[HIGH COURT OF AUSTRALIA.]

HUDDART PARKER LIMITED . . . APPELLANT;
DEFENDANT,

AND

COTTER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 12, 13, 16, 17; *Dec.* 14.

Rich, McTiernan and Williams JJ.

Shipping and Navigation—Injury to seaman—Owner's statutory obligation as to seaworthiness—Exclusion of common law duty—Meaning of seaworthiness—State legislation affecting seamen's contracts—Inconsistency—Application of sec. 65 *of Workers' Compensation Act* 1926-1938 (*N.S.W.*)—*Tort committed outside New South Wales—Navigation Act* 1912-1935 (*No.* 4 *of* 1913—*No.* 30 *of* 1935), *Part* II., *Div.* 8, *secs.* 46, 59—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 109—*Workers' Compensation Act* 1926-1938 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1938), *sec.* 65.

Master and Servant—Liability of master to servant—Defective machinery—Common employment—Onus of proof—Directions to jury.

Appeal and New Trial—New South Wales—Powers of Court—Verdict against weight of evidence—Entry of judgment—Supreme Court Procedure Act 1900 (*N.S.W.*) (*No.* 49 *of* 1900—*No.* 42 *of* 1924), *sec.* 7.

A seaman injured during a voyage on a ship to which sec. 59 of the *Navigation Act* 1912-1935 applies through a defect in equipment amounting to unseaworthiness cannot set up against the owner any contractual duty of care implied at common law but must rely on the contractual obligation as to seaworthiness implied under that section.

So *held* by *Rich* and *Williams* JJ. (*McTiernan* J. dissenting).

Held, further, by *Rich* and *Williams* JJ., that a ship is not seaworthy within sec. 59 if there is a defect in its equipment or appliances sufficient to render it unfit for the due and safe carrying of the crew or the cargo, not being a defect which can be readily cured during the voyage.

Per Rich and *Williams* JJ.: Sec. 65 of the *Workers' Compensation Act* 1926-1938 (N.S.W.), abolishing the doctrine of common employment, applies

only to torts committed in New South Wales. Inconsistency of State legislation purporting to affect the common law obligations of a seaman's contract of employment with Div. 8 of Part II. of the *Navigation Act* 1912-1935 considered.

On the facts, *held*, by *Rich* and *Williams* JJ. (*McTiernan* J. dissenting), that the trial judge had not properly directed the jury as to the question whether the negligence of the plaintiff's fellow-employee was in the province of common employment or in the employer's province. *Per McTiernan* J.: The trial judge properly directed the jury and there was evidence justifying a finding of negligence within the employer's province.

Per Rich and *Williams* JJ.: The Court has power under sec. 7 of the *Supreme Court Procedure Act* 1900 (N.S.W.) to set aside a verdict for the plaintiff on whom the onus lies and enter judgment for the defendant where as a matter of law there was no evidence on which the jury as reasonable men could find for the plaintiff, but not on the ground that, the whole of the evidence being before the Court, there was such a preponderance in favour of the defendant that any jury acting reasonably could only come to one conclusion.

Application of the doctrine of common employment in cases of injury through defective machinery and onus of proof in relation thereto considered.

Decision of the Supreme Court of New South Wales (Full Court), by majority, reversed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales, Cornelius Cotter claimed from Huddart Parker Ltd. damages in the sum of £3,000 for injuries said to have been sustained by him while employed as a fireman on S.S. *Zealandia*.

At the first trial the judge directed the jury to enter a verdict for the defendant company, but on appeal to the Full Court of the Supreme Court a new trial was ordered (*Cotter* v. *Huddart Parker Ltd.* (1)). The High Court, being evenly divided in opinion, refused leave to appeal from that decision on the ground that the Court would be in a better position to dispose finally of the case when the jury had given its verdict upon the facts.

The declaration, as amended before the second trial, contained two counts: (*a*) that at all material times the plaintiff was employed by the defendant to operate and attend to a certain boiler then under the control of the defendant on the defendant's ship yet the defendant by itself its servants and agents so negligently, improperly and unskilfully conducted itself in and about the care, control, operation, maintenance, equipment, supervision and management of the boiler and in and about failing to adopt proper and reasonable precautions to ensure due safety for the plaintiff and in and about the maintenance

(1) (1941) 42 S.R. (N.S.W.) 33; 59 W.N. 37.

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of a boiler in a defective state and in and about certain operations carried out with respect to a boiler and in and about failing to carry on its operations and work so as not to subject the plaintiff to unnecessary risk that the plaintiff whilst so employed in the said ship was grievously wounded and injured and suffered great pain of body and mind and incurred expense for nursing and medicine and medical and surgical attendance and was and is unable to attend to his usual occupation and was otherwise greatly damnified; and (*b*) that at all relevant times the plaintiff was employed by the defendant to operate and attend to a certain boiler then under the control of the defendant on the defendant's ship and the said ship was a ship to which the Commonwealth of Australia *Navigation Act* 1912-1935 applied and it was a term or obligation of the said contract of service that the defendant should use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the voyage began and to keep her in a seaworthy condition for that voyage and during the same yet the defendant did not use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the same began nor to keep her in a seaworthy condition for that voyage and during the same whereby part of a boiler in the ship ruptured and the plaintiff suffered the damage in the first count mentioned.

In answer to the first count the company pleaded not guilty and denied that Cotter was employed by it to operate and attend to a certain boiler then under the control of the company on its ship. The parties were treated as being at issue on the second count.

Many of the facts were not in dispute.

It was common ground that at Sydney on 21st July 1939, Cotter signed an agreement in the form prescribed by sec. 46 of the *Navigation Act* 1912-1935 and the *Navigation* (*Master and Seamen*) *Regulations* (Statutory Rules 1924 No. 199), reg. 6, by which he agreed with the company to serve on board the S.S. *Zealandia* in the capacity of fireman on voyages from Sydney to any ports in the Commonwealth of Australia and the Pacific Islands for a period not exceeding six months from 21st July 1939, or until the first arrival at Sydney after the expiry of that term. The S.S. *Zealandia* was registered in Melbourne. The ship left Sydney for Hobart on 5th August 1939.

The accident through which Cotter sustained the injuries of which he complained occurred at about six o'clock in the morning of the following day. At this time the ship had passed considerably to the south of the boundary between New South Wales and Victoria and

was about thirty miles off the coast. Something happened to No. 7 boiler, situated near where Cotter was working.

It appeared that the *Zealandia* was powered by seven Scotch marine boilers. There were two stokeholds, a forward and an aft stokehold. The forward stokehold was a space about thirty feet long, running from side to side of the ship, and about ten feet wide between the No. 7 boiler and the port and starboard bunkers, and Nos. 1, 2 and 3, which were on the after side of this space. The other boilers, Nos. 4, 5 and 6, were behind boilers Nos. 1, 2 and 3. No details were given about the arrangements there, except that it was described as the after stokehold, and behind that again came the engine-room. Scotch marine boilers consist of a metal cylinder of substantial size with three heating units, two being described as wing or upper furnaces, and the other as the lower furnace which is in the centre. Each furnace has a place where the coal itself is consumed with an ashpit underneath. There is a lead through to a combustion chamber at the back, and from there the flame, hot gases and smoke are led through the smoke tubes back to the front of the boiler where they escape into the smoke box and from there away to the ship's funnel. The essential feature of Scotch marine boilers is that the tubes do not carry any water, but carry only the flame and hot gases. The water itself is contained in the cylindrical part of the boiler, forming, as it were, a water jacket. This completely surrounds and encloses the three heating units. The water-jacket at the back, behind the combustion chamber, contains, as it were, a wall of water enclosed between the back wall of the combustion chamber and the back wall of the boiler itself, a space about fourteen inches from side to side. The two walls are secured one to another by a number of stays, which are threaded steel rods varying in size from $1\frac{3}{8}$ up to $1\frac{7}{8}$ inches in diameter. They are threaded for their full length and screwed through holes which are made in each of these two walls, which are themselves threaded. They are further secured by nuts which are secured on to the outside of the wall of the boiler itself and inside the wall of the combustion chamber so as to prevent any possibility of the metal walls expanding or becoming distorted. There are about five hundred of these stays in a boiler, so that, in view of the possibilities of corrosion and other injury, it is a matter of some moment to ensure that they are maintained in proper order, and precautions are taken so that any corroded, broken, or defective stays may be removed and replaced. At the time and on the date mentioned above the stay in the port margin of the back combustion chamber in the third row from the bottom fractured in such a manner that one short end was

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left in the hole in the back wall of the combustion chamber. When the fracture actually took place was not known, but at the time mentioned above the pressure in the boiler caused this piece of stay to be ejected from the hole in which it should have remained threaded and screwed, and it shot out into the lower furnace, followed by a stream of water from the boiler itself. This became apparent for the first time when another fireman was firing No. 7 boiler. He had completed the work which had to be done on the wing furnaces and was just turning his attention to the lower furnace. He opened the door and was met by a sudden gust of flame and gas which caused him to step back hurriedly. He then saw that water was coming into the lower furnace. He immediately warned the second engineer, who gave orders to draw the fires from the wing furnaces and himself isolated No. 7 boiler from the other boilers. The wing furnaces having been drawn, the fire in the lower furnace was quenched by the water which was pouring out from the boiler. The water continued to pour out and rise inside the boiler and behind the doors of the ashpit and the furnace. A sufficient quantity accumulated behind these doors to make the second engineer apprehensive that it might burst the ashpit door away from its fastenings and flood the stokehold suddenly and unexpectedly with water which was at a temperature considerably above the ordinary boiling point.

A conflict of evidence arose as to the circumstances under which the door of the lower furnace was opened. Cotter's case was that the door was opened by another fireman under the direction of the second engineer without Cotter being warned and that Cotter was injured by colliding with somebody when attempting to avoid the scalding water and falling into it. The second engineer, on behalf of the company, said that he opened the door himself after warning the men including Cotter.

It was common ground that stays are liable to fracture because they become wasted by corrosion, and because pressure in the boiler causes new or uncorroded steel to suffer from fatigue and snap. It is therefore necessary to carry out periodical inspections of their condition. In order to examine them inside the boiler the fires must be drawn, the boiler cooled off, emptied and opened up. This is done when the ship is in port. The inspecting officer then crawls into the boiler, taps the stays which he can reach with a hammer as their note will indicate whether they are sound or broken, and inspects those which he cannot reach visually with a torch. Where there is corrosion, and he can reach the stays, he chips it off in order to examine the amount of wasting. Corrosion can take place where the stay is free inside the boiler and where it is threaded into the

boiler plates. The plates of the boiler below the junction of the threads on the inside and the nuts on the outside should, therefore, also be inspected to see if there is any weeping, as weeping indicates corrosion where the stay is screwed into the plates. If there is corrosion, the threads should be caulked with a caulking chisel, if they are capable of repair, and, if they are not, the stay should be replaced. Two witnesses for Cotter gave evidence of the broken stay which indicated that it was in a dangerously corroded condition throughout its whole length, and that the corrosion was of such long standing that it must have been apparent to any skilled person who examined the stay with due care at any time for years before the accident. The chief engineer, who gave evidence for the company, said that the only corrosion was in the thread and that that part of the stay which was free in the boiler was of full girth. The practice on the ship was to carry out the method of inspection mentioned above.

In September 1938 the ship had been surveyed in accordance with the requirements of sec. 193 of the *Navigation Act*. On that occasion the boiler had been emptied and inspected inside and outside by the government surveyor who later gave a certificate. Accompanied by the second engineer the chief engineer had himself carried out a similar inspection in May 1939, but had not discovered any defect in the stay where it was free in the boiler or threaded into the plates or any weeping below the nuts. The second engineer said that he had made an inspection without emptying the boiler immediately before the subject voyage and had not noticed any weeping. But in order to examine the end of the stay and the nut at the back of the boiler plate in the combustion chamber he would have had to remove the sweep plate and firebricks. This was done at the inspection by the chief engineer in May 1939, but at the following inspection they were not removed and the second engineer merely looked into the ashpit, into which, he said, any weeping would have leaked.

The trial judge directed the jury that there was not any evidence on which they could find for Cotter on the second count and by his direction the jury returned a verdict for the company on this count.

On the first count the jury returned a verdict for Cotter for £2,800.

Upon an appeal by the company the Full Court of the Supreme Court was informed on behalf of the company that every ground of appeal was covered by the reasons already given on the first appeal and that nothing further could be brought under the notice of the Court. It, in effect, formally submitted that it was entitled to a

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new trial on each of the nine grounds of appeal, whereupon the Court treated the appeal as a formality and dismissed it.

From that decision the company appealed to the High Court.

Mason K.C. (with him *A. R. Taylor*), for the appellant. The law applicable is the law of the State of Victoria, that being the State in which the port of registry of the S.S. *Zealandia* is situated. An employer is bound (*a*) to provide proper and suitable plant, (*b*) to select fit and competent workmen, and (*c*) to provide a proper and safe system of working. Included in those obligations is a duty to provide a proper system for the maintenance of his plant, but he is not responsible for the negligent failure of an employee in using or operating that system. There are certain duties, apparently, which an employer cannot delegate. He cannot avail himself of the doctrine of common employment with regard to certain duties. Those duties which he cannot delegate may be put as (*a*) a duty to provide proper plant, and (*b*) a duty to instal a proper system of maintaining that plant. But if an employer has performed those duties and an accident happens to an employee in working the proper system of maintenance so provided the doctrine of common employment applies (*Wilsons and Clyde Coal Co. Ltd.* v. *English* (1); *Wilson* v. *Merry* (2); *Grantham* v. *New Zealand Shipping Co. Ltd.* (3); *O'Melia* v. *Freight Conveyors Ltd.* (4); *Gutteridge* v. *Frederick Leyland & Co. Ltd.* (5)). The evidence establishes that the appellant did provide proper and adequate plant; that for the purpose of maintaining that plant a proper and accepted system was followed, a system of periodically inspecting the plant for the purpose of ascertaining whether it required anything done to it; and that that system was operated in the usual way and at the usual period of time. The appellant's system of supervision and maintenance was not adversely commented upon but, on the contrary, was commended. It has not been suggested that the appellant's employees were incompetent (*Ogden* v. *Melbourne Electric Supply Co. Ltd.* (6)). If the accident was due to negligence it was due to the negligence of somebody in carrying out that system. That somebody was a fellow employee of the respondent's, and therefore the doctrine of common employment applies. If the chief engineer erred in judgment as to the need or the proper time to repair the boiler, that does not constitute or evidence negligence. A distinction should be drawn between want of repair due to the running of the plant and want of repair which may be done either while the plant is in

(1) (1938) A.C. 57.
(2) (1868) L.R. 1 Sc. & Div. 326.
(3) (1940) 4 All E.R. 258.
(4) (1940) 4 All E.R. 516.
(5) (1941) 69 Lloyd's List Rep. 63, 157.
(6) (1918) V.L.R. 77; 24 C.L.R. 303.

operation or at rest (*Ogden* v. *Melbourne Electric Supply Co. Ltd.* (1)). Also, a distinction should be drawn between a defect in a condition due to ordinary wear and tear and negligent repairing. The appellant took reasonable care to ensure that the plant was in a reasonably safe condition (*Cole* v. *De Trafford* [*No.* 2] (2) ; *Webb* v. *Rennie* (3)). The jury should have been directed that if the chief engineer had failed in an error of judgment as to the time he should take action that was not negligence. The experts agree that it is ordinary practice to leave it to the engineering staff to renew the stays. That is a risk accepted by all employed on ships. The injury to the respondent was caused as the result of the opening of the furnace door by the second engineer, a fellow employee of the respondent, which if done negligently comes within the doctrine of common employment (*Hedley* v. *Pinkney & Sons Steamship Co. Ltd.* (4)). This constitutes a *novus actus interveniens* subsequent to and apart from the original negligence alleged against the appellant, which, upon the application of the doctrine of common employment, absolves the appellant. The cause of the injury to the respondent was a fresh and independent act of the second engineer and was such an act as could not reasonably have been foreseen by the appellant (*In re Polemis and Furness Withy & Co. Ltd.* (5) ; *Weld-Blundell* v. *Stephens* (6) ; *Cutler* v. *United Dairies* (*London*) *Ltd.* (7) ; *Haynes* v. *Harwood* (8)). The measure of the appellant's duty and responsibility is to be found in secs. 46 to 60 inclusive of the *Navigation Act* 1912-1935. This is not in addition to an employer's common law liability, but is the total measure of his liability. The evidence shows that the *Zealandia* was seaworthy as required by the Act (*Hedley* v. *Pinkney & Sons Steamship Co. Ltd.* (4))—see also *Couch* v. *Steel* (9), *Rogers* v. *Loutit* (10) and *Namby* v. *Joseph* (11). The trial judge should have directed a verdict for the appellant. Alternatively, there was no justification in law for the directions contained in his summing up based on the question of a major or minor defect.

Weston K.C. and *Miller* K.C. (with them *Walsh*), for the respondent.

Weston K.C. There was a breach by the appellant of the common law duty to make the premises and place where the respondent was

(1) (1918) V.L.R., at p. 100.
(2) (1918) 2 K.B. 523.
(3) (1865) 4 F. & F. 608 [176 E.R. 713].
(4) (1894) A.C. 222.
(5) (1921) 3 K.B. 560.
(6) (1920) A.C. 956.
(7) (1933) 2 K.B. 297.
(8) (1935) 1 K.B. 146.
(9) (1854) 3 E. & B. 402 [118 E.R. 1193].
(10) (1881) 15 S.A.L.R. 4.
(11) (1890) 9 N.Z.L.R. 227.

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employed as suitable and safe as the exercise of care and skill would permit so as not to expose him to unnecessary danger (*Smith* v. *Baker & Sons* (1); *Jury* v. *Commissioner for Railways (N.S.W.)* (2); *Naismith* v. *London Film Productions Ltd.* (3); *Wilsons and Clyde Coal Co. Ltd.* v. *English* (4); *Ogden* v. *Melbourne Electric Supply Co. Ltd.* (5)). That common law duty cannot be delegated. It is not satisfied by the appointment and employment of competent servants (*Wilsons and Clyde Coal Co. Ltd.* v. *English* (4); *Naismith* v. *London Film Productions Ltd.* (6); *Charlesworth, Law of Negligence*, (1938), pp. 476, 478, 480, 483). It is a question of fact whether in all the circumstances the employer has exercised reasonable care in the fulfilment of this duty, and, therefore, where the plant is shown to be defective and dangerous prima facie there has been a breach of that duty. The supervision of plant is the obligation of the employer (*Wilson* v. *Merry* (7); *Ogden* v. *Melbourne Electric Supply Co. Ltd.* (8)). It is not only necessary that the employer should take reasonable care, but he must ensure that his delegates also take reasonable care (*Jury* v. *Commissioner for Railways (N.S.W.)* (9)). *Cole* v. *De Trafford* [*No.* 2] (10) is inconsistent with those cases unless it be taken as merely deciding that the position as regards ordinary domestic premises in relation to a chauffeur is quite different from providing and maintaining proper plant and equipment in working operations. The doctrine of common employment cannot be relied upon to defeat the injured servant when his injuries have resulted from the breach by the employer of this common law duty as stated (*Wilsons and Clyde Coal Co. Ltd.* v. *English* (4); *Charlesworth, Law of Negligence*, (1938), pp. 481, 482). The doctrine of common employment is based upon the view that employer and employee are deemed to have agreed *inter se* that the latter will hold the former indemnified against the negligence of a fellow employee causing injury to the latter (*Radcliffe* v. *Ribble Motor Services Ltd.* (11); *Charlesworth, Law of Negligence*, (1938), p. 467). The employer's duty is fourfold: (*a*) not to be personally negligent, (*b*) to appoint and employ competent employees, (*c*) to ensure the safety of his premises and plant, and (*d*) to have a proper system of working his plant and carrying on his undertaking. The duty *qua* premises is independent of and distinct from the duty *qua* system. The respondent's case is based on defective premises and plant.

(1) (1891) A.C. 325.
(2) (1935) 53 C.L.R. 273.
(3) (1939) 1 All E.R. 794.
(4) (1938) A.C. 57.
(5) (1918) V.L.R., at pp. 94, 96-98, 100, 101.
(6) (1939) 1 All E.R. 794.
(7) (1868) L.R. 1 Sc. & Div. 326.
(8) (1918) V.L.R. 77; 24 C.L.R. 303.
(9) (1935) 53 C.L.R., at p. 290.
(10) (1918) 2 K.B. 523.
(11) (1939) A.C. 215.

Wilsons and Clyde Coal Co. Ltd. v. *English* (1) is a system case, but it refers repeatedly to the duty *qua* premises and plant. When the duty *qua* premises and plant is breached by negligence it does not matter whether it is the negligence of a fellow employee simply or whether it is the employer's personal negligence or whether it is the result of the failure to provide a proper, non-negligent, system or whether it is the result of a negligent interruption of a proper system if the defect could have been prevented, removed or remedied by the exercise of reasonable care and skill. In such a case the employer cannot rely upon common employment to escape liability. The situation *qua* plant is to be distinguished from the case where the injured employee relies not on defective plant but solely on system of working. In the latter case he can be met by common employment, where it applies, unless he can show that the system itself was defective. This failure to distinguish between plant and system cases is the fundamental fallacy of the appellant's argument. It assumes that whenever an employer establishes a proper system he escapes liability. But this is not so in premises cases. The unnecessary danger to which the respondent was exposed resulted in damage through the consequent act of the second engineer in opening or causing to be opened the door and releasing into the stokehold a large volume of water which had previously been boiling under pressure. There was no *novus actus interveniens* (*Halsbury's Laws of England*, 2nd ed., vol. 23, pp. 590-596). The matters were intimately associated. Attempting to deal with the emergency was not an improbable consequence of the initial negligence. The chain of cause and effect is complete and the damage was in fact the direct result of the negligence complained of (*Harrison* v. *Great Northern Railway Co.* (2); *Paterson* v. *Mayor &c. of Blackburn* (3); *Sullivan* v. *Creed* (4); *Haynes* v. *Harwood* (5)). Having regard to the state of the evidence the trial judge should have directed the jury that the injury to the respondent arose from the failure by the appellant to have reasonable care and skill utilized in connection with the boiler: See *Phillips* v. *Ellinson Brothers Pty. Ltd.* (6). In dealing with the argument for the appellant the preliminary question is: What law applies? The answer is: The *lex loci contractus*, i.e., the law of New South Wales (*P. & O. Steam Navigation Co.* v. *Shand* (7)). That law includes the statutory provision in sec. 65 of the *Workers' Compensation Act* 1926-1938 (N.S.W.)

(1) (1938) A.C. 57.
(2) (1864) 3 H. & C. 231 [159 E.R. 518].
(3) (1892) 9 T.L.R. 55.
(4) (1904) 2 I.R. 317.
(5) (1935) 1 K.B., at p. 152.
(6) (1941) 65 C.L.R. 221.
(7) (1865) 3 Moo. P.C. (N.S.) 272, at p. 290 [16 E.R. 103, at p. 110].

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abolishing the doctrine of common employment, or, more correctly stated, that law does not include the doctrine of common employment, so that that doctrine cannot be implied in a contract of service governed by the law of New South Wales. The fallacies in the argument for the appellant are : (*a*) if the *Navigation Act* provides a complete code, it would displace not merely all other statutory provisions and different agreements the parties themselves may wish to make, but also the common law as to implied terms. That it is incomplete is patent, e.g., it is silent as to the liability of the employer for negligence. It cannot be assumed that the contract is meant to take away rights in tort by remaining silent as to them, and (*b*) being a contract all the law of New South Wales, being the proper law of the contract, has to be applied. Further, its whole legal effect will be considered in accordance with the law of New South Wales. It is entirely irrelevant to say that the employees of the appellant may have contracts differing in some respects from the respondent's contract because of the application of different law. That is one of the normal incidents of entering into contracts of this kind in different places. There is no reason for treating contracts of service on some different and special footing. There is no Commonwealth common law of contract, and no Commonwealth statutory law of contract. Each State has a different law of contract ; the position *qua* tort and criminal law is the same (*Washington* v. *The Commonwealth* (1) ; *Re McArthur* (2) ; *McArthur* v. *Williams* (3)). The Federal legislature must be deemed to have known that the proper law of the contract is the *lex loci contractus* unless the parties expressly agree to be bound by some other law. The *Navigation Act* is silent on the matter, therefore it must be regarded as confirming that position. The *Navigation Act* does not prevent the implication of any terms in a seaman's contract. On the face of it sec. 59 of that Act recognizes that there may be an implied agreement or an element of an agreement for service between the master for the shipowner and the seaman. In the case of master and servant, the law implies certain obligations on the part of the master ; it further implies, if certain exceptions arise, the doctrine of common employment. The *Navigation Act* merely provides an incomplete form. The terms to be implied are the terms implied at the date the form was used and the contract entered into. Implied terms of a contract are as much a matter of the express contract as if included therein (*Mulvay* v. *Henry Berry & Co. Pty. Ltd.* (4) ; *Hart* v. *MacDonald* (5)). One

(1) (1939) 39 S.R. (N.S.W.) 133, at p. 139 ; 55 W.N. 60, at p. 61.
(2) (1936) 36 S.R. (N.S.W.) 265, at pp. 270, 271.
(3) (1936) 55 C.L.R. 324, at pp. 339, 350-355, 361, 362.
(4) (1938) 38 S.R. (N.S.W.) 389 ; 55 W.N. 155.
(5) (1910) 10 C.L.R. 417.

of the implied terms in the agreement between the appellant and the respondent was the provision contained in sec. 65 of the *Workers' Compensation Act* 1926-1938 (N.S.W.), by which the doctrine of common employment was abolished *qua* the law of New South Wales. Under the Federal system the principle is recognized that there can be a law of a State governing a contract which arises under a Federal statute (*Wragge* v. *Sims, Cooper & Co. (Australia) Pty. Ltd.* (1)). The test is the locus of contract of employment, and not where the accident happened (*Mynott* v. *Barnard* (2)). The parties have excluded the doctrine of common employment; if it is not operable as a defence the verdict stands. *Couch* v. *Steel* (3), attributed to the doctrine of common employment, is the origin of the obligation as regards seaworthiness.

Miller K.C. informed the Court as to how the case was conducted in the Court below.

Mason K.C., in reply. Under sec. 46 of the *Navigation Act* 1912-1935 the form of contract is specified and it cannot be deviated from. The only implication is the statutory implication of seaworthiness. The Federal Parliament intended to cover the whole field as to seamen's contracts of service (*Ex parte McLean* (4)). The test whether sec. 65 of the *Workers' Compensation Act* 1926-1938 applies is not where the contract was made but where the injury happened. If the common law be introduced into a contract it is introduced as it existed at the time of the statute and not with subsequent alterations (*Washington* v. *The Commonwealth* (5)). The appellant believed the engineer to be a thoroughly competent engineer.

Cur. adv. vult.

Dec. 14.

The following written judgments were delivered :—

RICH J. I have had the advantage of reading the judgment of my brother *Williams* and I concur in it.

I am of opinion that the appeal should be allowed.

McTIERNAN J. The appellant, which was the owner of the steamship *Zealandia*, employed the respondent as a fireman on board the ship. The master engaged him at Sydney. The agreement covered voyages beyond the territorial waters of New South Wales, the first

(1) (1933) 50 C.L.R. 483, at pp. 490, 491.
(2) (1939) 62 C.L.R. 68, at p. 77.
(3) (1854) 3 E. & B. 402 [118 E.R. 1193].
(4) (1930) 43 C.L.R. 472.
(5) (1939) 39 S.R. (N.S.W.), at pp. 143, 144; 56 W.N., at p. 61.

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and last voyages being from and to Sydney, and was subject to the Commonwealth *Navigation Act* 1912-1935, sec. 46. It was in the form prescribed by reg. 6 of the Commonwealth *Navigation* (*Master and Seamen*) *Regulations*, which were made under the above-mentioned Act, and complied with the requirements of sec. 46. During the currency of the agreement one of the ship's boilers broke down when the ship was beyond the territorial waters of New South Wales and the respondent was severely scalded. He brought an action in the Supreme Court of New South Wales to recover compensation for the personal injury and loss he suffered. There were two trials. In the second trial the jury found a verdict for him and awarded him £2,800. The Full Court of the State dismissed a motion by the present appellant to set aside the verdict. This appeal is from the judgment on that motion.

There were two counts in the second trial, namely, for negligence and breach of the statutory duty created by sec. 59 of the Commonwealth *Navigation Act* 1912-1935. The first count alleged that the appellant neglected its duty as the respondent's employer in the care, control, operation, maintenance, equipment, supervision and management of the boiler. It also contained general allegations of breaches of its duty as employer to take due and reasonable care for the respondent's safety. The second count alleged that the appellant neglected its duty under sec. 59, that is, briefly, to use all reasonable means to ensure the seaworthiness of the vessel. The first count only was left to the jury and a verdict for the respondent was returned on that count. The trial judge directed the jury to return a verdict for the appellant on the second count, his Honour being of the opinion that there was no evidence fit to be left to the jury on that count. The respondent did not cross-appeal to the Full Court against the direction or the verdict for the appellant on the second count and did not seek to challenge either the direction or the verdict in this appeal: Compare *Musgrove* v. *McDonald* (1). The contest at the trial was not whether the accident happened and the respondent was severely scalded—these were facts that could not be disputed—but whether the injury which he suffered was the result of any negligence for which the appellant was responsible. It relied on the defences of contributory negligence, common employment and *novus actus interveniens*. The issue of contributory negligence was left to the jury. The verdict on the first count shows, of course, that it was resolved in the respondent's favour and no question on that defence is raised in this appeal. The appeal turns on questions raised by the other two defences.

(1) (1905) 3 C.L.R. 132.

Besides, it was argued on behalf of the appellant that the defective condition of the boiler could not provide any cause of action at common law, the respondent's only remedy being an action for the breach of the statutory duty imposed on the appellant by sec. 59 of the *Navigation Act*. The duty at common law of a shipowner to a seaman whom he engages to serve on board his vessel depends on the principles applicable to the relation of master and servant: See *Searle* v. *Lindsay* (1); *Hedley* v. *Pinkney & Sons Steamship Co. Ltd.* (2). The common law did not surround the seaman with the protection of an implied warranty that the ship was seaworthy: See *Couch* v. *Steel* (3). Parliament intervened to impose a statutory duty on the owner in respect of the seaworthiness of the ship: *Merchant Shipping Act* 1876, sec. 5; *Merchant Shipping Act* 1894, sec. 458. These provisions are adopted in principle by the Commonwealth *Navigation Act*, sec. 59. This section does not, in my opinion, derogate from the common law rights of a seaman. It adds to his rights and ensures greater protection for him. Seamen are a class which the law has favoured on account of the importance of their calling to the nation.

If the statutory duty created by sec. 59 had not been imposed on the shipowner, a seaman could maintain an action at common law against him for the neglect of his duty as the seaman's employer to maintain the machinery, including the ship's boilers, which the shipowner employed the seaman to use and operate, if the neglect caused injury to the seaman. The intention of sec. 59 is to create a new duty for the shipowner, not to abolish any right of action which the seaman might have had in respect of any wrongful act, neglect or default of the shipowner causing him injury. There is no principle preventing the same facts from constituting a cause of action under sec. 59 and a cause of action for negligence. The question whether sec. 59 introduces such a prohibition depends upon its provisions and their proper construction. The section does not exhibit any intention to take away from a seaman any existing right in addition to the intention, which it does exhibit, to give him a new right. The respondent is not, in my opinion, restrained by the operation of these or any other provisions of the Act from maintaining the cause of action for negligence upon which the jury found in his favour. The argument that the respondent's only remedy was to sue for a breach of the statutory duty under sec. 59 should fail.

A question preliminary to the consideration of the defence of common employment is whether that defence was excluded by sec.

(1) (1861) 11 C.B. N.S. 429 [142 E.R. 863].
(2) (1894) A.C. 222.
(3) (1854) 3 E. & B. 402 [118 E.R. 1193].

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65 of the *Workers' Compensation Act* of New South Wales. This section provides that where any injury or damage is suffered by a " worker " by reason of the negligence of a " fellow worker " the employer of those " workers " shall be liable in damages in the same manner and in the same cases as if those " workers " had not been engaged in common employment. The section is expressed to apply to every case in which the relation of employer and " worker " exists, whether the contract of employment is made before or after the passing of the Act and whether or not the employment is one to which the other provisions of the Act apply.

It is argued on behalf of the respondent that the proper law of the contract of employment in this case is that of New South Wales (the place where the contract was made) and that while sec. 46 of the Commonwealth *Navigation Act* bound the parties to observe a form in making the agreement their rights and duties under the agreement are to be ascertained by reference to the law of New South Wales. The argument is an attempt to use, perhaps also to extend, the principle which was applied in *Wragge* v. *Sims Cooper & Co. (Australia) Pty. Ltd.* (1).

For the appellant it is argued, first, that the *Workers' Compensation Act* of New South Wales applies only if the worker sustains injury within the territorial limits of the State, and reliance was had on *Mynott* v. *Barnard* (2). The reply made for the respondent to that argument is that sec. 65, as distinguished from the other provisions of the Act, applies to the contract of employment.

It is further argued for the appellant that sec. 46 of the Commonwealth *Navigation Act* determines both the form and the content of the agreement, and that what is intended by Parliament is that in every case to which the section applies the relations between the shipowner and a seaman engaged to serve on his ship should be governed exclusively by Commonwealth law. If that contention is correct, sec. 65 of the *Workers' Compensation Act* of New South Wales would not apply. Then it is argued that, if this section is excluded the rights of the respondent under the contract of employment are limited by the doctrine of common employment. This argument involves a twofold supposition, first that there is a common law of the Commonwealth incorporating the doctrine of common employment, and secondly that the limitations which the doctrine imposes on a workman's rights are incorporated in this agreement.

Another view which is suggested is that the agreement is governed by the law of the State of Victoria, that is, the law of the ship's flag. The law of Victoria, unlike that of New South Wales, retains

(1) (1933) 50 C.L.R. 483.

(2) (1939) 62 C.L.R. 68.

the doctrine of common employment to the extent that it is a defence in an action founded on the breach of the duty of an employer to his employee at common law.

In *Radcliffe* v. *Ribble Motor Services Ltd.* (1) Lord *Macmillan* said :— " The immunity of an employer from responsibility for injury sustained by one of his workmen through the negligence of a fellow workman is regarded as an implied term of the contract of employment, by which is meant that the law imports this term into the contract although the contract says nothing about the matter. The law is chary of implying in contracts terms which the parties themselves have not thought fit to express, and will not do so unless the implication is necessary in order to give effect to the intention of the parties as gathered from the nature and terms of their expressed contract. The passages I have quoted disclose the grounds on which the judges of England and the United States justified the importation into the contract of employment of the implication that the servant must be presumed to have accepted the risk of his fellow servant's negligence. Whatever validity these grounds may have possessed a hundred years ago, it is manifest that in these present days of large scale industry they have no foundation whatever in fact. The assumed facts are nowadays a sheer fiction. Yet the rule of law persists, though substantially mitigated by legislation, notwithstanding that its original ratio has long ceased to be regarded as tenable." This view of the basis of the employer's immunity in the case mentioned is to be found in all the judgments delivered in that case. Sec. 46 prohibits the insertion in the agreement of any stipulation to which both master and seaman do not agree. The section says that the agreement between the master and the seaman shall be framed so as to admit of stipulations (not contrary to law), which are approved by the superintendent, being introduced at the joint will of the master and seaman. Does the section permit the importation by implication into the agreement of a stipulation to which it may be presumed that the seaman would not agree if it were proposed to be made an express stipulation ?

The question raised by these arguments is whether the contract of employment is governed by the law of New South Wales or by that law and Commonwealth law, or by Commonwealth law only or by the law of Victoria or by that law and Commonwealth law.

These conflicting arguments may warrant legislative action freeing the relation between shipowner and seaman arising under an agreement made pursuant to sec. 46 from any uncertainty as to the law by which the rights and duties under it are to be ascertained. The

(1) (1939) A.C., at pp. 234, 235.

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powers of the Parliament with respect to this matter are expounded in *Australian Steamships Ltd.* v. *Malcolm* (1)—See also *Joyce* v. *Australasian United Steam Navigation Co. Ltd.* (2).

In the present case it is not necessary to decide the questions raised by these arguments if the evidence could not support the defence of common employment. In *Wilsons and Clyde Coal Co. Ltd.* v. *English* (3), Lord *Wright* said: "I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained. Thus the obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not, however, broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow servant or a merely temporary failure to keep in order or adjust plant and appliances or a casual departure from the system of working, if these matters can be regarded as the casual negligence of the managers, foreman, or other employees. It may be difficult in some cases to distinguish on the facts between the employers' failure to provide and maintain and the fellow servants' negligence in the respects indicated." The opinion of Lord *Wright* was in substance the same as that of the other Lords: See per Lord *Atkin* (4) and per Lord *Maugham* (5). The authorities to which Lord *Wright* refers include *Williams* v. *Birmingham Battery and Metal Co.* (6), in which *Vaughan Williams* L.J. and *A. L. Smith* L.J. approved of Lord *Herschell's* statement in *Smith* v. *Baker & Sons* (7), which is in these words: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk" (8). Another of these authorities is *Young* v. *Hoffmann Manufacturing Co. Ltd.* (9), where *Kennedy* L.J. said: "In the absence of a special contract between employer and employed, it is an implied term of the relation that the master undertakes, in the view of the common law, to use reasonable care— . . .; (*b*) in having and keeping his machinery, the use of which might otherwise be dangerous to the servant in his employment, in proper condition and free from defect" (10).

(1) (1914) 19 C.L.R. 298, at pp. 329, 330.
(2) (1939) 62 C.L.R. 160.
(3) (1938) A.C., at pp. 84, 85.
(4) (1938) A.C., at p. 62.
(5) (1938) A.C., at p. 85.
(6) (1899) 2 Q.B. 338.
(7) (1891) A.C. 325.
(8) (1891) A.C., at p. 362.
(9) (1907) 2 K.B. 646.
(10) (1907) 2 K.B., at p. 656.

It is clear that the appellant had the duty to take reasonable care to maintain each boiler on the ship in a proper condition and to keep it from any defect that would render the boiler dangerous to the respondent. That duty was not performed merely by the selection and appointment of skilled persons whose duty it was to maintain the boiler in a proper condition and free from any such defect. The duty resting on the appellant was broken if these employees failed to exercise due care and skill to maintain the boilers in a proper and safe condition unless it was a " merely temporary failure to keep in order " which could be regarded as their " casual negligence." In my opinion the jury could not reasonably draw the conclusion from the evidence that the boiler which broke down was maintained in a proper condition. The evidence proved to demonstration that it developed defects in its structure that rendered it dangerous.

The first indication of trouble in the boiler was an explosion followed by a gust of flame and gas which repelled a fireman attending to the furnaces of the boiler. He observed that its central or low furnace was filling with water flowing from the boiler. The engine-room staff dealt with the emergency by pulling the fires from the wing or high furnaces on to the floor of the stokehold where they were put out with water and then by opening the door of the central furnace in order to release the water which then gushed out flooding the floor and filling the stokehold with steam. The respondent was scalded by falling on the floor of the stokehold as the result of a collision with another fireman when the respondent was attempting to avoid the water. When the conditions permitted two firemen went inside the furnace and the combustion chamber to make an inspection. Besides discovering that the bricks and sweep plates in the low furnace had been thrown out of place they found a deeply corroded piece of a boiler stay with a nut attached that had come out of the plate of the combustion chamber, leaving a hole about $1\frac{1}{2}$ inches in diameter, and dropped to the bottom of the furnace. This end of the stay had been bolted into the plate and the other end into the boiler plate. There was a thread on the stay and in the plates. The boiler was not used again during the rest of the voyage, the ship relying on the other six boilers. No further work was done on the boiler until the ship arrived at Hobart, where boiler makers cut out the broken stay and repaired the boiler. The stays which were essential to the security of the boiler were numerous, but it was improbable that if one broke but the end did not come out of the plate the boiler would not remain serviceable. The evidence showed that everybody knew that corrosion was inevitable in boilers of the type used in the ship and that a stay would break if it were

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allowed to corrode. It showed also that corrosion attacked both the rod and the thread of a stay and the thread in the plate into which it ought to be securely bolted. There was considerable evidence on which the jury were entitled to act that the cause of the hole in the plate of the combustion chamber was that the thread of the fractured stay and the thread in the plate had been weakened by corrosion that had not been checked for a very substantial time, so that when the rod broke in consequence of the corrosion, which, according to the evidence, was visible in the part found, the threaded part of the stay was not held securely enough in the plate to resist the pressure resulting from the operations of the boiler and it was ejected from the plate. Evidence was adduced on behalf of the appellant that the thread in the plate was weakened by wastage but not by corrosion, and the mishap was due to that cause. If the jury accepted the evidence that there was corrosion in the plate of the combustion chamber at this place which was obviously vital, they could very properly draw the inference that there was a substantial defect in the boiler rendering it dangerous to the respondent and that it had not been properly maintained.

In the next place, there was ample evidence justifying the jury in finding that the boiler fell into this defective condition in consequence of the failure of the appellant's employees to exercise due care and skill in maintaining the boiler. There was evidence detailing the methods and tools which it was usual and proper to use to detect corrosion of the stays and in the plates of the boiler and the combustion chamber into which the stays are screwed and to correct its effects and proving how often it was necessary to make tests for corrosion. There was evidence that the susceptibility of the stays and the threads to corrosion rendered it prudent to test them not less frequently at any rate at the outside than once every few months, whereas the evidence of the badly corroded condition of the part of the stay which was expelled from the plate of the combustion chamber indicated that for some years past there was neglect in making tests to detect corrosion. It would be contrary to the evidence to find that there was a merely temporary failure to keep the boiler in order which could be regarded as the casual negligence of the employees. The evidence justifies the finding that the failure persisted for a long period far exceeding the limits of prudence, and was systematic and regular. Accordingly, I think there was evidence justifying the finding that the appellant broke its duty to maintain the boiler properly. This was the "personal negligence" of the appellant, to which common employment was not a defence.

The trial judge directed the jury substantially in accordance with the principles laid down by Lord *Wright*. But criticism is made of a test which his Honour gave for distinguishing between defects in machinery in respect of which an employer could not *vis-a-vis* an employee free himself from responsibility by delegating the care of the machinery to his employees and those matters in respect of which the negligence of an employee might in an action by another employee be met by the defence of common employment. His Honour asked the jury to consider whether the defect in the boiler was major or minor. The question whether this test would afford correct guidance to the jury depends on the explanation which was given of what were major and minor defects. His Honour told the jury that a defect of a substantial nature affecting the plant and its efficiency was a major matter. I understand that what his Honour meant was that the existence of such a defect would be evidence of a breach of the employer's duty to provide and maintain a proper plant. His Honour distinguished a minor defect as one which was incidental to the running of the plant. He gave these examples, "putting oil on appropriate oiling points, turning on a tap, pushing a switch, the tightening of a nut, an ordinary running repair." The point of his Honour's direction was that *vis-a-vis* an employee these matters are not within the area of personal responsibility which the law assigns to the employer. His Honour's view of the contentions of the parties on the question was expressed to the jury in these words: "I do not think it is seriously contended that it is not a substantial matter. If you come to the conclusion, of course, that it was a minor matter, a mere running repair, then of course it would be open to you to so hold, but I do not think that it is very seriously put forward." Of course "major matter" and "minor matter" are here to be understood in the light of his Honour's explanation of these terms. It seems to me that upon a fair view of the summing up the question was substantially put to the jury whether or not reasonable care was taken to maintain the boiler as part of the ship's plant. That is clearly a matter within the employer's field of duty and by their verdict the jury must be presumed to have determined that question against the appellant.

The remaining question in the appeal is whether the trial judge correctly directed the jury on the appellant's defence of *novus actus interveniens*. The act so described was that of an officer who had ordered one of the doors of the furnace, behind which the water flowing out of the boiler was banking, to be opened. When the door was opened water poured from the door and in rushing to get clear

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the respondent collided with a fellow workman and fell on the stokehold floor, which was flooded with this hot water. The trial judge dealt with the question in the course of his summing up. He used these words: "It was said that what happened before the opening of the door of the furnace was merely introductory history, and that the real cause of the accident being the opening of the door of the furnace with all that boiling water behind it, and that the door having been opened by the second engineer, who was a fellow servant of the employer of the plaintiff, that that was the real negligence, if there was any negligence, and being the negligence of a fellow servant the plaintiff cannot recover. That is the contention that is put to you, but I am bound to tell you that in law that is not the position. If you are satisfied that that boiler was not being maintained in a proper and safe condition, applying the tests I have already given to you, and if as a result of some failure of the employer to use reasonable care in relation to the maintenance of the boiler, hot water flooded out and by a regular chain of cause and effect escaped and as a consequence the plaintiff was burned, then the plaintiff is entitled to recover." The evidence demonstrated, as it seems to me, that the flooding of the furnace was the result of the appellant's failure to maintain the boiler in a proper condition. If the action of the officer in opening the door in the emergency was such an act as might reasonably and naturally follow, it is impossible to deny that the injuries sustained by the respondent were the result of the appellant's breach of its duty and the doctrine of common employment would afford no defence. His Honour directed the jury that they could find a chain of cause and effect between the defect in the boiler and the accident to the respondent. The considerations based on the evidence which he mentioned to the jury are contained in this passage: "You will remember, gentlemen, that if 25 or 30 tons of boiling water, and water boiling under pressure, which means higher than the ordinary 212 degrees F., escapes from the water container into the furnace or elsewhere, then the obvious inference is that some steps will have to be taken to cope with the situation, the water will have to be released or got away somehow and it is not unlikely under the circumstances it will get out into the stokehold floor and somebody might get injured. Here there is a chain of cause and effect running through from the original breaking of the stay to the water getting out on the floor, because the second engineer tells you, and you may think and perhaps form a very proper view of the position, that it was absolutely essential to do something to stop that weight of water banking up inside this furnace with the risk that the ashpit door would burst at some unexpected

moment and flood the stokehold without warning. So you may think that the opening of the door and releasing the water was a very proper thing to do under the circumstances, but it is still part of the chain of cause and effect whereby that water ultimately got out on to the stokehold floor after escaping through this bolt hole. If that is the position, gentlemen, then as a matter of law it would not be an answer to the plaintiff's claim to say that it was the action of the second officer in opening that door which was the real cause." It seems to me that upon the evidence the jury could not have reasonably found that the action of the officer in having the door open was a cause independent of and lying out of the natural chain of cause and effect which began with the appellant's failure to maintain the boiler in a proper condition. There was a conflict of evidence on the question whether the officer gave a warning to the men in the stokehold before having the door opened. The appellant relies on the absence of such a warning to give this act its character of a *novus actus interveniens*, the supposition being that no one would expect the door to be opened without a warning. But it is not to be assumed that the jury found that no warning was given. In my opinion there is no substantial question arising on the defence of *novus actus interveniens* which would justify an order for a third trial.

In the view which I have taken it is unnecessary to decide the question raised by the arguments on sec. 65 of the *Workers' Compensation Act* of New South Wales and sec. 46 of the Commonwealth *Navigation Act*. The view is that if the defence of common employment were an admissible defence, it could not, having regard to the evidence, succeed.

For these reasons the verdict for the respondent on the first count should stand, and the appeal should be dismissed, and with costs.

WILLIAMS J. The appellant Huddart Parker Ltd. is the defendant in an action at common law instituted by the respondent Cornelius Cotter as plaintiff in the Supreme Court of New South Wales. At the first trial the learned judge directed the jury to enter a verdict for the defendant, but on appeal the Full Court of New South Wales ordered a new trial. The proceedings at the first trial and before the Full Court on the appeal are fully reported in *Cotter* v. *Huddart Parker Ltd.* (1). On an application to this Court for leave to appeal against the order of the Supreme Court, this Court being evenly divided in opinion, leave was refused on the ground that this Court would be in a better position finally to dispose of the case when the verdict of the jury had been given upon the facts. At the second

(1) (1941) 42 S.R. (N.S.W.) 33; 59 W.N. 37.

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trial the declaration contained two counts: (1) that the plaintiff was employed by the defendant to operate and attend to a certain boiler then under the control of the defendant on the defendant's ship yet the defendant by itself its servants and agents so negligently improperly and unskilfully conducted itself in and about the care, control, operation, maintenance, equipment, supervision and management of the boiler and in and about failing to adopt proper and reasonable precautions to ensure due safety for the plaintiff and in and about the maintenance of a boiler in a defective state and in and about certain operations carried out with respect to a boiler and in and about failing to carry on its operations and work so as not to subject the plaintiff to unnecessary risk that the plaintiff whilst employed in the ship was grievously wounded and injured and suffered great pain of body and mind and incurred expense for nursing and medicine and medical and surgical attendance and was and is unable to attend to his usual occupation and was otherwise greatly damnified. (2) And the plaintiff further sues the defendant for that at all relevant times the plaintiff was employed by the defendant to operate and attend to a certain boiler then under the control of the defendant on the defendant's ship and the said ship was a ship to which the Commonwealth of Australia *Navigation Act* 1912-1935 applied and it was a term or obligation of the said contract of service that the defendant should use all reasonable means to ensure the seaworthiness of the said ship for the voyage at the time when the voyage began and to keep her in seaworthy condition for the voyage and during the same yet the defendant did not use all reasonable means to ensure the seaworthiness of the ship for the voyage at the time when the same began nor to keep her in seaworthy condition for the voyage and during the same whereby part of a certain boiler in the ship ruptured and the plaintiff suffered the damage in the first count mentioned.

In answer to the first count the defendant pleaded not guilty and denied that the plaintiff was employed by the defendant to operate and attend to the boiler then under the control of the defendant on the defendant's ship. The parties were treated as being at issue on the second count.

The learned judge directed the jury that there was no evidence on which they could find for the plaintiff on the second count and by his direction the jury returned a verdict for the defendant on this count. On the first count the jury returned a verdict for the plaintiff for £2,800. The defendant then moved the Full Supreme Court that the verdict of the jury be set aside and judgment for the defendant or a nonsuit be entered or in the alternative a new trial be

granted to the defendant. When the appeal came on for hearing before the Full Supreme Court, the Court was informed by counsel for the appellant that every ground of appeal was covered by the reasons already given on the first appeal and that counsel was unable to refer the Court to any further evidence or to any other authorities or to adduce any arguments that had not been considered and adjudicated upon by the Court on the prior motion. In these circumstances the Court did not consider itself called upon to examine the evidence for itself in order to see whether any further reasons suggested themselves which had been overlooked by the appellant's counsel, and, with the acquiescence of counsel for both parties, the appeal was treated as a formality and the motion dismissed with costs.

The defendant has now appealed to this Court and asks this Court to grant one of the three alternative forms of relief already mentioned. As the evidence given at the first trial has been carefully summarized in the judgments of the learned judges who comprised the Full Court on the first appeal, and the evidence given on the second trial does not differ substantially from that given at the first trial, it is unnecessary to refer to the evidence at the second trial at any length. Many of the facts are not in dispute. It is common ground that at the time of the accident the plaintiff was employed as a fireman on the S.S. *Zealandia*, a merchant passenger ship owned by the defendant engaged in inter-State trade between Sydney and Hobart, the port of registry being Melbourne. The plaintiff was serving under a running agreement entered into in accordance with Div. 8 of Part II. of the *Navigation Act* 1912-1935 for a period of six months commencing 21st July 1939, and expiring on 20th January 1940. The accident occurred at about 6 a.m. on Sunday, 6th August, when the ship was near Gabo Island beyond the territorial waters of New South Wales on a voyage from Sydney to Hobart.

In order to explain the events leading up to the accident I shall quote substantially the following passages from the summing up of the learned trial judge. "The plaintiff came on for duty at 4 o'clock on the morning of Sunday, 6th August, his watch being from 4 a.m. to 8 a.m. Things proceeded quite normally until somewhere in the neighbourhood of six o'clock. Something then happened to No. 7 boiler situated near where the plaintiff was working. It appears that the S.S. *Zealandia* was powered by seven Scotch marine boilers. There were two stokeholds, a forward and an aft stokehold. The forward stokehold was a space about thirty feet long, running from side to side of the ship, and about ten feet wide between

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the No. 7 boiler and the port and starboard bunkers, and boilers Nos. 1, 2 and 3 which were on the after side of this space. The other boilers, Nos. 4, 5 and 6 were behind boilers 1, 2 and 3. No details have been given about the arrangements there, except that it was described as the after stokehold, and behind that again came the engine-room. Those Scotch marine boilers have been described to you in detail. It appears that this type of boiler consists of a metal cylinder of substantial size with three heating units, two being described as wing or upper furnaces, and the other as the lower furnace which is in the centre. Each furnace has a place where the coal itself is consumed with an ashpit underneath. There is a lead through to a combustion chamber at the back, and from there the flame, hot gases, and smoke are led through the smoke tubes back to the front of the boiler again, where they escape into the smoke box and from there away to the ship's funnel. The essential feature of Scotch boilers is that the tubes carry no water, but only the flame and the hot gases, and the water itself is contained in the cylindrical part of the boiler, forming, as it were, a water jacket. This completely surrounds and encloses the three heating units. The water-jacket at the back behind the combustion chamber, contains, as it were, a wall of water enclosed between the back wall of the combustion chamber and the back wall of the boiler itself, a space about 14 inches from side to side. The two walls are secured one to another by a number of stays, which are threaded steel rods varying in size from $1\frac{3}{8}$ up to $1\frac{7}{8}$ inches in diameter. They are threaded for their full length and screwed through holes which are made in each of these two walls, which are themselves threaded. They are further secured by nuts which are screwed on to the outside of the wall of the boiler itself and inside the wall of the combustion chamber so as to prevent any possibility of the metal walls expanding or becoming distorted. Evidence has been given that there are about five hundred of these stays altogether in a boiler, so that, in view of the possibilities of corrosion and other injury, it is a matter of some moment to see that they are maintained in proper order and precautions are taken so that any corroded, broken, or defective stays may be removed and replaced . . . It would appear that somewhere about 6 o'clock on the morning of 6th August, the stay on the port margin of the back combustion chamber in the third row from the bottom fractured in such a manner that one short end was left in the hole in the back wall of the combustion chamber. When the fracture actually took place is not known, but at about the time I speak of the pressure in the boiler caused this piece of the stay to be ejected from the hole in which it should have remained threaded

and screwed, and it shot out into the lower furnace, followed by a stream of water from the boiler itself. This became apparent for the first time when the witness Woods was firing No. 7 boiler. He had completed the work which had to be done on the wing furnaces and was just turning his attention to the lower furnace. He opened the door and was met by a sudden gust of flame and gas which caused him to step back hurriedly. He then saw that water was coming into the lower furnace. He immediately warned the 2nd engineer, Mr. Martin. Mr. Martin gave orders to draw the wing furnaces, while he himself isolated that boiler from the other boilers. The wing furnaces having been drawn, the fire in the lower furnace was quenched by the water which was pouring out from the boiler. That water continued to pour out and rise inside the boiler and behind the doors of the ashpit and the furnace. A sufficient quantity accumulated behind these doors to make the second engineer apprehensive that it might burst the ashpit door away from its fastenings, and flood the stokehold suddenly and unexpectedly with water which was at a temperature considerably above the ordinary boiling point."

His Honour then proceeded to explain that at this stage a conflict of evidence arose as to the circumstances under which the door of the lower furnace was opened. The plaintiff's case was that the door was opened by another fireman under the direction of the second engineer without the plaintiff being warned, and that the plaintiff was injured by colliding with somebody when attempting to avoid the scalding water and falling into it, whilst the second engineer on behalf of the defendant said that he opened the door himself after warning the men, including the plaintiff. The defendant contended that the plaintiff was in the dilemma that if the jury accepted the evidence of the second engineer it was open to them to find that the plaintiff was guilty of contributory negligence, while if they accepted the evidence of the plaintiff it was open to them to find that the proximate cause of the accident was not the failure to maintain the boiler in a proper state of repair but the negligence of the second engineer in causing the door to be opened without taking due care for the safety of the men. The defendant admits that the learned judge directed the jury properly on the issue of contributory negligence, but complains that his Honour should also have left to them the alternative issue of whether, if the second engineer was negligent, this negligence was a *novus actus interveniens*. It is clear that it would have been grave misconduct on the part of the second engineer to have opened the door and let the water escape without seeing that the men were safe. There were, therefore,

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two negligent acts involved in the determination of the question of fact whether the negligence of the defendant was the proximate cause of the injury to the plaintiff. It would of course have been open to the jury to have found that the accident was occasioned by negligence in the care of the boiler. But, in order to arrive at this conclusion, it was necessary for them to find affirmatively that it was this negligence and not the negligence of the second engineer which was the proximate cause of the accident (*Lynch* v. *Nurdin* (1); *Haynes* v. *Harwood* (2); *The Gusty and The Daniel M.* (3); *Morgan* v. *Aylen* (4)). His Honour should therefore have left this question to the jury, but it is unnecessary to pursue the point further, because it only relates to the question whether the defendant should be granted a new trial on the first count; and, for reasons which will hereinafter appear, I am of opinion that the defendant is entitled to a verdict on this count.

I shall therefore proceed to discuss with respect to the first count the question whether there is any evidence that the accident to the plaintiff was caused by negligence in the care of the boiler, and, if there is any such evidence, the defendant is liable to the plaintiff for the damage he suffered as a result of that negligence.

It is common ground that stays are liable to fracture because they become wasted by corrosion, and because pressure in the boiler causes new or uncorroded steel to suffer from fatigue and snap. It is therefore necessary to carry out periodical inspections of their condition. In order to examine them inside the boiler the fires must be drawn, the boiler cooled off, emptied and opened up. This is done when the ship is in port. The inspecting officer then crawls into the boiler, taps the stays which he can reach with a hammer as their note will indicate whether they are sound or broken, and inspects those which he cannot reach visually with a torch. Where there is corrosion, and he can reach the stays, he chips it off in order to examine the amount of wasting. Corrosion can take place where the stay is free inside the boiler and where it is threaded into the boiler plates. The plates of the boiler below the junction of the threads on the inside and the nuts on the outside should, therefore, also be inspected to see if there is any weeping, as weeping indicates corrosion where the stay is screwed into the plates. If there is corrosion, the threads should be caulked with a caulking chisel, if they are capable of repair, and, if they are not, the stay should be replaced. Three witnesses who saw the broken stay gave evidence

(1) (1841) 1 Q.B. 29 [113 E.R. 1041].
(2) (1935) 1 K.B. 146, at p. 155.
(3) (1940) P. 159; 164 L.T. 271, at p. 273.
(4) (1942) 1 All E.R. 489.

of its condition. The two who gave evidence for the plaintiff gave a description of the stay which indicated that it was in a dangerously corroded condition throughout its whole length, and that the corrosion was of such long standing that it must have been apparent to any skilled person who examined the stay with due care at any time for years before the accident. The chief engineer, who gave evidence for the defendant, said the only corrosion was in the thread, and that the part of the stay which was free in the boiler was of full girth. He said that the practice on the ship was to carry out the method of inspection already mentioned, that in September 1938 the ship had been surveyed in accordance with sec. 193 of the *Navigation Act*, that on that occasion the boiler had been emptied and inspected inside and outside by the government surveyor, and that, accompanied by the second engineer, he had himself carried out a similar inspection in May, but that he had not discovered any defect in the stay where it was free in the boiler or threaded into the plates or any weeping below the nuts. The second engineer said that he had made an inspection without emptying the boiler at the end of July immediately before the fatal voyage, and had not noticed any weeping. But in order to examine the end of the stay and the nut at the back of the boiler plate in the combustion chamber he would have had to remove the sweep plate and fire bricks. This was done at the inspection by the chief engineer in May but in July they were not removed and the second engineer merely looked into the ashpit into which he said any weeping would have leaked.

The plaintiff's case is that the stay was in such a corroded condition that its dangerous deterioration must have been discovered if the inspections, especially those by the chief engineer in May and the second engineer in July, had been carried out with due care, and the defendant does not deny that there was evidence on which the jury could come to this conclusion.

The main contest on the appeal with respect to the first count has been whether this negligence of the chief and second engineer is negligence to which the maxim *respondeat superior* applies. The defendant relies on the doctrine of common employment. It also contends that the common law obligations of the employer on which the first count is based do not apply to a seaman's contract of employment, the only obligation of the shipowner to the seaman being that implied by sec. 59 of the *Navigation Act*.

It is true that in *Couch* v. *Steel* (1) it was held that no warranty of seaworthiness was to be implied between shipowner and seaman, and that in *Robertson* v. *Amazon Tug and Lighterage Co.* (2) *Cotton*

(1) (1854) 3 E. & B. 402 [118 E.R. 1193]. (2) (1881) 7 Q.B.D. 598, at p. 608.

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L.J. said: "The law does not, as against the owner, imply in favour of a captain or master any warranty of the seaworthiness or efficiency of the vessel." But in *Searle* v. *Lindsay* (1), where *Couch* v. *Steel* (2) and the cases relating to contracts of employment involving risk on land (including the then recent decision of the House of Lords in *Bartonshill Coal Co.* v. *Reid* (3)) were referred to, an officer of a ship who was injured during the voyage sued the shipowners, alleging that the defendants had failed in their duty to see that due care was exercised to maintain a winch on the ship in a safe condition. The action failed because the Court held that the plaintiff was in common employment with a competent chief engineer whose duty it was in the ordinary course of working the ship to see that the winch was rendered safe. If the Court had not considered that the common law obligations of an employer to his employee on land existed between a shipowner and his seamen, it would not have been necessary to decide whether the obligation to maintain the winch in a proper state of repair fell within the employer's department of duty or within the duties in which the chief engineer and the plaintiff were in common employment. In *Bellambi Coal Co. Ltd.* v. *Murray* (4), which was also an action by a ship's officer against a shipowner, one count of the declaration was based upon the same common law duties of an employer to his employee, and it was again assumed that the action lay.

In *Wilsons and Clyde Coal Co. Ltd.* v. *English* (5) Lord *Wright* said:—"I have chosen a few examples to show that the doctrine of common employment which was hinted at in connection with a butcher's cart and has roamed in its application to colliers, *seamen*, railwaymen, apprentices, chorus girls, and indeed every sphere of activity, *has always distinguished between the employer's duty to the employee and the fellow-servant's duty to the employee.*"

Couch v. *Steel* (2) was decided in 1854, and *Searle* v. *Lindsay* (1) in 1861, while the first statutory obligation of seaworthiness in favour of seamen was introduced by the Imperial *Merchant Shipping Act* 1876: *Bellambi Coal Co. Ltd.* v. *Murray* (4) was decided before the passing of the Commonwealth *Navigation Act*. The decision in *Searle* v. *Lindsay* (1) would appear to be an example of the way in which the doctrines of common law invaded the law merchant as the common law courts gradually assumed jurisdiction and ousted the jurisdiction of the Courts of Admiralty: See *Holdsworth's History of English Law*, 2nd ed. (1937), vol. 8, pp. 248 et seq. If the

(1) (1861) 11 C.B. N.S. 429 [142 E.R. 863].
(2) (1854) 3 E. & B. 402 [118 E.R. 1193].
(3) (1858) 3 Macq. 266.
(4) (1909) 9 C.L.R. 568.
(5) (1938) A.C., at p. 80.

statutory implication had not been introduced it is probable that, whenever a seaman was injured by a defect in any part of the equipment of a ship at sea, the question of the owner's liability to the injured seaman for the negligence of a fellow employee through whose want of care the accident occurred would have had to be determined by the same principles as those laid down in *Wilsons and Clyde Coal Co. Ltd.* v. *English* (1). But *Searle* v. *Lindsay* (2) does not appear to have established itself as an authoritative case in shipping law. It is not mentioned in such recognized authors as *Abbott* on *Merchant Ships and Seamen*, 14th ed. (1901), *Carver, Carriage of Goods by Sea*, 7th ed. (1925), *Maclachlan, Law of Merchant Shipping*, 6th ed. (1923), and *Temperley's Merchant Shipping Acts*, 4th ed. (1932), although it is cited in *Halsbury's Laws of England*, 2nd ed., vol. 22, p. 192. This is probably because after 1876 the express statutory obligation has been generally regarded as the only protection for seamen injured by a defective ship at sea: (*Abbott* on *Merchant Ships and Seamen*, 14th ed. (1901), at p. 219; *Temperley's Merchant Shipping Acts*, 4th ed. (1932), p. 279). As will appear hereafter, the obligations imposed by sec. 59, which are of a wide character, provide a different standard from that implied at common law in order to determine whether a seaman injured at sea through the negligence of a fellow employee to keep part of the equipment of the ship in order can sue the shipowner as though it had been his own personal negligence. It is clear, I think, applying the maxim *expressum facit cessare tacitum*, that the obligations implied by statute and at common law were not intended to coexist, so that after the enactment of sec. 59 no further contractual duty of care could be implied at common law against a shipowner in the same field as that occupied by the statutory obligation (*Lowe* v. *Dorling & Son* (3); *Dickson* v. *Zizinia* (4); *Stephens* v. *Junior Army and Navy Stores Ltd.* (5); *Bank Line Ltd.* v. *Arthur Capel & Co.* (6); *Gemmell Power Farming Co. Ltd.* v. *Nies* (7)).

It is different from those cases where statutory obligations are imposed upon employers to take certain specific safeguards as, for instance, fencing with respect to dangerous machines, by various Factory Acts. Those specific statutory duties are superimposed upon the common law duties implied in the contract of employment. They do not, like the obligation created by sec. 59, form part of the contract of employment, and an employee who is damaged by their

(1) (1938) A.C. 57.
(2) (1861) 11 C.B. N.S. 429 [142 E.R. 863].
(3) (1906) 2 K.B. 772, at p. 785.
(4) (1851) 10 C.B. 602, at p. 610 [138 E.R. 238, at p. 242].
(5) (1914) 2 Ch. 516, at p. 526.
(6) (1919) A.C. 435, at p. 462.
(7) (1935) 35 S.R. (N.S.W.) 469; 52 W.N. 162.

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breach cannot sue in contract, but only in tort. It is highly probable that it was intended to put a seaman by statute in an analogous position to that of a passenger at common law—See *Readhead* v. *Midland Railway Co.* (1), the headnote of which reads as follows: "The contract made by a general carrier of passengers for hire with a passenger, is to take due care (including in that term the use of skill and foresight), to carry the passenger safely; and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose; that is to say, free from all defects likely to cause peril although those defects were such that no skill, care, or foresight could have detected their existence,"—in which case the whole of the seaman's rights would depend upon the statutory obligation, but it is unnecessary finally to determine the point. A modern ship, and particularly a passenger ship, contains a great deal of equipment that is installed for the purposes of converting the ship into a floating hotel or for purposes of recreation, and it is possible that defects in these parts of the ship might not be considered as defects constituting unseaworthiness, so that the provision and maintenance of this equipment might constitute a field in which the implied common law duties could operate. For instance, defective heating appliances installed to provide hot water for the passengers' baths, the kitchens, and the pantries (See the *Navigation Act*, sec. 270) or for the seamen (sec. 136 (3)), might not make the ship unseaworthy, so that a member of the crew, if his remedy was confined to sec. 59, would have no redress although he was injured because the shipowner had failed to exercise due care to see that fit and proper appliances were provided for that purpose. It may be that *Searle* v. *Lindsay* (2), and *Bellambi Coal Co. Ltd.* v. *Murray* (3), *Leonard* v. *Leyland & Co.* (4), and *Gillies* v. *Cairns* (5), are cases of the kind where, the defective appliances not being of sufficient importance to make the ship unseaworthy, the shipowner could still be under a common law duty to see that reasonable care was exercised to keep them in repair. But when a seaman is injured by defective equipment during a voyage and the defect in the equipment is such as to constitute unseaworthiness, his cause of action must, in my opinion, be based on sec. 59 and not on any contractual duty implied at common law.

The evidence shows that, apart from the effect, if any, on the contract of sec. 65 of the *Workers' Compensation Act* 1926-1938 (N.S.W.) the plaintiff was at the time of the accident in common employment

(1) (1869) L.R. 4 Q.B. 379.
(2) (1861) 11 C.B. N.S. 429 [142 E.R. 863].
(3) (1909) 9 C.L.R. 568.
(4) (1902) 18 T.L.R. 727.
(5) (1905) 8 F. (Sess. Cas.) 174.

with the officers and crew of the ship (*Hedley* v. *Pinkney & Sons Steamship Co. Ltd.* (1)). Sec. 46 of the *Navigation Act*, so far as material, provides that a master of a ship who engages any seaman in Australia shall enter into an agreement with him in the prescribed form in the presence of the superintendent and that no master shall carry any seaman engaged in Australia to sea without having entered into such agreement. Statutory Rules 1924 No. 199, reg. 6 (1), prescribes the form of agreement. The contract was in this form. The plaintiff contends that the proper law of the contract is the law of New South Wales, that sec. 65 of the *Workers' Compensation Act* does not deal with the liability of the employer to pay statutory compensation but with his liability to pay damage for negligence at common law, so that the section is really a completely separate enactment although embodied for convenience in the *Workers' Compensation Act*, that the section is intended to affect all contracts the proper law of which is the law of New South Wales, and that, as the present contract was made in New South Wales and provided for the employment to commence and conclude in Sydney, the proper law of the contract is the law of New South Wales. The defendant, on the other hand, has pointed out that the port of registry is Melbourne, that the *Merchant Shipping Act* 1894, sec. 265, which is in force in Australia, provides that where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is any provision on the subject which is thereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered, and contends that if the contract is governed by the law of a State it is the law of Victoria, where the doctrine of common employment is still in force. But it is unnecessary to express any opinion on these contentions, because I agree with the unanimous view of the Full Supreme Court that sec. 65 only applies to torts committed in New South Wales. And the point, I think, can be determined by a more important consideration. In *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (2) *Isaacs* J. said :—" It is obvious from an inspection of sec. 46, and, indeed, of the group of sections headed 'Div. 8—The Agreement', that, just as in the Imperial *Merchant Shipping Acts*, a complete scheme is enacted. For the purpose of obtaining that complete scheme it is required that the articles shall be in the form and to the effect provided directly or indirectly by the Commonwealth Parliament. That is to say, the contractual obligations of the parties shall be

(1) (1894) A.C. 222.

(2) (1925) 36 C.L.R. 130, at p. 146.

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found complete in the agreement that conforms to Div. 8. Both the Imperial and the Commonwealth statutes are based upon the same fundamental idea." He had already expressed the same opinion in *Federated Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1). There would have to be, of course, in the case of articles, just as in the case of any other contract, a proper law of the contract. This would have to be the law of one of the States, either the law of the State in which the port of registry was situated if sec. 265 of the *Merchant Shipping Act* 1894 applied, or, if it did not, the State of the proper law determined in accordance with the principles of private international law. But, having regard to the comprehensive scope of the *Navigation Act*, to its express terms, and to the inconvenience and confusion that would arise if seamen serving on inter-State ships were subject or not subject to the doctrine of common employment, or to other incidents added to, or subtracted from, seamen's contracts of employment by the law of the State which was held to be the proper law of the contract, it appears to me that the Commonwealth Parliament, when it enacted Div. 8, evinced a clear intention that as between itself and the States its legislation should thereafter completely, exhaustively and exclusively occupy the legislative field with respect to the rights and liabilities attaching to agreements entered into between masters and seamen of ships subject to the Act, so that any subsequent State legislation which purported to affect the obligations of the contract at common law as they then existed would be inconsistent with the Commonwealth law under sec. 109 of the Constitution and would be to that extent invalid (*Ex parte McLean* (2); *Carter* v. *Egg & Egg Pulp Marketing Board* (*Vict.*) (3); *Washington* v. *The Commonwealth* (4)). It follows, therefore, that, in my opinion, the contract under which the plaintiff was serving as fireman on the S.S. *Zealandia* at the time of the accident was subject at common law to an implied condition that he would "take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services . . . and . . . where the nature of the service is such that as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant by his contract takes upon himself as between him and his master" (*Radcliffe* v. *Ribble Motor Services Ltd.* (5));

(1) (1922) 30 C.L.R. 144, at p. 158.
(2) (1930) 43 C.L.R. 472.
(3) *Ante*, p. 557.
(4) (1939) 39 S.R. (N.S.W.) 133; 56 W.N. 60.
(5) (1939) A.C. 215, at p. 230.

or, as Lord *Watson* succinctly put it in *Johnson* v. *Lindsay & Co.* (1): "The immunity extended to a master in the case of injuries caused to each other by his servants whilst they are working for him to a common end is an exception from the general rule, and rests upon an implied undertaking by the servant to bear the risks arising from the possible negligence of a fellow-servant who has been selected with due care by his master."

In *Wilsons and Clyde Coal Co. Ltd.* v. *English* (2) the House of Lords dealt exhaustively with the principles that govern the extent to which the doctrine is a "defence" where a servant sues a master for damage due to the negligence of another employee of the same master. The House decided that an employer is under a fundamental duty towards an employee which he cannot delegate, to see that due care is used (1) to provide proper machinery, plant, appliances, and works and to make such periodical overhauls, repairs, and replacements as are required to maintain the machinery, plant, appliances, and works in good order and condition, (2) to select properly skilled persons to manage and superintend the business, and (3) to institute a proper system of working. But the House did not decide that, whatever the facts relating to the employment may be, the employer's province, in which he is liable for the negligence of one employee to another employee as if it was his own personal negligence, despite any stipulation to the contrary, must inevitably include all the matters included in the above three departments. It is possible to imagine a case where an employer employed the same staff to construct, maintain and work the appliances, in which event the risks incident to the common employment might attach to all three tasks. Where an employer employs one staff to construct the appliances and to maintain them in proper order, and a separate staff to work them, although as between a member of the second staff and the employer, the employer would be personally liable for any damage suffered by the employee from the negligence of a member of the first staff, the members of the first staff would as between themselves be in common employment with respect to the risks incident to their common work. In *Wilson's Case* (2) the plaintiff, who was employed to work in a colliery, suffered injury because the owners had not instituted a safe traffic system for men proceeding to and from their work. The planning of this system was not any part of the work in which the plaintiff was engaged in common with any other employees of his master. This is made clear by Lord *Macmillan* (3). In most cases it is reasonably certain where the boundary lies

(1) (1891) A.C. 371, at p. 382. (2) (1938) A.C. 57.
(3) (1938) A.C., at p. 76.

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between the employer's province of personal duty to each employee, and the province where the employees are engaged in a common task. But, as the House has pointed out, it will often be difficult to determine where it lies in the case of the subsequent care of plant which has been properly provided in the first instance. This determination must depend upon the facts of each particular case. In so far as it is part of the ordinary routine of the employees engaged in common in working the machinery and plant to maintain that machinery and plant in repair, then, so long as the employer has provided a competent staff to supervise the repairs and a proper system of working, each employee must be taken to have impliedly contracted to take the risk that any of his fellow employees may be negligent in the execution of his part in effecting such repairs. This is what I understand Lord *Wright* to mean when he says: "Thus the obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not, however, broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow-servant or a merely temporary failure to keep in order or adjust plant and appliances or a casual departure from the system of working, if these matters can be regarded as the casual negligence of the managers, foreman, or other employees" (1). There are many cases in which it would be easy to decide that the steps required to maintain a ship in a proper state of repair were outside the province of the common work which a ship's crew is engaged to do. Work that required a ship to be docked, the use of special land machinery, and the employment of skilled tradesmen on shore would be in this category. But many kinds of repairs could be carried out either by the ship's crew or by outside workmen, in which case it would be a question of fact, which would have to be submitted to the jury, whether the work fell within the province of the personal liability of the owner or within that of the common employment. In *Radcliffe* v. *Ribble Motor Services Ltd.* (2) Lord *Wright* said: "In modern law it is realized that a duty may arise out of a relationship based on contract with a consequent liability for a breach of that duty, which I take to be the legal basis for many cases of liability in negligence and for such liability as now exists between employer and employee" (3). Where an employee sues an employer for such a breach, although the doctrine of common employment is often referred to as a defence and specially pleaded, it can be raised under the general plea of not guilty. Where there is evidence that the plaintiff is engaged in work in common with other employees of

(1) (1938) A.C., at pp. 84, 85. (2) (1939) A.C. 215.
(3) (1939) A.C., at p. 240.

the defendant, and it is proved that the accident is due to the negligence of another employee of the defendant, the plaintiff must prove that the negligence occurred in the province in which the defendant is personally liable, because the plaintiff will only establish a breach of duty if he can prove that the negligence was in the employer's province. Where, therefore, the accident is due to failure to use due care to maintain machinery in a safe condition, the plaintiff must prove that the repair is not one which falls to be performed as part of the common task in the ordinary course of working the undertaking. If he fails to prove this he should be nonsuited; or, if the defendant has gone into evidence, and there is no evidence on which the jury as reasonable men could come to this conclusion, a verdict should be directed for the defendant (*Wiggett* v. *Fox* (1); *Morgan* v. *Vale of Neath Railway Co.* (2); *Searle* v. *Lindsay* (3); *Wigmore* v. *Jay* (4); *Lovegrove* v. *London, Brighton & South Coast Railway Co.* (5); *Gibbs* v. *Great Western Railway Co.* (6); *Bartonshill Coal Co.* v. *Reid* (7)).

Assuming, therefore, in the present case that there was any evidence to go to the jury on the first count, the onus of proving that the failure to keep the stay in a safe condition was negligence that fell within the defendant's province was upon the plaintiff. This was a question of fact which only the jury could determine in his favour. But his Honour in effect directed the jury that they were only concerned to find whether the accident was due to the negligence of an employee. He did not leave to the jury the question whether that negligence was in the province of common employment or in the employer's province. It is true that he warned the jury at the commencement of his summing up that they alone were the judges of fact, but, in dealing with the personal liability of the employer, he adopted a classification into major and minor repairs with which I am unable to agree, and, reading the summing up as a whole, directed them that the repair was a major one. At an early stage his Honour did say the question whether the repairs were a major or a minor job was a question for them, but he did not direct the jury to find for the defendant if they considered that the repair was a minor one or refer in his summing up to the doctrine of common employment either in relation to the question of *novus actus interveniens* or to the question of major or minor repairs. He

(1) (1856) 11 Ex. 832 [156 E.R. 1069].
(2) (1864) 5 B. & S. 570 [122 E.R. 944]; (1865) 5 B. & S. 736 [122 E.R. 1004]; L.R. 1 Q.B. 149.
(3) (1861) 11 C.B. N.S. 429 [142 E.R. 863].
(4) (1850) 5 Ex. 354 [155 E.R. 155].
(5) (1864) 16 C.B. N.S. 669, at p. 670 [143 E.R. 1289, at p. 1290].
(6) (1884) 12 Q.B.D. 208, at pp. 211, 212.
(7) (1858) 3 Macq. 266.

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told them they were not concerned with the position of the ship. It appears to me that he confined the issues of fact for the jury to the questions whether there had been negligence in the maintenance of the stay, and, if this question was answered in the affirmative, whether the plaintiff had been guilty of contributory negligence. His Honour was bound, in my opinion, to expound to the jury the doctrine of common employment and to leave to them the question whether the accident was due to one of the natural risks and perils incident to the performance of the plaintiff's service. The trial judge cannot exclude from the jury the consideration of any issue of fact which must be found affirmatively in favour of the plaintiff before he can succeed, so that on this ground the defendant is entitled to a new trial.

It remains to consider the question whether the defendant is entitled to have the verdict set aside and judgment entered in its favour on the first count. The powers of a court of appeal under the judicature system are discussed in *Phillips* v. *Ellinson Brothers Pty. Ltd.* (1). In that case this Court was evenly divided as to the powers of the trial judge to disregard the verdict of the jury, but that division did not extend to the powers of a Full Supreme Court or of this Court on appeal under the *Judiciary Act* 1903-1940, sec. 37. But the powers of the Full Court of New South Wales under sec. 7 of the *Supreme Court Procedure Act* 1900 are more limited than the powers of the Full Courts of those States which have adopted the judicature system. Under this section the Court can only set aside a verdict for the plaintiff on whom the onus lies and enter a verdict for the defendant upon an issue of fact, where it is satisfied that as a matter of law there was no evidence on which the jury as reasonable men could find for the plaintiff (*Shepherd* v. *Felt & Textiles of Australia Ltd.* (2)). Where the jury has found a verdict in favour of the plaintiff on whom the onus lies the Court cannot on appeal under this section set aside the verdict and enter judgment for the defendant on the ground that, the whole of the available evidence being before the Court, it preponderates in favour of the defendant to such an extent that any jury acting reasonably could only come to the one conclusion. To do so would be to decide a question of fact and not of law.

The question is, therefore, whether there was any evidence on which the jury as reasonable men could have come to the conclusion that the negligent failure to maintain the stay in good order was negligence within the defendant's implied province of personal

(1) (1941) 65 C.L.R. 221, at pp. 248-253.

(2) (1931) 45 C.L.R. 359, at p. 391.

liability at common law. Expert witnesses for the plaintiff said that the stays should be examined inside and outside the boiler every three months. The chief engineer said that the practice on the *Zealandia* was to make the examination every six months in the summer and every three months in the winter. Mr. *Weston* contended that this evidence showed that the defendant had failed to institute a proper system of working. But the contention appears to me to be irrelevant because, even if the plaintiff's experts are right, the accident occurred in the winter and the stays were in fact examined by the chief engineer inside and outside the boiler on 26th May, less than three months before the accident, so that there is no evidence that the damage to the plaintiff was caused by a defective system.

The alleged negligent inspection by the chief engineer took place before the date of the contract and there is ample evidence that the danger existed for a considerable time prior to that date, but if the repair was one to be effected in the ordinary course of working the ship this is immaterial (*Wilson* v. *Merry* (1)). The evidence called on behalf of both parties shows that it is part of the ordinary work of the chief engineer with the assistance of the engine-room staff to make the periodical inspections required to determine the condition of the stays, when they should be renewed to do the work of replacing them, and when they required to be brushed and scraped or the threads caulked at their junction with the boiler plates to brush and scrape them or to do the caulking; and that it is a case, so far as they are concerned, "of ordinary wear and tear and corrosion going on all the time." The work is all a simple mechanical job requiring no special skill beyond the general capacity of the ship's engineers and crew and no special tools. It is work in the same category as the work which in *Wigmore* v. *Jay* (2), *Searle* v. *Lindsay* (3) and in *Waller* v. *South Eastern Railway Co.* (4) was held to be part of the common employment. It was certainly open to the jury on this evidence to conclude that the maintenance of the stays in good condition was part of the ordinary routine of working the ship. In fact, I think that the evidence preponderates so strongly in favour of this conclusion that under a judicature system the defendant might be entitled to have the verdict of the jury set aside and a verdict entered for it on the facts. As, however, the House of Lords in *Wilsons and Clyde Coal Co. Ltd.* v. *English* (5) has pointed out that the same employees may be engaged in different departments

(1) (1868) L.R. 1 Sc. & D., at pp. 332, 334, 335.
(2) (1850) 5 Ex. 354 [155 E.R. 155].
(3) (1861) 11 C.B. N.S. 429 [142 E.R. 863].
(4) (1863) 2 H. & C. 102 [159 E.R. 43].
(5) (1938) A.C. 57.

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of duty, it might be difficult to hold as a matter of law that there was no evidence to go to the jury that the engineers in examining the boiler were performing a duty personal to the employer. But it is unnecessary finally to determine the point because, assuming that any implied common law duties can exist outside the field occupied by the statutory obligation, the only reasonable conclusion open to the jury on the evidence, having regard to the definition of unseaworthiness in sec. 207 of the *Navigation Act*, was that the damage suffered by the plaintiff was due to the ship being unseaworthy. This was a breach of duty within the field occupied by the statutory obligation for which it was only open to the jury to find a verdict for the plaintiff on the second count, and on this ground the defendant is entitled as a matter of law to have the verdict on the first count set aside and a verdict entered for it on this count.

It remains to consider the position with respect to the second count, which his Honour withdrew from the jury. It is based upon the obligation imposed by sec. 59 of the Act upon the owner of a ship that the owner and the master, and every agent charged with loading the ship or preparing her for sea or sending her to sea, shall use all reasonable means to ensure the seaworthiness of the ship for the voyage *at the time when the voyage begins*, and to keep her in seaworthy condition for the voyage during the voyage. With respect to this count, his Honour said: "To be seaworthy a ship has to be able to meet the ordinary perils of the voyage on which she has embarked, and I cannot see here, gentlemen, that there is any evidence upon which it can be suggested that this ship, even though deprived of the use of this No. 7 boiler from Gabo Island to Hobart, and even though there might have been a very short temporary dislocation in the usual routine of firing those other three boilers, can be said at any stage to have been unfit to meet the ordinary perils of the voyage, not extraordinary, nor unusual perils, but the ordinary perils, so that for that reason, as I say, I have indicated as a matter of law, there is no evidence of unseaworthiness."

His Honour therefore appears to have considered that because the ship was able to continue her voyage with six boilers and the seventh boiler could be isolated in a simple and well-understood manner, this provided evidence in the face of which it was not open to the jury reasonably to conclude that the ship was unseaworthy at the time when the voyage began, that is to say, at the moment when she left her moorings without the intention of returning to them (*The Rona* (1)). This evidence was no doubt relevant to prove that the vessel was seaworthy at this moment of time, but with

(1) (1884) 51 L.T. 28.

great respect to his Honour it was certainly not conclusive (*Lindsay* v. *Klein*; *The Tatjana* (1)). In *McFadden* v. *Blue Star Line* (2) *Channell* J., dealing with an absolute warranty of seaworthiness, quoted with approval a passage from *Carver* on *Carriage by Sea* which said that in order that a vessel should be seaworthy it "must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the shipowner . . . undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed, the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking" (3). Ships have over and over again been held to be unseaworthy where the defect was not such as to be likely to cause the ship to founder but was such that the ship was not in a condition to carry her cargo with reasonable safety unless and until it had been remedied (*Gilroy, Sons & Co.* v. *Price & Co.* (4)). For instance a ship has been held to be unseaworthy where a stove has been placed in such a position that there is danger of fire (*The Diamond* (5)); where a valve has been left open (*The Carron Park* (6)); where there has been a defective valve (*McFadden* v. *Blue Star Line* (7)); a defective porthole (*Dobell & Co.* v. *Steamship Rossmore Co. Ltd.* (8)); a defective cock (*The Schwan* (9)); or defective bunker coal (*Fiumana Società Di Navigazione* v. *Bunge & Co. Ltd.* (10))—see generally the cases collected in *Halsbury's Laws of England*, 2nd ed., vol. 30, pp. 464-466. A ship is unseaworthy if she is not properly protected against fire (*Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (11)). So many actions were brought against shipowners for damage caused to goods by this type of unseaworthiness that a special statutory exemption had to be enacted: see the *Merchant Shipping Act* 1894, sec. 502; *Louis Dreyfus & Co.* v. *Tempus Shipping Co.* (12). The warranty implied by sec. 59 in favour of seamen, except that it is not an absolute warranty, must be construed in a similar manner to the common law warranty in favour of shippers (*Namby* v. *Joseph* (13)). If, therefore, the defect is sufficient to render the ship unfit for the due

(1) (1911) A.C. 194, at p. 208.
(2) (1905) 1 K.B. 697.
(3) (1905) 1 K.B., at p. 706.
(4) (1893) A.C. 56, at pp. 63, 65, 68.
(5) (1906) P. 282.
(6) (1890) 15 P. 203, at pp. 206, 207.
(7) (1905) 1 K.B. 697.
(8) (1895) 2 Q.B. 408.
(9) (1909) A.C. 450.
(10) (1930) 2 K.B. 47.
(11) (1912) 1 K.B. 229, at p. 235.
(12) (1931) A.C. 726, at pp. 737, 738, 741, 744.
(13) (1890) 9 N.Z.L.R. 227.

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and safe carrying of the goods or the crew and it is not a defect which can be readily cured on the voyage it will constitute unseaworthiness (*Gilroy, Sons, & Co.* v. *Price & Co.* (1); *Ingram & Royle Ltd.* v. *Services Maritimes du Tréport* (2) (reversed on another point (3)).

Sec. 207 provides that a ship shall not be deemed seaworthy under the Act unless she is in a fit state as to condition of hull and equipment, boilers and machinery, stowage of ballast or cargo, number and qualifications of crew including officers, and in every other respect, to encounter the ordinary perils of the voyage then entered upon, and she is not overloaded. By the definition, sec. 6: "'Boilers and machinery' includes engines and everything connected therewith employed in propelling a steamship, and every description of machinery used on a ship for the purposes of the ship or her cargo, and all other apparatus or things attached to or connected therewith or used with reference to any engine or under the care of the engineer." "'Equipment' includes boats, tackle, pumps, apparel, furniture, lifesaving appliances of every description, spars, masts, rigging, and sails, fog signals, lights and signals of distress, medicines and medical and surgical stores and appliances, and every thing or article belonging to or to be used in connexion with, or necessary for the navigation and safety of, the ship, including apparatus for preventing or extinguishing fires, buckets, compasses, charts, axes, lanterns, and loading and discharging gear and apparatus of all kinds."

These provisions, which refer specifically to boilers, show a clear intention on the part of Parliament to include in the statutory definition of matters which can constitute unseaworthiness all those multitudinous circumstances which the courts have held at common law to make a ship unseaworthy.

Other provisions in the Act (see, for instance, secs. 208 and 209) indicate the importance attached by Parliament to a vessel being seaworthy from the point of view of the safety of the lives on board including the members of the crew, and to a ship having the officers and crew at full strength (see secs. 43 and 44). I entirely agree with the statement of *Edwards* J. in *Namby* v. *Joseph* (4): "It appears to me that if the ship's spars and tackle are in such a condition as to endanger the lives or limbs of the crew, as in the present case, this makes her unseaworthy, inasmuch as it endangers the efficiency of the crew, the adequacy of which is as much a condition precedent to seaworthiness as a sound hull and spars. Looking, moreover, to

(1) (1893) A.C. 56.
(2) (1913) 1 K.B. 538, at p. 543.
(3) (1914) 1 K.B. 541.
(4) (1890) 9 N.Z.L.R., at pp. 231, 232.

the meaning and intent of the statute, I think it is plain that no restricted meaning ought to be placed upon the word 'seaworthiness' in sec. 154. This provision is for the benefit of the seamen, and it has been deemed so essential that they are not allowed to contract themselves out of it. It would be frittering away the provision to hold that the shipowner may with impunity risk the lives of his seamen by the falling of spars or blocks in consequence of the defective state of the tackle and equipments, if only he can establish that there is a reasonable probability that the vessel itself will reach its port."

The effect of the leakage of the scalding water was that steps had to be taken to draw the fires of the number seven boiler and to allow the scalding water to escape by the furnace door. There is evidence that tons of scalding water had banked up against this door, and that, if it had broken down the door, the lives of several firemen would have been endangered. As it was, the second engineer and three firemen were injured during its escape. Such a peril to the lives of the crew could plainly constitute unseaworthiness. It is not what actually happened but what might have happened that is important in determining whether the ship was seaworthy when the voyage commenced. What actually happened is more important when it comes to assess the damage that flowed from the breach of the warranty (*Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (1)). It seems to be clear from the definition of " equipment " in the Act that it would have been open to the jury to find that the ship was unseaworthy if she had sailed without proper medicine and medical and surgical stores and appliances on the ground that to do so would endanger the lives of those on board, and it must have been equally open to them to find that the defective boiler constituted unseaworthiness because it endangered the due and safe carrying of the crew.

The obligation imposed by sec. 59 is not that of an insurer, but one that due care will be used so that the plaintiff must prove not only that the defective condition of the stay made the ship unseaworthy, but also that the failure to discover the defect before the voyage began was due to negligence (*Dobell & Co.* v. *Steamship Rossmore Co. Ltd.* (2); *McFadden* v. *Blue Star Line* (3); *The Dimitrios Rallias* (4)). But it is clear that the defect was not one which, like an open hatch, an unobstructed open porthole, or some unfixed stanchions and rails, could be easily remedied on the voyage, in which case the failure to do so would not make the ship unseaworthy but

(1) (1924) A.C. 522, at p. 536.
(2) (1895) 2 Q.B. 408.
(3) (1905) 1 K.B. 697.
(4) (1922) 128 L.T. 491.

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would be negligence in the careful management of the ship (*Hedley* v. *Pinkney & Sons Steamship Co. Ltd.* (1)). If the ship was unseaworthy the defendant would be liable under the section just as though the negligence of the engineers had been its own personal negligence and would be unable to set up the defence that it was the negligence of persons with whom the plaintiff was in common employment (*Cunningham* v. *Frontier S.S. Co.* (2) (a decision upon the *Merchant Shipping Act* 1894 (Imp.), sec. 458) ; *Dobell & Co.* v. *Steamship Rossmore Co. Ltd.* (3) ; *Lochgelly Iron & Coal Co. Ltd.* v. *M'Mullan* (4) ; *Yelland* v. *Powell Duffryn Associated Collieries Ltd.* (5)). The question whether the defect constituted unseaworthiness is one of fact for the jury, the onus being on the plaintiff to satisfy the jury on this point, but if the jury considered that the defect in the boiler was sufficient to constitute unseaworthiness, then, apart from the direct evidence, the occurrence of the accident immediately after the ship had left port would raise a presumption that the defect existed at the commencement of the voyage (*Lindsay* v. *Klein* (6)).

The action with respect to the second count is in an unusual position. The plaintiff's counsel did not object to the learned judge withdrawing this count from the jury. He has not asked for a new trial on this count before the Full Supreme Court or in this Court. If a new trial is granted the defendant will no doubt seek to set up the issues of contributory negligence and of *novus actus interveniens* to which I have referred. On the issue of contributory negligence, the question of law would arise in the lower court whether that court should consider itself bound by the decision of this Court in *Bourke* v. *Butterfield & Lewis Ltd.* (7), in view of the contrary view of the House of Lords in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* (8) (applied by the Court of Appeal in *Stimpson* v. *Standard Telephones and Cables Ltd.* (9)). The plaintiff's counsel have chosen to contest the action to date on the first count. The plaintiff should therefore pay all the present costs of the action except the costs of the first appeal to the Full Supreme Court. The order made by the Full Court on that appeal should not be disturbed. This Court does not know whether the plaintiff desires a new trial on the second count, but he should not be debarred from applying for it if so advised. But, before an order for such a trial should be made, in the event of the defendant desiring to allege contributory

(1) (1894) A.C. 222.
(2) (1906) 2 I.R. 12.
(3) (1895) 2 Q.B. 408.
(4) (1934) A.C. 1.
(5) (1941) 1 K.B. 154.
(6) (1911) A.C. 194.
(7) (1926) 38 C.L.R. 354.
(8) (1940) A.C. 152.
(9) (1940) 1 K.B. 342.

negligence, this Court should decide for the guidance of the Court below whether the principles of law established by *Caswell's Case* (1) should now be followed in Australia in preference to *Bourke's Case* (2).

Under all the circumstances the proper order will be to give the plaintiff leave to apply, if so advised, to this Court within a reasonable time for a new trial on the second count, and this Court, if it grants a new trial, can settle the issues, and determine this question.

Appeal allowed. Order that the verdict for the plaintiff on the first count at the second trial be set aside and a verdict and judgment be entered for the defendant on this count. Leave reserved to the plaintiff to apply to this Court on or before 12th April 1943 by notice of motion on four clear days' notice to the defendant to set aside the verdict for the defendant on the second count and for a new trial on this count. Order the plaintiff to pay the defendant's costs of the first and second trial and of the appeal to the Full Court of New South Wales at the second trial and of this appeal. Order of the Full Court of New South Wales on the appeal at the first trial to stand. Liberty to apply.

Solicitors for the appellant, *Norton Smith & Co.*
Solicitors for the respondent, *Sullivan Brothers.*

J. B.

(1) (1940) A.C. 152.

(2) (1926) 38 C.L.R. 354.