

Friday, May 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MOHAD v. ANCHOR LINE

(HENDERSON BROTHERS) LIMITED.

*Master and Servant—Workmen's Compensation—Seaman—Contract of Service—Desertion—Termination of Contract—Emergence of Right to Compensation—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 7 (1) (e)—Merchant Shipping Act 1906 (6 Edw. VII, cap. 48), sec. 34 (1).*

The Workmen's Compensation Act 1906 enacts—Section 7 (1) (e)—“The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act 1894 as amended by any subsequent enactment or otherwise, liable to defray the expenses of maintenance of the injured . . . seaman . . . .”

The Merchant Shipping Act 1906 (6 Edw. VII, cap. 48) enacts—Section 34 (1)—“If . . . a seaman belonging to a ship receives any hurt or injury in the service of the ship . . . the expenses of the maintenance of the . . . seaman until he is cured or dies, or is returned to a proper return port, and of his conveyance to the port . . . , shall be defrayed by the owner of the ship without any deduction on that account from his wages.”

A seaman who was engaged for a round voyage from Bombay to the United Kingdom and back to Bombay was injured by an accident arising out of and in the course of his employment while on the voyage to the United Kingdom. After a period in hospital he deserted the ship on the return voyage and thereafter claimed compensation. *Held* that the desertion terminated the liability of the shipowners for maintenance, that the latter were not entitled to insist that the seaman should return to Bombay as a condition precedent to his obtaining compensation, and that the right to compensation emerged at the time of the desertion.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 7 (1) (e), and the Merchant Shipping Act 1906 (6 Edw. VII, cap. 48), section 34 (1), are quoted *supra* in rubric.

Guhalm Husain Mohad, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Glasgow (LEE) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), brought by the appellant against the Anchor Line (Henderson Brothers), Limited, *respondents*, appealed by Stated Case.

The Case stated—“1. That it was admitted on 14th June 1920 the appellant sustained an injury to his right hand by accident arising out of and in the course of his employment as a greaser with the

respondents on their s.s. ‘Circassia.’ 2. That as the result of said injuries the appellant was for some time totally, and at the date of proof was still partially, incapacitated for work. 3. That the appellant's average weekly earnings in said employment, including the value of rations supplied to him by the respondents, were 25s. 4. That the appellant's contract with the respondents was for service throughout a round voyage from Bombay to the United Kingdom and back to Bombay within one year. 5. That after said accident the appellant was treated in hospital at Marseilles, and then brought by the respondents in one of their steamers to Liverpool, and thence by train to Glasgow, where he rejoined the s.s. ‘Circassia.’ 6. That in September 1920, while the respondents were in process of returning the appellant to the port of Bombay in terms of their contract and of the provisions of the Merchant Shipping Act 1906, he left the said s.s. ‘Circassia’ without leave and deserted his service. And 7. That the respondents have all along been willing, and have offered and now offer, to return the appellant to the said port of Bombay.

“I found in law (1) that the respondents were liable under the provisions of the Workmen's Compensation Act 1906 to pay compensation to the appellant during his incapacity resulting from the said injuries, and (2) that the respondents being liable under their contract with the appellant and under the provision of section 34 of the Merchant Shipping Act 1906, to defray the expenses of the maintenance of the appellant until he should be returned to Bombay, and being willing to discharge said liability and to return him to Bombay, no weekly payment of compensation was at the date of my award payable.

“On 15th December 1920 I therefore issued an award refusing *in hoc statu* to award compensation and finding the appellant liable to the respondents in expenses.”

The *question of law* for the opinion of the Court was—“On the facts as stated, and in view of the provisions of the Merchant Shipping Act 1906, section 34, and the Workmen's Compensation Act 1906, section 7 (1) (e), was I as arbitrator entitled to refuse an award of compensation?”

The following *note* was appended by the arbitrator to his award—“The pursuer founds his claim primarily on a contract of service. Under the contract both parties were bound for the period of a voyage from Bombay to the United Kingdom and back to Bombay, and it appears to me that the effect of section 34 of the Merchant Shipping Act 1906 is to prevent an earlier termination of the contract through the inability of the workman to continue in the performance of the duties of his service. The defenders under the contract and the provision of the statute are under an obligation to maintain the pursuer till they return him to Bombay, and the pursuer is under a reciprocal obligation to remain on the ship and perform the duties of his employment if and when and to the extent he is able. The defenders may have, and I expect do

have, an interest to require the pursuer to return to Bombay where he will be among his own people and the best chance of obtaining such employment as his diminished capacity must in future restrict him to. In my opinion the pursuer is not entitled to desert his employment and have his rights under the Workmen's Compensation Act determined in advance.

"The defenders admit their liability, and the pursuer is entitled to a finding to that effect. But there can be no order for payment of compensation, because under section 7 (1) (e) of the Workmen's Compensation Act 1906 the weekly payment is not payable in respect of the period during which the defenders are under the Merchant Shipping Act 1906 liable to defray the expenses of the pursuer's maintenance. He must wait for any operative order till he returns to Bombay, by which time it is possible that his incapacity may be at an end."

Argued for the appellant—On the facts as stated the appellant was entitled to an award of compensation. The purpose of section 7 (1) (e) of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) was to prevent overlapping. The duration of liability to pay compensation was not coincident with the duration of the contract of service. Section 34 (1) of the Merchant Shipping Act 1906 (6 Edw. VII, cap. 48) only gave a right to maintenance while such was demanded, and desertion was equivalent to a waiver of the claim to maintenance. The effect of section 7 (1) (e) of the Workmen's Compensation Act 1906 had been considered in *M'Dermott v. Owners of s.s. "Tintoretto,"* [1911] A.C. 35, 48 S.L.R. 728, 4 B.W.C.C. 123; *Ashrody v. s.s. "City of Edinburgh,"* 1919, 12 B.W.C.C. 387, *per* Atkin, L.J., at pp. 397 and 398.

Argued for the respondents—Section 7 (1) (e) of the Workmen's Compensation Act 1906 and section 34 of the Merchant Shipping Act 1906 together formed a statutory code applicable to the present case. This code imposed a statutory period of maintenance and a right to compensation at its expiry—*Turner v. s.s. "Haulwen" (Owners of),* 1915, 8 B.W.C.C. 242. A seaman by breaking his contract could not enlarge the liability of his employer, and there could be no liability for compensation before expiry of the period of maintenance.

At advising—

LORD JUSTICE-CLERK—The workman in this case is a seaman who was engaged for a round voyage from Bombay to the United Kingdom and back to Bombay within one year. While on the voyage to this country in June 1920 he was injured under such circumstances as would admittedly have entitled him to compensation under the Workmen's Compensation Act of 1906 subject to the point afterwards referred to. After being treated in hospital at Marseilles he was brought to Liverpool and thence to Glasgow, where though still partially incapacitated he rejoined his ship. After rejoining his ship, and while in course of being returned to Bombay, he in September 1920

deserted his ship. But for his so deserting he would in ordinary course have been returned to Bombay before the end of November 1920. In his application he claimed compensation as from the date of his accident. Under his contract with his owners, and in terms of the Merchant Shipping Act 1906, the owners were bound to maintain him till his return to Bombay, and it is not suggested that the owners failed in any respect to discharge their obligation so to do down to the date of his desertion.

The Workmen's Compensation Act of 1906, section 7 (1) (e), provides—"The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act 1894 as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice."

The owners contended that the applicant had no right to an operative award of compensation until he had been returned to Bombay, and the learned arbitrator has given effect to this contention. I cannot accept this view.

In my opinion by his desertion the applicant terminated any right on his part to insist on maintenance from his owners which otherwise he would have had under and in terms of section 34 of the Merchant Shipping Act 1906.

The two statutes are perfectly distinct. The Merchant Shipping Act came into operation on 1st June 1907, and the Workmen's Compensation Act on 1st July 1907. They agree in this, that apart altogether from the express terms of the contract of service they conferred certain rights on the workman and imposed corresponding liabilities on the employer. But the workman's rights to compensation are not, in my opinion, so far as the question in this case is concerned, made dependent for their enforcement on his fulfilling his obligations under his contract of service to return to Bombay. When the accident happened and the injury was sustained, he *ipso facto* became entitled to compensation except in so far as there was statutory provision to the contrary. The only statutory provision of that sort with which we are here concerned is that contained in said section 7 (1) (e). That has been interpreted in the House of Lords in the case of *M'Dermott* ([1911] A.C. 35) as meaning only that the workman is not at the same time to receive maintenance under both statutes—benefits under the two Acts, as it was said, are not to overlap.

It may be that a seaman could not by desertion make his owners pay compensation under the Compensation Act at an earlier date and to a larger amount than they would have had to do had he duly observed the terms of his contract and returned to Bombay in October or November 1920. But in my opinion the period of liability for maintenance referred to in section 7 (1) (e), if matters had proceeded in due course and there had been no desertion, must have come to an end before the arbitrator could have given his award.

In my opinion the owners are not entitled

to insist that the applicant shall return to Bombay as a precedent to his obtaining an award of compensation. I am therefore of opinion that the question submitted to us falls to be answered in the negative.

The question as to the precise amount to be awarded is quite properly not raised in the case, and I indicate no opinion as to that matter.

LORD DUNDAS—On 14th June 1920 the appellant's right hand was injured by an accident arising out of and in the course of his employment as a greaser with the respondents on their s.s. "Circassia." In consequence he was for sometime totally, and was when this case came before the learned arbitrator still partially, incapacitated. It is common ground between the parties, and the arbitrator has found in law, that the respondents are liable under the Workmen's Compensation Act 1906 to pay compensation to the appellant during his incapacity. The case, however, is attended by other considerations which led the learned arbiter to find that the appellant was not entitled, as at the date of his award 15th December 1920, to any payment of compensation, and therefore to refuse him *in hoc statu* any payment. The case is rather a puzzling one, and the difficulty is not lessened by a somewhat scanty statement of the facts. I have come to the conclusion upon the case as stated that the learned arbitrator was wrong.

The appellant's contract with the respondents was for service throughout a round voyage from Bombay to the United Kingdom and back to Bombay within one year. The sixth finding states "that in September 1920, while the respondents were in process of returning the appellant to the port of Bombay in terms of their contract and of the provisions of the Merchant Shipping Act 1906, he left the said s.s. 'Circassia' without leave and deserted his service." The concluding words just quoted appear to me to import that the appellant at that date became a deserter in the ordinary sense and meaning of the word. His counsel, however, insisted that no more was really meant than that the man, for reasons of his own, declines to go back to Bombay, and desires to waive any right he may have to be taken there and to be maintained by the respondents on the voyage. I should find it difficult to construe the sixth finding in this sense; but I do not think the point is of material importance, because it seems—and the argument was conducted before us on this basis—that the appellant has at all events repudiated and renounced any further claim to maintenance by the respondents as from the date of his "desertion." The crux arises from the respondents' argument to the effect that while this may be so, the contract is not rescinded by the appellant's refusal to go back to Bombay; that he cannot waive his claim for maintenance as he seeks to do; and that they are entitled, in virtue of the contract and of section 34 of the Merchant Shipping Act 1906, to insist upon carrying him back to that port, paying the expenses of his maintenance during the voyage.

They maintain that they have an interest to pursue this course, (1) because when the man reaches Bombay his incapacity may have ceased or at least materially diminished; and (2) because he would, as the arbitrator explains in his note, "be among his own people and have the best chance of obtaining such employment as his diminished capacity must in future restrict him to." Whether or not these considerations will form proper matters for the arbitrator in assessing the amount of compensation to be awarded—as to which I express no opinion—I do not think that they justify the suspension *in hoc statu* of any award. I cannot hold that the respondents are entitled either by the contract, or upon a sound construction of section 34, to insist upon carrying this man back to Bombay against his will. Whether or not he is liable to them in damages or otherwise in consequence of the attitude he has assumed is another matter, and one which cannot be determined in this process.

In my judgment we must answer the question put to us in the negative, and the learned arbitrator must proceed to award to the appellant, under the Workmen's Compensation Act, such compensation as he may find under the whole circumstances to be just.

LORD SALVESEN—The statement of facts in this case is certainly not nearly so full and detailed as I think it ought to have been, because on the facts found it seems to me doubtful whether the voyage of the "Circassia," which the appellant had undertaken to complete, still remained unfinished, or whether there had been an intervening voyage and it was a mere accident that the "Circassia" was available for performing the obligation of the shipowner, under the Merchant Shipping Act, of returning the injured seaman to the port at which he had signed on. I take it that the latter is the true view, and counsel for the parties seemed to agree that it was so.

On the facts as stated, and as interpreted in the light of what I have said, it appears that this man having been injured on 14th June was taken care of by the shipowners in hospital and maintained there, and that he was then sent from Marseilles, where he had been first landed, to Glasgow in order that he might go on the "Circassia." He was apparently able to travel and to go on board the vessel. Whether he would have been able to work is not stated. Indeed, the contrary seems to be implied from the finding of the arbitrator that even at the date of the proof he was still partially incapacitated.

Now the owners were under obligation in these circumstances to offer to take him to Bombay and to maintain him on the voyage, and they were willing to discharge that obligation imposed upon them by the Merchant Shipping Act. The man, however, refused to avail himself of this right and left his service, and immediately took proceedings under the Workmen's Compensation Act. The whole question seems to me to turn upon whether by his so acting in

breach of his contract he did not discharge the liability of the shipowner under the Merchant Shipping Act to maintain him until he was returned to the port where he had originally joined the ship. In my opinion the liability was discharged by the act of the appellant. I do not doubt that the shipowners and he might have agreed that he should be discharged at Glasgow, and that he would be perfectly entitled to waive the benefits conferred on him by the Merchant Shipping Act. If so, it is obvious that their obligation of maintenance would cease. And it seems to me that the words of Lord Loreburn in the case of *M'Dermott* ([1911] A.C. 35) apply, and that the effect of the two Acts read together is that compensation is to begin exactly where the right to maintenance ends.

If I am right in the view that the action of the man in deserting his service and electing to take compensation under the Workmen's Compensation Act, which was his alternative remedy, terminated the liability of the shipowners, it follows that his right to compensation from that moment arose. Up to September 1920 it does not seem to me that he can possibly have any claim, because he has been maintained by the owners of the ship; and after all the allowance under the Workmen's Compensation Act is primarily an allowance with a view to maintenance. But as from the time when he discharged or repudiated his rights under the Merchant Shipping Act for further maintenance, I am of opinion that his right to compensation emerged.

Your Lordships have said nothing as to the footing upon which the arbitrator, who is now to proceed under our judgment to award compensation, is to proceed; but I think it right to say that *prima facie* it does not seem to me that the fact that the man has broken his contract should place him in a better position than if he had duly implemented it, and that therefore it may very well be that some of the considerations that appealed to the learned arbitrator as a ground for suspending the award altogether may be quite relevant in assessing the amount. I say no more than that, because, no doubt, the arbitrator will consider the whole circumstances of the case. But I can quite understand that the position of a native of India, who elects to remain in this country, where perhaps there may be great scarcity of employment suitable for him as compared with the facilities which he might have in his own country, may have a possible bearing upon the amount of compensation to be awarded.

**LORD ORMDALE**—It is not necessary again to recite the circumstances in which the present application for an award of compensation was presented.

The arbitrator, while holding that the respondents were liable to pay compensation to the appellant during his incapacity for work, has refused to make an award on the ground that the respondents are liable, under their contract and under the provision of section 34 of the Merchant Shipping Act 1906, to defray the expenses of the main-

tenance of the appellant until he should be returned to Bombay, and that as they are willing to discharge this liability and return him to Bombay, no weekly sum of compensation is payable. He reaches this conclusion because of the terms of section 7 (1) (e) of the Workmen's Compensation Act 1906, which provides that the "weekly payment shall not be payable in respect of the period during which the owner of the ship is under the Merchant Shipping Act . . . liable to defray the expenses of the maintenance of the injured . . . seaman. . . ." It was maintained by the respondents that that period necessarily endures in this case until the appellant is returned to Bombay or some other proper return port.

I agree in thinking that the period was terminated by the action of the appellant when, as stated in the Case, after joining the "Circassia" in Glasgow he in September 1920 left the ship without leave and deserted his service "while the respondents were in process of returning the appellant to the port of Bombay." That was, it appears to me, an absolute repudiation or waiver of any claim competent to him under the Merchant Shipping Act for the expenses of his maintenance. The stated facts do not disclose what became of the appellant after his leaving the ship, although he appears to have attended the proof led in his application in December 1920, or whether the respondents took any steps to recover him for repatriation purposes, but he has on the facts stated continued to be recalcitrant, and has cut himself adrift from all connection with the respondents, and so discharged them of all liability for the expenses of his maintenance.

The Court answered the question of law in the negative, recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to proceed.

Counsel for the Appellant—Mackay, K.C. —Aitchison. Agents—W. G. Leechman & Company, Solicitors.

Counsel for the Respondents—Moncrieff, K.C. —Gentles. Agents—Macpherson & Mackay, W.S.

## COURT OF TEINDS.

Friday, May 27.

MACKENZIE, PETITIONER.

SIMPSON, PETITIONER.

*Church — Glebe — Application for Authority to Feu — Expenses of Application — Glebe Lands (Scotland) Act 1866 (29 and 30 Vict. cap. 71), secs. 18 and 19 — Feudal Casualties (Scotland) Act 1914 (4 and 5 Geo. V, cap. 48), sec. 18.*

The Glebe Lands (Scotland) Act 1866 provides (sec. 18) that the expenses of applying for authority to feu, and also those of making the necessary streets and drains, shall form a permanent bur-