Thursday, May 26.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

DOWNIE *v.* CONNELL BROTHERS, LIMITED.

Reparation—Master and Servant—Assault by Master of Vessel on Member of Crew — Responsibility of Owners — Common Employment—Relevancy.

A seaman brought an action of damages against the owners of a vessel, in which he averred that when he was lying ill on board, the master, in order to compel him to proceed with his work, assaulted him and pulled him from his berth, whereby his illness was aggravated.

Held that as the pursuer and master were fellow servants the action must be dismissed as *irrelevant.*

Ship—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 128 (1)—*Merchant Shipping Act* 1906 (6 *Edw. VII, cap.* 48), *sec.* 31—*Refusal to Give Certificate of Discharge — Liability of Owners — Relevancy.*

A seaman, on the averment that the master of a vessel on which he had served had failed to give him a certificate of discharge in terms of the Merchant Shipping Acts, claimed damages from the owners of the vessel.

Held that the action was irrelevant in respect that under the provisions of the Merchant Shipping Acts the duty of giving a certificate lay upon the master, as such, and that he alone was responsible for failure to perform it.

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) enacts—sec. 128 (1)—"The master shall sign and give to a seaman discharged from his ship, either on his discharge, or on payment of his wages, a certificate of his discharge in a form approved by the Board of Trade, . . . and if the master fails so to do he shall for each offence be liable to a fine not exceeding ten pounds."

The Merchant Shipping Act 1906 (6 Edw. VII, cap. 48) enacts — sec. 31 — "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. . . ."

John Downie, Broad Wynd, Leith, brought an action against Connell Brothers, Limited, shipowners, Glasgow, in which he, *inter alia*, claimed damages for an assault alleged to have been committed upon him by the master of the vessel, and for the master's alleged failure to give him a certificate of discharge in terms of the Merchant Shipping Acts.

The *facts* as well as the nature of the pursuer's averments sufficiently appear from the opinion *infra* of the Lord Ordinary (SALVESEN), who on 30th December 1909 assoilzied the defenders.

Opinion.—"This is an action by a seaman against the owners of the s.s. 'Kilchattan.' The pursuer was engaged to serve as fireman on board this vessel for a period of three years from 29th April 1908, and to be returned and paid off in a port of the United Kingdom. He remained on board the vessel until 2nd December 1908, when, according to his own statement, he had become so unwell, and was suffering such acute pain, that he was unable to attend to his duties. On that day he was taken in a cab to a hospital at Colombo, where he remained till 9th December 1908. On 10th December he was dispatched as a distressed seaman to London by the Superintendent of Shipping at Colombo, a substitute having been engaged in his place on board the s.s. 'Kilchattan.' The pursuer makes three claims in the action, namely, (1) for wages" . . . [*After disposing of this claim as irrelevant, his Lordship proceeded*—] . . . "(2) The pursuer's second claim is for damages for an alleged assault committed upon him by the captain. He says that while he was lying sick in his berth the captain, in order to compel him to proceed with his work, 'assaulted him, pulled him from his berth, and dragged him out of the forecastle on to the deck.' The pursuer then fell down in a fit and became unconscious. He explains that on the other firemen interfering he was taken back to the forecastle, and that his illness was much aggravated by the assault.

"I can quite understand how these averments, if well founded, would entitle the pursuer to reparation from the master, but I fail to see how they give rise to any claim against the owners of the vessel. The pursuer says that the master acted in the course of his employment and in the defenders' interests; and if the action had been raised by a person not in the employment of the defenders, there are cases in the books which might be plausibly cited as analogous; but it is an entire novelty for one servant to claim damages against the common master for an assault committed upon him by a fellow-servant. No case was cited at the Bar in which such a claim had ever been made, although it may be assumed that, if valid, numerous similar cases must have occurred. If it were a sound proposition in law that a master is liable for assaults committed by one servant on another, in the course of the employment and in the intended interests of the master, there would be no end to such actions, for I can see no reason why they should be confined to assaults by superior servants upon inferior. If a shipmaster were ill while the vessel was proceeding on its voyage, and one of the mates took it into his head that he was merely shamming, and that it was desirable in the interests of safe navigation that he should be encouraged to attend to his duties by a method similar to that applied to the pursuer, exactly the same reasoning would apply to make the common master responsible for the ill-advised violence. The truth is, that while such acts may be done in the course of the employment and under an

erroneous belief that the employer's interests would thereby be served, they can never fall within the implied mandate. The plain duty of the master was to ascertain by a medical examination what the pursuer's state of health was, and not to put the pursuer to such a drastic test in order to obtain personal conviction as to his state of health. I accordingly think this claim is as unfounded as it is admittedly unprecedented.

"(3) The pursuer's third claim is for a sum of £100, which is based entirely on the captain's failure to give him a certificate of discharge in terms of the Merchant Shipping Acts. He says that owing to this failure he has since been unable to obtain any employment.

"The duty of the master of a British ship who discharges a seaman at any place out of the United Kingdom to give him a certificate of discharge is a purely statutory one. It was enacted by the Merchant Shipping Act 1854, section 172, and has been re-enacted by section 128 of the Merchant Shipping Act 1894, and again by section 31 of the Merchant Shipping Act 1906. This last section slightly varies section 128 of the 1894 Act, which remains unrepealed, and which provides that if the master fails to give a certificate of discharge he shall for each offence be liable to a fine not exceeding £10. It will be observed that a duty is laid upon the master, as such, and it is obvious that it is impossible for the owners when he is in a home port to take any means to compel him to perform this duty. In the case of *Vallance* (13 Q.B.D. 109) it was held that an action will not lie for the refusal to give a seaman the certificate of discharge directed to be given by the 172nd section of the Merchant Shipping Act 1854, the only remedy for such refusal being the penalty provided by that section. If no action lies against the master for the non-performance of a statutory duty expressly laid upon him, I cannot conceive how an action of damages will lie against the master's employers; and accordingly I think that this claim also fails. I may add that the only conceivable value which such a certificate of discharge has for the seaman who receives it is that it may contain a note as to his character and conduct. If the pursuer had received such a certificate it would obviously have been worse than useless, as it would either have contained no statements as to these points or one which could only have been highly unfavourable. . . . I accordingly reach the result that the pursuer has stated no relevant case for inquiry, and that the defenders are entitled to be assoilzied, with expenses."

The pursuer reclaimed, and argued—(1) *Esto* that the master had acted in excess of his duty, that did not exempt his employers from liability—*Dyer* v. *Munday*, [1895] 1 Q.B. 742. The fact that the master and the pursuer were fellow-servants was immaterial, for the defence of common employment only applied where there had been negligence on the part of the fellow-servant. The assault here could not be held to be a risk within the contemplation of the pursuer at the beginning of the voyage. (2) The owners were liable in damages for the master's failure to give a certificate of discharge, for section 31 of the 1906 Act imposed a statutory duty on the master to give a certificate to a seaman discharged abroad. If, as was the case, no penalty was provided by the Act of 1906 for his failure to do so, then, as there could be no wrong without a corresponding remedy, the seaman was entitled to claim damages at common law. It was important for a seaman to have a discharge, for it showed that he was not a deserter.

Argued for respondents — (1) The pursuer's averments, if true, showed that the master had acted outwith his authority, and therefore that the defenders were not liable—*Gillespie* v. *Hunter*, May 28, 1898, 25 R. 916, 35 S.L.R. 714; *Poulton* v. *London and South-Western Railway Company*, 1867 L.R., 2 Q.B. 534 (Blackburn, J., at 539). The pursuer could have no claim against the defenders, for any such claim was absolutely barred by the doctrine of common employment. (2) Section 128 of the 1894 Act was not limited to discharges within the United Kingdom, for it had been decided that section 134—which was in same catena of clauses as 128—was of universal application—*Palace Shipping Company, Limited* v. *Caine*, [1907] A.C. 386. Under section 128, which was a re-enactment of the 172nd section of the Merchant Shipping Act 1854, the duty of giving a certificate of discharge lay upon the master, not upon the owners. A master could not be sued for damages for refusing to give a discharge, for the only remedy was the penalty provided by the section—*Vallance* v. *Falle*, [1884] L.R. 13 Q.B.D. 109. *A fortiori*, therefore, no action lay against the master's employers.

At advising—

LORD LOW—[*After narrating the facts, and finding that the pursuer's first claim fell to be dismissed as irrelevant, his Lordship proceeded*] — In regard to the second claim, I agree with the Lord Ordinary that the pursuer has not stated a relevant case. Assuming the pursuer's averments to be true, I think that the master was plainly acting in the course of his employment, and the question is whether that renders the defenders liable, seeing that the pursuer and the master were fellow-servants, both employed by the defenders in the same work. Although the Lord Ordinary has held that the pursuer has not stated a relevant case against the defenders, he appears to have been doubtful whether the doctrine of common employment applies to the case of one servant being assaulted by another. Of course if the assault were not committed in the course of the employment there could be no question of the employer's liability; but the law being that the employer is not liable for an injury caused by the fault of a fellow-servant, even when that servant is acting in the course of his

employment, I do not think that the precise nature of the fault is of any importance. No such distinction has, so far as I know, ever been taken, and I do not think that any solid ground for such a distinction exists. My opinion therefore is that this claim also falls to be dismissed.

The third claim of the pursuer is for damages on account of the alleged failure of the master to make provision for his maintenance at, and return from, Colombo, and to give him a discharge.

The first of these grounds does not seem to have been maintained before the Lord Ordinary, but it was so before us, and must be disposed of. The statutory enactment upon which the pursuer founds is the 34th section of the Merchant Shipping Act 1906. By that section it is provided that if a seaman "suffers from illness (not being venereal disease, or an illness due to his own wilful act or default, or his own misbehaviour), the expenses of his maintenance until he is cured or returned to his proper port, and of his conveyance to the port, shall be defrayed by the owner of the ship without any deduction from his wages."

Here again the pursuer's averments are of the most meagre description. He only says—"No arrangement had been made" (when the ship left Colombo) "for the maintenance of the pursuer and for his return to the United Kingdom." Now the pursuer's own statement is that on the 2nd December he was taken from the ship to the hospital, that he remained in the hospital until the 9th December, and that on the 10th December he sailed for London in the "Moldavia" as a distressed seaman. He does not say that he was charged anything for maintenance and medical attendance in the hospital or for his voyage home, and it is certain that no deduction was made from his wages on account of these matters. Further, there is very good reason to believe that the pursuer's illness was due to his own misbehaviour. It therefore seems to me to be clear that the pursuer has made no relevant averment of failure to comply with the statutory provisions in regard to maintenance.

In regard to the claim in respect of the alleged failure of the master to give the pursuer a certificate of discharge, I take the same view as the Lord Ordinary. The duty of giving a certificate of discharge to a seaman discharged at any place out of the United Kingdom is, by the 31st section of the Merchant Shipping Act 1906, laid upon the master. A similar provision is made in regard to a seaman discharged in the United Kingdom, by the 128th section of Merchant Shipping Act 1894. The only substantial difference between the two enactments is that in the latter case failure to give the certificate renders the master liable to a fine not exceeding £10. I do not know why a similar penalty was not attached to the master's failure to give a certificate to a seaman discharged out of the United Kingdom, when it is even more impossible than in the case of a discharge in the United Kingdom for the owners to see that the duty is performed. I think, however, that it is sufficiently plain that the duty of giving a certificate of discharge is in both cases laid upon the master alone, and that he alone is responsible for failure to perform the duty.

I am therefore of opinion that the action was rightly dismissed by the Lord Ordinary.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD DUNDAS was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer (Reclaimer)—Mac-Robert—Gentles. Agent—T. M. Pole, Solicitor.

Counsel for Defenders (Respondents)—Spens—Paton. Agent—Campbell Faill, S.S.C.

Thursday, May 26.

SECOND DIVISION.

[Lord Cullen, Ordinary.

TURNBULL *v.* TURNBULL.

Revenue—Estate Duty—Property Passing on Death—Cesser of Liferent—Payment of Duty by Second Liferenter—Right of Liferenter to Charge Fee where Fiar Avers Liability to Account—Form of Charge—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 1, 2 (1) (*b*), 9 (5), 23 (18).

A disponed an estate to himself in liferent and after his death to B in liferent and to C in fee. On A's death B paid estate duty and presented a petition for an order on C to grant a bond and disposition in security over the estate in her (B's) favour for the amount of the duty.

Held (1) that the subject chargeable with the duty was the fee of the estate and not merely the liferent, and that B was entitled to have the duty charged on the estate by way of bond and disposition in security, and was not bound to charge it by way of a terminable charge; and (2) that B was entitled to an order on C to grant the bond notwithstanding an averment by C that B had in her hands the proceeds of sales of timber the fee of which belonged to him.

The Finance Act 1894 enacts—section 1—that in the case of every person dying after the commencement of the Act, estate duty shall be levied on the principal value of all property passing on his death. Section 2 (1)—"Property passing on the death of the deceased shall be deemed to include . . . (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." Section 9 (5)—"A person authorised or required to pay the estate duty in respect of any property