HIGH COURT OF AUSTRALIA

Union Steamship Co. of New Zealand Limited

Vs.

Commonwealth

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

16 June 1925

Knox C.J.

The plaintiff Company is the owner, and the plaintiff Rolls the master, of the steamship *Niagara*, a British ship registered in the United Kingdom and trading between Sydney and Vancouver. The plaintiff Rolls, having occasion to discharge the crew of that ship and to engage a new crew in Sydney, applied to the defendant Jones, who is the superintendent of the Mercantile Marine Office in Sydney, to allow such discharges and engagements to be effected in his presence in accordance with the provisions of the *Merchant Shipping Acts 1894 and 1906*. The defendant Jones refused to allow the discharges or engagements to be effected in his presence *unless all the conditions (including payment of fees) imposed by the Navigation Act 1912-1920 were complied with*. The plaintiffs, under protest, paid the fees demanded and effected discharges and engagements *in accordance with the conditions imposed by the Navigation Act*. This action is brought to recover the fees so paid, and the parties have agreed in stating a case for the opinion of this Court on the following questions: "(a) Whether in the circumstances herein set forth the said master was required by law to comply with the conditions (including the payment of fees) with respect to the discharge of seamen imposed or purporting to be imposed by the Navigation Act 1912-1920 and the Regulations thereunder; (b) Whether in the circumstances herein set forth the said master was required by law to comply with the conditions (including the payment of fees) with respect to the engagement of seamen imposed or purporting to be imposed by the Navigation Act 1912-1920 and the Regulations thereunder."

The plaintiffs contend that, as the *Niagara* is a British ship, registered in the United Kingdom, the discharge abroad of seamen from, and the engagement abroad of seamen for, that ship are regulated by the provisions of the *Merchant Shipping Acts*, and that it was the duty of the defendant Jones to allow such discharges and engagements to be effected in accordance with those Acts in his presence without payment of any fee. The defendant Jones seeks to justify his refusal by reference to the *Navigation Act 1912-1920* and the Regulations made thereunder. The plaintiffs reply that certain of the provisions of Part II. of the *Navigation Act* and of the Regulations, including the regulation which provides for payment of fees on discharges or engagements being effected in the presence of the superintendent, if they apply to British ships registered in the United Kingdom, are repugnant to the provisions of the *Merchant Shipping Acts* and are therefore void and inoperative by force of sec. 2 of the *Colonial Laws Validity Act 1865*.

The first question is whether the provisions of the *Merchant Shipping Acts* apply to the discharges and engagements in Sydney of seamen in connection with the *Niagara*. It will be necessary to consider separately the provisions relating to discharges and those relating to engagements.

As to Discharges:—Sec. 30 (1) of the *Merchant Shipping Act 1906* provides that the master of a British ship shall not discharge a seaman at any place out of the United Kingdom (except at a port in the country in which he was shipped), unless he previously obtains, endorsed on the agreement with the crew, the sanction of the proper authority, but that sanction shall not be refused where the seaman is discharged on the termination of his service. "Proper authority" is defined as meaning, as respects a place in a British possession, a superintendent, or, in the absence of such superintendent, the chief officer of customs at or near the place. If a master fail to comply with the provisions of sec. 30, he is guilty of a misdemeanour. Sec. 31 of the same Act provides that, where the master of a British ship discharges a seaman at any place out of the United Kingdom, he shall give to that seaman a certificate of discharge in a form approved by the Board of Trade. By sec. 260 of the *Merchant Shipping Act of 1894* read in conjunction with sec. 49 (3) of the Act of 1906, the provisions of Part IV. of the Act of 1906 (which consists of secs. 28 to 49, both inclusive) are made to apply to all sea-going ships registered in the United Kingdom and to the owners, masters and crews of such ships, subject to certain immaterial exceptions. The *Niagara* is a sea-going ship within the meaning of this provision, and it follows that discharges abroad of seamen serving on her are within the provisions of the *Merchant Shipping Act 1906* above referred to. The defendant Jones was the "proper authority" within the meaning of these provisions, and, as the engagements of the seamen whom the plaintiffs desired to discharge had terminated, he had no right to refuse his sanction to their discharge under the *Merchant Shipping Act 1906* or to insist on a discharge being given under the *Navigation Act* if the provisions of the former Act were binding on him.

As to Engagements:—Sec. 113 of the *Merchant Shipping Act 1894* provides that the master of every ship (with certain immaterial exceptions) shall enter into an agreement in accordance with that Act with every seaman whom he carries to sea from any port in the United Kingdom. Sec. 114 provides that the agreement shall be in a form approved by the Board of Trade, and shall contain certain particulars specified in the section. Sec. 124 is in the words following:—"(1) With respect to the engagement of seamen abroad, the following provisions shall have effect:—Where the master of a ship engages a seaman in any British possession other than that in which the ship is registered or at a port in which there is a British consular officer, the provisions of this Act respecting agreements with the crew made in the United Kingdom shall apply subject to the following modifications:—(a) In any such British possession the master shall engage the seaman before some officer being either a superintendent or, if there is no such superintendent, an officer of customs: (b) at any such port having a British consular officer, the master shall, before carrying the seaman to sea, procure the sanction of the consular officer, and shall engage the seaman before that officer: (c) the officer shall endorse upon the agreement an attestation to the effect that the agreement has been signed in his presence and otherwise made as required by this Act, and also, if the officer is a British consular officer, that it has his sanction, and if the attestation is not made the burden of proving that the engagement was made as required by this Act shall lie upon the master. (2) If a master fails to comply with this section he shall be liable for each offence to a fine not exceeding five pounds." Sec. 260 provides that Part II. of the Act (consisting of secs. 92 to 266 both inclusive) shall, unless the context or subject matter requires a different application, apply to all sea-going ships registered in the United Kingdom and to the owners, masters and crews of such ships, subject to certain provisions not relevant to this case.

For the defendants it was argued that sec. 124 on its true construction does not extend to ships registered in the United Kingdom. It was said that the words "Where the master of a ship engages a seaman in any British possession other than that in which the ship is registered" import that the ship first mentioned was registered in a British possession, and that a ship registered in the United Kingdom could not be said to be a ship registered in a British possession. If these words stood alone

and if the section contained the original enactment on the subject matter with which it deals, this argument might have greater force. But the section provides in one phrase for two cases, namely, where the master of a ship engages a seaman (*a*) in any British possession other than that in which the ship is registered or (*b*) at a port in which there is a British consular officer. In case (*b*) no reason can be suggested for excluding from the operation of the section ships registered in the United Kingdom, and it seems proper to interpret "ship" where first mentioned in the section as meaning any British ship wherever registered. This view is supported by the fact that in the Act of 1894, which is a consolidating Act, sec. 124 takes the place of secs. 159 and 160 of the *Merchant Shipping Act 1854*, which clearly apply to the engagement of seamen abroad by the master of a ship registered in the United Kingdom.

For these reasons I am of opinion that the provisions of the *Merchant Shipping Acts* apply to the discharges and engagements now in question.

The next question for consideration is whether the provisions of the *Navigation Act* and Regulations on which the defendants rely are repugnant to the relevant provisions of the *Merchant Shipping Acts*. The *Navigation Act* by sec. 61 requires that the discharge given shall be in the prescribed form, and by sec. 60 that the person engaging or discharging any seaman shall pay the prescribed fees. "Prescribed" means prescribed by the Act or by regulations made under the Act, and by sec. 425 the Governor-General is empowered to make regulations in relation to (*inter alia*) the fixing of the fees to be paid in respect of any matter under the Act or under the regulations. Reg. 9 of the *Navigation (Master and Seamen) Regulations 1922* (Statutory Rules 1922, No. 34) provides that the fee for engagements or discharges effected before a superintendent shall be, for each seamen engaged or discharged, two shillings, and that the master may deduct one-half of the fee from the wages of the seamen engaged or discharged. It is apparent that this regulation only authorizes the exaction of a fee when the engagement is made or the discharge is given under the *Navigation Act*. Regs. 10 and 11 prescribe the form of certificates of discharge and of reports of conduct.

Sec. 46 of the *Navigation Act* provides that the master of a ship (with certain immaterial exceptions) who engages any seaman in Australia shall enter into an agreement with him in the prescribed form, and imposes a penalty of £5 for any breach of this provision. Sub-sec. 3 of sec. 46 provides that the agreement shall be so framed as to admit of stipulations *approved by the superintendent* being introduced therein at the joint will of the master and seaman. Sec. 69 prohibits (*a*) the insertion in the agreement of any stipulation for the payment in advance to any seaman of the wages or any portion thereof, and (*b*) the payment of any wages in advance; and by sub-sec. 3 any agreement for payment in advance is avoided.

Some of the provisions of the *Merchant Shipping Acts* relating to engagement and discharge have been referred to above; I mention in addition the provision in sec. 114 of the Act of 1894 that the agreement shall be so framed as to admit of stipulations being introduced at the joint will of the master and seaman whether respecting advances or otherwise. No approval by the superintendent is required and an agreement to pay wages in advance is permitted.

In the case of discharges and engagements of seamen in Australia to which the provisions of the *Merchant Shipping Acts* apply, I think it is clear that the provisions of the *Navigation Act* which require the agreement or dlscharge to be in the prescribed form are inconsistent with and repugnant to the relevant provisions of the *Merchant Shipping Acts*. The form of agreement prescribed under the *Navigation Act* may, and in respect of advances of wages must, differ from that approved by the Board of Trade, and under the *Merchant Shipping Acts* the master of a ship which is within the

provisions of those Acts commits an offence if he carries to sea a seaman who has not signed an agreement in the form approved by the Board of Trade. The provisions regulating discharges are open to a similar objection.

The remaining question is whether sec. 2 of the *Colonial Laws Validity Act* applies. That section provides that any colonial law which is in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, shall be read subject to such Act and shall to the extent of such repugnancy be void and inoperative. It is not disputed that the Commonwealth of Australia is a "colony" within the meaning of that provision, but it was argued for the defendants that the power given by the Constitution to the Commonwealth Parliament to legislate with respect to shipping and navigation (secs. 51 and 98) excluded the operation of the *Colonial Laws Validity Act* on laws made by the Commonwealth Parliament with respect to those subjects, the *Commonwealth of Australia Constitution Act* being an Imperial Act later in date than the *Colonial Laws Validity Act*. It was said also that the Constitution Act operating on secs. 51 and 98 of the *Constitution* exempts the Commonwealth Parliament from the restrictions on colonial legislation imposed by secs. 735 and 736 of the *Merchant Shipping Act 1894*.

In effect the argument is that the Constitution Act operates as an implied repeal *pro tanto* of the *Colonial Laws Validity Act* and the *Merchant Shipping Act 1894*. It would follow, if this contention were correct, that the *Colonial Laws Validity Act* would have no application to laws enacted by the legislature of a colony on which a constitution in the usual form—i.e., giving power to make laws for the peace, order and good government of the colony—had been conferred by an Act of the Imperial Parliament passed after 1865. In my opinion the argument for the defendants on this point cannot be sustained. The *Colonial Laws Validity Act* is an Act dealing with laws made by colonial legislatures generally. It assumes the competence of a colonial legislature to make laws with respect to a given subject matter, and deals only with such provisions of a law otherwise valid as are repugnant to any Act of the Imperial Parliament or to any order or regulation made thereunder. It deals with a special subject, and I can see nothing to justify a limitation of the plain words "any colonial law" to laws made under authority given by the Imperial Parliament before the passing of the Act. In my opinion, the *Colonial Laws Validity Act* applies to laws passed under a power given by an Imperial Act passed after that Act, as much as to laws passed under a power given by an Imperial Act passed before it.

In *In re R. v. Marais*[1] the Judicial Committee, speaking by the Lord Chancellor, said:—"The obvious purpose and meaning of that statute was to preserve the right of the Imperial Legislature to legislate even for the colony, although a local legislature had been given, and to make it impossible, when an Imperial statute had been passed expressly for the purpose of governing that colony, for the colonial legislature in that sense to enact anything repugnant to an express law applied to that colony by the Imperial Legislature itself. That is the meaning of those words."

For these reasons I am of opinion that the provisions of the *Navigation Act* which require engagements and discharges to be effected in the manner provided by that Act are, so far as they purport to extend to British ships in the position of the *Niagara* in this case, rendered void and inoperative by the *Colonial Laws Validity Act 1865*, and, as the regulation providing for payment of the fees exacted in this case applies only to engagements and discharges effected under the provisions of the *Navigation Act*, the plaintiffs were not liable to pay such fees.

Both questions submitted should be answered in the negative.

Isaacs J.

The question, concretely stated, is whether the captain of the *Niagara*, a British ship registered in England and not engaged in the coastal trade of the Commonwealth, nor having its first port of clearance and port of destination in the Commonwealth, was in discharging and engaging seamen in Australia governed by the Imperial *Merchant Shipping Acts 1894 and 1906* or by the *Australian Navigation Act*, or by both. The Commonwealth officials insisted that he was bound to proceed in compliance with the *Australian Act*; he, on the other hand, insisted on proceeding under the Imperial Act. Ultimately, under protest, he proceeded under the *Australian Act*, and accordingly paid the fees demanded, amounting to £52. This action being brought to recover back the money so paid, the question is which statute applied to the circumstances of this case, or whether both so applied.

The plaintiff's contention is that the appropriate law is found in the *Merchant Shipping Acts 1894 and 1906*, and that the provisions of the *Navigation Act* requiring him to proceed under that Act are repugnant to the Imperial Act. By reason, therefore, of sec. 2 of the *Colonial Laws Validity Act 1865* it is contended that the *Navigation Act* is, to that extent, void and inoperative, and that the fees were unlawfully demanded and should be returned. The Commonwealth contends, first, that on a true construction of sec. 124 of the *Merchant Shipping Act 1894* there is no repugnancy, and, next, if there is, the Commonwealth Constitution empowers the Parliament to legislate fully on the subject of navigation and shipping as part of foreign and inter-State commerce even to the extent of inconsistency with Imperial legislation existing at the date of the Constitution and directly applying to Australia.

As to repugnancy, the question primarily depends on the interpretation of the word "ship" in sec. 124. If "ship" there used in reference to a possession includes a ship registered in the United Kingdom, there is possible repugnancy; if, however, it is in that connection confined to ships registered in some possession as distinguished from the United Kingdom, then there is no repugnancy because the present case would not be provided for by the Imperial Act.

The Merchant Shipping Acts.—The *Merchant Shipping Acts 1894 to 1906* treat merchant shipping as an Imperial subject. They indicate an endeavour to provide on a national basis for all contingencies of British mercantile navigation throughout the Empire, partly by direct enactment and partly by optional local enactment imperially sanctioned (secs. 711, 735 and 736). But the Acts in one way or another cover the whole subject. As to the engagement of seamen there are various provisions. Sec. 113, with a certain small exception immaterial here, provides that the master of "every ship" shall, when sailing from any port in the United Kingdom, enter into an agreement—called "the agreement with the crew"—and "in accordance with this Act" with every seaman whom he carries to sea as one of his crew. Sailing from the United Kingdom his ship must be either a foreign-going ship or a home trade ship; and penalties are provided by sec. 113 itself for carrying a seaman to sea without "an agreement," that is, without any agreement at all. I may point out at once that, if there is "an agreement," so as to escape the penalty of sec. 113, but the agreement used by any person is, without reasonable cause, *not in the form approved by the Board of Trade*, sec. 722 makes it an offence even greater than that under sec. 113, the maximum penalty being double. This demonstrates the importance attached by the Imperial Parliament to the requirement of sec. 114 that the agreement shall be in the form approved by the Board of Trade. Sec. 114 enumerates certain particulars which must be included in the agreement so that every man may know his obligations and rights as to those matters. Among those particulars are those marked (*g*), namely, "any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful

punishment for misconduct which have been approved by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt." Then in sub-sec. 3 it is enacted that "the agreement with the crew"—which, by reference to sec. 113, means the agreement under the Imperial Act—shall be framed so as to admit of such stipulations "to be adopted at the will of the master and seaman" as are not contrary to law. Now, that, so far, is general as to all ships leaving the United Kingdom either as a foreign-going ship or "a home trade ship"—in each case the United Kingdom (or for a home trade ship the Channel Islands or the Isle of Man) being one terminus. Sec. 115 adds provisions for foreign-going ships, and sec. 116 for home trade ships. The object of that sub-section (sec. 114 (3)) is of the highest importance. It is to secure that *whatever* is agreed upon between master and seamen shall be contained in the written articles. In other words, the essence of the statutory intention on the subject in the *Merchant Shipping Acts* is that "the agreement" *shall in itself be precise and complete*, and nothing whatever shall be part of the actual agreement of the parties except that which is contained in the articles under the Acts. Sec. 124 makes a general provision for "the engagement of seamen abroad." It begins: "Where the master of a ship engages a seaman." I stop there for a moment to consider the absolute generality of the words so far. "Abroad" means anywhere outside the United Kingdom. "Ship" is the generic term for "every description of vessel used in navigation not propelled by oars" (sec. 742). It is, of course, limited to British ships, because that is the subject of the Act, and internationally that must be so understood. Then the words quoted are expressed as to each individual instance of engaging a seaman, indicating that all seamen engaged abroad on that ship are, whenever possible, to be protected by the section. Then the places abroad where the Act contemplates possible protection are (1) British possessions and (2) foreign ports where there is a British consular officer. As to British possessions where the ship is registered, sec. 261 (d) leaves the matter to the "jurisdiction of the government of the British possession in which the ship is registered." That is, local self-government is recognized as to ships belonging to the local possession. But that leaves all other British possessions to be dealt with with respect to all British ships. Sec. 124 says that when the engagement is in any British possession other than that in which the ship is registered—the counterpart of sec. 261 (d)—the provisions of this Act respecting agreements with the crew made in the United Kingdom shall apply with certain modifications. That means, not that that part of sec. 124 is confined to ships registered in British possessions, but that the engagement referred to is confined to British possessions where the ship is not registered. The ship may be registered either in the United Kingdom or in some other British possession, or, perhaps I should add, anywhere within the terms of sec. 4 so as to be within the expression in sec. 2 (1) "registered under this Act." As to foreign ports, they are such as have a British consular officer. *Ex concessis* the "ship" in relation to such a port includes a ship registered in the United Kingdom. It is impossible, when we refer back to the word "ship," to say it has two meanings which may be distributively applied to the two classes of places "abroad" specified by sec. 124.

I have so far considered sec. 124 upon its literal construction independently of authority. The case of *Ritchie v. Larsen*[2], both in the argument of Mr. *Hamilton* (now Lord *Sumner*)[3] and in the judgment of *Channell* J.[4], strongly supports the view I have taken. In Mr. *Hamilton's* argument it was said: "Sec. 124 is intended to extend such provisions as those relating to engagement of seamen, contained in secs. 113-115, to cases of engagement abroad." In the judgment accepting that view, it is said: "It is quite clear that the main object of sec. 124 is to provide, in the case of seamen who are engaged abroad, for matters which are dealt with by sec. 115 in the case of seamen engaged in the United Kingdom." That case was confirmed in *Rowlands v. Miller*[5].

The suggested limited meaning of "ship" in relation to engagement in British possessions would neutralize much of that intended protection. Sec. 260 makes a wide application, but I do not think

its function is to help out this point. The force of that section is in the word "sea-going" and to set at rest any doubt as to how extensive among "ships registered in the United Kingdom" is the application of Part II. "Sea-going" means simply that the ship does go to sea (*Salt Union Ltd. v. Wood*[6]). The section, in short, is not intended to bring for the first time into Part II. "ships registered in the United Kingdom" as a class, but, except where the context or subject matter forbids it, to extend the part to all such of those ships as go to sea with the exceptions stated in the section itself. Sec. 261 performs the same function for "sea-going British ships registered out of the United Kingdom." Sec. 260 effectually brings the *Niagara* into the ambit of sec. 124, because, although it is neither a "foreign-going" nor a "home trade" ship from the United Kingdom standpoint, it is a "sea-going" ship and is registered in the United Kingdom. Unless, therefore, the law as it appears from the *Merchant Shipping Acts 1894 to 1906* be rendered inapplicable to Australia by the *Navigation Act of 1912-1920*, the engagements referred to in the case fell to be governed by the Imperial provisions.

Then, as to discharges, sec. 128 of the Act of 1894 requires the master to give a discharged seaman a certificate of his discharge "in a form approved by the Board of Trade" under a penalty not exceeding £10, and also by sec. 132 he is to deliver "in the manner provided by this Act a full and true account, in a form approved by the Board of Trade" of the seamen's wages. By sec. 136 the seaman where the discharge takes place before a superintendent must sign a release "in a form approved by the Board of Trade." Again it is seen to be a constant and permeating principle that the oversight and protection of the seaman is to require the intervention of the Board of Trade. The law as to discharge stands in the same position as the law regarding engagement.

The Navigation Act 1912-1920.—Sec. 46 required the master of the *Niagara* when engaging a seaman in Australia to enter into an agreement with him "in the prescribed form." "Prescribed" there means prescribed by the Act or by regulations under the Act (*Acts Interpretation Act 1904*, sec. 9). By sec. 425 the Governor-General (in Council) is the prescribing authority. To have proceeded to sea without such agreement would have been punishable by a fine of £5 in respect of each seaman. To use the form as approved by the Board of Trade would not afford an escape from contravention, unless it happened to be prescribed by the Governor-General. It is obvious from an inspection of sec. 46, and, indeed, of the group of sections headed "Division 8.—The Agreement," that, just as in the Imperial *Merchant Shipping Acts*, a complete scheme is enacted. For the purpose of obtaining that complete scheme it is required that the articles shall be in the form and to the effect provided directly or indirectly by the Commonwealth Parliament. That is to say, the contractual obligations of the parties shall be found complete in the agreement that conforms to Division 8. Both the Imperial and the Commonwealth statutes are based upon the same fundamental idea. *Abbott on Shipping*, 14th ed., at p. 220 (following the 5th ed., at p. 433), points out that "in order to prevent the mischiefs that frequently arose from the want of proper proof of the precise terms upon which seamen engaged to perform their service in merchant ships" it was enacted in the reign of George II., &c. The history of ships articles is there traced down to the Act of 1894.

Validity of the Navigation Act.—So far as the validity of the relevant provisions of the *Navigation Act* depends on the extent of power granted by the Constitution, I can entertain no doubt whatever. Every such provision is a recognized part of the subject of navigation and shipping and that subject is, by sec. 98 of the *Constitution*, expressly included in the trade and commerce power enumerated in sec. 51. But, conceding so much, the question is raised whether, by force of sec. 2 of the *Colonial Laws Validity Act 1865* (28 & 29 Vict. c. 63), the relevant Australian provisions are not "void and inoperative" as being repugnant to the Imperial provisions. That question involves two important considerations, namely, are the challenged provisions repugnant, and, if so, are they nevertheless

dominant by reason of the *Commonwealth of Australia Constitution Act*, itself an Imperial Act (63 & 64 Vict. c. 12)?

Repugnancy.—The only real danger of error as to this question is in the manner of applying the test of repugnancy. What is to be avoided in the present case is meticulous inquiry whether, if all the conditions in both sets of enactments were aggregated into one agreement, they could be humanly observed or, if applied to the one discharge, the parties could comply with all. That is not the present problem. One approximating it in principle might arise in relation to other Acts or even other parts of these Acts. What we have to remember is a much broader proposition when the real nature and import of the legislation is borne in mind. The *Merchant Shipping Acts* deal with the subject of British merchant shipping from the standpoint of what is now recognized as the whole British Commonwealth of Nations, and in some instances the Acts regulate the supremacy of law as among or between the constituent units of that Commonwealth. Secs. 264 and 265 are signal examples. The Commonwealth Act treats the subject matter from an all-Australian standpoint. State legislation could deal with it only on a more limited basis. Therefore, for the purpose of detecting repugnancy, if there be any, the attention of the Court is not to be concentrated on mere minute verbal expressions or individual differences of requirements. What we have to measure is the broad intention to treat Australian shipping, not as a separate integer, but as a component part of one Imperial integer. Particular expressions are valuable in order to ascertain this purpose. The matter resembles the case of a State industrial disturbance being regarded, not as a separate independent disturbance, but as an indivisible part of an inter-State industrial dispute. The *Merchant Shipping Acts* deal with the shipping of each part of the Dominion as part of British shipping, and the Acts make their own exceptions. The Acts therefore intend, apart from their own exceptions, to make the provisions which are relevant to this case cover the field, and to make the agreement required and the discharge required the only agreement and the only method of discharge required by the law of the Empire. Repugnancy to that central and commanding intention is repugnancy to the Acts, just as State interference with a Commonwealth award, by specially regulating the State portion of an Australian industrial dispute, would be repugnancy to Commonwealth law. My observations have no reference to local legislation merely assistant to and for the better effectuation of the supreme law applicable to the subject matter.

First, then, we have to define what is meant by "repugnancy" in the present connection. In *Attorney-General for Queensland v. Attorney-General for the Commonwealth*[7] I have stated, with some elaboration, my understanding of the word "repugnant" as used in the *Colonial Laws Validity Act*, and have there traced to some extent the history of the word. I refer to what is there set out at length, and merely reaffirm the conclusion that "repugnancy" is equivalent to inconsistency or contrariety. In *McCawley v. The King*[8] my brother *Rich* and I stated our view of sec. 2 of the *Colonial Laws Validity Act 1865*. Two further references may be made. One is the case of *The Farewell*[9], where *Stuart* J., in the Vice-Admiralty Court, applied sec. 2 of the *Colonial Laws Validity Act* by giving effect to a Dominion Act allowing a pilot two dollars a day, only so far as it was not in conflict with the *Merchant Shipping Act 1854* allowing only ten shillings and sixpence a day, the difference being disallowed. The other reference is to *Hearn's Government of England* (1886), 2nd ed., p. 596. Speaking of the supremacy of the Imperial Legislature, the learned author says:—"It was well settled by common law, and it has been declared by an Act of Parliament passed in the year 1865, which is worthy of your attention. Originally the rule ran, much in the same form in which power is usually given to corporations to make by-laws, that a colonial Act must not be repugnant to the law of England. Such a restriction, if it were construed literally, would have proved too severe; and accordingly repugnancy was defined to imply, not diversity, but conflict; that is, if there were an Imperial law and a colonial law on the same subject, but with different enactments, the Imperial law

must prevail." Those further references are in harmony with the cited references in the two cases mentioned.

It remains to apply the principle in order to see whether there is repugnancy in the sense of inconsistency or conflict between the *Merchant Shipping Acts* and the *Navigation Act*. When we remember that each is aiming at the same thing, namely, to compel the making of an agreement which shall formally, precisely, *completely* and exclusively set forth *all* the terms which are to constitute and to dissolve the mutual contractual obligations of master and seaman, one of two alternatives must be admitted: Either the two systems are identical or they are in conflict. You cannot have at the same time, between the same persons and in respect of the same subject matter two different agreements each complete and exclusive. One must, on ordinary principles of contract, supersede or abrogate the other. Neither statutory system is established as an addition to the other. Each assumes that it occupies the whole field. But each exercises a different authority, each establishes its own distinct controlling agency, each agency operating independently, and necessarily independently, of the other. A good test would be if we suppose the contested provisions in the *Navigation Act* were contained in an Imperial Act not enacting any express repeal of any part of the *Merchant Shipping Act*. Could it have been said the two sets of provisions could stand together? Was the second set intended to supplement or to supplant the first? In *Mitchell v. Scales*[10] I quoted from an American decision which is worth repeating after eighteen years. In *Norris v. Crocker*[11] *Catron* J. said: "As a general rule it is not open to controversy, that where a new statute covers the whole subject matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication; as the provisions of both cannot stand together." Of course a colonial Parliament cannot repeal Imperial legislation, except where Imperial law so permits it, as in sec. 735 of the *Merchant Shipping Act 1894*, but the test of whether its legislation is inconsistent with Imperial legislation is the same as if it had the power of repeal. I am unable to understand how the two sets of enactments with which this case is concerned can stand together, unless it can be shown—which seems to me impossible—that they are identical; and not merely identical in terms but identical in obligation. For instance, if there be a discharge in conformity with the Imperial Act, is the contractual tie completely dissolved? Or does it still continue until the Australian law of discharge also operates? And, if there be a State law on the same subject, must that be satisfied also before the relation of master and seaman is ended?

It was suggested that the Board of Trade might approve of the form prescribed by the Governor-General, or the Governor-General might prescribe exactly what the Board of Trade approves. That is not reasonably possible. But if it were, it would be futile and there would be no sense or virtue in doing precisely the same thing twice, incurring double expense and liability to two sets of penalties and double prosecutions under two sets of laws for the one state of facts. That was not the intention of the Federal Parliament, and any construction of the Act that depended upon that intention would, in my opinion, do scant justice to the sense of Parliament. The basic meaning of each Act being a complete and exclusive agreement, they are mutually repugnant in this respect, and, unless the final view presented by the Commonwealth be correct, namely, the supremacy of the Federal Act by reason of the terms of the Imperial statute 63 & 64 Vict. c. 12, the *Navigation Act* must, by force of the *Colonial Laws Validity Act*, so far give way to the Imperial *Merchant Shipping Acts*.

It may tend to further elucidate the matter if we suppose the State Parliament also passed a similar law requiring the form of agreement to be prescribed by the State Governor in Council and fixing its own penalties and fees. No doubt sec. 109 of the *Constitution* would be invoked to declare the invalidity of the State law because, since the Commonwealth Act occupied the field, the State law would be inconsistent with it. But, if that be conceded, how can the present case be regarded as not

one of repugnancy? And, if it be not conceded, then the master of a ship would be compelled to enter into three different agreements on the same subject matter with three different sets of consequences. I find it difficult to describe the situation that would be created by holding there is no repugnancy.

The Constitution.—I have already said that inherently the Constitution by secs. 51 (I.) and 98 empowers the Commonwealth Parliament to pass such an enactment as the *Navigation Act* provisions now under consideration. If there were no Imperial Act those provisions would be fully operative. But, in presence of the Imperial provisions, have the Australian provisions any legal force? It was suggested for the Commonwealth that they have, because, so it was urged, the Constitution was passed after the *Merchant Shipping Act 1894* and therefore intended to give power to supersede it. But that view is not tenable. Neither the *Merchant Shipping Act* nor any other Imperial Act then in existence either widened or narrowed the scope of the Constitution Act. That Act speaks for itself and the powers of the Commonwealth are measured by its terms. For instance, a mere future *Merchant Shipping Act* could not narrow its powers; and, if it did, the repeal of the later *Merchant Shipping Act* would not restore the cancelled authority. That is quite different from saying a future *Merchant Shipping Act* would not affect the force of Commonwealth legislation passed under the authority of the Constitution. You have to assume the existence of a primarily valid and operative Commonwealth Act in presence of an Imperial Act to which it is in part repugnant. I lay no stress on the date of the Imperial Act, whether it has passed before or after the Constitution Act. I predicate only that it is presently speaking and operating (see *McCawley's Case*[12]). The mere passing of the Constitution would not affect the operation of the *Merchant Shipping Act 1894*, and, if no Commonwealth legislation had been passed, no one would question the application of the Imperial Act in Australia.

Given, then, the repugnancy between an existing *Imperial Act* and an existing Commonwealth Act, what is the consequence? It seems to me plain that the constantly speaking sec. 2 of the *Colonial Laws Validity Act 1865* determines the matter. It declares that the *Navigation Act* "shall be read subject to" the *Merchant Shipping Acts 1894 to 1906*, and "shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." The case falls within the plain words of sec. 2 and within the equally plain words of Lord *Halsbury* L.C., speaking for a very powerful Court, in *In re R. v. Marais*[13].

The necessary final conclusion is that both questions submitted in the special case for the opinion of this Court should be answered in the negative.

Higgins J.

This is a special case stated with the concurrence of the parties, under Order XXXII., r. 1, for the opinion of the Court. The plaintiffs (par. 11) claim to recover from the defendants two sums of £25 10s. and £26 12s. paid under protest to the superintendent at the port of Sydney, as fees for witnessing the discharge and the engagement of seamen. These fees are payable at two shillings per head, according to sec. 60 of the *Navigation Act 1912-1920*, and Statutory Rules 1922, No. 34, reg. 9. The main questions are—were these fees, (a) for discharge, (b) for engagement, legally payable?

The action is to recover the amount of these fees, and nothing else. Under r. 1 of Order XXXII. the parties are entitled to get the opinion of the Court on the questions of law *arising in the cause*; and the question, are these fees legally payable, does arise in the cause, is necessary for its decision. The difficulty of law arises from the fact that the *Merchant Shipping Acts* in dealing with discharge and

engagement of seamen say nothing about fees, whereas the Australian *Navigation Act* requires them to be paid (sec. 60); and reg. 9 of the Statutory Rules 1922, No. 34, provides: "The fee for engagements or discharges effected before a superintendent shall be, for each seaman engaged or discharged, two shillings." The plaintiffs contend that this provision for payment of fees is "repugnant" to the British Acts extending to Australia, and is therefore invalid, under sec. 2 of the *Colonial Laws Validity Act 1865*.

Now, I cannot see any substantial ground whatever for the main contention of the Commonwealth—the contention that the *Colonial Laws Validity Act* does not apply to laws, such as the *Navigation Act*, made under the *Australian Constitution*. It would, no doubt, be convenient for Federal Ministers and their staffs, in framing Navigation Acts under the powers contained in the Constitution (secs. 51 (I.), 98), to feel that they can devise a complete and consistent system, suited for Australian conditions, and unfettered by any English Acts; and it may be that the British Parliament will some day confer such a power on the Commonwealth Parliament. But it is the duty of this Court to give effect to the law as it stands. We have in particular to look at sec. 2 of the *Colonial Laws Validity Act*; and as its words cannot be too carefully weighed in a matter involving, as this case does, the constitutional relations of Australia to the Empire, I may repeat them:—"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament" (the British Parliament) "extending to the colony to which such law may relate ... shall be read subject to such Act ... and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." Now, "colonial law" in this Act is defined as including (I weld two of the definitions together) any law made by the legislature of any of the King's possessions abroad in which there shall exist a legislature; but the Channel Islands, the Isle of Man and British Indian territories are excepted. The words "British possession," as interpreted in the British *Interpretation Act of 1889*, would include Australia, because it includes parts of the Dominions which are under both a central and a local legislature (sec. 18); but that section does not apply to Acts passed before 1889, and therefore does not apply to the *Colonial Laws Validity Act 1865*. In my opinion, however, there is no doubt that an Act passed by the Australian Parliament is a "colonial law" within the meaning of the British Act of 1865; for it cannot be reasonably contended that Australia is not one of the "King's possessions abroad." Then the words "is or shall be" show that sec. 2 applies to future times and future Acts as well as to the times of 1865 and to then existing Acts. It seems to me clear, also, that many of the provisions of the *Merchant Shipping Acts*, including Part II. of the Act of 1894 and the sections of the Acts of 1894 and 1906 relating to the discharge and engagement of seamen, "extend" to Australia, and to discharge and engagement in Australia (secs. 124 and 260 of the Act of 1894; secs. 30, 31, 49 (3) of the Act of 1906). It is stated in the case that this ship *Niagara* is registered in the United Kingdom; and Part II. of the *Merchant Shipping Act 1894* applies to it and to its owner, master and crew (sec. 260).

Under these circumstances, sec. 2 of the *Colonial Laws Validity Act* applies to the *Navigation Act* and the Regulations made thereunder; and the result, according to sec. 2, is that this latter Act must be read "subject to" the *Merchant Shipping Acts*, and that, if in any respect repugnant thereto, it must, "to the extent of such repugnancy, but not otherwise, be absolutely void and inoperative." In coming to this conclusion, I have not neglected the warning uttered in the United States, and repeated in Australia, to remember that it is a Constitution we are construing. But at present we are not merely construing the Constitution: we are examining the relation of the Constitution to other British Acts, equally binding. It is true that the Constitution Act is a later Act than the *Colonial Laws Validity Act*; but it does not repeal the earlier Act, either expressly or by necessary implication. It does not even refer to it. Nor is there any provision in the earlier Act which is inconsistent with the later; in such a case the later would prevail. Both Acts can be obeyed at the same time.

But what is the meaning of the words "repugnant" and "repugnancy" in sec. 2? What was the *Colonial Laws Validity Act* meant to achieve? According to the recital in the Act itself, it was to remove doubts: "Whereas doubts have been entertained respecting the validity of divers laws enacted or purporting to have been enacted by the legislatures of certain of Her Majesty's colonies, and respecting the powers of such legislatures, and it is expedient that such doubts should be removed." It had been a common practice for the British Parliament, in granting constitutions to British possessions, to provide that no law should be made by the local legislature which is "contrary to the laws of England," or to that effect; and much uncertainty, difficulty and controversy had arisen from the use of the words. For instance, in the Act of 9 Geo. IV. c. 83, conferring a Council constitution on New South Wales, the Governor with the advice of the Council was empowered to make laws and ordinances "not being repugnant to this Act" or to any charter, &c., "or to the laws of England." Was New South Wales not to have power even to modify or negative the common law of England where that law did not seem to be adapted to the circumstances of the colony? The object of the Act of 1865 was not so much to preserve the rights of the British Parliament against encroaching colonial legislatures, as to make it clear that a colonial legislature, acting for the colony in pursuance of the powers of legislation conferred, might act freely and without constraint from London, excepting only so far as a British Act, applying or extending to the colony, definitely contradicted the colonial legislation. This view is supported by the expression of the late Professor *A. V. Dicey*, that the Act of 1865 was "the charter of colonial legislative independence" (*Law of the Constitution*, 5th ed., p. 99). The British Parliament by the Act of 1865 expressly confined the principle of invalidity for repugnancy to repugnancy between the local law and some definite provision of a British *Act* extending to the colony; and prevented the local Act from being treated as invalid in all its sections and provisions if it were invalid in one. Hence the words in sec. 2, "to the extent of such repugnancy, and not otherwise."

Now, I do not think that the full effect of these latter words in sec. 2 has been sufficiently appreciated. They really convey a positive grant to the colonial legislature—a grant of validity to the Acts of the legislature even where they deal with matters dealt with by a British Act extending to the colony; for the colonial Act is to be valid except to the extent of any actual repugnancy or direct collision between the two sets of provisions. Such a concession on the part of the supreme Parliament marks a very high level of liberality, foresight, statesmanship.

It is instructive to study the attitude of the English and the American Courts when faced with similar problems. In England the same precise problem could hardly arise, for there are not legislatures having equal power to make laws on the same subject. But a question frequently arises as between an earlier Act and a later Act. The question is not precisely the same, for in such cases the solution rests on intention, to be ascertained by construction of words in the later Act; whereas in our case the rule of repugnancy operates in spite of intention. Yet there is a series of cases in the Queen's Bench Division, close to one another in date, which throw light on the subject. In *Kutner v. Phillips*[14] the late *A. L. Smith* L.J. said: "Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied." In *Churchwardens &c. of West Ham v. Fourth City Mutual Building Society*[15] the same Lord Justice puts the test of repeal by subsequent legislation in these words: "Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?" In *Crocker v. Knight*[16] *Lindley* and *Kay* L.JJ. applied the same test as between the *Trade Union Act of 1871* and the *Trade Union Act of 1876*. In *Tabernacle Permanent Building Society v. Knight [No. 1]*[17], a case in the House of Lords, the Lord Chancellor, *Halsbury*, and Lords *Herschell* and *Field* decided to the same effect; Lord *Herschell* declaring the test to be, can you read the provisions of the later Act into the earlier, without any conflict between the two; and Lord *Field* declaring that it

was not enough to show that the later Act is contrary to the sense and principle of the earlier (see also *Phipson v. Harvett*[18], the turnpike tolls case). In the United States the precise question often arises as between the Constitution and an Act; and it is held that if part of the Act is unconstitutional, the Courts should not declare the remainder bad also, unless it is clear that the legislature would not have passed the constitutional part without the unconstitutional part. Even if the two parts are contained in the same section, effect may be given to the constitutional part and refused to the unconstitutional part—may be given to some classes of cases specified and refused to others also specified in the same sentence (*Cooley's Constitutional Limitations*, 7th ed., p. 246, &c.; *Jaehne v. New York*[19]). If there is a reasonable doubt, the question should be settled in favour of the Act (*Cooley's Constitutional Limitations*, pp. 252, 253; and see per *Marshall* C.J. in *Fletcher v. Peck*[20]).

But still we have to find the full meaning of the word "repugnant" itself, as used in the Act. According to the *Oxford Dictionary*, it has this meaning—as its primary meaning: "contrary or contradictory to, inconsistent or incompatible with, divergent from, standing against, something else"; but the meaning "divergent from, standing against, something else" is marked as obsolete. No doubt the word "repugnant" is often used loosely and rhetorically; but in considering Acts of Parliament, the strict meaning should prima facie be applied.

We have had to consider the word "inconsistent" in this Court, as applied to Acts of Parliament and things done and regulations framed under Acts of Parliament. In the case of *Australian Boot Trade Employees' Federation v. Whybrow & Co.*[21] these questions were asked by the President of the Commonwealth Court of Conciliation:—(1) Is it competent for this Commonwealth Court under the Federal Constitution to make any award which is inconsistent with any and if so which of the said awards of the State Wages Boards? (2) Is there in the proposed award any provision or provisions and if so what provision or provisions inconsistent with any and if so which of the awards or determinations of the State Wages Board, and in what respects? The Court, by a majority, held that the Commonwealth Court had no power to make an award inconsistent with a determination of a State Wages Board; but by a still greater majority—if not by all the members of the Court—it was held that an award of the Commonwealth Court is not "inconsistent" with a State law if compliance with the award is consistent with obedience to the State law; and that therefore an award fixing a minimum rate of wages higher than that fixed by a determination of the State Wages Board is not, for that reason alone, "inconsistent" with that determination. The late Chief Justice *Griffith* said that the test of inconsistency of the two Acts is whether the proposed Act is consistent with obedience to both directions—its own directions and the direction of the other Act; and he referred[22] to his opinion expressed to the same effect in *Federated Saw Mill &c. Employees' Association of Australasia v. James Moore & Sons Pty. Ltd.*[23]. *Barton* J. said that the term "inconsistency" is used in the sense of incompatibility, so that to obey one provision is to disobey the other. *O'Connor* J. concurred; and I concurred—saying that the Commonwealth award would impose an additional duty, not an inconsistent duty. It is difficult to see any substantial distinction between *inconsistent* provisions and *repugnant* provisions in such a connection. In sec. 109 of the *Constitution*, the word "inconsistent" is used, as between a State law and a Commonwealth law; if they are inconsistent, the State law is, "to the extent of the inconsistency, invalid." But if there is any distinction, the word "repugnant" covers a narrower ground—requires a kind of direct hostility to support its application; as in *Cicero*, Top. *xii.*, fin.—*quicquid repugnat, id ejusmodi est, ut cohærere nunquam possit*. Again, in the case of *Attorney-General for Queensland v. Attorney-General for the Commonwealth*[24], it was argued that the *Land Tax Assessment Act of the Commonwealth* was repugnant to the *Constitution of New South Wales* (18 & 19 Vict. c. 54) which gives the State Legislature the control and management of waste lands. It was urged that the Commonwealth Act interfered with the New

South Wales Legislature in exercising its discretion as to lands, &c. But it was pointed out by my brother *Isaacs* that, under sec. 106 of the *Constitution*, the State Constitution has to give way to the requirements of the Federal Constitution; and that under sec. 109, whenever a State *law* is found to be "inconsistent" with a law of the Commonwealth, it is *pro tanto* invalid. I find I said that sec. 2 of the *Colonial Laws Validity Act* obviously refers to the case of a colonial legislature making a law which, but for the existence of some Act of the British Parliament extending to the colony, is within the ambit of the powers of the legislature, but which is, in some one or more provisions "repugnant" to the British Act. I said I was strongly inclined to think that no colonial Act can be repugnant to an Act of the British Parliament unless it involves, either directly or indirectly, a contradictory proposition—probably, contradictory duties or contradictory rights (see also *Fox v. Robbins*[25]). As there was no command or proposition in the *Land Tax Assessment Act* which contradicted the Act 18 & 19 Vict. c. 54, however the former Act might affect the exercise of the powers under the later Act, there was, in my opinion, no repugnancy; and the later Act was therefore valid. In other words, I thought, and still think, that Australian legislation, if enacted within the powers expressly conferred by the Constitution, covers all Australian territory, except so far as a wall erected by the British Parliament actually excludes it.

Looking, now, in the light of this view of the word "repugnant," at the first question asked, we have to find whether the provisions in the *Navigation Act* and Regulations (secs. 60, 425 (i); Statutory Rules 1922, No. 34, reg. 9) for payment of fees on discharge is "repugnant" to the *Merchant Shipping Acts*. The relevant sections of the *Merchant Shipping Acts* are secs. 30 and 31 of the Act of 1906. Sec. 30 forbids the master of a British ship to discharge a seaman at any place out of the United Kingdom unless he previously obtain, endorsed on the agreement with the crew, the sanction of the proper authority as defined, "but that sanction shall not be refused where the seaman is discharged on the termination of his service." Then, under sub-sec. 2, the authority to whom an application is made for sanction under this section may, and if not a merchant, shall, examine into the grounds on which a seaman is to be discharged at a place out of the United Kingdom, may administer oaths, &c., and "may grant or refuse the sanction as he thinks just, but such sanction shall not be unreasonably withheld." According to par. 3 of this case as stated by the parties, the master "complied with all the requirements of the Merchant Shipping Acts for the discharge of seamen," and then requested the superintendent to allow the discharge to be effected, "in his presence." Sec. 30 (2) speaks of an application for *sanction*, after examination of the grounds; but as the sanction cannot be refused where a seaman is, as in this case (see par. 3), discharged on the termination of his voyage, I may treat the position as if the master duly made his application for sanction under the *Merchant Shipping Acts*. The defendant refused to allow the discharges to be effected in his presence unless and until the conditions including the payment of fees with respect to the discharge of seamen imposed by the *Navigation Act* and the Regulations thereunder were also complied with (par. 4). Thereupon the plaintiff paid the fees and effected discharges in accordance with the conditions imposed by the *Navigation Act* and the Regulations (par. 5). I take these statements as meaning, in substance, that the superintendent refused to do what was necessary for the discharges unless the master complied with the conditions of the *Navigation Act* as well as with the provisions of the *Merchant Shipping Acts*—in particular as to the payment of the fees. The payment of the fees is the only subject for relief in this action; and the only question of law arising in the action is this—was the master under a legal obligation to pay them? Is the direction to pay them repugnant to any direction in the British Act? For my part, I can see no repugnancy merely because the *Merchant Shipping Act* does not prescribe a fee, and the *Navigation Act* does; and especially where the Commonwealth has to pay the officer, and the British Government has not. The Commonwealth Parliament, having full competence to make any law for Australia with respect to navigation and

shipping in inter-State and foreign commerce (the Constitution, secs. 98, 51 (1)), has enacted that for any discharge within Australia before its officer a fee shall be paid; and the British Parliament has not anywhere said that a fee shall *not* be paid. In my opinion, there is no contradiction, no repugnancy, between the Acts so far as the conditions of both Acts can be obeyed. That was the test of repugnancy adopted in *Gentel v. Rapps*[26]. This was a case of tramway by-laws, and offences thereunder; but, paraphrasing the words of *Channell* J. to suit the present position, I should say that a colonial Act is not repugnant to the *Merchant Shipping Acts* merely because it imposes on the master an additional duty in discharging a seaman in the colony; but that it is repugnant if it imposes an additional duty which the *Merchant Shipping Acts* forbid.

But in this present case there is, I think, a clear repugnancy due to the provision in sec. 30 of the *Merchant Shipping Act 1906* that "sanction shall not be refused where the seaman is discharged on the termination of his service"; and these seamen were, as the case states, discharged on the termination of their voyage. The Australian Parliament says in effect "Do not give sanction unless the master pay two shillings"; the British Parliament says, "Do not refuse sanction, on any ground, to a discharge on the termination of a voyage." The British command must be obeyed.

With respect to the engagement of seamen, the same legal principles apply; but I cannot find any repugnancy between the British and Australian Acts as to the payment of fees imposed by the *Australian Act*. Under sec. 124 of the *Merchant Shipping Act of 1894*, as to the engagement of seamen "abroad," the master of the *Niagara* must enter into an agreement in accordance with the Act (sec. 113), and must engage the seamen before a superintendent; and the superintendent must ascertain that the seaman understands the agreement before he signs it, and must attest the signature. There is no provision negativing the right to withhold sanction as in the provisions for discharge, or forbidding the imposition of other conditions by the law of the appropriate local Parliament. Under these circumstances, I am of opinion that the master was required "by law" to pay the fees for engagement.

To say that this result is not that intended by the Federal Parliament is no answer to this view of the law. That Parliament meant to occupy the whole field of agreements made in Australia, intended that its Act and Regulations should form a complete scheme, *totus teres atque rotundus*; but the *Colonial Laws Validity Act* operates on that intention and prescribes how far it can be carried into effect. The *Merchant Shipping Acts* are to have their full operation; and the *Navigation Act* is to have its full operation except so far as it contradicts the *Merchant Shipping Acts*. If the *Navigation Act* were to be treated within this limited common area, as if it were a by-law made under the *Merchant Shipping Acts*, the position would be somewhat similar.

But this brings me to consider the question asked, and the kind of answers which this Court should give. Those who settled the case are not content with asking whether the directions to pay fees are repugnant to the British Acts, but whether the master "was required by law to comply with the conditions (including the payment of fees) with respect to the discharge of seamen" imposed by the *Navigation Act* and Regulations. This question would involve an answer in the form of a universal affirmative or a universal negative; and, holding the view which I have stated with regard to repugnancy, I do not think that the question should be answered in this form. As I have stated in the beginning of my judgment, the special case can ask us for an opinion as to questions of law *arising in the cause*; and here the only cause, or action, is for recovery of fees paid. Par. 11 of the case states explicitly that "the plaintiffs claim to recover from the defendants the sums of £25 10s. and £26 12s."; and par. 13 shows that it is only the recovery of these sums that is the matter litigated. We have no right or duty to decide questions which do not arise in the action, no right to decide

questions which are unnecessary for the recovery of these moneys. Above all, we should not decide a grave constitutional point, involving the validity or invalidity of an Act of Parliament, without being compelled to do so in working out justice as between the litigants as to the matters substantially in issue.

Much stress has been laid on the fact that under the *Merchant Shipping Act 1894* the Board of Trade has to approve of any ("a" not "the") form of agreement with the seamen, and that under the *Navigation Act* the Governor-General has to prescribe the form. But it does not necessarily follow that the form prescribed by the Governor-General may not be approved by the Board of Trade. This is an additional ground for not deciding any question which does not actually come before us, legitimately and in due course.

In my opinion, the answers should be (1) that under the circumstances stated the master was not required by law to pay the fees imposed by the *Navigation Act* for discharge of seamen; and (2) that the master was required by law to pay the fees imposed by the *Navigation Act* for the engagement of seamen.

Rich J.

In my opinion the questions should be answered in the negative. So far as the subject matter of the *Navigation Act* provisions depends upon the Constitution, they are fully authorized. But they are, in my opinion, in conflict with the *Merchant Shipping Acts 1894 and 1906*. Those Acts reduce to a legislative system the Imperial scheme of regulating shipping for the British Empire and they apply to the Dominions. Part of that scheme is to provide for the engagement and discharge of seamen on British ships, not only in Great Britain, but in the Dominions overseas, even in foreign parts where there are British consular officers. Special provision is made for local jurisdiction in the case of ships registered locally. But in a case of a ship, like the *Niagara*, not registered in Australia, the Imperial Act applies so as to regulate the employment and discharge of the seamen in Australia. I think it is a case of legislative conflict for two Acts to prescribe, for the same things, regulations that would clash. Two agreements in different terms for the same voyage would clash. The consequence is that there is repugnancy between the two Acts. I have already, in collaboration with my brother *Isaacs*, stated in *McCawley v. The King*[27] my opinion as to the construction of the *Colonial Laws Validity Act*. Sec. 2 of that Act applies, with the result that no operative effect can be given to the clauses of the *Navigation Act* on which the defendants rely. In my opinion the case of *In re R. v. Marais*[28] is in point. For these reasons I come to the conclusions above stated.

Starke J.

Judgment should, in my opinion, be entered for the plaintiffs. The facts have been so fully stated in the opinions of the Chief Justice and of my learned brethren who have preceded me that I have but little to add.

It was hardly denied in argument that the Commonwealth was subject to the provisions of the *Colonial Laws Validity Act 1865*. But it was claimed that the Constitution, particularly sec. 51, pl. I., and sec. 98 created a new source of power, unaffected by the *Colonial Laws Validity Act*, or, at least, gave plenary power to the Parliament of the Commonwealth to repeal Imperial legislation extending to Australia, upon the subject matter within the ambit of those provisions. The point is not new: it has been mooted in Canada, and, to some extent, in Australia (see *Keith's Responsible Government in the Dominions*, vol. *i.*, ch. 3, pp. 412-423, and ch. 7, pp. 1190-1194; *Lefroy's Canada's Federal*

System, pp. 57-58). If we remember, however, the absolute nature of the legislation of the Imperial Parliament, and that the *Colonial Laws Validity Act* is always operating upon laws within the scope of its provisions, then there is no room for doubt that any law of the Commonwealth repugnant to the provisions of an Imperial Act extending to the Commonwealth is, to the extent "of such repugnancy, but not otherwise, absolutely void and inoperative."

On the question of repugnancy in the present case, I am in general agreement with what my brother *Isaacs* has said. And I would add that the Commonwealth has attached the fees claimed, in this case, to engagements and discharges of seamen made and given pursuant to its own *Navigation Act*. Consequently we have not to consider whether the Commonwealth could authorize one of its officers, performing the function of superintendent under the *Merchant Shipping Act 1894*, to charge fees for services so rendered by him.

Both questions answered in the negative. Judgment for the plaintiffs with costs.

Solicitors for the plaintiffs, Creagh & Creagh.

Solicitor for the defendants, Gordon H. Castle, Crown Solicitor for the Commonwealth.

[1] (1902) A.C., at p. 54.

[2] (1899) 1 Q.B. 727.

[3] (1899) 1 Q.B., at p. 729.

[4] (1899) 1 Q.B., at p. 732.

[5] (1899) 1 Q.B. 735.

[6] (1893) Q.B. 370, at p. 374.

[7] [1915] HCA 39; (1915) 20 C.L.R. 148, at pp. 166-168.

[8] [1918] HCA 55; (1918) 26 C.L.R. 9, particularly at p. 50.

[9] (1881) 7 Queb. L.R. 380.

[10] [1907] HCA 66; (1907) 5 C.L.R. 405, at p. 417.

[11] (1851) 13 Howard 429, at p. 438.

[12] (1918) 26 C.L.R., at p. 50.

[13] (1902) A.C., at p. 54.

[14] (1891) 2 Q.B. 267, at p. 272.

[15] (1892) 1 Q.B. 654, at p. 658.

[16] (1892) 1 Q.B. 702.

[17] (1892) A.C. 298.

[18] (1834) 1 C. M. & R. 473.

[19] (1888) 128 U.S. 189.

[20] [1810] USSC 10; (1810) 6 Cranch 87, at p. 128.

[21] [1910] HCA 8; (1910) 10 C.L.R. 266.

[22] (1910) 10 C.L.R., at p. 286.

[23] [1909] HCA 43; (1909) 8 C.L.R. 465.

[24] [1915] HCA 39; (1915) 20 C.L.R. 148.

[25] [1909] HCA 81; (1908-09) 8 C.L.R. 115.

[26] (1902) 1 K.B. 160.

[27] (1918) 26 C.L.R., at p. 50.

[28] (1902) A.C., 51.

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