

the fourth parties seems only to be this, that where holograph writings are of a kind not usually authenticated by signature, such will be sustained though without such authentication.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD YOUNG was absent.

The Court answered the first question in the negative, and found it unnecessary to answer the second question.

Counsel for First and Second Parties—Darling—MacWatt. Agents—Purves & Wakelin, S.S.C.

Counsel for Third Parties—Dickson—G. Wardlaw Burnet. Agents—Smith & Mason, S.S.C.

Counsel for Fourth Parties—Pearson. Agent—Sommerville Greig, W.S.

Saturday, December 6.

FIRST DIVISION.

[Sheriff of Renfrew
and Bute.

SEWARD. V. RATTER.

Ship—Seaman—Wages—Desertion—Absence from Ship without Leave—Merchant Shipping Act 1854 (17 and 18 Vict. c. 104), secs. 243, 249.

A seaman absented himself without leave from his ship at a foreign port, and took away a portion of his clothes. When on shore he was arrested, and the ship sailed without him. In an action for recovery of wages, held that he was not in desertion, since the evidence showed that he was not, and was not treated by the captain as, a deserter until after he was prevented by his arrest from rejoining his ship.

The Merchant Shipping Act 1854 (17 and 18 Vict. cap. 104) provides by section 243—“Whenever any seaman who has been lawfully engaged . . . commit any of the following offences he shall be liable to be punished summarily as follows, that is to say (sub-section 1)—For desertion he shall be liable . . . to forfeit all or any part of the clothes and effects he leaves on board, and all or any part of the wages or emoluments which he has then earned.”

Sub-section 2 provides . . . “For absence at any time without leave, and without sufficient reason, from his ship or from his duty, not amounting to desertion, or not treated as such by the master, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour, and also at the discretion of the Court to forfeit out of his wages a sum not exceeding two days’ pay, and in addition, for every twenty-four hours of absence either a sum not exceeding six days’ pay, or any expenses which have been properly incurred in hiring a substitute.”

Section 249—“In all cases of desertion from any ship in any place abroad, the master shall produce the entry of such desertion in the official log-book to the person or persons hereby required

to endorse on the agreement a certificate of such desertion.”

This action for the recovery of wages, and a sum said to be due for overtime work, was raised in the Sheriff Court at Greenock by Thomas Seward, assistant engineer on board the s.s. “Teddington,” against John Ratter, as commander and part owner of the said ship. The pursuer also claimed £7, 10s. as the value of clothes left by him in the ship, and £10, 4s. for maintenance-money while he was at New York awaiting his ship’s return. He alleged the balance due to him, after certain deductions, to be £63, 5s. 3d.

The pursuer had shipped at Tower Hill, London, on 19th November 1881, as “donkeyman” or assistant engineer on the “Teddington” at a monthly wage of £4, 10s.

After calling at various ports the vessel arrived at New York on 23d December 1882, and discharged her cargo. On the 30th December the ship sailed to Baltimore without the pursuer, he being at that time on shore in jail. The pursuer alleged that he was arrested on board ship on a false accusation, at the instance of a fellow seaman, that he was detained in jail while inquiries were being made, and that upon the charge being found to be untrue he was released, but by that time the ship had sailed, and that after awaiting her return for some time he ultimately worked his passage home.

The defender averred that on the ship’s arrival at New York upon the 22nd December 1882 the pursuer had without leave left the vessel and absented himself from his work, that another man had to be engaged to do his work, as the vessel was discharging cargo and a man was required to attend to the steam-winch. He also alleged that the vessel proceeded from New York to Newport News on the 30th December, and remained there until the 6th January 1883, and that the pursuer had ample time to have rejoined her if he had felt inclined; that as the pursuer did not return to the ship, the defender had, in compliance with section 250 of the Merchant Shipping Act of 1854, entered his name both upon the 29th and 30th December as a deserter. He also alleged that the ship returned to New York about the 24th March 1883 and remained there for five days, but that the pursuer made no application to be taken on board.

The defender pleaded, that as the pursuer had deserted his ship, he had thus forfeited all claim to wages or other moneys, and that as the pursuer had removed his body-clothes from the ship he had no claim against the defender for their value.

The Sheriff-Substitute allowed the parties a proof, the import of which sufficiently appears from the interlocutor of the Sheriff-Substitute and passages quoted in the opinion of Lord Mure.

The following joint-minute was put in process—“The pursuer stated that he had no evidence to lead except his own; that he is at sea, and his witnesses being principally seafaring men are also at sea. In consideration thereof, the defender agrees to hold the statements of pursuer in his condescence, *quantum valeat*, as the evidence he would give on oath if under examination.”

On 17th January 1884 the Sheriff-Substitute (SMITH) pronounced this interlocutor—“Finds in

fact (1) That on 19th November 1881 the pursuer signed articles as donkey-engine driver for a voyage in the steam-ship 'Teddington,' of which the pursuer was master, at the rate of wages of £4, 10s. per month, 'from London to Port Said, and any ports and places within the limits of 75 degrees north and 60 degrees south latitude, trading to and fro for any period not exceeding three years, and back to the final port of discharge in the United Kingdom;' (2) That the 'Teddington' proceeded on her voyage with the pursuer doing duty on board; that she called at various ports and arrived at New York on 20th December 1882; (3) That on the 22d December the pursuer left the ship without leave; that he returned on the 26th of the same month, but left again without leave the same day, taking with him some clothes in a bag; (4) That the defender made, on the 29th of December, an entry in the official log to the effect that he considered the pursuer had deserted, and that he made another entry on the 30th to the effect that he had proceeded on his voyage leaving the pursuer behind; (5) That the defender when clearing his ship at the consular office in New York on the 29th December, made no report of the pursuer's desertion, and got no authority to leave him behind; but that the defender then stated that the pursuer had got locked up, and that he would let him continue in the ship; (6) That in point of fact the pursuer was under arrest when the ship left New York, and that the pursuer was therefore unable to rejoin it, although he was discharged from prison on the same day; (7) That the pursuer never did rejoin the ship, and that it appears from the consular certificate that he was left behind by the defender 'without consular sanction;' (8) That it was not till 16th March 1883 that the defender made any report to any British consul or other authority of the fact that the pursuer had left the ship, although the defender had had repeated opportunities of making such a report earlier; (9) That on 22d December 1882 the pursuer had earned monthly wages amounting to £58, 19s. besides the wages for 420 hours' overtime, which at the agreed-on rate of 6d. per hour amount to £10, 10s., or £69, 9s. in all, and that £48, 18s. 7d. had been paid to account, leaving £20, 10s. 5d. due to the pursuer when he left the ship; (10) That the pursuer has failed to prove that he left any clothes or other effects in the ship after he took away the bag on the 26th December, and that he has also failed to prove that he has any legal claim to subsistence-money; (11) That the additional expenses caused to the defender by the failure of the pursuer to complete the voyage do not appear to have exceeded £2, 10s.: Therefore finds in law that the £20, 10s. 5d. which the pursuer had earned and had not received up to 22d December should suffer an abatement or forfeiture to the extent of £2, 10s.; decerns against the defender for the balance of £18, 0s. 5d.; Finds the pursuer entitled to expenses, subject to some modification to be afterwards fixed, &c.

"*Note.*—The Sheriff-Substitute thinks that it would be very harsh to fine the man upwards of £20 in the circumstances. No doubt he did desert on the 22d December, but the defender condoned that desertion, and formally stated to the Vice-Consul that he was going to take him back. There is nothing to shew that the pursuer

would not have gone back if he had been able. But when the ship sailed he was in prison (apparently on a groundless charge) and could not go back. Whether the defender might not have made some slight effort to get him out of prison in time need not be inquired now. But it would be a terrible aggravation of the pursuer's misfortune in being wrongfully accused, if he were, as a consequence of the accusation, to forfeit a sum which represents to him the savings of many months.

"The Sheriff-Substitute thinks that the statute gives him a wide discretion as to the amount of the forfeiture in all cases of desertion. And he thinks the present is a case for limiting the forfeiture to the amount of the ship's actual loss. He thinks so both on account of the position of duration in which the pursuer was placed when the ship sailed, and also in respect of the defender's condonation of the offence up to the moment of sailing, and his failure to report it at any consulate for nearly three months longer.

"The reason why it is thought that there should be some modification of costs is because the pursuer created a good deal of expense unnecessarily by failing to be ready to go to proof on the day fixed."

On 30th April 1884 the Sheriff (MONCREIFF) adhered.

"*Note.*—The Sheriff thinks that the Sheriff-Substitute has done substantial justice. The conduct of both parties has been unsatisfactory. The defender acted irregularly in leaving the pursuer at New York without obtaining consular sanction; but on the other hand the pursuer twice left the vessel without leave, and there are strong grounds for believing that he had no wish or intention to return to the defender's service. The defender may have subjected himself to penalties under the Merchant Shipping Act, but with that the Sheriff has nothing to do in this case."

The defender appealed to the Court of Session, and argued—This was a case of desertion; the pursuer had left his ship and work, and taken away his clothes, and was thus a deserter within the meaning of sec. 243 of the Merchant Shipping Act of 1854. His desertion was consummated before he was put in jail. There was no evidence of condonation on the part of the defender; the pursuer by deserting had forfeited all right to his wages.

Argued for respondent—This was not a case of desertion, but merely of leaving a ship without permission; the two offences were quite distinct—the latter did not involve a forfeiture of wages. The result arrived at in the Inferior Court was just and equitable in the circumstances.

At advising—

LORD MORE—This is an action for wages by a seaman, who claims a sum of £112 (under deduction of £36 and £12, 18s. 7d. already paid to account) as money due to him in his capacity of assistant engineer on board the steamship "Teddington."

His monthly wage was £4, 10s., and the amount of his claim, if any sum be due him at all, is not disputed.

The Sheriff-Substitute, after deducting from the pursuer's claim the sums already paid to account, and also allowing for the additional expense caused to the defender by the pursuer's

failure to complete his engagement, granted decree for the balance, amounting to £18, 0s. 5d. The defence to the action is, that as the pursuer deserted his ship at New York, he thereby forfeited his claim to wages, and accordingly nothing was due to him.

The Sheriffs have repelled this defence and found the pursuer entitled to the sum I have mentioned.

In the result arrived at both by the Sheriff-Substitute and the Sheriff I concur, but not on the grounds upon which their judgment is founded.

The Sheriff-Substitute in his note thinks that there was desertion by the pursuer and condonation of that desertion by the defender. The Sheriff on the other hand considers the case rather as one of leave without permission, and in that view I am disposed to concur. The evidence shows beyond doubt that the pursuer left the ship shortly after her arrival at New York, and that without the sanction or permission of the captain, but I cannot see anything in evidence to show that in so leaving he determined to desert.

There is a carefully-expressed distinction in the various sections of the Merchant Shipping Act of 1854 to which we were referred between "desertion" and "leaving a ship without leave." They are treated as separate offences, and the punishment for each is separate and distinct.

When the desertion takes place at a foreign port the captain's duty is to communicate the fact to the British Consul and get him to write the deserter's name off the ship's articles.

Now, what took place in the present case appears from the proof to be this. The pursuer left the ship without permission on the 22d December, a day or two after her arrival in New York. He came back upon the 26th December, and upon that occasion took away with him some of his clothes. On the same day he again left without permission, and two days after, upon the 28th, he was arrested by the police upon a charge of assault and detained in jail until the 30th, by which time the "Teddington" had left New York on a voyage to Baltimore.

Now, it was under these circumstances that the pursuer was upon the 29th entered in the log as a deserter, and this is the account which the captain gives of the circumstances attending the entry. He says:—"I made an entry in the official log on the 29th December, after pursuer had been two days absent. I did not make an entry as to pursuer leaving the ship on the 22d December, because the British Consul won't write a man off the articles till just before the ship is going to sea, also because I am not in the habit at New York of making an entry of every movement of a sailor there. The same reasoning stands when a man takes his clothes with him. I did not go to the British Consul between the 22d and the 29th about pursuer's desertion. I only applied to the British Consul to write him off as a deserter when I cleared the ship on 29th December. I made no inquiry about pursuer before leaving. I did not take any of his clothes with the ship. The British Consul did not strike the pursuer's name from off the articles before I left on the 30th December. I did not ask him to do so. When clearing the ship at the Consular Office I remarked to Mr Fraser [Consul] that I had heard

Seward had got locked up. Mr Fraser replied that in that case I would have to leave his wages behind. I objected, and informed Mr Fraser that any claim that came against Seward I would pay, and let him continue in the ship. This is the reason why I did not get pursuer written off the articles. . . . When pursuer came to me for money on the 26th December I charged him, not with desertion, but with absenting himself from duty.

. . . One reason for not agreeing to leave pursuer's wages with the Consul was because I desired pursuer to continue on board the ship as "donkeyman." He does not call it a case of desertion to the Consul, nor does he get the certificate required by the statute in cases of desertion.

Now, this evidence is confirmed by that of the head engineer, who says:—"Pursuer informed me before we got to New York more than once that he wanted to be paid off there, and that he would not go with the ship any further whether paid or not. I again saw pursuer on board on the 26th December. He was moving about apparently drunk, quarrelling with the other men. Reid, a coloured fireman, made a complaint to me about Seward having struck him. Reid asked me for leave to go on shore to make a complaint to the police about Seward assaulting him. . . . Reid informed me that pursuer had assaulted him. I did not see the assault. It was on board. It occurred on the 26th December 1882. I keep an engineers' log. I did not enter Reid's complaint in my log. It is not entered there. The entries are about engine-room affairs. The assault came up in conversation between me and the captain the same day, I believe; I am not positive. Reid told me he had told the captain of the assault the day it was committed. I remember Reid telling me on his return that he had lodged a complaint to the police against pursuer. He did not tell me that pursuer had been apprehended. The assault was generally talked of on board. Reid went on shore between the 26th and the 30th, about the assault as I understood. Reid told me he had to appear against pursuer. I afterwards learned from Reid that pursuer was in jail,"—and the mate corroborates this. It is thus put beyond all doubt, I think, that the cause of the pursuer's not coming back to his ship was well known both to the captain and other officers at the time when they left New York upon the 30th December.

Now, this circumstance warrants in my opinion the leading findings in fact in the Sheriff-Substitute's interlocutor, for it is clear, I think, that the captain never considered the pursuer as a deserter, but he treated him all along as one who had left the ship without authority. That being so, I consider the findings in law of the Sheriff-Substitute are correct, and I think the deductions which he has made from the sum sued for are fair and reasonable.

There appears to have been some irregularities as to the mode in which the evidence was taken in the Inferior Court, but the joint-minute for the parties which is in process precludes any objections which might have been taken by the defender as to the effect of the pursuer's evidence.

LORD SHAND—When the steamer "Teddington" arrived at New York the pursuer of this

action was under an engagement to return with the ship to England after she had visited the various ports at which she was chartered to call. He was thus bound to remain by his ship and to discharge his duty as engineer of the donkey engine during her stay at New York.

It appears from the evidence that upon the 22d December he left the ship without leave and spent some days on shore. He took away a part of his clothes, and when he returned to the ship upon the 26th he on leaving removed a further portion of his clothes.

At the time when the vessel sailed he was in prison, having been apprehended on a charge of assault at the instance of one of the seamen named Reid.

About the pursuer's absence from the ship there can be no doubt, but was it desertion to the effect of forfeiting any claim which he might have for wages, or was it merely a case of a sailor leaving his ship without permission?

The case is a narrow one, but on the whole I do not think the pursuer intended to desert, nor did the captain apparently treat him as a deserter. Neither upon the 22d nor upon the 26th did the captain enter him in the log-book as a deserter, although upon both these occasions he was absent from the ship.

It was not until the 29th, at which time he undoubtedly was in prison and unable to return to the ship, that the entry was made. In these circumstances there has been here a failure, I think, to prove desertion, especially as it has not been shown that the pursuer took all his clothes with him. On the contrary, part of his present demand is for clothes of his alleged by him to be in the ship at the time she sailed from New York while he was in jail.

I therefore agree with your Lordships that we should affirm the judgment appealed against.

LORD FRASER—The Sheriff-Substitute in his note says that in his opinion the pursuer did desert his ship, but that the defender condoned that desertion. All that I desire to say is that I do not think there is any evidence of condonation, but I agree with your Lordships in thinking that desertion has not been proved.

The **LORD PRESIDENT** and **LORD DEAS** were absent.

The Court affirmed the interlocutor appealed against.

Counsel for Pursuer and Respondent—Rhind—Watt. Agents—Gunn & Fodd, S.S.C.

Counsel for Defender and Appellant—Pearson—Boyd. Agent—J. Smith Clark, S.S.C.

Saturday, December 6.

SECOND DIVISION.

WATERS' TRUSTEES v. WATERS.

Succession—Vesting—Destination—Over—Survivorship.

A trustor directed his trustees to hold the residue of his estate equally for his children, and to apply the income (subject to an annuity to their mother) equally among them for their maintenance and education till they respectively reached the age of twenty-five, at which date they were to receive payment of their shares, the shares of daughters to be alimentary and exclusive of the rights of husbands, and the issue of a predeceasing child to be entitled to the share which would have fallen to their parent at the term of payment had he or she then survived. Held that the shares vested a *morte testatoris*, and therefore that the share of one child who died intestate and without issue under twenty-five passed to his legal representatives.

James Coltart Waters died at Craigton House, Stirlingshire, on 11th September 1867, leaving a trust-disposition and settlement dated 30th April 1862. He was survived by a widow and three children, Alexander William Dun Waters, Grace G. Waters, and James C. Waters, the eldest of whom had been born in 1863.

By his settlement Mr Waters conveyed his whole estate, heritable and moveable, to trustees for the purposes, in the first place, of payment of his debts and the expenses of the trust; and in the second place, for satisfaction and implement of the provisions in favour of his wife contained in his antenuptial contract of marriage. The third purpose of the trust was in the following terms—
“Third, I direct my said trustees, after satisfying the first purpose of this trust, to hold and divide the whole residue of my estate, heritable and moveable, equally for and among any child or children who may be lawfully procreated of my body, and after paying equally from the yearly income of said shares the annuity which may be payable to my widow, to apply the remaining income, or such part thereof as my said trustees may think expedient, towards the maintenance and education of said child or children, and for their use until they respectively attain the age of twenty-five years complete, at which dates I direct my trustees to pay and make over their respective shares so far as not required for payment of said annuity, and upon the death of my widow to pay and make over on their respectively attaining twenty-five years their shares of the investments which may have been retained to meet said annuity: Declaring that the shares of any daughters I may leave, and the interest or produce thereof until they attain the age of twenty-five years, shall be paid to them for their own alimentary use, exclusive of the *jus mariti* and right of administration of any husbands they may marry, and shall not be assignable by them or subject to their debts or deeds, or to the diligence of creditors; and that the issue of any child predeceasing shall be entitled equally among them to the share of my said estate that would have fallen to the predeceasing parent at the term