

Tuesday, March 18.

FIRST DIVISION.

[Lord Mure, Ordinary.]

O'NEILL v. RANKIN.

*Merchant Shipping Act, 17 and 18 Vict. cap. 104, sect. 246 — Owner and Master — Liability — Mandate.*

In a case where a seaman raised an action of damages against the owners of a vessel for certain alleged illegal proceedings taken by the master under sect. 246 of the Merchant Shipping Act, 1854,—held that the ground of action was irrelevant, the owners not being liable unless it could be shown that they had expressly authorised the illegal proceedings, or had taken benefit therefrom.

This was an action raised by a seaman against the owners of the brig "Earl Grey" of Liverpool; and the pursuer sought to recover damages from the defenders on the ground of certain alleged illegal proceedings by Edward Nankivell, the master of the vessel. The Lord Ordinary pronounced the following interlocutor:—

"23d December 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions—Sustains the first plea in law for the defenders William Rankin & Sons, dismisses the action, and decerns: Finds them entitled to expenses, of which appoints an account to be given in; and remits the same, when lodged, to the Auditor to tax and report.

"*Note.*—In this action the pursuer seeks to recover damages from the defenders, as owners of a vessel in which the pursuer was engaged as cook, in respect of certain alleged illegal proceedings of the master of that vessel, who is also called as a defender, but against whom the summons has not been executed. The damages are laid on two grounds—1st, Certain irregularities in proceedings taken at the instance of the master for apprehending the pursuer as a deserter from the vessel, when at Kirkcudbright in November 1871; and 2d, for the master having illegally carried away the pursuer's clothes, bedding, bed-clothes, &c., from the Railway Station at Kirkcudbright, and taken them on board the vessel on the day it sailed. It is not, however, said that any of the things complained of were done by the master by orders from the defenders, or with their authority, or after communication had with them on the subject; and, in the absence of any such allegations, it appears to the Lord Ordinary that the statements are not relevant to found a claim of damage against the present defenders.

"As regards the removal of the clothes and bedding, the charge appears to amount almost to one of theft on the part of the master. It was at all events not a proceeding within his ordinary duties as ship-master, but one apparently of such an irregular and illegal description as—having regard to the opinion of the Court in the case of *Macdonald*, 16th May 1860—cannot, it is thought, be made the foundation of a claim of damages against owners unless directly authorised by them. The claim made in respect of the alleged illegal apprehension is attended with more difficulty; as it has the appearance of having been a proceeding adopted for the benefit of the vessel and its owners.

It is one, however, which would not, it is thought, at common law have been competent to the master in the discharge of his ordinary duty, or as falling within his ordinary powers delegated to him by the owners. For it relates to the exercise of a power specially conferred upon him, as well as upon all 'owners, ship-husbands, or consignees,' by section 246 of the Merchant Shipping Act, on which the application against the pursuer was founded. It is made competent by that section for each or any of these parties to adopt such proceedings on their individual responsibility: and the statute bears expressly that when the proceedings appear to the Court before which the case is brought to have been improperly taken, it is the party making the application who is to be responsible for the penalty incurred. Now the petition in the present instance bears to have been presented under the statute in the name of the master alone; and in the absence of any allegation of direct authority, or any instructions from the defenders, it appears to the Lord Ordinary that in such circumstances it is against the master, and not the owners, that the party complaining ought to proceed in order to obtain redress."

The pursuer reclaimed.

Authorities—*Gowans v. Thomson*, Feb. 6, 1844, 6 D. 606; *M'Naughton v. Halbert*, Nov. 29, 1843, 6 D. 104; *M'Naughton v. Allhusen & Co.*, Dec. 11, 1847, 10 D. 236; *The Druid*, April 25, 1842, 1 Wm. Robinson, 391 (Dr Lushington's opinion, 399); *Parsons on Shipping*, ii, 26; *Leddy v. Gibson & Co.*, Jan. 18, 1873, 10 Scot. Law Rep., 186; *Paterson v. Walker*, Nov. 29, 1848, 11 D. 167; *M'Donald v. Chisholm*, May 15, 1860, 22 D. 1075; *Fraser v. Younger & Sons*, June 13, 1867, 5 Macph. 861.

At advising—

LOD PRESIDENT—In this case there is an action at the instance of Thomas O'Neill, cook on board the brig "Earl Grey," for damages for certain illegal proceedings of the master, alleged to have taken place at Kirkcudbright when the ship was about to sail for Portugal. The master is also named as a defender, and concluded against in the summons, but the summons was not executed against him, but against the owners only. The proceedings complained of were taken under sec. 246 of the Merchant Shipping Act, and the defence is that the pursuer has not set forth facts relevant to infer liability on the part of the defenders. This raises an important question, but rather a special one, in respect that this section of the Act is unlike any similar enactment for regulating the relations of masters and seamen, and it gives a title to adopt proceedings to a great variety of persons. It provides that "Whenever either at the commencement or during the progress of any voyage any seaman or apprentice neglects or refuses to join, or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master, or any mate, or the owner, ship's husband, or consignee, may, in any place in Her Majesty's dominions, with or without the assistance of the local police officers or constables, who are hereby directed to give the same if required, as also at any place out of Her Majesty's dominions if and so far as the laws in force at such a place will permit, apprehend him without first procuring a warrant; and may thereupon, in any case, and shall in case he so requires and it is practicable, convey him before some

Court capable of taking cognisance of the matter, to be dealt with according to law; and may, for the purpose of conveying him before such Court, detain him in custody for a period not exceeding twenty-four hours, or such shorter time as may be necessary, or may, if he does not so require, or if there is no such Court at or near the place, at once convey him on board; and if any such apprehension appears to the Court before which the case is brought to have been made on improper or insufficient grounds, the master, mate, owner, ship's-husband, or consignee, who makes the same or causes the same to be made, shall incur a penalty not exceeding Twenty pounds; but such penalty, if inflicted, shall be a bar to any action for false imprisonment in respect of such apprehension." Now the proceedings here were at the instance of the master, on the ground that the pursuer had deserted his ship, and the latter alleges that they were irregular and illegal. The question is, Whether the owners are answerable for the irregularity and illegality. If they are answerable for the master, the inquiry at once arises, whether they are answerable for any of the other persons named in the section to whom is given the power of taking such proceedings. Now, it seems quite impossible to contend that the owners can be liable for acts done by the ship's-husband or consignee. No such liability is created by this statute, and it certainly does not exist at common law. The natural conclusion is, that all the persons named in the section are *in pari casu*, that each is liable in damages for his own actings. It is contrary to all rules of construction to hold that the owners are liable for the master, and for no one else, and this is the more confirmed by what is contained in the latter part of the clause, which provides that where the apprehension appears to the Court to have been made improperly, the person making it shall be liable to a penalty of £20. In the first place, Is anybody but the person who makes the wrongful apprehension liable to the penalty? It seems that he alone is responsible. Then, further, the statute provides that "such penalty, if inflicted, shall be a bar to any action for false imprisonment in respect of such apprehension." Does this mean that it shall be a bar to an action for false imprisonment against the person who has made the apprehension, and not against the owners? I think the natural meaning is that it shall be a bar to any action. The statute is expressed in the very words which one would expect if its intention was that if the master, mate, owner, ship's-husband, or consignee, has a penalty inflicted on him, then there is to be no action for false imprisonment. I therefore conclude that there is no liability on anybody except the directly guilty person. There were some cases cited by the pursuer to show that owners have been held liable; only two of these require any notice. The first is the case of *M'Naughton*, reported in the sixth and tenth volumes of Dunlop. The first is a report of proceedings by *M'Naughton* against the master of the vessel, for the purpose of suspending a sentence and warrant under section 9 of the then existing Act, 5 and 6 Will. IV. cap. 19. That section provided "That every seaman who shall absolutely desert the ship to which he shall belong shall forfeit to the owner or master thereof all his clothes and effects which he may leave on board, and all wages and emoluments to which he might otherwise be entitled, provided the circumstances at-

tending such desertion shall be entered in the log book at the time, and certified by the signature of the master and mate, or other credible witness, and that the absence of a seaman from the ship for any time within the space of twenty-four hours immediately preceding the sailing of the ship, without permission from the master thereof, or for any period however short, under circumstances plainly showing that it was not his intention to return thereto, shall be deemed an absolute desertion; and in case such desertion shall take place in parts beyond the seas, and the master of the ship shall be under the necessity of engaging any seaman as a substitute for the deserter, at a higher rate of wages than that stipulated in the agreement to be paid to the seaman deserting, the owner or master of the ship shall be entitled to recover from the deserter, by summary proceeding in the same manner as wages are by this Act made recoverable, any excess of wages which such owner or master shall pay to such substitute beyond the amount which would have been payable to the deserter in case he had performed his service pursuant to his agreement."

Now, here observe that the owner and the master are in the same category, proceedings may be taken by either of them; but the object is, first, to obtain possession of the seaman's clothes and property, and, secondly, to recover any expenses to which the owner might have been put. It is plain under that section that the proceedings are for the owner's benefit, so that in that case there is no doubt that the master was acting directly for the owner, and so the owner was held liable in expenses of the proceedings by the seaman against the master. The question afterwards was as to whether a seaman was also entitled to recover from the owners the expenses of an action of suspension in this Court, but it was held that though the master had a good and sufficient mandate for his former proceedings, that did not justify him in taking part in an action here, for which he ought to have had a special mandate.

The second case, that of *Gowans*, reported in the sixth volume of Dunlop, comes rather nearer the present, but is still quite distinguishable from it, and depends on a different section, viz., section 42 of the former Act. There it is put in the master's power to sail leaving behind any person who had deserted, but as it was found that such persons very commonly took to piracy, the policy of the statute was, that this should not be resorted to except on the clearest evidence; therefore it required the master before sailing to obtain a certificate from some specified authority. In this case the master sailed without obtaining that certificate, and having the clothes and other personal property of the seaman on board, and the seaman recovered their value from the owners on the ground that the latter had become illegally possessed of them. The Court held that the master was only acting as the agent for his employers, the owners, and for their benefit. There could be no answer made to the demand against the owners as they were the master's employers and had taken benefit by that which he did, and so the Court decided that it was a case for taking the pursuer's oath *in litem*, and that was the only point decided in the case. That case had no resemblance to this, and no case can be an authority here except one arising under sect. 246 of the existing Act.

It occurred to me in the course of this case that

some light might be thrown on it by another statute, the Master and Servant Act, under which the manager as well as the master may sue for desertion of service and such like offences, but it is clear that the manager sues solely for his employers, and that is analogous to the case of *M'Naughton*, but not to this one.

The other Judges concurred.

The Court pronounced the following interlocutor:—

“Adhere to the said interlocutor, dated 23d December 1872: Refuse the reclaiming note: Find the defenders entitled to additional expenses; allow an account thereof to be given in; and remit the same, when lodged, to the Auditor to tax, and report.”

Counsel for Pursuer—Campbell Smith and M'Kechnie. Agents—Drummond & Mackenzie, S.S.C.

Counsel for Defenders—Solicitor-General (Clark) and Maclean. Agents—J. W. & J. Mackenzie, W.S.

Wednesday, March 19.

## FIRST DIVISION.

[Sheriff of Renfrewshire.

### M'KERNAN v. GREENOCK LODGE OF UNITED OPERATIVE MASONS ASSOCIATION OF SCOTLAND.

*Trades Union—Compensation for injury.*

In a case where a member of a trades union brought an action against the local lodge of the union to compel payment of compensation for bodily injury—*held* that the action ought to have been directed against the Society as represented by the Central Committee. *Question* whether the Court might not interfere to make the Society obey its own rules, even though by those rules the jurisdiction of all courts of law was excluded.

This was an appeal from a judgment pronounced by the Sheriff of Renfrewshire (FRASER). The pursuer raised an action against the Greenock Lodge of the United Operative Masons Association of Scotland, concluding for a sum of £80, “being the amount of the provision to members disabled for life by any real accident received while following their employment as a mason, according to the rules and regulations and laws of the said United Operative Masons Association of Scotland.”

The Sheriff-Substitute (TENNENT) pronounced the following interlocutor:—

“Greenock, 12th July 1872.—The Sheriff-Substitute having heard parties' procurators on the relevancy of this cause, in respect that it is stated at the bar that the Association is in course of considering and disposing of the pursuer's claim, and of bringing it before the branches of the Association, who it is stated are, in terms of Law 8, class IV., the parties who are to vote on the claim, and that this will be done in four weeks after the end of July current, continues the cause till the last court day in September.

“*Note.*—By the terms of the rules of the Asso-

ciation of which the pursuer is a member, the Association, according to the rules and procedure laid down, are to determine upon the pursuer's claim. It is stated at the bar that they are at present exercising that power. At all events they do not seem to have over-stepped the time given them to do so. The Sheriff-Substitute will certainly not take that power out of their hands, more particularly in the face of provisions as to voting upon the claim which may exclude the interference of any civil Court. After the lapse of the time to which this case is continued the case may be resumed for consideration on the relevancy, according to the state of matters and what may have been done before that time.”

The pursuer appealed to the Sheriff, who pronounced the following interlocutor:—

“Edinburgh, 9th December 1872.—The Sheriff having considered this process, with the debate thereon, dismisses the action as incompetent; finds no expenses due to or by either party, and decerns.

“*Note.*—It is with regret that the Sheriff finds himself obliged to pronounce the foregoing interlocutor, because he thinks the pursuer is entitled to the money he asks, and that the Masons Association are bound in common honesty to pay him. To refuse payment of a just demand like this will do far more damage to the Association by shaking confidence in its management, than the Association would lose though they paid down the money. At the same time, after the judgment of the Second Division of the Court in *Manners v. Fairholme*, 6th March, 1872, 10 Macph. p. 520, no other course is open to a Court of law than to dismiss this action. The pursuer is a member of a voluntary club, which is managed by a central committee, and locally by lodges, of which there are 83 in Scotland. Each member is entitled in case of accidents to a certain provision under class IV. of the Society's rules and regulations. It is there said that ‘members disabled for life by any real accident received while following their employment as a mason, may lay an application before the Society according to Law VII. of this class, and if a majority of those voting on the application shall consider him entitled, he shall receive the sum of £80 sterling.’ Law VII. enacts that three months must elapse from the time of accident before any member can make such an application, and after six months it is incompetent. Then comes Law VIII., which is as follows,—‘When any application is made, the lodge applied to shall appoint a doctor and delegate to examine the applicant, and if satisfied that he is disabled for life from following his trade, to send such information to the central committee, who, if not satisfied, may authorise a lodge, or appoint a delegate, to investigate the case,—the delegate to send a full report to the C.C., who shall submit the same to the Society. A majority of those voting on the application shall be held binding, without power of appeal to any court of civil law or equity; but should any dispute arise between a member and the Society, the same shall be submitted to arbitration, as in Law 14, class III., each party to pay one-half of the expenses, the C.C. to pay over the amount within one month after the decision of the Society is known. Any delegate sending a false statement shall pay a fine of £1.’

“Now the pursuer duly complied with all these regulations. He sent in his application in time to his lodge, and the lodge forwarded it to the central committee. He was examined by doctors, and by