether or not some default by the employer is part of the seaman's cause of action.

The second part of the provision supports this view. The words are: "but subject to this paragraph this Act shall not affect any civil liability of an employer under any other law." This provision is a general provision as to the civil liability of an employer in respect of an injury for which a workman may be entitled to compensation under the Act. The general proposition that other civil liability of an employer shall not be affected is subject to the qualification that a seaman shall not be entitled to recover compensation both independently and also under the Act. Upon the natural construction of the provision this qualification is intended to operate within the area of other civil liability and it, therefore, should be interpreted as applying to all such liability and therefore to common law claims for damages as well as to claims under a State workers'-compensation Act.

But the plaintiff contends that if the provision is construed in the manner stated it is invalid. The objection is that the provision so construed is legislation which limits common-law rights of action for negligence, that such a subject matter is not committed to the Commonwealth Parliament, and that it falls within the exclusive power of the Parliaments of the States. The State Parliaments undoubtedly have a power of general legislation with respect to negligence. They may alter the common law as they may think proper. There is no doubt that the Commonwealth Parliament has no power to legislate upon the general subject of negligence or of liability for negligence. It is argued that the Commonwealth Parliament cannot, when legislating upon the subject of seamen's compensation, deprive a seaman of a right of action for damages for negligence which he possesses at common law.

The *Seamen's Compensation Act* applies to the employment of seamen on ships described in sec. 4 of the Act, including ships

engaged in trade and commerce with other countries or among the States. Sec. 51 (i.) of the Constitution provides that the Commonwealth Parliament shall have power to make laws with respect to trade and commerce with other countries and among the States. Sec. 98 of the Constitution provides that " the power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping." In *Australian Steamships Ltd.* v. *Malcolm* (1) it was contended that the legislative powers conferred upon the Commonwealth Parliament by sec. 51 (i.) and sec. 98 of the Constitution did not enable that Parliament to regulate conditions of employment in inter-State or foreign trade and commerce. That argument was rejected. It was held that the Commonwealth Parliament had power to regulate the " inter-relations and mutual obligations of ship owners and crew " (2). *Isaacs* J. also said : " It is not easy to see why any modification of common law or statute law affecting the relations of employer and employee, while engaged in co-operating in the " (inter-State or foreign) " trade and commerce . . . is not part of the necessary control of the subject " (3). *Gavan Duffy* and *Rich* JJ. said that the Constitution authorized Parliament " to regulate the relations and reciprocal rights and obligations of those conducting the navigation of ships in the course of such commerce both among themselves and in relation to their employers on whose behalf the navigation is conducted " (4). The decision in *Malcolm's Case* (1) was followed and applied in *Huddart Parker Ltd.* v. *The Commonwealth* (5) and in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (6). The Commonwealth Parliament, therefore, has power to make laws with respect to the relations of employers and employees who are engaged in inter-State trade and commerce. In making such laws the Commonwealth Parliament is not limited in any way by State statutes or by the common law. Any other view would be inconsistent with the conception of the paramount operation of valid Federal law. Thus, there being no doubt that the challenged provision is legislation with respect to a subject matter entrusted to the Commonwealth Parliament, the contention that it is invalid must fail.

(1) (1914) 19 C.L.R. 298.
(2) (1914) 19 C.L.R., at p. 328.
(3) (1914) 19 C.L.R., at p. 332.
(4) (1914) 19 C.L.R., at p. 335.
(5) (1931) 44 C.L.R. 492.
(6) (1931) 46 C.L.R. 73.

H. C. OF A. 1939.

JOYCE v. AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD.

Accordingly, judgment should now be given for the defendant upon the demurrer with costs in the Supreme Court. When the question as to limits *inter se* arose, it was the duty of the Supreme Court "to proceed no further in the cause." Thus the order of the Supreme Court should be set aside. The plaintiff was permitted to appeal *in forma pauperis* and I think that there should be no order as to the costs of the appeal.

RICH J. I agree in the view of the Supreme Court that the contention raised before it that sec. 5 (2) (*b*) of the *Seamen's Compensation Act* 1911 is *ultra vires* of the Commonwealth Parliament involved a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State. Accordingly I think the cause was *ipso facto* removed into this court. Having in this manner seisin of the cause, it becomes necessary for us to decide the construction of sec. 5 (2) (*b*) first and then its validity. The question of construction is whether the word "compensation" covers an ordinary common law liability for damages. In my opinion it does. Damages for personal injury in tort are awarded by way of reparation or compensation. There is nothing in the natural meaning of the word to exclude damages for personal injury by negligence or breach of duty and the policy of the provision seems to point to an intention to cover such a liability, which if it were left standing would mean a double reparation. As to the validity of the sub-section so construed I feel no doubt. If, as is established, the power conferred by sec. 98 of the Constitution extends to a seamen's compensation law, that law must deal with the question, one way or another, whether the statutory compensation is alternative or cumulative, concurrent or mutually exclusive with other rights to compensation or damages. However the legislature dealt with that question, its power to cover it by the compensation law must exist if the power to pass a compensation law exists. It is an incidental or ancillary provision forming a necessary part of the scheme.

In my opinion the contention that sec. 5 (2) (*b*) is invalid has no foundation.

STARKE J. This action, brought in the Supreme Court of New South Wales, was to recover damages for injuries sustained by the plaintiff Joyce whilst employed by the defendant, the above-mentioned company, on the steamship *Macumba*. The defendant for a second plea said that at all relevant times the plaintiff was a seaman within the meaning of the *Seamen's Compensation Act* 1911 and was employed by the defendant, and that the injuries alleged were sustained by the plaintiff during such employment and were injuries for which compensation was payable by the defendant to the plaintiff under the Act, and that a long time prior to the institution of the action the plaintiff had applied for and recovered from the defendant compensation under the Act in respect of the injuries. The plaintiff demurred to this plea.

The Supreme Court was of opinion that the defendant should have judgment on the demurrer, but ordered that further argument upon the demurrer stand over generally upon suggestion that a question arose as to the limits *inter se* of the constitutional power of the Commonwealth and that of the State of New South Wales (*Judiciary Act* 1903-1937, sec. 40A; *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co. Ltd.* (1)).

The *Seamen's Compensation Act* 1911 provided compensation for seamen, within the meaning of that Act, for personal injury by accident arising out of and in the course of their employment. Provided that "a seaman shall not be entitled to recover compensation both independently of and also under this Act; but subject to this paragraph this Act shall not affect any civil liability under any other law." The rights under the Act are, as *Jordan* C.J. said in the Supreme Court, alternatives. The recovery of compensation under the Act necessarily excludes any right to recover compensation under any other Act: Cf. *Bennett* v. *L. and W. Whitehead Ltd.* (2), per *Scrutton* L.J. It is contended, however, that compensation in the section does not include damage recoverable in consequence of some tortious act injuring a seaman.

Workers' compensation payments are not damages in the ordinary sense of the word. Damages are sums payable by reason of some tortious act—some breach of duty whether imposed by contract,

(1) (1919) 27 C.L.R. 249.

(2) (1926) 2 K.B. 380, at pp. 404, 405,

H. C. OF A. 1939.

JOYCE v. AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD.

Starke J.

by the general law, or by legislation (*Hall Brothers Steamship Co. Ltd.* v. *Young* (1)). But the meaning of the word " compensation " in the *Seamen's Compensation Act* 1911 depends upon its provisions and the context in which the word is found. And in this Act it appears to me that the Supreme Court rightly concluded that the word extends to " any compensation recoverable from the employer in respect of the injury by whatever machinery and in whatever conditions " or, in other words, that it includes as well compensation for injuries which involve no breach of duty as compensation for injuries which involve tortious acts or damages. The antithesis in sec. 5 (2) (*b*) is between compensation under the Act and any other civil liability. The provision in the sub-section that " this Act shall not affect any civil liability of an employer under any other law " aids this construction, and so do the provisions in sec. 5 (2) (*e*) relating to claims for compensation for injury under any law of the United Kingdom or any other part of the King's Dominions or any foreign country. The sub-section is so wide in its terms that a seaman is not entitled to recover compensation both under the Act and independently of the Act whether by Commonwealth or State legislation or by the general law of any State. But it is argued that the constitutional power of the Commonwealth does not extend so far; that it crosses, in the Act, its constitutional boundary and invades the field of constitutional power vested in the States. A question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States thus arises (*Baxter* v. *Commissioners of Taxation* (N.S.W.) (2) ; *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (3)). The *Seamen's Compensation Act*, however, has already been sustained in this court under the trade and commerce power which extends to navigation and shipping (*Australian Steamships Ltd.* v. *Malcolm* (4)). Under this power the Commonwealth has authority, as I understand the decisions of this court, to make laws regulating the employment of persons engaged in inter-State or foreign trade and the rights, duties and remedies of those engaged therein (*Huddart Parker Ltd.* v. *The Commonwealth* (5) ; *Dignan* v.

(1) (1938) 3 All E.R. 234 ; (1939) 1 All E.R. 809 ; (1939) 1 K.B. 748.
(2) (1907) 4 C.L.R. 1087, at pp. 1119, 1155.
(3) (1917) A.C. 528 ; 24 C.L.R. 396.
(4) (1914) 19 C.L.R. 298.
(5) (1931) 44 C.L.R. 492.

Australian Steamships Pty. Ltd. (1))—Cf. *Second Employers' Liability Cases* (2). Accordingly, the provisions of sec. 5 (2) (*b*) are valid and do not transcend the constitutional power of the Commonwealth.

Judgment should therefore, as intimated by the Supreme Court, be for the defendant on the demurrer.

EVATT J. The plaintiff was employed by the defendant company as a seaman on the s.s. *Macumba*. He brought an action against the defendant in the Supreme Court of New South Wales in its common law jurisdiction and claimed damages for personal injury sustained in the course of the employment. The declaration contained three counts ; the first two were founded upon breaches of statutory duty, and the third upon breach of a duty of care imposed by the common law.

We are concerned only with the second of the defendant's pleas, which asserted that the plaintiff's claims for damage were all in relation to injuries sustained by him during his employment by the defendant as a seaman under the Commonwealth *Seamen's Compensation Act* 1911, and that in respect of the same injuries the plaintiff had already recovered from the defendant compensation under the said Act.

This plea was based upon sec. 5 (2) (*b*) of the *Seamen's Compensation Act*, which provides that " a seaman shall not be entitled to recover compensation both independently of and also under this Act." And also that, subject to the paragraph, the civil liability of the employer under any other law is to remain unaffected.

I. The first question is one of construction of the Act, whether the plaintiff's prior recovery of compensation under the Commonwealth Act bars his right to recovery in the present common law action. It was contended that sec. 5 (2) (*b*) only disentitles the plaintiff from recovering " compensation," and that such expression should be understood as limited to payments to which an employee may become entitled under such Acts as the *Seamen's Compensation Act* itself and the *Workers' Compensation Acts* of the several States ; under all of which a right to " compensation " arises without proof of the employer's fault, but under which also the amount recoverable

(1) (1931) 45 C.L.R. 188. (2) (1912) 223 U.S. 1 ; 56 Law. Ed. 327.

H. C. OF A. 1939.

JOYCE v. AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD.

Evatt J.

is limited and often falls far short of the damages recoverable at common law in respect of a similar injury; it is contended that under sec. 5 (2) (*b*) "compensation" does not include damages recoverable at common law, and so the present action is maintainable.

In some circumstances the distinction between "damages" recoverable at law and "compensation" payable under Acts like the *Workmen's Compensation Act* may assume crucial importance. Thus in *Murray* v. *Schwachman Ltd.* (1) the English Court of Appeal had to determine whether a workman (an infant) who had received eleven weekly payments under the *Workmen's Compensation Act* was to be regarded as having definitely exercised an option or election so as to bar his right of proceeding by common-law action. It was held that as the infant's choice of remedy was not for his benefit he was not bound and might sue at law. In his judgment *Slesser* L.J. emphasized "the great limitations which are placed upon workmen under the *Workmen's Compensation Act*, principally that in no case can they recover damages, but only compensation, which compensation is limited to the extent and the period of their incapacity" (2).

This is the very distinction which the present plaintiff seeks to draw. But the question is whether in the context provided by the *Seamen's Compensation Act* the word "compensation" does not extend to damages at law. It seems plain that the object of sec. 5 (2) (*b*) was to protect the employer against having to pay twice over in respect of some injury. To that end, the civil liability of the employer was discharged so soon as payments were received by the seaman either under the *Seamen's Compensation Act* or independently of it. In its context the word "compensation" aptly refers to money payments from the employer to the seaman in respect of the personal injury defined in sec. 5 (1). If the seaman receives compensation from the employer independently of the Act, that receipt disentitles him to recover under the Act; further, if he recovers money under the Act he disentitles himself to recover independently of the Act. I do not see how it is possible to exclude common law liability from the exemption from further liability which payment under the Act confers upon the employer. A similar

(1) (1938) 1 K.B. 130.

(2) (1938) 1 K.B., at p. 151.

meaning is attached to the word " compensation " as used in the English *Workmen's Compensation Act* 1906 (6 Edw. VII. c. 58, sec. 1) for an analogous purpose.

The further suggestion that sec. 5 (2) (*b*) merely disentitles a seaman who has recovered under the *Seamen's Compensation Act* from recovering compensation under other Commonwealth legislation is untenable. The disentitlement extends to all attempts to recover compensation in respect of the same injury so long as the seaman has recovered compensation under the Act. The Commonwealth Parliament has no general jurisdiction over workers' compensation or liability for tort, and it is certain that the paragraph was addressed to the question of the liability of the employer under the laws of the several States.

II. Thus the Supreme Court of New South Wales reached the correct conclusion that, as a matter of construction, sec. 5 (2) (*b*) entitled the present defendant to succeed. It next was asked to hold that, so construed, the paragraph was an invalid enactment not authorized by the legislative power of the Commonwealth Parliament in relation to trade and commerce with other countries and among the States (Constitution, sec. 51 (i.)). The Full Court then decided that the attack upon the constitutional validity of sec. 5 (2) (*b*) raised a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States. This opinion is clearly correct. The matter has recently been considered by the court in *Ffrost* v. *Stevenson* (1) and *Hopper* v. *Egg and Egg Pulp Marketing Board (Vict.)* (2).

III. At the moment when the *inter-se* question arose in the Supreme Court the latter was deprived of jurisdiction to make any order: Cf. *George Hudson Ltd.* v. *Australian Timber Workers' Union* (3). By force of sec. 40A of the *Judiciary Act* (secs. 40A, 38A), the cause was removed to this court. " The jurisdiction of the Supreme Court vanishes and the cause passes by force of the statute to the High Court to be dealt with under its original jurisdiction. All the rest is procedure. This case was a cause pending in the Supreme Court up to the instant the fatal point arose, and then the law removed it

(1) (1937) 58 C.L.R. 528, at pp. 576-578. (2) (1939) 61 C.L.R. 665.
(3) (1923) 32 C.L.R. 413, at pp. 429-431.

H. C. OF A. 1939.

JOYCE v. AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD.

Evatt J.

into this court. It is in our hands, ready to be determined " (per *Isaacs* J. (1)).

In the present case the formal order made by the Full Court merely " intimated " that, apart from the constitutional question, the court was of opinion that there should be judgment for the defendant on the demurrer, and the order stood over the hearing of the demurrer until the constitutional question was determined in this court. A somewhat similar " intimation " was made by the Supreme Court in *Hudson's Case* (2). But there this court in obedience to the *Judiciary Act* (secs. 38A, 40A, 41) treated the cause as within its exclusive competence and disposed of it by answering the question in the case stated by the magistrate for the Supreme Court as though the case had been originally stated for the determination of this court. A similar principle should be applied in the present case, and if the constitutional question is determined adversely to the plaintiff judgment on the demurrer should be entered for the defendant but should be entered by this court.

IV. The last question is whether sec. 5 (2) (*b*) is *ultra vires* of the Commonwealth Parliament. It has already been held in *Australian Steamships Ltd.* v. *Malcolm* (3) that the *Seamen's Compensation Act* is a valid exercise of the legislative power of the Commonwealth Parliament. But it is contended that this decision does not necessarily involve an affirmation of the validity of each and every provision in the Act; and it is said that the Commonwealth Parliament's authority in relation to trade and commerce, extensive as it is, does not enable it to enact that a seaman who, having been injured in the course of his employment in inter-State or overseas commerce, recovers compensation under a Commonwealth Act, shall be debarred from pursuing his remedy to recover damages at common law in the courts of the States. The plaintiff concedes that the Commonwealth Parliament could make its grant of compensation conditional upon the seaman's *not* having received common-law damages; but argues that it cannot use the fact of payment of compensation under Commonwealth law to limit right and jurisdiction conferred and established by State law.

(1) (1923) 32 C.L.R., at p. 431. (2) (1923) 32 C.L.R., at p. 415.
(3) (1914) 19 C.L.R. 298.

It would seem that the answer to the plaintiff's contention is that the Commonwealth *Seamen's Compensation Act* established a code dealing with the subject of compensating seamen who have been injured in the course of their employment on vessels engaged in inter-State or overseas commerce. It is not accurate to consider the case upon the footing that the Parliament has *merely* deprived the seaman of his rights to bring an action in State courts and by reference to State law. The Parliament has created for the benefit of each seaman a new right, i.e., a right to be compensated by his employer irrespective of fault on the latter's part. If fault can be proved an action for damages may still be brought by the seaman in the appropriate form in order to enforce rights given by the laws of the States. But the Commonwealth insists that the seaman who pursues the Commonwealth remedy and does so successfully cannot recover twice over by invoking the laws of the States. In truth, sec. 5 (2) (*b*) should not be described as an attempt to interfere with a right given by State law, but as a provision protecting the employer engaged in inter-State or overseas trade from being twice vexed by claims in respect to the same injury to the same seaman where that injury has been occasioned while the seaman was performing an act sufficiently related to inter-State and overseas trade. So regarded, sec. 5 (2) (*b*) is merely a relevant and incidental portion of a scheme for the better regulation of inter-State and overseas trade. While not compelling any particular choice by the seaman it declares that when his first choice is followed by recovery he shall be bound.

It is difficult to see how such a provision can be regarded as outside the legislative power of the Commonwealth under sec. 51 (i.). The case of *Huddart Parker Ltd.* v. *The Commonwealth* (1), cited with approval by the Privy Council in *James* v. *The Commonwealth* (2), illustrates the wide reach of the commerce power in Australia and suggests that it includes a power to regulate the incidents of the relationship of master and servant where master and servant are co-operating in the carriage of goods or the provision of services in inter-State or overseas trade.

(1) (1931) 44 C.L.R. 492.

(2) (1936) A.C. 578; 55 C.L.R. 1.

H. C. OF A. 1939. JOYCE v. AUSTRALASIAN UNITED STEAM NAVIGATION CO. LTD. Evatt J.

It is interesting to observe that in *Malcolm's Case* (1) *Isaacs* J., in a judgment affirming the validity of the Act, said :—" The underlying notion involved in that judgment is that the enterprise is in actual essence a co-operative service rendered to the public. The *Seamen's Compensation Act* 1911 is based upon that idea, and it makes the master bear part of the burden of an accident incidental to inter-State or foreign commerce, even where there is no negligence, and makes the workman bear the other part even if there was, by not getting full damages."

This passage is of importance in two aspects. First, it indicates that, as a matter of construction of the Act, the scheme is that a seaman who receives compensation under the Act can recover nothing more in respect of the same injury. Secondly, it indicates that, so far from such a scheme tending to destroy the constitutional validity of sec. 5 (2) (*b*), it was regarded by *Isaacs* J. as an element which went to establish its validity.

The result is that the defence pleaded in the second plea is good in law. For the reasons already given, the cause removed to this court should be disposed of by an order discharging the Full Court's order and entering judgment for the defendant upon the demurrer to the second plea, which demurrer constitutes the " cause " before this court. The plaintiff should pay the costs of the proceedings before the Full Court. In view of the order made by this court allowing the plaintiff to proceed *in forma pauperis* there should be no order as to the costs of proceedings in this court.

McTiernan J. Two questions are raised by the demurrer to the appellant's action :—1. Does the phrase "compensation independently of this Act," which is in sec. 5 (2) (*b*) of the Commonwealth *Seamen's Compensation Act*, include the damages claimed by the appellant in the action ? 2. If the phrase does include such damages, is sec. 5 (2) (*b*) a valid exercise of the legislative power of the Commonwealth.

If these two questions are answered in the affirmative, the appellant's action is clearly barred by sec. 5 (2) (*b*) and the respondent is

(1) (1914) 19 C.L.R., at p. 334.

entitled to judgment. In its ordinary meaning the word "compensation" may refer to the compensation payable to a worker under legislation of the class to which the present act belongs or to damages recoverable in an action at law. In the present context there is no reason to suppose that the legislature was using the word in the narrow sense of statutory compensation rather than as a general description covering any pecuniary redress which the worker may recover in curial proceedings. The phrase "compensation independently of this Act" should, in my opinion, be read as including the damages claimed by the appellant in the action.

The second question is clearly disposed of by the case of *Australian Steamships Ltd.* v. *Malcolm* (1). In that case the majority of the justices said that sec. 5, and, indeed, the Act itself, was valid: See *Isaacs* J. (2), *Gavan Duffy* and *Rich* JJ. (3) and *Powers* J. (4) The majority affirmed that it is within the legislative powers of the Commonwealth to make the employers of seamen who are within the purview of the Act liable to pay compensation to them for injuries which they sustain in the course of their employment. The legislative powers affirmed in that case extend, in my opinion, to the imposing on the seaman's right to recover such compensation and on the employer's liability any condition or limitation that Parliament may think appropriate. The effect of sec. 5 (2) (*b*) is to impose such a condition and limitation. In my opinion sec. 5 (2) (*b*) is *intra vires* of the Parliament.

The only remaining question is whether the appellant's attack on the validity of the sub-section raises a question as to the limits *inter se* of the constitutional powers of the Commonwealth and States. In my opinion, the point taken against the validity of sec. 5 (2) (*b*) raises such a question. The point is, in substance, that the common law and statutes of the States which govern the liability of the respondent to the appellant have full force despite sec. 5 (2) (*b*), because the Commonwealth Parliament is without the power to pass it. The result is that, by virtue of sec. 40A of the *Judiciary Act*, the demurrer is in this court to be decided in the first

(1) (1914) 19 C.L.R. 298.
(2) (1914) 19 C.L.R., at p. 334.
(3) (1914) 19 C.L.R., at pp. 334-336.
(4) (1914) 19 C.L.R., at p. 342.

H. C. OF A. 1939.

JOYCE v. AUSTRAL-ASIAN UNITED STEAM NAVIGATION CO. LTD.

McTiernan J.

instance and not by way of appeal. In my opinion, there should be judgment for the respondent on the demurrer.

Their Honours of the Full Court of the Supreme Court intimated that, apart from the constitutional question, there should be judgment for the present respondent on the demurrer but, acting on the view that an *inter-se* question was raised, did not give judgment.

Order of Supreme Court set aside. Appeal dismissed without costs. Judgment for defendant on demurrer with costs of proceedings in Supreme Court.

Solicitors for the appellant, *G. W. Charker & Cahill.*
Solicitors for the respondent, *Ebsworth & Ebsworth.*

J. B.