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be exercised ' with great care and jealousy ' . . . and ' with extreme caution ' ". The purpose of the present action is not to obtain a construction of a contract which will determine the future rights and obligations of the parties, but to enforce the completion of a sale pursuant to the exercise of an option of purchase, and it does not appear to us to be a case in which a declaration of right should have been made except as incidental to the enforcement of the contract either by way of specific performance or damages.

As we have said, counsel for the appellants did not in the end press either the defence of mutual mistake or of a subsequent variation of the indenture, but they were argued to some extent and we think that we should express an opinion upon them. It has sometimes been said that the power of the Court to rectify a contract on the ground of mutual mistake is confined to cases where there was an actual concluded contract antecedent to the instrument which is sought to be rectified. The law was so stated by *James* V.C., as he then was, in *MacKenzie* v. *Coulson* (1) and by this Court in *Australian Gypsum Ltd. & Australian Plaster Co. Ltd.* v. *Hume Steel Ltd.* (2). But in *Shipley Urban District Council* v. *Bradford Corporation* (3) *Clauson* J., as he then was, held that the statement of *James* V.C. in *MacKenzie* v. *Coulson* (4) did not warrant the suggestion that the jurisdiction of the Court cannot be exercised so as to rectify an instrument which clearly does not give effect in some respect to the concurrent intention of the parties existing at the date of its execution unless a previously existing contract can be proved. The high authorities cited by *Clauson* J. (5) appear to us to show that this is right. The statement of the law in *Australian Gypsum Ltd. & Australian Plaster Co. Ltd.* v. *Hume Steel Ltd.* (2), as in *MacKenzie* v. *Coulson* (4), should be read in the light of the facts of that case and confined to cases where the mutual mistake is sought to be established by reference to the terms of a previous contract. The views expressed by *Clauson* J. were completely adopted by *Simonds* J., as he then was, in *Crane* v. *Hegeman-Harris Co. Inc.* (6). His Lordship there gave judgment for the defendant on a counterclaim to rectify a contract in an action brought to enforce an award of an arbitrator (7). His Lordship said : " with his " (i.e., *Clauson* J.'s) " reasoning I wholly concur, and I can add nothing to his authority in the matter, except that I would say that, if

(1) (1869) L.R. 8 Eq. 368, at p. 375.
(2) (1930) 45 C.L.R. 54.
(3) (1936) Ch. 375.
(4) (1869) L.R. 8 Eq. 368.
(5) (1936) Ch., at pp. 394, 395.
(6) (1939) 1 All E.R. 662.
(7) (1939) 1 All E.R., at p. 664.

it were not so, it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it". There was an appeal (1), and the Court of Appeal only dealt specifically with the contention that an action cannot be brought to rectify the contract after an award. The Court of Appeal had no time for this contention and dismissed the appeal without calling on counsel for the respondent. But Sir *Wilfrid Greene* M.R., as he then was, at the end of his judgment said: "I have thought proper to put in my own language my reasons for saying that this appeal should be dismissed, but I might have been content to say that the judgment of *Simonds* J., both on law and on fact, is one with which I am in entire agreement" (2). It seems to us to be clear that the Court of Appeal must have agreed with *Simonds* J. that *Clauson* J. had correctly stated the law in *Shipley's Case* (3), otherwise they should have reversed the judgment on the counterclaim, and we are of opinion that this law should be followed in the Australian Courts. We approach the present case on this basis. But we cite the words of *Simonds* J.: "let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was" (4). We can find no concurrent intention of the parties existing at the date of the contract of 12th March 1946 that the option was to be an option exercisable at any time during the first year of the lease but only to be completed at the end of that year. At the date of the contract that intention was at most only the intention of the appellants. The respondent never had such an intention. She had at most an intention at an early stage of the negotiations that the option should be an option to be exercised during the first year and immediately completed upon its exercise. But even that intention was not her intention at the date of the contract. Her intention then was in accordance with the contract.

The defence that the option contained in the indenture was subsequently varied by the agreement of the parties also fails. It appears from the correspondence that the solicitors for both parties thought that a deed could not be varied by a subsequent contract but only by another deed. This was wrong (*Halsbury*, 2nd ed., vol. 10, p. 232), but we cannot find any evidence of any

(1) (1939) 4 All E.R. 68.
(2) (1939) 4 All E.R., at p. 72.
(3) (1936) Ch. 375.
(4) (1939) 1 All E.R., at p. 665.

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subsequent contract to vary the deed in consideration of the payment by the appellants to the defendant of the sum of £219 15s. 0d. or any other consideration. The sum of £219 15s. 0d. represented the amount out of the deposit of £500 retained by the appellants as damages for breach of Hackwill's covenant to keep the hotel in repair. The respondent throughout the subsequent negotiations always claimed that she was entitled to this sum irrespective of any dispute as to the proper form of the option. She eventually issued a summons in the county court to recover it. It was in consideration of the respondent on payment of the £219 15s. 0d. agreeing to withdraw the summons and bear her own costs of the summons that the parties approached an agreement for a variation of the option in the indenture. The variation was that the respondent was to have the right to exercise the option in the first year of the lease, completion of the sale to take place immediately on the exercise of the option, but before they reached a complete *consensus ad idem* the respondent changed her solicitor at the crucial moment and the parties then disagreed on the question whether as the respondent contended the option was to be in addition to or as the appellants contended in substitution for the option contained in the indenture. This disagreement was never resolved, so that no subsequent contract was ever made to vary the option in the indenture.

For these reasons we are of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants, *C. E. Coy.*

Solicitors for the respondent, *Cornwall, Stodart & Co.*

E. F. H.

Dist Manufacturing Grocers' Employees Fed of Aust, Re 60 ALJR 347
Dist Manufacturing Grocers' Employees Fed of Aust, Re 160 CLR 341
Dist Manufacturing Grocers Employees Federation, Re 65 ALR 461
Cons Public Prosecutions Reference (No2 of 1996), Director of (1997) 96 ACrimR 519
Foll DPP Reference No2 of 1996 (1997) 141 FLR 414

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

HAMILTON KNIGHT AND OTHERS; EX PARTE THE COMMONWEALTH STEAMSHIP OWNERS ASSOCIATION.

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MELBOURNE, *Feb.* 25, 26.

SYDNEY, *July* 31.

Dixon C.J., McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Industrial Arbitration (Cth.)—Award—Matters which may be included—Duration —Conciliation commissioner—Jurisdiction—Employees in merchant service— Intervals off duty—Pensions—Compensation for injury—Whether jurisdiction excluded by Navigation Act (Cth.)— "Annual or other periodical leave with pay"—"Industrial dispute"—"Industrial matters"—Prohibition—Conciliation and Arbitration Act 1904-1951 (*No.* 13 *of* 1904—*No.* 58 *of* 1951) *ss.* 4, 13 (1) (*c*), 48—*Navigation Act* 1912-1950 (*No.* 4 *of* 1913—*No.* 80 *of* 1950), *ss.* 127, 132.

Logs of claims served on their employers by organisations of employees engaged in sea-going duties contained claims for intervals off duty which an employee might spend ashore. These intervals were computed with the aim of giving to sea-going employees the same period of time off as that which is enjoyed by an employee who works on land, having regard to weekends and to public holidays.

Held that the claims did not seek awards "providing for annual or other periodical leave with pay" within the meaning of s. 13 (1) (*c*) of the *Conciliation and Arbitration Act* 1904-1951; and therefore, the jurisdiction of a conciliation commissioner to deal with the claims was not excluded.

The logs of claims also made claims for pensions for employees who had served for a certain time and who had otherwise fulfilled certain requirements.

Held by *Dixon* C.J., *McTiernan*, *Williams* and *Fullagar* JJ. (*Webb* and *Kitto* JJ. dissenting) that the claims sought awards which could not validly be made: by *Dixon* C.J. and *Fullagar* J. because any award giving effect to the claims would be in contravention of s. 48 (1) of the *Conciliation and Arbitration Act* 1904-1951 which provides that an award shall, subject to s. 49 which deals with setting aside or varying an award, continue in force for a period to be specified in the award, not exceeding five years from the

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date upon which the award comes into force; by *McTiernan* and *Williams* JJ. because the claims did not deal with any matter which was an "industrial matter" within the meaning of s. 4 of the *Conciliation and Arbitration Act* 1904-1951.

The logs of claims also made claims for payment of compensation to an employee for personal injury by illness or accident arising out of or in the course of the employment. The right to compensation was not to arise until the contract of employment had been determined and the compensation was to be "that provided for under the *Seamen's Compensation Act* 1909, 1911, 1938, 1947 as amended". The *Seamen's Compensation Act* 1911-1949 does not, of its own force, apply to the employees who made the claims in the logs.

Held by *Dixon* C.J., *Webb* and *Kitto* JJ. (*McTiernan* and *Williams* JJ. dissenting, *Fullagar* J. expressing no opinion) that the claim dealt with a matter which was an "industrial matter" within the meaning of s. 4 of the *Conciliation and Arbitration Act* 1904-1951.

Held, further, by *Dixon* C.J., *Webb* and *Kitto* JJ. that ss. 127 and 132 of the *Navigation Act* 1912-1950 did not constitute an exhaustive statement of the liabilities which were to be imposed on shipowners in consequence of illness or accident in the case of masters, seamen or apprentices and accordingly the jurisdiction of the conciliation commissioner to make an award giving effect to the claim was not excluded.

Held, further, by *Dixon* C.J. and *Kitto* J. (*Fullagar* J. dissenting) that the difficulty or impossibility of giving effect to the claim for compensation as framed, namely, that the compensation should be that provided under the *Seamen's Compensation Act* was not a ground for granting a writ of prohibition.

R. v. *The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Jones*; *Ex parte W. Cooper & Sons* (*Builders' Labourers' Case*) (1914) 18 C.L.R. 224, referred to.

ORDER NISI FOR PROHIBITION.

The Merchant Service Guild of Australasia and the Australian Institute of Marine and Power Engineers were associations of employees registered under the *Conciliation and Arbitration Act* 1904-1951. The Commonwealth Steamship Owners Association was an association of employers registered under the same Act. On 30th June 1951 the Merchant Service Guild of Australasia served a log of claims on the Commonwealth Steamship Owners Association. On 19th September 1951, the Australian Institute of Marine and Power Engineers served a log of claims on the Commonwealth Steamship Owners Association.

Intervals off Duty. Clause 27 of the log of claims served by the Australian Institute of Marine and Power Engineers contained this claim and was as follows: "(a) Every employee shall be entitled to be absent from his vessel in port during intervals,

each to be of 24 consecutive hours, and the number of such intervals and the place and time of giving them shall be as follows: (i) In the case of vessels voyaging between places in Australia, and in the case of vessels voyaging to places beyond Australia, if the period of absence from the home port or the port of engagement of the employee does not exceed two months, for each complete month of the employment, including time spent on leave, four intervals to be given at the home port only and five intervals to be given at the home port or from midnight to midnight on Sundays or public holidays at other ports named in sub-clause (e) hereof. Provided that in the case of a vessel which is absent from the home port for at least twenty-five complete consecutive days, intervals accrued due for the first calendar month of such absence shall, if given at the home port during the next succeeding month and if given after the four intervals to be given for that succeeding month at the home port have been given, be deemed to have been given in the month in which they accrued due. (ii) In the case of vessels voyaging to ports beyond Australia and absent from the home port for a period exceeding two months, but returning within six months, in and for each period of six months or lesser period of complete months of employment, including time spent on leave, intervals at the rate of twenty-four per six months to be given at the home port only and intervals at the rate of thirty per six months to be given either at the home port or from midnight to midnight on Sundays or public holidays at other approved loading and discharging ports in Europe, Asia, East Coast of America, West Coast of North America, Capetown or Durban in Africa, or New Zealand. (iii) In the case of vessels absent from the home port of the employee for a period exceeding six months on voyages extending beyond Australia in and for each year of such employment or lesser period of complete months of the employment, including time spent on leave, intervals at the rate of four per month shall be given at the home port and intervals at the rate of five per month shall be given either at the home port or at approved loading or discharging ports of the voyage in Europe, Asia, the East Coast of America, or the West Coast of North America, or New Zealand, Capetown or Durban.

(b) In the case of vessels referred to in sub-clause (a) (ii) and (iii) on the arrival of the vessel at the home port of the employee, unless the employee is being sent to take his annual leave, to which the intervals due to him are added, he shall (at least during the stay of the vessel) be granted complete intervals of twenty-four hours during not less than 50 per cent. of the time so spent by the vessel, and the balance shall be granted within six months in the

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case of sub-clause (a) (ii) and within one year in the case of sub-clause (a) (iii).

(c) In the case of an employee serving for any period less than one or more complete months, the employee shall receive for every 2.3 days of the employment not forming part of a complete month one additional home port interval.

(d) (i) If any of the intervals to be given at the home port only be not given, the employee shall be paid therefor at double his daily rate. (ii) If any of the 'other' intervals be not given, the equivalent of such intervals not so given shall be allowed as leave either cumulative with the annual leave if granted within a period of six months from the date when the first of such ungranted intervals arose, or in a consecutive period of leave within six months of the date when the first of such ungranted intervals arose. (iii) Unless the said home port and 'other' intervals are granted in accordance with the terms of the above sub-clauses they shall be paid for at the rate of double the daily rate for the home port intervals and at the rate of one and a half times the daily rate for the 'other' intervals. The employee shall be so paid immediately upon the expiry of the period within which the home port intervals should have been granted, and six months from the date when the first of such 'other' intervals arose.

(e) The ports where 'other' intervals may be granted on Sundays or Public Holidays in the terms of sub-clauses (a) (i) (ii) and (iii) hereof shall be strictly confined to the undermentioned places and no other: In Australia: Darwin, Brisbane, Sydney, Newcastle, Melbourne, Port Adelaide, Fremantle, Hobart and Launceston. In New Zealand: Auckland, Napier, Wellington, Lyttleton and Dunedin. Elsewhere: At main ports or ports with a population of 20,000 or more white inhabitants.

(f) Where any interval or group of intervals given under this clause does not comprise a complete day or complete days from midnight to midnight, the hours of interval on the day of commencement and on the day of termination of the interval or group shall, if they together aggregate at least twenty-four in number, be treated as an interval; but if they are so treated as an interval all time worked on such days of commencement and termination shall, for the purpose of calculating overtime, be treated as if worked on one day only.

(g) For the purpose of this Clause—The home port shall be the home port prescribed by Clause 29, but another port within the voyage of the vessel may be treated as the home port if approved in writing by the Secretary or other authorised Officer of the

Institute, or if approved by the Registrar: Provided that in the case of a vessel which has no fixed itinerary, or which periodically for unfixed duration changes its terminal or intervening ports on some of its voyages, or where none of its terminal or intervening ports other than the home port under Clause 29 is a reasonably suitable permanent residential port for the employee, having regard to the place where the employee is usually engaged, the provision for fixing the home port within the voyage of the vessel shall not apply; and upon such a vessel, unless the intervals are given at the home port as prescribed by Clause 27, the employee shall be paid for all home port intervals not granted within the month in which they accrue due and the vessel shall be deemed to come within the provisions of paragraph (i) of sub-clause (a).

(h) Every employee shall be entitled to be notified by the employer three hours at least before the time of commencement of his interval that he is required to take the interval, and where, the employee having been so required to take the interval, the full three hours' notice has not been given, the extent to which the notice is less than of three hours shall be added to and given in a consecutive period with the interval.

(i) If an employee performs duty on a Sunday or Public Holiday in his port of residence he shall be paid at the prescribed overtime rate and be given in his port of residence an additional interval but if an employee performs duty on a Sunday or Public Holiday in a port other than his port of residence he shall be paid at the prescribed overtime rate, but the interval so worked shall be credited against him as one of his intervals under Clause 27 of this Award.

(j) The intervals prescribed, and allowed for, in the above sub-clauses are based upon the assumption there are only ten Public Holidays, therefore for every additional Public Holiday hereinafter proclaimed one additional home port interval shall be allowed in the month it arises under sub-clause (a), (i), or in each six months under sub-clause (a) (ii) or in each year under sub-clause (a) (iii)." Clause 22 of the log of claims served by the Merchant Service Guild of Australasia was similar except that it did not contain any provision corresponding to cl. 27 (i).

Compensation for injury. Clause 32 (3) and (4) of the log served by the Australian Institute of Marine and Power Engineers and cl. 28 (3) and (4) of the log served by the Merchant Service Guild of Australasia made this claim as follows: " (a) If personal injury by illness or accident arising out of or in the course of the employment be caused to an employee, the compensation payable by the employer shall be that provided for under the Commonwealth

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Seamen's Compensation Act, 1909, 1911, 1938, 1947 (as amended). Except that—(i) For the first three months of the duration of the incapacity in lieu of what would be payable under the said act in respect to the said period the compensation shall be a sum equal to the pay which he would have earned had he been able to render the agreed service in the capacity obtaining at the time of the accident. (ii) Where death results from the injury there shall be paid to the personal representatives of the deceased a sum equal to four years' pay computed at the rate of the earnings of the employee at the time of the accident, with a right to such earnings being computed at the rate of the earnings over the last three months of such employment or lesser period if the employment in that capacity has not extended for three months.

4. The right to compensation under this Clause shall not commence until the contract of employment under Clause 37 of this Award has been determined, and the employee is no longer entitled to his wages under the Award".

Pensions. Clause 39 of the log served by the Australian Institute of Marine and Power Engineers and cl. 34 of the log served by the Merchant Service Guild of Australasia made this claim as follows: "(a) An Agreement or an Award shall be made indeterminate so far as its duration is concerned, but subject to variation by mutual consent between the parties or by order of the Arbitration Court containing the undermentioned provisions for the payment of pensions.

(b) Notwithstanding that the employee may be retired by the employer, the relationship of employer and employee shall continue while under the provisions set out hereunder; such employee is entitled to monetary allowance during the time he is not actually working.

(c) Upon attaining the age of 65 years or earlier, if, on the grounds of infirmity, he becomes unable to render the agreed service, the employee shall be entitled to a pension upon the undermentioned terms and qualifying period: (i) After fifteen years' service to an annual pension of one-half of the annual salary he was earning over the last twelve months of his working period. (ii) After ten years' service to an annual pension of one-quarter of his annual salary in the last year, and increasing by one-fifth of such salary for each year of service between ten and fifteen years.

(d) Such pension shall be adjusted quarterly in accordance with the retail price index numbers applied by the Commonwealth Arbitration Court, but so as to assure to the pensioner that the whole of his pension shall be adjusted in a manner that will assure

to him the same purchasing power as the pension possessed when first granted to him.

(e) In the event of the employee predeceasing his wife, then the widow shall be paid one-half of the pension to which the employee would have been entitled ".

Industrial disputes which arose out of the claims made by the logs were heard together by Hamilton Knight, a conciliation commissioner appointed under the provisions of the *Conciliation and Arbitration Act* 1904-1951.

On 12th December 1951, the Commonwealth Steamship Owners Association obtained an order nisi for a writ of prohibition directed to Hamilton Knight and the Merchant Service Guild of Australasia and the Australian Institute of Marine and Power Engineers, to prohibit the conciliation commissioner from further hearing the disputes in so far as the disputes exclusively related to claims made in the clauses of the logs which are set out above, and to prohibit the other respondents from further proceeding with the claims made in any of the said clauses. The grounds of the order nisi were as follow: (1) as to the claims made in the said cll. 22 and 27 (intervals off duty) that each of the said claims is a claim for an award providing for or altering a provision for annual or other periodical leave with pay: (2) as to the claims made in the said cll. 28 (3), (4) and 32 (3), (4) (compensation for injury) (a) that the dispute in respect of each of the said claims is not an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1951 inasmuch as it is not a dispute in relation to any industrial matter within the meaning of the said Act; (b) that each of the said claims is a claim for an award providing for or altering a provision for sick leave with pay: (3) as to the claims made in the said cll. 34 and 39 (pensions) that the dispute in respect of each of the said claims is not an industrial dispute within the meaning of the *Conciliation and Arbitration Act* 1904-1951 inasmuch as it is not a dispute in relation to any industrial matter within the meaning of the said Act.

E. H. Hudson Q.C. (with him *B. B. Riley*), for the prosecutor. The claim in respect of intervals off duty is a claim for an award which provides for or alters a provision for annual or other periodical leave with pay within the meaning of s. 13 (1) (*c*) of the *Conciliation and Arbitration Act* 1934-1951. It is leave granted after a period of work and recurs periodically. Sub-clause (a) of the claims in respect of pensions makes a claim for an indeterminate award. This is contrary to s. 48 (1) of the *Conciliation and Arbitration Act*

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1904-1951. Sub-clause (b) recognizes the second difficulty in the way of securing an award of a pension and, to overcome the necessity for the existence of the relationship of employer and employee at any time when rights or benefits accrue in favour of the employee under the award, provides for a notional or fictional employment when in fact there is none. This claim does not give rise to an "industrial dispute" as defined in s. 4 of the *Conciliation and Arbitration Act* 1904-1951 because "industrial dispute" means "a dispute . . . as to industrial matters" and "industrial matters" is defined to mean "all matters pertaining to the relations of employers and employees". No such matters can exist unless the relationship exists. Matters which will arise in future can, of course, be provided for, but only to the extent that the relationship continues into the future. There cannot be matters which "belong to" or are "in the sphere of" a relationship that does not exist. All the specified matters by way of extension of the definition of "industrial matters" in s. 4 are likewise limited by the same requirement. Although in certain cases an award may contain a provision in the nature of a covenant restraining an employee from competing with a former employer after termination of the employment yet not every stipulation which might be introduced between parties would constitute an "industrial matter", e.g., a bank clerk might agree that he would not gamble, yet it could not constitute an "industrial matter". See, e.g., *Clancy* v. *Butchers' Shop Employes Union*, per *O'Connor* J. (1). [He referred to *Federated Gas Employees Industrial Union* v. *The Australian Gas Light Co.* per *Dethridge* C.J. (2)]. The claim in respect of compensation for injury does not give rise to an "industrial dispute" since, here also, the right does not arise until the contract of employment has been determined and the relationship of employer and employee is no longer in existence. Alternatively, sub-cl. (3) of this claim makes a claim for sick leave with pay within the meaning of s. 13 (1) (*c*) of the *Conciliation and Arbitration Act* 1904-1951.

G. Gowans Q.C. (with him *C. I. Menhennitt*) for the respondents. The claim in respect of intervals off duty is not a claim for "annual or other periodical leave with pay". "Other periodical leave" should be read *ejusdem generis* with "annual leave". The meaning would then be periodical leave in the nature of annual leave. The claim made here is for leave which is in the nature of the breaks from work which occur on land at weekends and on holidays and cannot be described as "periodical leave in the nature of annual

(1) (1904) 1 C.L.R. 181, at p. 205. (2) (1936) 38 C.A.R. 653, at p. 662.

leave ". The principle of compensation for Sundays and public holidays lost is not new. [He referred to *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (1); *R.* v. *The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Allen Taylor & Co. Ltd.*; *Ex parte the Gulf Steamship Co. Ltd.*; *Ex parte William Holyman & Sons Ltd.* (2); *Merchant Service Guild of Australasia* v. *Commonwealth Steam-Ship Owners' Association* (3); *Merchant Service Guild of Australasia* v. *The Commonwealth Steam-Ship Owners' Association* (4); *Merchant Service Guild of Australasia* v. *The Adelaide Steam-Ship Co. Ltd.* (5); *The Commonwealth Steamship Owners' Association* v. *The Australasian Institute of Marine and Power Engineers* (6); *Merchant Service Guild of Australasia* v. *The Commonwealth Steamship Owners Association* (7).] Annual leave is a period of continuous leave granted at, or near, the end of a year of service in respect of, and as compensation for, that service and in order to provide a respite from continuity of work. It differs from long service leave, in its purpose as a recurrent refresher. It differs from holiday leave in the absence of association with individual commemorations or celebrations. It differs from substitutional leave in lieu of holidays in that it is not a substitution for anything. See *Federated Storemen and Packers Union of Australia* v. *G. Adams Pty. Ltd.* (8). The claim in respect of compensation for injury does not ask for an award " providing for, or altering a provision for, . . . sick leave with pay ". It does not provide for " leave ", but does provide merely for a right to compensation after the employment is terminated. " Pay " is of wider meaning than " wages " and includes remuneration for times which are not working times, e.g., holiday pay, but it does not include sums paid after the contract of employment is terminated although such payments have their origin in the contract of employment. Moreover, the clauses do deal with an " industrial matter ". It is a matter which pertains to the relations of employers and employees. [He referred to *Australian Tramway Employes Association* v. *The Prahran and Malvern Tramway Trust*, per *Isaacs* and *Rich* JJ. (9); *R.* v. *Kelly*; *Ex parte the State of Victoria* (10). The conciliation commissioner has power to grant compensation for injury. See the *Builders' Labourers' Case* (11); *Merchant Service Guild of Australasia* v. *Commonwealth Steam-Ship*

(1) (1911) 6 C.A.R. 6.
(2) (1912) 15 C.L.R. 586.
(3) (1916) 10 C.A.R. 214, at pp. 230, 240.
(4) (1920) 14 C.A.R. 459, at p. 479.
(5) (1923) 17 C.A.R. 497, at pp. 526, 552.
(6) (1923) 18 C.A.R. 591, at pp. 597, 603.
(7) (1941) 48 C.A.R. 577, at p. 603.
(8) (1940) 44 C.A.R. 178.
(9) (1913) 17 C.L.R. 680, at p. 693.
(10) (1950) 81 C.L.R. 64.
(11) (1914) 18 C.L.R. 224.

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Owners' Association (1); *Federated Gas Employees' Industrial Union* v. *The Metropolitan Gas Co.* (2); *Federated Seamen's Union of Australasia* v. *The Commonwealth Steamship Owners' Association* (3); *Merchant Service Guild of Australasia* v. *The Adelaide Steamship Co. Ltd.* (4); *Commonwealth Steamship Owners' Association* v. *The Australasian Institute of Marine and Power Engineers* (5).] The duty or obligation created at the time of the injury belongs to the relationship of employer and employee as such, even though it is to be discharged after the employment. It is presupposed that incapacity is present when the employment ceases. The deferment of payment does not make the obligation different in character. Likewise, the payment of compensation to personal representatives is a question arising between employer and employee as to whether the employer will compensate the employee's personal representatives in the case of death from injury. It could be compared with a question between employer and employee as to how the employer will behave to others in close association with the employees, e.g., union inspectors. *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (6). The claim in respect of pensions likewise deals with "industrial matters". After an employee has worked for a certain period for an employer, he is entitled to long service leave, any question about which is admittedly an industrial matter. Long service leave is an industrial matter not merely because it is leave but because it is a reward for long service. For the same reason a question as to pensions constitutes an industrial matter.

B. B. Riley in reply.

Cur. adv. vult.

July 31.

The following written judgments were delivered:—

DIXON C.J. This is an order nisi for a writ of prohibition directed to a conciliation commissioner.

The conciliation commissioner has before him two industrial disputes or alleged industrial disputes affecting the merchant service. One dispute arises from a log of claims served upon shipowners by the Merchant Service Guild of Australasia, which is a respondent to the order nisi. The other dispute arises from a log of claims served by the Australian Institute of Marine and Power Engineers, which also is a respondent to the order nisi. Each log

(1) (1916) 10 C.A.R. 214, at p. 234.
(2) (1916) 11 C.A.R. 267, at p. 285.
(3) (1918) 12 C.A.R. 752, at p. 761.
(4) (1923) 17 C.A.R. 497, at p. 531.
(5) (1923) 18 C.A.R. 591, at p. 600.
(6) (1919) 27 C.L.R. 207.

contains claims for (1) pensions, (2) compensation for sickness and accident arising out of or in the course of the employment and (3) intervals off duty.

The purpose of the writ of prohibition that is sought is to restrain the conciliation commissioner from proceeding with the hearing of these claims on the ground that to make an award in respect of them is beyond his authority.

There is no substantial difference between the two logs in the manner in which the claims are respectively framed. It will be enough to deal with the material clauses as they stand in the log of the Merchant Service Guild.

1. *Pensions.* Clause 34 of that log is as follows :—" (a) An Agreement or an Award shall be made indeterminate so far as its duration is concerned, but subject to variation by mutual consent between the parties or by order of the Arbitration Court containing the undermentioned provisions for the payment of pensions.

(b) Notwithstanding that the employee may be retired by the employer the relationship of employer and employee shall continue while under the provisions set out hereunder, such employee is entitled to monetary allowance during the time he is not actually working.

(c) Upon attaining the age of 65 years or earlier, if, on the grounds of infirmity, he becomes unable to render the agreed service, the employee shall be entitled to a pension upon the undermentioned terms and qualifying period: (i) After fifteen years' service to an annual pension in one half of the annual salary he was earning over the last twelve months of his working period. (ii) After ten years' service to an annual pension in one quarter of his annual salary in the last year, and increasing by one-fifth of such salary for each year of service between ten and fifteen years.

(d) Such pension shall be adjusted quarterly in accordance with the retail price index numbers applied by the Commonwealth Arbitration Court, but so as to assure to the pensioner that the whole of his pension shall be adjusted in a manner that will assure to him the same purchasing power as the pension possessed when first granted to him.

(e) In the event of the employee predeceasing his wife, then the widow shall be paid one half of the pension to which the employee would have been entitled ".

In my opinion no award giving effect to this claim could be made consistently with s. 48 (1) of the *Conciliation and Arbitration Act* 1904-1951. That sub-section provides that an award, shall subject to the next succeeding section (which deals with setting

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aside or varying an award) continue in force for a period to be specified in the award, not exceeding five years from the date upon which the award comes into force.

This provision does two things. It requires the conciliation commissioner or court to provide by the award for a definite period which must be named in the award and it limits that period, so to be named, to a maximum of five years. It is true that sub-s. (2) carries on the operation of the award to the making of the next award, subject to any order to the contrary and to the possibility of an order setting it aside. But that further continuance of the award is independent of the will of the commissioner or court (unless the will is expressed in an order otherwise or an order setting it aside). Otherwise the will of the conciliation commissioner or court is to be addressed to the specified period.

Now it is quite clear that par. (a) of cl. 34 of the log is flatly opposed to the requirements of s. 48 (1). Paragraph (b) does not help. Indeed it appears to be nothing more than an attempt to give to a relationship which has in fact ceased to be that of employer and employee that character in law just because the definition of "industrial matters" makes that expression mean all matters pertaining to the relations of employers and employees. It is a device which can be of no service in bringing pensions within the authority of the commissioner or court if otherwise they are not within it. But par. (a) of cl. 34 has a purpose of a very different kind. It recognizes that a pension provision must go on indefinitely and therefore requires an award that is "indeterminate" in duration. An employee must be secured in his pension rights, however many years may elapse before he becomes sixty-five years of age. An employee who becomes sixty-five must be secured in the payment of his pension however many years it may be before his life drops. A pension scheme to operate only during the next five years would not make sense and it is not what cl. 34 contemplates. Hence par. (a). An inspection of the remaining paragraphs of cl. 34 is enough to show that this is so. It must not be forgotten that if at the end of five years a new award were made it could not cover former employees who had retired. A pension scheme therefore could not be carried on by award after award for successive periods of five years. The claim embodied in cl. 34 is for pensions during the remainder of the life of the employee who retires (or of his widow) and that means a claim that after the expiration of the next five years employers shall continue to perform obligations accruing thereafter over future intervals of time. That is a form of relief which by reason of s. 48 (1) an award cannot give. It is

not possible to give effect to the whole or any part of the claim which cl. 34 makes and yet keep within the principle of s. 48 (1). I am therefore of opinion that the conciliation commissioner has no power to give any relief in respect of this claim.

2. *Compensation* for personal injury by illness or accident arising out of or in the course of the employment.

This matter is the subject of a claim expressed in sub-cl. (3) of cl. 28 of the log of the Merchant Service Guild. The sub-clause is as follows: "3. *Compensation.*—(a) If a personal injury by illness or accident arising out of or in the course of the employment be caused to an employee, the compensation payable by the employer shall be that provided for under the Commonwealth Seamen's Compensation Act, 1909, 1911, 1938, 1947 (as amended). Except that: (i) For the first three months of the duration of the incapacity in lieu of what would be payable under the said Act in respect to the said period the compensation shall be a sum equal to the pay which he would have earned had he been able to render the agreed service in the capacity obtaining at the time of the accident. (ii) Where death results from the injury there shall be paid to the personal representatives of the deceased a sum equal to four years' pay computed at the rate of the earnings of the employee at the time of the accident, with a right to such earnings being computed at the rate of the earnings over the last three months of such employment or lesser period if the employment in that capacity has not extended for three months".

This sub-clause is followed by a fourth sub-clause which provides that the right to compensation shall not commence until the contract of employment has been determined and the employee is no longer entitled to wages. The sub-clause refers to a provision in the log setting out the conditions claimed concerning the termination of employment.

The first question for consideration is whether the definition of "industrial matters" in s. 4 of the *Conciliation and Arbitration Act* 1904-1951 covers such a claim as that contained in sub-cll. 3 and 4 of the log. The statutory definition of "industrial dispute" is confined to disputes as to industrial matters. It is therefore necessary that the claim should relate to an industrial matter in the defined sense and if it does not the conciliation commissioner can make no award with respect to the claim. The definition of "industrial matters" begins with general words which make the expression mean all matters pertaining to the relations of employers and employees. These general words are followed by seventeen particular matters which the definition says the expression is to

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include " without limiting the generality of the foregoing ". Of these seventeen particular matters one (par. (*b*)) is " the privileges, rights and duties of employers and employees ", and another (par. (*h*)) is " the mode, terms and conditions of employment ".

I find it very difficult to see why the question whether the employer shall compensate the employee for injuries occasioned to him by reason of the employment does not pertain to the relations of the employer and employee and is not within the descriptions " rights and duties of employers and employees " and " terms and conditions of employment ".

If a risk of injury is involved in the performance of the work required by the employment the question whether the employer should compensate the employee for injury of that kind appears to me to be fairly within the foregoing parts of the definition: cf. *The Builders' Labourers' Case*, per *Isaacs* J. (1). No doubt the degree of connection between the employment and the cause of the injury postulated by any given claim on the subject made by a log requires consideration before the conclusion is reached that the claim does fall within the definition of " industrial matters ". In the present case the use by the claim of the alternative " or " in the familiar phrase " arising out of or in the course of the employment " combined with the inclusion of illness may be thought possibly to go beyond what would give a sufficiently close connection. For the decided cases give the phrase a very wide application. " Illness arising in the course of the employment " might be interpreted as covering the onset of diseases which have no causal relation to the employment and if so a question might arise whether this " pertained " to the relation of employer and employee. But even if the expression were interpreted so that it went further than could be warranted under the definition of " industrial matters ", the greater part of the ground covered by the claim nevertheless falls, as I think, within the definition and the possibility that an award adopting literally the phraseology of the claim might go too far is no sufficient reason for prohibiting the conciliation commissioner from proceeding with the claim.

A further difficulty arises from the manner in which the claim is expressed. For it takes the *Seamen's Compensation Act* and, without explanation of how it is to be accomplished, demands that " the compensation payable by the employer shall be that provided for under " that Act. There is a misdescription in the claim in respect of the years given for the Act, which is now the *Seamen's Compensation Act* 1911-1949. But that does not matter. The definition of

(1) (1914) 18 C.L.R. 224, at pp. 249, 250.

" seamen " contained in s. 3 (1) excludes espressly " a master, mate, engineer or radio officer of a ship ". Hence the claim. If it is intended to apply the *Seamen's Compensation Act* directly to the excluded officers, this seems to be just what Parliament has decided against. But no one supposes that Parliament meant that employers should be under no liability to employees of the excluded category, suffering injury attributable to their employment. If the claim means no more than that the rates of compensation prescribed by the Act shall be applicable, probably that does not conflict with any intention to be ascribed to Parliament. But the conciliation commissioner cannot by his award extend to the officers in question the jurisdiction of the courts upon which the *Seamen's Compensation Act* confers the various authorities given by, for example, ss. 5 (3), 5C (3); First Schedule, cll. (1) (*a*) (ii), (7A), (10), (17), (18); Second Schedule, cll. (2), (3), (7), (8) (*e*) and (12). See the *Builders' Labourers' Case* (1). Further if the provisions of the Act were made applicable in full it would be found that in some respects the operation of the words with which cl. 3 (a) of the claim begins, viz. :—" if personal injury by illness or accident arising out of or in the course of the employment be caused to an employee ", would be enlarged and in others qualified or restricted : see for instance ss. 3 (3), 5C and 5AA. Further there would be a possibility of the weekly payments and the provisions relating thereto being given a purported operation beyond the period specified in the award under s. 48 (2) of the *Conciliation and Arbitration Act* 1904-1951.

It is evident that there are many difficulties in an attempt to incorporate the Act by reference in an award, in relation both to meaning and application and also validity and operation. But I think that the fair meaning of the claim in the log is that the organization demands that employees shall be compensated in respect of personal injury caused to them by illness or accident arising out of or in the course of the employment and that it demands that the compensation payable shall be that provided for under the *Seamen's Compensation Act*. The second demand I take as fixing the maximum limits of amounts payable. The first demand I take as seeking the imposition or concession of some liability to compensate such injury.

The resulting dispute is wide enough to enable the conciliation commissioner, should he think fit to do so, to make an award which within the ambit of the dispute he may so frame that it does not

(1) (1914) 18 C.L.R., particularly at p. 252.

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encounter the difficulties I have mentioned or otherwise exceed the limits of his power. I do not think that ss. 127 and 132 of the *Navigation Act* 1912-1950 constitute an exhaustive statement of the liabilities which are to be imposed on shipowners in consequence of illness or accident in the case of masters, seamen or apprentices. These provisions may possibly occupy some part of the field exclusively but if so that field does not extend to compensation for such illness or accident at all events after the termination of the service.

I am of opinion that the conciliation commissioner ought not to be prohibited from proceeding with the hearing of the claims of the organizations with respect to injury by illness or accident arising out of or in the course of the employment.

3. *Intervals off duty.*

In my opinion the claims for these intervals fall within the province of the conciliation commissioner and are not claims for annual leave or other periodical leave within s. 13 (1) (*c*) of the *Conciliation and Arbitration Act* 1904-1951. I have had the advantage of reading the judgments prepared respectively by *Williams* J., *Fullagar* J. and *Kitto* J. which give reasons in which I fully concur for this conclusion.

I think that the order nisi should be made absolute for a writ of prohibition limited to the claims made by cl. 34 (Pensions) of the log of the Merchant Service Guild of Australasia and by cl. 39 (Pensions) of the Australian Institute of Marine and Power Engineers.

McTIERNAN J. The pecuniary benefits claimed under the headings "compensation" and "pensions" by the employees' organizations are not specified by any Conciliation and Arbitration Act of the Commonwealth as "industrial matters". If Parliament intended "industrial matters" to include such benefits, it is strange that it was never specially concerned to mention them expressly. Section 6 of the Act of 1947 made the enumeration of industrial matters more comprehensive than any previous enumeration of such matters: yet the industrial matters specially mentioned include nothing which connotes either of the matters described in the employees' logs of claims as "compensation" or "pensions".

The whole of the argument that "compensation" and "pensions" are both "industrial matters" depends upon the general definition introduced by s. 6 of the Act of 1947. This section says that the term "industrial matters" means "all matters pertaining to the relations of employers and employees".

As part of the enumeration of "industrial matters", s. 6 retains the phrase "conditions of employment" upon which, in the *Builders' Labourers' Case* (1), was based the contention that workmen's compensation was included in "industrial matters" as defined in the Acts under which the case was decided. *Griffith* C.J. and *Barton* J. decided that in the context of these Acts, workmen's compensation was not within that phrase: *Isaacs* J. was of the contrary opinion.

The "compensation" which the employees required the employers to provide is of the nature of workmen's compensation. Although this matter is not covered by the words "conditions of employment", the general definition of industrial matters invites the question whether "the compensation" pertains to the relations of employers and employees. The general definition is wider than the phrase "conditions of employment". The *Builders' Labourers' Case* (1) is not necessarily an obstacle in the path of the employees' organizations. The word "pertaining" describes the nature of the connection which must exist between the "compensation" and the relations of the disputants on either side to one another in their respective economic roles of employers and their employees, in order that the "compensation" may be an industrial matter. The right to workmen's compensation is not an incident attached by common law to the contract of employment: the right is the product of statute law. The nature and incidents of this kind of statutory compensation are well known and discussion upon them is here unnecessary. Such compensation is payable to a workman during his incapacity for work, or in the event of his death, to his dependants. The employees' logs of claims show that the "compensation" would have these incidents and the employers' liability to pay it would arise upon the determination of the contract of employment. Is the "compensation", nevertheless, a matter which pertains to the employer-employee relations of the disputants? The incidents which have been mentioned exclude the "compensation" from this description, unless there is some other incident of it which makes it pertain to those relations. The "compensation" would be payable upon contingencies proper to legislative schemes of workmen's compensation. The only link between the "compensation" and the employment would be injury or illness arising out of or in the course of the employment. The criterion of liability is very wide. It is enough to notice that an employer would be liable, as in the case of any legislative scheme of workmen's compensation, irrespective of his responsibility for an employee's loss of earning power

(1) (1914) 18 C.L.R. 224.

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or death. The employers would be the insurers of their employees against loss of earning capacity and of their employees' dependants against loss of their means of support. The policy of legislation on the subject of workmen's compensation has been to impose this obligation upon employers. The compensation is a form of social security extending beyond the duration of the relations of employer and employee and covering persons other than employees, namely the dependants of employees.

In the preliminary note to the Acts brought under the title " National Insurance and Social Security " in *Halsbury's Statutes of England*, 2nd ed., vol. 16, p. 642, the editor says " The Acts in this title are concerned primarily with payments either by way of insurance or assistance on the occurrence of events in life which impose an extra financial burden on an individual or deprive him of the means of providing for his own and his family's needs ". These Acts form the legal basis of the " Welfare State ". One of the payments with which the Acts are concerned is workmen's compensation. The *National Insurance (Industrial Injuries) Act* 1946 (Imp.) (9 & 10 Geo. 6 c. 62) (see p. 797) is one of the Acts. It removed the liability placed on the employer by the *Workmen's Compensation Act* 1925 (Imp.) (15 & 16 Geo. 5 c. 84) (a consolidating Act), and provided a comprehensive scheme of insurance in respect of industrial injuries and diseases. It seems that the Act proceeds upon the principle that workmen's compensation is more than a mere incident of the relationship of employer and employee, even although the scheme of previous legislation was to cast upon the employer the whole liability of providing this form of financial assistance to the employee and his dependants. The liability of the employer to provide such financial assistance is based upon considerations of social welfare which transcend the strict employer-employee relationship; it is not a matter which wholly pertains to the area of the employment. The obligation to provide such pecuniary benefits, under the conditions which mark them as workmen's compensation, in my opinion, does not come within the statutory conception of " industrial matters ".

The " compensation " which is claimed by the logs is not of the nature of " sick leave with pay " over which by ss. 13 and 25 of the principal Act, as amended by ss. 4 and 5 of Act No. 18 of 1951, the court is given exclusive jurisdiction.

It is not implied in anything which I have said that if workmen's compensation was added to the list of " industrial matters " enumerated in the Act, that the refusal by employers of a demand by employees to assume liabilities connoted by workmen's compensation

would be an " industrial dispute " within the meaning of the Constitution. I pass no opinion on that question. The opinion which I express is that the subject matter of the employees' claim for " compensation " is not upon the true construction of the Act included within the definition of the term " industrial matters ".

I am also of the opinion that the claim for " pensions " does not relate to " industrial matters ". The basis upon which this claim is put forward contains a contradiction. The claim contains this statement " Notwithstanding that the employee may be retired by the employer the relationship of employer and employee shall continue while under the provisions set out hereunder, such employee is entitled to monetary allowance during the time he is actually not working ". This is an attempt to make a fictitious relationship of employer and employee between persons who are not in truth in that relationship. Does such a fiction help to make the claim pertain to the relations of employer and employee ? I think that it does not do so. In truth the claim for " pensions " is a demand for pecuniary benefits payable after the relations of employer and employee have really ended. There is nothing in the list of enumerated " industrial matters " which in any way resembles the " pensions " claimed by the employees. The payment of such pensions is not a matter which pertains to the relations of employers and employees. The employees demand that the employers should assume an obligation to provide by payments of money for the social security or welfare of persons who had been in their employment. This obligation in my opinion transcends the relations which arise out of the contractual relationship of employer and employee.

If the Legislature intended " pensions " to be an industrial matter, it is, as stated above, strange that the enumeration of " industrial matters " does not include " pensions "; but as in the case of " workmen's compensation " I pass no opinion on the question of the power of the Legislature. The " pensions " which are claimed are not of the nature of " long service leave with pay " over which by ss. 13 and 25 of the principal Act, as amended by ss. 4 and 5 of Act No. 18 of 1951, the court is given exclusive jurisdiction.

As regards the claim for " Intervals off Duty ", this falls within the ambit of " industrial matters ". The question is whether by ss. 4 and 5 of the *Conciliation and Arbitration Act* (*No.* 2) 1951 the power to make an award on the subject of the claim is withdrawn from the conciliation commissioner and placed exclusively in the court. The provision of relief within the ambit of this claim would

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not be " a provision for annual or other periodical leave with pay ". I have read what my brothers *Williams* and *Kitto* have said on this question: I have nothing to add.

I should make the order nisi absolute in respect of the claims for " compensation " and " pensions " and discharge it in respect of the claim for " Intervals off Duty ".

WILLIAMS J. This is an application to make absolute a rule nisi for prohibition prohibiting Hamilton Knight Esq., one of the conciliation commissioners appointed under the *Conciliation and Arbitration Act* 1904-1951 from further hearing disputes between the Merchant Service Guild of Australasia and the Australian Institute of Marine and Power Engineers and the prosecutor the Commonwealth Steamship Owners Association in so far as these disputes exclusively relate to the claims made in cll. 22, 28 (3), 28 (4) and 34 of the log of claims of the respondent Guild and to the corresponding clauses in identical terms, namely, cll. 27, 32 (3), 32 (4) and 39, of the log of claims of the respondent Institute.

It will be convenient in the first instance to deal with cl. 22 of the log of claims of the Guild and cl. 27 of the log of claims of the Institute. These clauses are headed " Intervals off Duty ". The objection to Mr. Knight's jurisdiction to hear these disputes is that they are claims for an award providing for or altering a provision for annual or other periodical leave with pay. The *Conciliation and Arbitration Act* (*No.* 2) 1951 amended ss. 13 and 25 of the principal Act by inserting in lieu of paragraph (*c*) in each of these sections the following new paragraph " providing for, or altering a provision for, annual or other periodical leave with pay, sick leave with pay or long service leave with pay ". The effect of these amendments was to exclude such claims from the jurisdiction of conciliation commissioners and place them within the exclusive jurisdiction of the Commonwealth Court of Conciliation and Arbitration.

The members of the Guild are captains and officers and the members of the Institute engineering officers of sea-going vessels. Clauses 22 and 27 in effect provide that such members while serving on such vessels are to have, so far as possible, four intervals of twenty-four hours off duty in each month to be given at the home port only, and five intervals of twenty-four hours off duty in each month to be given at the home port or at other prescribed ports, in some instances only on Sundays or public holidays. The clauses divide voyages into voyages of vessels between places in Australia and to places beyond Australia where the period of absence from

the home port or the port of engagement of the employee does not exceed two months, voyages to ports beyond Australia where his period of absence from the home port exceeds two months but not six months, and voyages extending beyond Australia where his period of absence from the home port exceeds six months. In the case of voyages of the second and third description the clauses provide for the manner in which these intervals are to be granted during the time spent by the vessel in the home port unless the employee is being sent to take his annual leave in which case the intervals due to him are to be added to his annual leave. The clauses provide that the intervals at home ports which are not granted at all shall be paid for at double the daily rate. If the other intervals are not so granted their equivalent shall be allowed as leave either cumulative with annual leave if granted within a period of six months from the date when the first of such ungranted intervals arose or in a consecutive period of leave within six months of the date when the first of such ungranted intervals arose. If these other intervals are not granted at all they shall be paid at one and a half times the daily rate.

The intervals provided for in these clauses are taken with pay but they are not annual or other periodical leave. They are breaks from duty corresponding to the breaks from work at weekends and on holidays enjoyed by employees in most industries conducted ashore adapted to the exigencies of an industry carried on at sea involving voyages of different durations and to different destinations. Annual leave is leave granted in consideration of an employee having worked continuously for a year. Its purpose is to provide a thorough respite from work for recuperative purposes. Periodical leave is of the same genus. It is leave granted in consideration of the employee having worked continuously for some period other than a year and for the same purpose. The ordinary breaks from work which occur in weekends and on holidays could not in any ordinary use of language be described as annual or other periodical leave.

Accordingly the objection to Mr. Knight's jurisdiction to hear the claims contained in cll. 22 and 27 fails and in this respect the rule nisi should be discharged.

Clauses 28 (3) and (4) and 34 of the log of claims of the Guild and cll. 32 (3) and (4) and 39 of the log of claims of the Institute. The main objection to Mr. Knight's jurisdiction to deal with these clauses is that they do not relate to industrial matters within the meaning of the *Conciliation and Arbitration Act*. There is a second ground of objection to the claims contained in cll. 28 (3) and (4)

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and 32 (3) and (4) that these are provisions for sick leave with pay and cannot be entertained by a conciliation commissioner but only by the Commonwealth Court of Conciliation and Arbitration. The second ground only arises if the first ground fails. Clauses 28 (3) and 32 (3) relate to compensation for accidents. They provide that if an employee suffers personal injury by illness or accident arising out of or in the course of his employment, the compensation payable by the employer shall be that provided by the *Seamen's Compensation Act* 1909-1947 (Cth.) subject to two exceptions (1) for the first three months of the duration of the incapacity, in lieu of what would be payable under that Act, the compensation shall be a sum equal to the pay he would have earned had he been able to render the agreed service in the capacity obtaining at the time of the accident; (2) when death results from the injury there shall be paid to the personal representatives of the deceased a sum equal to four years' pay computed in a certain manner. Clauses 28 (4) and 32 (4) provide that the right to compensation shall not commence until the contract of employment has been determined and the employee is no longer entitled to his wages under the award.

Clause 34 and cl. 39 are headed "pensions". They contain six paragraphs. Paragraphs (a) and (b) are in the following terms: (a) an agreement or award shall be made indeterminate so far as its duration is concerned, but subject to variation by mutual consent between the parties or by order of the Arbitration Court containing the undermentioned provisions for the payment of pensions; (b) notwithstanding that the employee may be retired by the employer the relationship of employer and employee shall continue whilst under the provisions set out hereunder such employee is entitled to monetary allowance during the time he is not actually working.

Section 48 of the *Conciliation and Arbitration Act* provides (1) that an award shall, subject to the next succeeding section, continue in force for a period to be specified in the award, not exceeding five years from the date upon which the award comes into force; (2) that after the expiration of the period so specified, the award shall, subject to the next succeeding section, and unless the court, in the case of an award made by the court, or a conciliation commissioner, in the case of an award made by a conciliation commissioner, otherwise orders, continue in force until a new award has been made; (2A) nothing in sub-s. (1) of this section prevents the inclusion in an award of provisions in relation to long service leave with pay notwithstanding that those provisions are so

expressed as not to be capable of operating, or of operating fully, during the period specified in the award in pursuance of sub-s. (1) of this section. Section 49 provides that the court may with respect to a matter referred to in s. 25 of the Act, and a conciliation commissioner may, subject to s. 13 of the Act, if for any reason it or he considers it desirable to do so—set aside an award or any terms of an award; or vary any of the terms of an award. Plainly the provisions in (a) that an agreement or award shall be indeterminate so far as its duration is concerned, and in (b) that the relationship of employer and employee shall continue indefinitely, directly conflict with s. 48 of the Act and are void, and the respondents do not seek to uphold either of these paragraphs. But they contend that the remaining paragraphs are valid. These paragraphs provide that at a certain age and after a certain term of service, in the events therein mentioned, an employee shall become entitled to a pension and that, in the event of the employee predeceasing his wife, the widow shall be paid half of the pension to which the employee would have been entitled.

None of the claims contained in the clauses under discussion can raise disputes within the meaning of the *Conciliation and Arbitration Act* unless the meaning of industrial matters is wide enough to include claims to impose upon employers liabilities to employees accruing after the employment has ceased. The *Conciliation and Arbitration Act* provides, so far as material, s. 4, that "industrial dispute" means a dispute as to industrial matters which extends beyond the limits of any one State. "Industrial matters" means all matters pertaining to the relationship of employers and employees and, without limiting the generality of the foregoing, includes, *inter alia*, (*b*) the privileges, rights and duties of employers and employees; and (*h*) the mode, terms and conditions of employment. If the respondents cannot bring the claims within the wide general words "matters pertaining to the relationship of employers and employees", it would not seem that they can derive any assistance from pars. (*b*) and (*h*). These paragraphs, like other sub-heads of the definition, simply illustrate the nature of the matters that may be said to pertain to the relations of employers and employees.

The meaning of the general words has already been before this Court. The dispute must be one which "belongs to" or is "within the sphere of" the relations of employers and employees as employers and employees: *R.* v. *Kelly*; *Ex parte State of Victoria* (1). The relationship of employer and employee can only exist during the employment. It cannot exist after the employment has ceased.

(1) (1950) 81 C.L.R. 64, at p. 84.

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The dispute must be concerned with and appropriate to the relationship that exists during the continuance of the employment. The specific instances of industrial matters contained in pars. (*a*) to (*q*) of the definition assist this meaning. The provision in s. 48 that an award is to continue in force for a limited period points to the relations being the current mutual relations of employers and employees suitable to be regulated by an award of a temporary nature. Sections 13 and 25 specify the matters that are not within the jurisdiction of conciliation commissioners but are within the jurisdiction of the Commonwealth Court of Conciliation and Arbitration. They all relate to current relations. Paragraph (*c*) of these sections, which has already been set out, is carefully worded so that its operation is confined to various forms of leave with pay, and leave connotes permission to be absent from work during an existing relationship of employer and employee. Section 48 (2A) only enlarges the period for which an award may continue in force for the limited purpose of enabling provisions in relation to long service leave to have their full operation.

All these considerations indicate that Parliament intended to confine the scope of awards to the mutual relations of employers and employees accruing within the framework of an existing employment. The clauses under discussion are beyond the jurisdiction of a conciliation commissioner, and, it may be added, of the Commonwealth Court of Conciliation and Arbitration, on the first ground, and it is unnecessary to consider the second ground.

The rule nisi should be made absolute in respect of cll. 28 (3) and (4) and 34 of the log of claims of the Guild and cll. 32 (3) and (4) and 39 of the log of claims of the Institute.

WEBB J. This is an application to make absolute an order nisi for a prohibition to restrain proceedings on claims by the above-mentioned Guild and Institute made to a conciliation commissioner to award (1) intervals off duty; (2) compensation for illness or accident; and (3) pensions.

As to (1): the ground in the order nisi is that the claim is for periodical leave on pay, and so is placed beyond the jurisdiction of the commissioner and within that of the Arbitration Court by ss. 13 (1) (*c*) and 25 (*c*) of the *Conciliation and Arbitration Act* 1904-1951. I think this ground fails.

These intervals off duty are, as I understand them, intended to secure for members of the claimant unions the equivalent of a forty hours' week which in other occupations is usually worked in five days, excluding Saturdays and Sundays. The number of

intervals off duty sought by the claimant unions in respect of each year is equal to the number of days off duty at week ends added to the ten public holidays which normally are available to other employees in a year. No doubt the intervals off duty which are sought in lieu of public holidays appear to be in the nature of leave, although the equivalent ten intervals off duty are not identifiable. But the balance of such intervals, i.e., those given for the loss of Saturdays and Sundays ashore, are not in the nature of leave, as Saturdays and Sundays are not holidays: they are simply periods outside the weekly forty hours ordinary working time. Even if these latter intervals off duty are to be paid for, still I think that does not make them leave, as the Saturdays and Sundays for which they are substituted are not working time of which the employer is deprived, but for which he pays. Any provision for payment may be thought necessary to secure a real equivalent for the loss of week ends and holidays ashore. Public holidays may be different in this respect; but as already stated, their equivalent intervals off duty are not identifiable, although the conciliation commissioner could, I think, be restrained from providing periodical equivalents for them. But neither the public holidays nor their equivalent intervals can, I think, be said to be "other periodical leave" within the meaning of ss. 13 (1) (*c*) and 25 (*c*) as they are not awarded at regular or fixed intervals. It is true that the time between public holidays is generally constant, but this is accidental and not the result of deliberate spacing. Ordinarily public holidays are provided for without reference to the intervals between them.

As to (2): the ground in the order nisi is that the claim for compensation is not an industrial matter as defined in s. 4 of the Act: that it does not pertain to the relations of employers and employees; if it does, then there is a further ground that it is a claim for sick leave with pay, and so is beyond the jurisdiction of the commissioner and within that of the Arbitration Court under s. 13 (1) (*c*) and s. 25 (*c*). I think the latter ground fails, as the claim is for compensation after the employment terminates and wages cease to be payable. But then the prosecutors submit, the first ground also fails, as the claim no longer pertains to the relations of employers and employees.

In the *Builders' Labourers' Case*, *Griffith* C.J. (1) in a judgment in which *Barton* J. agreed (2), appears to have suggested that as compensation for injuries was, at the time of Federation, a matter for legislation, and not for agreement between employers and employees, it could not be the subject of an industrial dispute as

(1) (1914) 18 C.L.R. 224, at p. 236. (2) (1914) 18 C.L.R., at p. 237.

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then understood, and so was not within s. 51 (xxxv.) of the Commonwealth Constitution. There is, I think, much to be said for this view; but as it was not expressed by a majority of the Court in that case, and it does not appear to have been advanced since by any member of this Court, I hesitate to adopt it, in the absence of fuller argument than we have heard on this application. However, Parliament has, in s. 4, defined the matters that may be the subject of an industrial dispute and be dealt with under the Act. This definition in its widest terms is still confined to matters which pertain to the relations of employers and employees. Now it is true, as Mr. *Riley* of counsel for the prosecutors submits, that this does not include all that the parties might bargain for. What pertains to those relations is I think, to be determined objectively. But the scope of those relations might vary with the circumstances of a particular industry or occupation. In many callings risks are taken by employees that cannot completely be avoided by precautionary measures; and so provision for payment for incapacity or death resulting from employment in any such calling would, I think, be natural enough, and might properly be said to pertain to the relations of the employers and employees.

As to (3): the ground of the order nisi is that the claim for pensions for employees and their widows is not an industrial matter within s. 4. But I think that such a provision, being an incentive to and a reward for long service with an employer, can properly be said to pertain to the relations of employers and employees in almost any industry. Although the pension necessarily is paid after the relationship ceases it is still remuneration for service during the relationship. It does not cease to be such because the payment is deferred until after the service is finally performed, and is then spread over the life of the employee or the lives of the employee and his widow.

But the effect of ss. 48 and 49 has to be considered. Those sections provide for a time limit on the operation of awards. Section 48 (1) limits the duration of an award to the period specified in it, not exceeding five years; but s. 48 (2) also provides that, unless otherwise ordered, an award shall remain in force until a new award is made. Section 49 provides for the setting aside of an award or the variation of its provisions. If nothing further were provided then, on the termination of an award, only accrued rights could be enforced. But it would not follow that only such matters as, say, wages could be dealt with in an award, and not such matters as paid leave, or incapacity or retiring allowances, simply because the period of such leave or of incapacity or retirement might extend

beyond the currency of the award. After all wages might be provided for on, say, a monthly or quarterly basis, and a part of the month or quarter might still have to run when the award comes to an end. No right could be said to have accrued *under the award* in respect of that part. That applies also to leave or an allowance, although the employee before the award expires might have done everything required of him to entitle him to it.

However, by s. 8 of the *Conciliation and Arbitration Act* (*No.* 2) 1951, s. 48 was amended by adding the following sub-section:— "(2A) Nothing in sub-section (1) of this section prevents the inclusion in an award of provisions in relation to long service leave with pay notwithstanding that those provisions are so expressed as not to be capable of operating, or of operating fully, during the period specified in the award in pursuance of sub-section (1) of this section".

It will be observed that sub-s. (2A) is directed to the contents of an award and is silent on the question of payment in respect of periods after the award terminates. But that question does not arise here.

If sub-s. (2A) is to be read as excluding from awards provisions for other kinds of paid leave, that is to say, if the maxim *expressio unius est exclusio alterius* applies, then this sub-section excludes short leave on pay, such as recreation leave and sick leave. I think that could not have been intended. Courts are not at liberty to refuse to give effect to provisions of a statute, either express or necessarily implied, in order to avoid what might seem to be an absurd result. But there is no necessary implication from a merely affirmative provision like sub-s. (2A). I think then that sub-s. (2A) was enacted "under the influence of excessive caution" (*Maxwell* on *The Interpretation of Statutes*, 9th ed. (1946), p. 318); and that every kind of paid leave may be provided for in an award. However, if all such paid leave can be included I see no reason why incapacity and retiring allowances should not also be included, as their exclusion would also have to be justified solely by the possibility or probability that the period of incapacity or of retirement would continue beyond the currency of the award, the extent of the possibility or probability being in many cases one of degree involving a question of fact and not of law. The certainty of such continuance could not properly be forecast in all cases; or in any case if s. 48 (2) is taken into consideration. However no assumption could be made that s. 48 (2) would operate.

A conciliation commissioner must assume that his award will not last beyond five years and that, say, a claim for pensions for

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employees on reaching sixty-five can be awarded only to those who have reached sixty when the award is made, and even then that the provision for pensions will be enforceable only while the award exists. The commissioner cannot properly assume that a fresh award will not be made at the end of five years so that the old award will continue indefinitely. Still I think that these limitations do not take such provision out of the category of "industrial matters", the definition of which is literally wide enough to include it, in the absence of any indication to the contrary elsewhere in the Act. But it is unlikely that a conciliation commissioner with these limitations in view, will venture to provide for pensions simply because he has the legal power so to do. After all it is within his undoubted legal power to do many absurd things. To ensure that necessary powers are given very general terms are employed, thereby conferring some powers which would not be likely to be conceded in a category of specific powers. But the commissioner is expected and can, I think, be trusted to act as a reasonable, responsible person at all times. It is true that the qualifying length of service must have been rendered, the employee have retired and the pension have become payable within the period specified in the award as its duration, and therefore that the qualifying period would have to be comparatively short. But there is no limit to the legal power of the commissioner as to the length of service he might prescribe. He might also make the amount of the pension depend upon the length of the service. As it is possible that some employees might qualify for the pension, draw it, and die during the period prescribed in the award for its duration, it cannot I think be held that there is no legal power to provide pensions, although it would appear foolish so to do. The legal power is not limited by practical considerations short of impossibilities.

I think then that ss. 48 and 49 do not preclude the granting of the incapacity or retiring allowance sought by the claims.

Finally the effect of the *Navigation Act* 1912-1950 and of the *Seamen's Compensation Act* 1911-1949, both enacted in exercise of the power given by s. 51 (i.) of the Commonwealth Constitution, must be considered. Although Parliament cannot enact, in disregard of the arbitrator's opinion, what provisions shall be included in industrial awards, still it has power to confer jurisdiction to make awards, and it may limit this jurisdiction, and do so either expressly or by implication. This power to confer a limited jurisdiction can be exercised, among other ways, by definitions of "industrial dispute" and "industrial matters" as in s. 4 of the *Conciliation and Arbitration Act*; and in s. 56 (2) Parliament has gone as far

as to direct preference to be granted when the conciliation commissioner is of the opinion that it is necessary for the welfare of society, among other things. But has Parliament in the *Navigation Act* or the *Seamen's Compensation Act* limited the jurisdiction to make industrial awards ? In my opinion the selection by Parliament of particular persons or classes of persons for special protection in relation to conditions of employment cannot properly be construed as a denial of jurisdiction to grant that or similar protection to persons or classes not so selected. I think its exclusive effect does not extend beyond the persons selected, and then only in respect of the same or similar protection. To hold that such action of Parliament extends further would give it an exclusive and exhaustive effect not hitherto attributed to it by industrial authorities or the courts, as far as I am aware. When Parliament selects particular persons or classes and prescribes special protection for them, I think it would constitute an attempt to ignore Parliament, and be beyond power, to provide in an industrial award for additional protection of the same or a similar kind for the same persons or classes ; but that it would not be objectionable to make the same or similar provisions for persons or classes not so selected. If it were, then, on the same principle, once a statute provided any condition of employment for any persons whomsoever, no industrial award of any kind could be made either for them or for other persons. But there is a limit to implications from statutes ; and here, I think, the limit is placed after the particular persons or classes for whom the statutes provide, and only then in respect of the particular types of protection given.

In my opinion then a conciliation commissioner has jurisdiction to grant claims for intervals off duty, periodical and lump sum payments for incapacity and death arising out of employment, and retiring allowances. But he has no power to provide for a notional extension of the award or of the relationship of employer and employee for any purpose.

As to the claims for notional extensions, I would make the order absolute ; otherwise I would discharge it.

FULLAGAR J. This is the return of an order nisi for a writ of prohibition directed to Mr. Hamilton Knight, a conciliation commissioner under the *Conciliation and Arbitration Act* 1904-1951. The object of the application is to prohibit the commissioner from dealing with certain claims in two logs presented respectively by the Merchant Service Guild of Australasia and the Australian

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Institute of Marine & Power Engineers, each of which is an organisation of employees registered under the Act. The claims in question though contained in differently numbered clauses in the respective logs, are (practically speaking) in identical terms in the two cases. The prosecutor is the Commonwealth Steamship Owners Association which is an organisation of employers registered under the Act. The arguments of the prosecutor are based on the construction and effect of the Act, and no constitutional question has been raised.

The first claim in question is contained in cl. 22 of the Guild's log and cl. 27 of the Institute's log. The claim relates to what are described as "intervals off duty" but might perhaps be better described as "intervals off ship". The provisions which the log seeks to have embodied in an award are elaborate and somewhat involved, but it is unnecessary to examine them in detail. The general nature of the claim is indicated by the opening words, which are: "Every employee shall be entitled to be absent from his vessel in port during intervals, each to be of 24 consecutive hours, and the number of such intervals and the place and time of giving them shall be as follows". What follows shows that the general object is to ensure that each employee shall have one clear day ashore for every Sunday and public holiday in the period of his employment: the intervals prescribed are stated to be based on the assumption that there are ten public holidays in a year, and it is provided that there shall be an additional interval for every additional public holiday proclaimed. The complexity of the provisions actually made is occasioned primarily by the fact that ships to be affected by the award will be engaged in voyages of widely differing character. An "interval" at the "home port" is regarded as more advantageous than an interval at any other port. Some ships will be absent from the home port only for short periods. Others will be at sea for long periods, and for other periods will be in ports where a day ashore presents little or no attraction. An attempt is accordingly made to provide something like an equitable distribution of "intervals" to cover these and other cases, the primary basis adopted being a division of ships into three classes. It is obvious that in some cases "intervals" will "accumulate". In some such cases there is provision for them to be taken consecutively, and in appropriate cases the accumulated intervals are to be added to and taken with the employee's annual leave.

With regard to the claim for intervals, the argument for the prosecutor was that, although it could be dealt with by the Court of Conciliation and Arbitration, it fell outside the jurisdiction of a conciliation commissioner under the Act. This argument was based

on ss. 13 and 25 of the Act as they stand after amendment by ss. 4 and 5 respectively of the *Conciliation and Arbitration Act* (*No.* 2) 1951. The two sections are complementary to one another. Section 13, so far as material, provides that a conciliation commissioner shall not be empowered to make an order or award providing for, or altering a provision for, annual or other periodical leave with pay, sick leave with pay, or long service leave with pay. Section 25 gives to the court the jurisdiction which s. 13 denies to commissioners. The existing awards contain provision for " intervals off duty ", though in different terms from those now claimed by the two logs. The prosecutor says that the logs, in so far as they seek new provision for " intervals ", seek an order or award altering a provision for annual or other periodical leave with pay, and that to that extent they raise a claim which a conciliation commissioner has no jurisdiction to entertain.

This contention has, of course, the appearance of being strictly logical, because it treats the word " leave " as meaning permitted absence from duty, and then asserts that each " interval " in question is a permitted absence from duty occurring from time to time and therefore " periodical ", the pay of the employee continuing to accrue during the permitted absence. The contention, however, is not, in my opinion, sound. The fallacy lies, I think, in the fact that it gives too large a meaning to the word " leave ". It is not every permitted absence from duty that is correctly described by the word " leave ". An employee in any industry may, in accordance with an award, work from 9 a.m. to 5 p.m. on each day from Monday to Friday. He may be said to be permitted to be absent from duty from 5 p.m. on Monday to 9 a.m. on Tuesday, but it would not be a natural or correct use of the term to say that he was on " leave " during that period or on a Saturday or a Sunday or a public holiday. Necessary gaps or breaks in the normal day-to-day routine of work are not within the conception of " leave " as commonly understood. They are mere *incidents* of the normal day-to-day routine. The characteristic of " leave "—at least in its context in the Act—is that it involves a departure from, a temporary abandonment of, the normal day-to-day routine of work. It does not generally involve a cessation of the employment, but it does involve a temporary cessation of the conditions to which the employment is subject. Observance of those conditions for a given period is regarded as earning freedom from those conditions for a limited period without forfeiture of pay.

The distinction itself seems clear enough. The question remains whether the " intervals " claimed by the logs are to be regarded

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as incidents of the normal day-to-day routine of work or as possessing the character of " leave ". A consideration of the nature and purpose of such a provision serves, I think, to show that they cannot be regarded as possessing the character of " leave ". The occasion for the " intervals " arises from the peculiar nature of the industry in which members of the Guild and of the Institute are engaged. Their place of employment is a ship, and the exigencies of the running of a ship are such that they cannot regularly be absent from their place of employment on Sundays and public holidays. The very nature of their calling thus deprives them of a privilege which is a normal incident of the day-to-day routine of work of the average shore worker. The whole object of providing for " intervals " is to give them something in the nature of an equivalent of that normal incident of shore employment. The first provision on the subject seems to have been made by *Higgins* J. in 1912 in *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (1), where he dealt with the matter under the heading of " Time Off ", regarding it as a subject quite distinct from " Leave of Absence ". In 1916 he dealt with the matter again (*Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (2)), under the heading " In Lieu of Sundays and Holidays ". The word " Intervals " appears to have been first used in 1920 (*Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (3)) when *Higgins* J. again dealt with the matter under the heading of " Sundays & Holidays or Intervals in Lieu Thereof ". In 1923 (*Commonwealth Steamship Owners' Association* v. *Australasian Institute of Marine and Power Engineers* (4)), *Powers* J. continued in force a pre-existing " provision as to days off in lieu of Sundays and holidays ". In 1942 (*Merchant Service Guild of Australasia* v. *Australian Institute of Marine and Power Engineers* (5)) Judge *Kelly* (as he then was) spoke of such a provision as designed to bring about " equivalence *in the matter of an ordinary working week* with the conditions of the generality of shore-workers regulated by awards of this Court ". (The italics are mine.)

In my opinion, the claims made by cll. 22 and 27 of the respective awards are claims pertaining to the normal day-to-day routine of work and not to " annual or other periodical leave " within the meaning of s. 13 of the Act. It follows that prohibition in respect of these claims must be refused.

(1) (1912) 6 C.A.R. 6, at pp. 15, 16.
(2) (1916) 10 C.A.R. 214, at pp. 230, 231.
(3) (1920) 14 C.A.R. 459, at p. 479.
(4) (1923) 18 C.A.R. 591, at p. 597.
(5) (1942) 48 C.A.R. 577, at p. 604.

The next claim in respect of which prohibition is sought is contained in cl. 28 (3) and (4) of the Guild's log and cl. 32 (3) and (4) of the Institute's log. By this claim it is sought to have embodied in an award a provision that, if personal injury by illness or accident arising out of or in the course of the employment be caused to an employee, " the compensation payable by the employer " shall (subject to three qualifications which are in favour of the employee) be " that provided for under the Commonwealth Seamen's Compensation Act 1909, 1911, 1938, 1947 (as amended) ". It is to be noted that the *Seamen's Compensation Act* 1909 was held in *Owners of S.S. Kalibia* v. *Wilson* (1) to be invalid and was repealed by s. 18 of the Act of 1911. The reference to the Act of 1909 may, therefore, be ignored. The Act of 1911 was challenged in *Australian Steamships Ltd.* v. *Malcolm* (2), but was held to be valid. This Act included masters, officers and engineers among the employees entitled to its benefits, but an amendment effected by the Act of 1938 had the effect of excluding from its operation members of the Guild and members of the Institute. It is to be noted also that the words " as amended " in the claims import the inclusion of the amendments effected by the *Seamen's Compensation Act* 1949.

In consequence of the decision in the *Builders' Labourers' Case* (3) some doubt seems to have been entertained as to whether the Court of Conciliation and Arbitration could or should make *any* award or order relating to compensation for accident: see *Merchant Service Guild of Australasia* v. *Commonwealth Steam-Ship Owners' Association* (4). However, in 1920 *Higgins* J. made an award in favour of the Guild (*Merchant Service Guild of Australasia* v. *Commonwealth Steam-Ship Owners' Association* (5)) which included a provision for such compensation. At this time the *Seamen's Compensation Act* applied to members of the Guild, but the provision embodied in the award was considerably more favourable to members than the provisions of the Act. In 1923 Sir *John Quick*, Deputy President, refused (*Merchant Service Guild of Australasia* v. *The Adelaide Steam-Ship Co. Ltd.* (6)) to continue this clause in the award, expressing doubt as to whether the Court had jurisdiction to include it in an award, and saying that in any case he did not think it proper to do so having regard to existing legislation on the subject. In the same year, however, *Powers* J. included such a provision in an award in favour of the Institute (*Commonwealth Steamship Owners' Association* v. *Australasian Institute of*

(1) (1910) 11 C.L.R. 689.
(2) (1914) 19 C.L.R. 298.
(3) (1914) 18 C.L.R. 224.
(4) (1916) 10 C.A.R., at p. 234.
(5) (1920) 14 C.A.R., at p. 483.
(6) (1923) 17 C.A.R. 497, at p. 531.

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Marine and Power Engineers (1)), and at a later date it appears to have been restored to the Guild's award. In 1928 we find Chief Judge *Dethridge* saying (*Australian Institute of Marine and Power Engineers* v. *Commonwealth Steamship Owners' Association* (2)) that, if such a provision had not been included in the then existing award, he would have felt considerable doubt as to the "propriety" of introducing such a clause having regard to the existence of the Commonwealth legislation on the subject. He did, however, embody the pre-existing provision in the award made by him. The same provision is contained in the now existing awards both of the Guild and of the Institute.

Each of the existing awards provides for the payment of compensation in cases of (a) death, (b) total or partial incapacity for work. The amount payable is determinable by reference to the award alone, and any dispute as to liability or amount could be decided in an action at law in the ordinary courts: cf. *Mallinson* v. *Scottish Australian Investment Co. Ltd.* (3); *Spain* v. *Union Steamship Co. of New Zealand Ltd.* (4). If, however, an award were made in the terms now claimed, the compensation payable would (subject to the somewhat far-reaching qualifications expressed in the claim) be determinable by reference to the terms of the *Seamen's Compensation Act* 1911-1949.

Now, in the *Builders' Labourers' Case* (5) *Higgins* J. had made an award which provided for payment of compensation in accordance with the *Commonwealth Workmen's Compensation Act* 1912 (which has since been repealed) and appointed a Board of Reference by which the liability to pay compensation, and the amount of compensation to be paid, should be determined. A Court consisting of six justices was unanimous in the view that these provisions were made without jurisdiction and were invalid, but the six justices were not unanimous in their reasons. *Griffith* C.J. and *Barton* J. were of opinion that the whole subject-matter of compensation for injury was beyond the jurisdiction which had been, or could be, conferred upon the Court of Conciliation and Arbitration. *Isaacs* J. was of opinion that a claim for an award relating to compensation for injury was an industrial matter which could be the subject of an industrial dispute, and that the subject-matter was within the jurisdiction of the Court. He held, however, that the provisions relating to the Board of Reference were invalid, and that these provisions were not severable from that part of

(1) (1923) 18 C.A.R., at pp. 600, 601.
(2) (1928) 27 C.A.R. 446, at p. 516.
(3) (1920) 28 C.L.R. 66.
(4) (1923) 32 C.L.R. 138.
(5) (1914) 18 C.L.R. 224.

the award which related to compensation. *Gavan Duffy* J. and *Rich* J. were less explicit on the point, but it seems a fair inference from what is said by them (1) that they were of the same opinion as *Isaacs* J. On the other hand, the fair inference from what is said by *Powers* J. (2) seems to be that he was of the same opinion as *Griffith* C.J. and *Barton* J. However, the view of *Griffith* C.J. and *Barton* J. (3) seems fairly clearly to be based on principles which cannot be now accepted consistently with the *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (*The Engineers' Case*) (4), *Clyde Engineering Co. Ltd.* v. *Cowburn* (5) and *H. V. McKay Pty. Ltd.* v. *Hunt* (6). Accordingly the *Builders' Labourers' Case* (7) must be taken to rest on the narrower ground only, viz., that there is no jurisdiction under the *Conciliation and Arbitration Act* to commit to any other tribunal or body the determination of amounts to be paid, or of questions arising, under an award.

But even on this narrower basis it seems to follow from the *Builders' Labourers' Case* (7) that the commissioner has no jurisdiction to include in an award a provision as to compensation in the terms claimed by the logs in this case. Before the *Seamen's Compensation Act* 1949 this would indeed have been very clear, because in cases of total or partial incapacity no amount could ever have been arrived at except by means of a decision of one of the tribunals referred to in the Second Schedule. Such a tribunal could derive no jurisdiction under the Act because compensation would not be payable under the Act, and the *Builders' Labourers' Case* (7) decides that it could derive no jurisdiction under the award. But, although the position in this respect has been altered since the amendment of cl. 1 (*b*) of the First Schedule by the Act of 1949, the "compensation provided for" by the Act is still "provided for" subject to many matters which can only be determined by one of the tribunals mentioned in the Second Schedule. It is necessary only to refer to cll. 7A, 8 (*b*), 9 and 10 of the First Schedule: see also cll. 16, 17 and 18. A valid award as to compensation cannot, in my opinion, be made by reference to the *Seamen's Compensation Act*.

For the above reason, I am of opinion that prohibition should go against the granting of the claims made by cl. 28 (3) and (4) of the Guild's log and cl. 32 (3) and (4) of the Institute's log. And I do not think that on this application the broad general question whether *any* award as to compensation for injury by accident could

(1) (1914) 18 C.L.R., at p. 257.
(2) (1914) 18 C.L.R., at p. 272.
(3) (1914) 18 C.L.R., at pp. 236, 238.
(4) (1920) 28 C.L.R. 129.
(5) (1926) 37 C.L.R. 466.
(6) (1926) 38 C.L.R. 308.
(7) (1914) 18 C.L.R. 224.

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be validly made should be considered. The commissioner is not, of course, even apart from s. 42 of the *Conciliation and Arbitration Act*, bound simply to accept or reject the actual claim made. But the question of what award (if any) could be lawfully made in dealing with the claim is fraught with grave difficulties, and I think it highly inconvenient, if not indeed impracticable, to attempt to consider it in the abstract. In the first place, questions as to the ambit of the dispute may arise. In the second place, a serious question might arise, as to a particular proposed award, whether it would not be inconsistent with ss. 127 and 132 of the *Navigation Act* 1912-1950. (As to the very special character of that Act see *Federated Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1) (per *Knox* C.J. and *Gavan Duffy* J.) and *Union Steamship Co. of New Zealand Ltd.* v. *The Commonwealth* (2) (per *Isaacs* J.).) This question, though it was suggested from the bench as possibly arising, was not argued before us, and it is very undesirable to determine it without full argument. In the third place, a particular proposed award might raise, and indeed would be very likely to raise, questions relating to the effect of s. 48 of the Act—questions which assume vital importance in connection with the third set of claims in respect of which prohibition is now sought. All such questions as these can only be conveniently considered in relation to a particular claim or proposed award, and the proper course in the present case is, in my opinion, simply to prohibit the making of awards in the terms claimed by the logs.

The next and last claims in respect of which prohibition is sought are contained in cl. 34 of the Guild's log and cl. 39 of the Institute's log. The two clauses are in the same terms, and seek to obtain provisions in an award for pension rights for members of the Guild and of the Institute. It is said by the prosecutor that such a claim does not relate to an "industrial matter" and therefore cannot be the subject of an "industrial dispute" within the meaning of s. 4 of the *Conciliation and Arbitration Act*.

If the provisions of s. 4 had alone to be considered, it might be difficult to maintain that the matter in question was not an "industrial matter". On its face the claim made seems to seek, in each case, the conferring of a right on an employee and the imposition of a corresponding duty on an employer. The real question involved, however, is very far from being simple, and it is clear that its inherent difficulties have by no means gone unnoticed by those who framed the claims in question. For

(1) (1922) 30 C.L.R. 144, at p. 150. (2) (1925) 36 C.L.R. 130, at pp. 147, 148.

each claim contains two introductory sub-clauses. The first provides that the award is (subject to an immaterial qualification) to be indeterminate as to duration. And the second provides that the relation of employer and employee shall, notwithstanding that the employee may be retired by the employer, continue so long as the employer is entitled to rights under the substantive provisions for pensions which follow. It was conceded that neither of these provisions in an award would be valid. The concession was, in my opinion, entirely proper and correct, but it seems to me to follow from it that no valid and effective award as to pensions can be made. The objection to the first sub-clause is that it is plainly inconsistent with s. 48 of the *Conciliation and Arbitration Act*. The objection to the second, which goes deeper, is that where, as here, the dispute is between employers on the one hand and employees on the other hand, the jurisdiction of the Court and of the commissioners extends only to the creation of rights and duties between employer as such and employee as such. Neither the Court nor the commissioners can enlarge their own jurisdiction by declaring that a relationship shall be deemed to subsist which does not in fact subsist.

The claim made in each case is for a pension upon the attainment of the age of sixty-five years or upon the employee becoming unable through infirmity to perform his duties. The qualifying period is ten years, the maximum of half the employee's salary being reached after fifteen years' service. The pension is to be adjusted quarterly in accordance with the retail price index numbers applied by the Court. In the event of the employee predeceasing his wife, the widow is to be paid one half of the pension to which the employee would have been entitled. The real argument of the prosecutor is that an award in any such terms as those sought must, if it is to be effective, (a) operate to create obligations which will subsist after the award has expired and after the relation of employer and employee has ceased to exist between obligor and obligee, and (b) operate to create obligations between persons (an employer and the widow or personal representative of a former employee) who are not and cannot be parties to an industrial dispute or to an award. No such award, it is said, can be validly made under the Act.

The argument rested mainly on s. 48 of the Act. But, before examining that section, it will be well to consider for a moment the nature of an award. It is not subordinate legislation. It is not legislation at all. It is, no doubt, an "instrument" in the general legal sense: it is a document affecting rights. But

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it is not, in my opinion, an instrument within the meaning of s. 46 of the *Acts Interpretation Act*, the purpose of which is to apply to subordinate legislation provisions enacted in the first place with reference only to Acts of Parliament. The making of an award is not an exercise of judicial power, but an award is essentially a decision *inter partes* upon matters in dispute *inter partes*. It depends for its binding effect entirely upon the Act, and particularly and primarily upon what is now s. 50 of the Act, which says upon whom it shall be binding. If it expires or for any other reason ceases to exist as an award, the Act ceases to operate upon it, and it simply ceases to be binding upon any of the persons mentioned in s. 50.

It is to this state of affairs that s. 48 is directed. Sub-section (1) of that section provides that an award shall continue in force for a period to be specified in the award, not exceeding five years from the date upon which it comes into force. This provision is qualified by sub-s. (2), which provides that, after the expiration of the period so specified, the award shall, unless otherwise ordered, continue in force until a new award has been made. The validity of this provision in an earlier form was attacked in *Waterside Workers' Federation of Australia* v. *The Commonwealth Steamship Owners' Association* (1), but it was held by a majority of the Court to be valid. Sub-section (3) provides that, where an award has continued in force after the expiration of the period specified in the award, any award made for the settlement of a new dispute between the parties may be made to operate from a date not earlier than the date upon which the dispute arose. Sub-section (4) provides that the fact that an award has been made and is in force shall not prevent an award being made for the settlement of a further dispute between all or any of the parties to the first-mentioned award, with or without additional parties, and whether or not the subject matter of the further dispute is the same in whole or in part as the subject matter of the dispute determined by the first-mentioned award. A new sub-s. (2A) was added by s. 8 of the *Conciliation and Arbitration Act* (*No.* 2) 1951. This provides that nothing in sub-s. (1) prevents the inclusion in an award of provisions in relation to long service leave with pay, notwithstanding that those provisions are so expressed as not to be capable of operating, or of operating fully, during the period specified in the award.

It seems obvious, on the one hand, that any conception of arbitration as a means of " settling " industrial disputes involves

(1) (1920) 28 C.L.R. 209.

the necessity of some such provision as s. 48, and, on the other hand, that any such provision is likely to live in the shadow of difficult constitutional questions. It was only by the narrowest of margins that what is now s. 48 (2) escaped being held unconstitutional in the *Waterside Workers' Case* (1). The ground of attack was that the Parliament, in enacting that an award should continue in force after the period specified in it, was assuming directly to prescribe industrial conditions and therefore transcending the limits of the power given by s. 51 (xxxv.) of the Constitution. It is unnecessary to consider the questions raised in the *Waterside Workers' Case* (1) or the further somewhat intricate questions discussed in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (*Gas Employees' Case*) (2), *R.* v. *The Commonwealth Court of Conciliation and Arbitration*; *Ex parte Victorian Railways Commissioners* (*Australian Railways Union's Case*) (3) and *Australian Tramway and Motor Omnibus Employees' Association* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (*Tramway Employees' Case*) (4). Nor is it necessary to discuss the purpose or effect of sub-s. (4) of s. 48, which first appeared in 1947, taking the place of the old s. 28 (3), which was considered in the two last-mentioned cases. For present purposes it is necessary only to point out that the present s. 48, like the old s. 28, contemplates an award made in settlement of a dispute and having operation, as an award representing the will of the Court or commissioner, only during a period which must be specified in it and which must not exceed five years. What follows is designed to cover any gap between the expiration of the specified period and the making of a new award, and is incidental and subsidiary. The position was thus explained by *Dixon* J. in the *Australian Railways Union's Case* (5): "The award is kept alive under sec. 28 (2)",—now s. 48 (2)—"not by force of an arbitral decision, but by direct legislative enactment which operates notwithstanding that by arbitral decision a period of duration has been fixed for the award and that that period has expired. The authority to do this has been considered"—i.e., in the *Waterside Workers' Case* (1)—"to belong to the Legislature because to hold an existing industrial regulation in force during the interval between arbitral decisions made in the settlement of disputes appeared to be fairly incidental to the subject matter of sec. 51 (xxxv.). To empower the Court of Conciliation and Arbitration

(1) (1920) 28 C.L.R. 209.
(2) (1919) 27 C.L.R. 72.
(3) (1935) 53 C.L.R. 113.
(4) (1935) 54 C.L.R. 470.
(5) (1935) 53 C.L.R., at pp. 141, 142.

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to make alterations in the terms of the award so kept alive seems a further incident of the power, because, if it is right to retain in force by direct enactment an expired award, it is a reasonable consequence that, in case of unfairness or hardship, the Court should be allowed to exclude or modify the operation of the terms or conditions found inappropriate. But it must be remembered that *all this is a result of the expiration of the industrial settlement effected by arbitration. It is the consequence of the fulfilment of the arbitral regulation which the Court making the award must be taken to have intended*". (The italics are mine.) The reference to the power of the Court " to make alterations in the terms of the award so kept alive " is a reference to the old s. 28 (3), which, as has been said, has been replaced by s. 48 (4). Section 48 (4) is probably in some respects wider and in some respects narrower than s. 28 (3) but in any case what *Dixon* J. said is just as applicable to s. 48 as to s. 28.

What we are concerned with in the present case is the power of the Court and of the commissioners. Neither the Court nor a commissioner can lawfully make an award in terms operating beyond a period which must be specified therein, and that period cannot exceed five years. This position is in no way affected by the subsidiary provisions, which are designed merely to cover any gap between the expiration of the specified period and the making of a new award. Those provisions cannot be read as authorising the making of an award imposing obligations of such a nature that they will or may continue after the termination of that period. They cannot operate to give validity to what would be *ab initio* invalid.

To say this is not, of course, to deny that rights may accrue during the currency of an award and enforced after its expiration. Section 48 (2) has no bearing on this position. The distinction is between rights which come into existence during the currency of the award and rights which the award purports to bring into existence after its currency has expired. We may take, on the one hand, an award which provides for wages at the rate of £10 per week, and also provides that it is to continue in force for three years. Arrears of wages which have accrued due during the three years may be recovered after the expiration of the three years, and could be so recovered if there were no such provision in the Act as s. 48 (2). But the award could not lawfully provide for the rate of wages to be paid after the expiration of the three years, and, if it were not for s. 48 (2), wages earned after the expiration of the three years could not be recovered by reference to the award

but only by reference to some express or implied contract between employer and employee. The award itself covers, and can only lawfully cover, the period which it itself specifies. Then what has been lawfully awarded for that period is carried on, so to speak, by the direct operation of s. 48 (2). When, on the other hand, the Court or a commissioner is asked to make an award providing for the payment of pensions at the rate of £5 per week, it or he is being asked to make an award which may, and probably will, operate beyond the maximum allowable period of the operation of the award as such. The very nature of the claim made is such that it cannot be granted without making a provision which will bring rights into existence after the expiration of the allowable period of operation of the award. This cannot be done. The position is not affected by s. 48 (2), which does no more than carry on by direct operation provisions originally valid.

A necessary consequence of the inability of the Court or a commissioner to make an award in terms operative beyond a period to be specified in the award is to limit the scope of the subject matter with which the Court or a commissioner may lawfully deal. In other words, the permitted scope of an award in point of time indicates its permitted scope in point of subject matter. If a particular claim cannot be granted, or a particular subject matter cannot be regulated, without imposing obligations extending beyond the permitted scope in point of time, then that claim cannot be granted and that subject matter cannot be regulated. The position is clearly recognised by the new sub-s. (2A), which was introduced in 1951, and was designed to obviate that position so far as long service leave with pay is concerned. The general conclusion which emerges is that the jurisdiction to make an award is limited to regulating the conditions of a subsisting employment during a period which must be specified and must not exceed five years.

When once this position is reached—and it may be that it cannot be constitutionally and effectively avoided—the answer to the question with regard to the claims for pensions in the two logs seems plain. It is clear that no award can be made within the ambit of those claims without imposing obligations extending beyond the permitted scope in point of time. The making of any such award must go beyond regulating the conditions of a subsisting employment within that permitted scope. It follows that the subject of pensions is a subject lying outside the jurisdiction of the Court and of the commissioners.

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The claims for pensions for employees' wives is open to a further objection, which was taken in argument and has already been noted. This objection is that an award of such a nature would impose obligations as between persons other than an employer and an employee. It is not necessary, in the view which I take, to determine whether this objection is sound, but it is to be observed that to hold such an award valid would seem to go far beyond anything decided in *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (*Burwood Cinema Case*) (1) or *Metal Trades Employees Association* v. *Amalgamated Engineering Union* (*Metal Trades Case*) (2).

The order nisi should be discharged so far as it relates to " intervals off duty ". It should be made absolute so far as it relates to compensation for injury by accident and to pensions.

KITTO J. This is the return of an order nisi, obtained by a registered organisation of employers as prosecutor, for a writ of prohibition against a conciliation commissioner appointed under the *Conciliation and Arbitration Act* 1904-1951. The commissioner is in course of dealing with two industrial disputes to which the prosecutor is a party. Each dispute arose out of the service on the prosecutor of a log of claims by a registered organisation of employees, the organisations being the Merchant Service Guild of Australasia and the Australian Institute of Marine and Power Engineers which may be conveniently referred to as the Guild and the Institute respectively. The logs make extensive claims in respect of the employment of ships' officers including both navigating officers and engineers. Prohibition is sought upon the ground that the commissioner has no authority to deal with the disputes in so far as they relate to three matters dealt with in the logs, that is to say intervals off duty, compensation for accidents, and pensions. It is convenient to deal with the three matters in that order.

Intervals off duty. The provisions of the logs on this topic are contained in cl. 22 of the log served by the Guild and in cl 27 of the log served by the Institute. These clauses demand that every employee shall be entitled to be absent from his vessel in port during intervals, each to be of twenty-four consecutive hours, the number of intervals and the place and time of giving them being prescribed in respect of three classes of vessels. The first class consists of vessels voyaging between places in Australia, and also vessels voyaging to places beyond Australia if the period of

(1) (1925) 35 C.L.R. 528. (2) (1935) 54 C.L.R. 387.

absence from the home port or the port of engagement of the employee does not exceed two months. In the case of these vessels, for each complete month of the employment, including time spent on leave, four intervals are to be given at the home port only, and five intervals are to be given at the home port or from midnight to midnight on Sundays or public holidays at certain other ports. There is a proviso which need not be recited. The second class consists of vessels voyaging to ports outside Australia and absent from the home port for a period exceeding two months but returning within six months. In this case, in and for each period of six months or lesser period of complete months of employment, including time spent on leave, intervals are to be given at the rate of twenty-four per six months to be given at the home port only, and at the rate of thirty per six months to be given either at the home port or from midnight to midnight on Sundays or public holidays at certain other ports. The third class consists of vessels absent from the home port of the employee for a period exceeding six months on voyages extending beyond Australia. In this case, in and for each year of such employment or lesser period of complete months of the employment, including time spent on leave, intervals are to be given at the rate of four per month at the home port and at the rate of five per month either at the home port or at certain other ports. The clauses contain a number of subsidiary provisions, to some of which reference will be made later.

The application for prohibition in respect of intervals off duty is based primarily upon the submission that the intervals would constitute annual or other periodical leave with pay, within the meaning of ss. 13 (1) (*c*) and 25 (*c*) of the *Conciliation and Arbitration Act* 1904-1951, by which power to make an award providing for such leave is denied to a conciliation commissioner and assigned to the Arbitration Court. The privilege of an employee described by the words "annual or other periodical leave" is a familiar incident of employments governed by contract, award or statute. The phrase refers to a specified period of permitted absence from work, without loss of wages, to which an employee becomes entitled at the end of each year or other selected period of his employment, and which is allowed because of, and as providing an opportunity for recreation after, the service rendered by the employee during that year or other period. Two essential characteristics of such leave are that the right to it is a right to interrupt for a predetermined period the normal course of duty in the employment, and that there is a particular purpose for which the right is claimed

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and granted, namely the purpose of recreation after the work of the period to which it relates. A clear distinction exists between a period of leave of this description and certain days which are not days of normal work and are enjoyed by employees in most industries at week-ends and on public holidays. In ordinary parlance these days are not referred to as periodical leave, for reasons which are not difficult to appreciate. On non-working days of the kind just mentioned, the employee is off duty, not because of a privilege entitling him to depart from the normal course of duty, but because the normal course of duty does not necessitate his working on those days. They are days which he has free simply in consequence of the manner in which the total working hours for a week or other period have been arranged by the terms of the employment for all employees to whom they apply. Thus where a normal working week of forty hours is provided for by specifying as ordinary working hours a period of eight hours between stated times on each day of the week (other than public holidays) from Monday to Friday inclusive, there is a residue of hours on each of those days, and a residue of days, which automatically fall outside ordinary working hours. They are of course available for recreation, but they are not the subject of any exception for that purpose out of the normal obligation to work; and their occurrence has no relation to any period for which the individual employee has worked.

A perusal of the logs makes it clear that the intervals off duty which are claimed are of the same character as the days off duty to which the generality of employees are entitled at week-ends and on public holidays. The necessity for a special provision with respect to them arises from the fact that the nature of the employment makes it impossible to limit the number of days in each week on which the employees shall be available for work at their place of employment. The logs (in cll. 17 and 19 respectively) limit the number of ordinary working hours per day to eight, and provide for the fixing of the times within which those hours shall be worked; but mariners at sea cannot observe anything less than a seven-day working week or avail themselves of public holidays. Consequently the logs set about providing a method of limiting total normal working time by providing days off duty in port in lieu of the days which have been referred to as residual days in the case of employees on land. Though they do so, as for practical reasons they must, by approaching the problem from the point of view of intervals off duty rather than from that of times on duty, the primary purpose is still to place the desired limit upon the total normal working time rather than to except a period from

that time as a respite from the continuity of the demands which their employment makes upon them.

The period of a month is taken as the unit of time with reference to which the number of intervals is to be calculated. This enables public holidays to be taken into account. It is stated in par. (i) of cl. 22 of the Guild's log, and in par. (j) of cl. 27 of the Institute's log, that the intervals claimed are based upon the assumption that there are only ten public holidays (*scil.* in each year), and an additional interval is claimed for every additional public holiday. Allowing for ten public holidays and fifty-two week-ends in a year, the monthly average of non-working days for which substitutes are to be allowed is 9.5. Clauses 22 and 27 of the respective logs provide for nine only; but as against that, cll. 23 and 28 provide for the addition of three days to an employee's annual leave on account of intervals not taken into consideration under the earlier clauses. Then both cl. 22 of the Guild's log and cl. 27 of the Institute's log provide in a sub-cl. (c) that in the case of an employee serving for any period less than one or more complete months, the employee shall receive for every 2.3 days of the employment not forming part of a complete month one additional home port interval. This preserves the proportion in which it is assumed that a month is divided between working and non-working days, namely twenty-one working days and nine non-working days. This division of the month is reflected elsewhere in the logs; since wages are claimed at monthly rates (cll. 15 and 17), the daily rate, which must be ascertained for some purposes mentioned in the logs, is to be reached by dividing the monthly cash wage (or that wage plus a fraction of the basic wage) by twenty-one: (cll. 1 and 4, definitions of "Daily Rate"). Finally, cl. 17 (e) of the Guild's log and cl. 27 (i) of the Institute's log contain provisions which emphasise the character of intervals off duty as making up as far as possible for the days on which employees on land are able to leave the scene of their labours and go about their own affairs. The former paragraph provides that while a vessel is at the home or residential port of an employee on a Saturday, Sunday or public holiday and there spends upwards of twenty-four hours, such employee shall be granted intervals under cl. 22 to the extent of the available time. The latter paragraph provides that if an employee performs work on a Sunday or public holiday in his port of residence, he shall be paid at the overtime rate and be given in his port of residence an additional interval; but if he performs work on a Sunday or public holiday in a port other than his port of residence he shall be paid at the overtime rate but the interval

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so worked shall be credited against him as one of his intervals under cl. 27.

The nature of these intervals and their manifest purpose place them completely outside the conception of annual or other periodical leave. The provisions for them are designed only to reconcile the prescription of a maximum number of ordinary working hours with a due recognition of the practical necessities of the industry. They do not operate to entitle each employee to a form of leave having reference, as regards either the granting or the duration of it, to any period of his individual service, or intended as a respite which he has earned by that service. Their operation is to give all employees covered by the logs who sail in the one vessel the same benefit as one another, for the purpose of reducing the average of their ordinary working hours per month to the level observed in the case of employees on land. There is, therefore, no ground for the contention that this aspect of the dispute is beyond the authority of the commissioner.

Compensation for injury. The next aspect of the dispute with which the prosecutor denies that the commissioner has power to deal is that which is the subject of cl. 28 (3) and (4) of the log served by the Guild and cl. 32 (3) and (4) of the log served by the Institute. The claim is that, if personal injury by illness or accident arising out of or in the course of the employment be caused to an employee, the compensation payable by the employer shall be that provided for under the Seamen's Compensation Acts of the Commonwealth, with certain exceptions. The *Seamen's Compensation Act* 1911-1949 (Cth.) does not of its own force apply to the employees with whom the logs are concerned, such employees being excluded from the meaning of the word " seaman " by the definition contained in s. 3 inserted by the Act No. 7 of 1949. The logs provide that the right to compensation (by which obviously is meant the right to the immediate receipt of payments of compensation), is not to commence until the contract of employment has been determined and the employee is no longer entitled to his wages under the award.

The prosecutor's challenge to the jurisdiction of the commissioner to deal with the subject-matter of this claim is based in the first instance upon the fact that, if any provision with respect to it is included in an award, the rights of employees and the obligations of employers under that provision will become enforceable after the employment has ceased. The recipients of compensation will not be employees, but will be either incapacitated ex-employees or the personal respresentatives of deceased employees. The persons

required to make the payments will not be employers, but will be ex-employers. Therefore, it is said, the claim lies outside the sphere of the employer-employee relationship; its subject matter is not a matter pertaining to the relations of employers and employees, and is not within any of the particular categories of industrial matter set out in s. 4 of the *Conciliation and Arbitration Act*.

The argument assumes that the "matter" which has to be considered for the purpose of deciding whether it is an industrial matter is the right to receive each amount of compensation as it becomes payable. It is that right and that only which will accrue after the termination of the employment. But the "matter" to be considered is the matter as to which the dispute exists; and the dispute exists upon the question whether the employment of the employees whose organisations are involved shall be upon the terms (*inter alia*) that employment injuries (as they may be called for brevity) shall be compensatable. That subject of dispute in my opinion falls squarely within the definition of "industrial matters" in s. 4 of the *Conciliation and Arbitration Act*. It is not a subject which is foreign to the employment, for the compensatable character of an injury is dependent upon its being caused to an employee (that is to say during the employment), and caused by illness or accident arising out of or in the course of the employment. A provision affecting an employer with a liability upon the happening of such an injury might with perfect appropriateness be included in an employment contract, for it would prescribe an incident of the relation existing between an employer as employer with an employee as employee. The topic is therefore within the general portion of the definition of industrial matters in s. 4: *R.* v. *Kelly*; *Ex parte State of Victoria* (1). Moreover, it falls within both par. (*b*) and par. (*h*) of that definition, by which the privileges, rights and duties of employers and employees, and the terms and conditions of employment, are specifically included in the expression "industrial matters". It surely cannot be a relevant consideration that, if a provision for compensation is included in an award, the obligations of employers arising under the provision will fall to be discharged by payments to be made after the relationship of employment has ended. If a claim with respect to wages included a provision that payment of the whole or a portion of the wages should be deferred until after the termination of the employment, presumably no one would maintain that the provision for deferment precluded the claim from being a claim as to an industrial matter.

(1) (1950) 81 C.L.R. 64, at p. 84.

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It was further contended on behalf of the prosecutor that the claim for a compensation provision is within the jurisdiction, not of the conciliation commissioner but of the Court. Such a provision is said to be one providing for, or altering a provision for, sick leave with pay, within the meaning of ss. 13 (1) (*c*) and 25 (*c*). The submission is clearly untenable.

If the commissioner were minded to include in his award a provision granting compensation upon death or incapacity from illness or from accident arising out of or in the course of the employment, he would need to evolve a provision in terms very different from those of the logs. The logs make no real effort to face the difficult problems which would confront the draftsman of a workable compensation scheme. For one thing, the award could not validly confer on the tribunals referred to in the *Seamen's Compensation Act* jurisdiction to adjudicate upon claims to compensation under the award, and some other means of deciding claims would need to be adopted. But such considerations have no bearing upon the question which alone is before us at this stage, namely whether the dispute as to compensation is within the arbitral authority of the commissioner. There is, I think, only one question not already considered which bears upon that question, and that is whether the existence of ss. 127 and 132 of the *Navigation Act* 1912-1950 (Cth.) debars the commissioner from making any provision intruding into the field of compensation for incapacity arising from employment illnesses or injuries. If those sections exhibited an intention to make, in respect of the employees for whom claims are made by the logs, all the provisions which the Parliament considered ought to be made for them in that field, it may well be that, in accordance with the maxim *generalia specialibus non derogant*, the *Conciliation and Arbitration Act* should not be construed as empowering the respondent commissioner in settling the dispute to make an award dealing with the subject. But I do not think that the sections should be regarded as belonging to that field, and I am therefore of opinion that those sections should not affect the decision of this case.

Pensions. The final matter upon which prohibition is sought is the claim for pensions, contained in identical terms in cll. 34 and 39 of the respective logs. The pensions range from one-quarter of the annual salary earned by the employee during his last year after ten years' service to one-half of that annual salary after fifteen years' service. A pension at the appropriate rate is claimed for an employee upon attaining sixty-five years, or earlier if, on the grounds of infirmity, he becomes unable to render the

agreed service. There is added a claim for quarterly adjustments to cover variations in the purchasing power of money, and a claim that in the event of the employee predeceasing his wife, then the widow shall be paid one-half of the pension to which the employee would have been entitled. The clauses making these claims commence with two paragraphs which must be quoted in full, with corrections of punctuation to make the meaning clear: "(a) An Agreement or an Award shall be made, indeterminate so far as its duration is concerned but subject to variations by mutual consent between the parties or by order of the Arbitration Court, containing the undermentioned provisions for the payment of pensions. (b) Notwithstanding that the employee may be retired by the employer the relationship of employer and employee shall continue while, under the provisions set out hereunder, such employee is entitled to monetary allowance during the time he is not actually working".

Similar paragraphs occur in the clauses of the logs which make claims for extended leave (see pars. (j) and (k) of cll. 23 and 28 of the respective logs).

The provision of par. (a) of the relevant clauses was attacked as being in conflict with s. 48 (1) and (2) of the Act, which provide, in effect, that an award shall continue in force for a period to be specified in the award, not exceeding five years from the date upon which the award comes into force, and thereafter, unless otherwise ordered, until a new award has been made. Of course the comissioner cannot make an award conforming to par. (a), but the inclusion of that paragraph in the demand does not produce the consequence that the disputes created by the omission of the employers to concede the demands made by the pension clauses are such that the commissioner has no power to settle them by appropriate awards made in conformity with the requirements of the Act.

Paragraph (b) is apparently directed to precluding the prosecutor's main argument in relation to pensions. This argument was that the claims made are outside the conception of industrial matters because they seek rights in respect of a period after the cessation of the employment. The prosecutor sought to dispose of the paragraph by saying that jurisdiction under the *Conciliation and Arbitration Act* exists only with respect to an actual employer-employee relationship and cannot be extended by creating a fiction that there is such a relationship when in fact there is none. But the function of par. (b) does not appear to be to create a fiction at all. Its effect would seem to be to preclude a purported