

Tuesday, November 24.

SECOND DIVISION.

BOARD OF TRADE v. LEITH LOCAL MARINE BOARD.

Shipping Law—Cancellation of Certificate—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), secs. 469, 470, and 471.

Held that when the Board of Trade has remitted a case under sec. 471 of the Merchant Shipping Act 1894 to a Local Marine Board for inquiry, the Local Marine Board, and not the Board of Trade, on its recommendation, has power to cancel or suspend the certificate of a master, mate, or engineer.

By the Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) Part IV., entitled "Special Shipping Inquiries and Courts," sections 469, 470, and 471, it is provided as follows:—"Sec. 469.—The Board of Trade may suspend or cancel the certificate of any master, mate, or engineer, if it is shown that he has been convicted of any offence.

"Sec. 470.—(1) The certificate of a master, mate, or engineer, may be cancelled or suspended—(a) By a court holding a formal investigation into a shipping casualty under this part of the Act, or by a naval court constituted under this Act, if the court find that the loss or abandonment of or serious damage to any ship, or loss of life, has been caused by his wrongful act or default, provided that, if the court holding a formal investigation is a court of summary jurisdiction, that court shall not cancel or suspend a certificate unless one at least of the assessors concurs in the finding of the court; (b) By a court holding an inquiry under this part of this Act into the conduct of a master, mate, or engineer, if they find that he is incompetent, or has been guilty of any gross act of misconduct, drunkenness, tyranny, or that in a case of collision he has failed to render such assistance, or give such information as is required under the fifth part of this Act; (c) By any naval or other court where under the powers given by this part of this Act the holder of the certificate is superseded or removed by that court. (2) Where any case before any such court as aforesaid involves a question as to the cancelling or suspending of a certificate, that court shall, at the conclusion of the case or as soon afterwards as possible, state in open court the decision to which they have come with respect to the cancelling or suspending thereof. (3) The court shall in all cases send a full report on the case with the evidence to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, send the certificate cancelled or suspended to the Board of Trade with their report. (4) A certificate shall not be cancelled or suspended by a court under this section unless a copy of the report, or a statement of the case on which the investigation or inquiry has been ordered, has been furnished before the commencement of the investigation or inquiry to the holder of the certificate.

"Sec. 471.—(1) If the Board of Trade, either on the report of a local marine board or otherwise, have reason to believe that any master, mate, or certificated engineer is from incompetency or misconduct unfit to discharge his duties, or that in a case of collision he has failed to render such assistance or give such information as is required under the fifth part of this Act, the Board may cause an inquiry to be held. (2) The Board may either themselves appoint a person to hold an inquiry or direct the local marine board at or nearest the place at which it is convenient for the parties or witnesses to attend to hold the same, or where there is no local marine board before which the parties and witnesses can conveniently attend, or the local marine board is unwilling to hold the inquiry, may direct the inquiry to be held before a court of summary jurisdiction. (3) Where the inquiry is held by a local marine board, or by a person appointed by the Board of Trade, that board or person (a) Shall hold the inquiry, with the assistance of a local stipendiary magistrate, or if there is no such magistrate available, of a competent legal assistant appointed by the Board of Trade; and (b) Shall have all the powers of a Board of Trade inspector under this Act; and (c) Shall give any master, mate, or engineer against whom a charge is made an opportunity of making his defence either in person or otherwise, and may summon him to appear; and (d) May make such order with regard to the costs of the inquiry as they think just; and (e) Shall send a report upon the case to the Board of Trade. (4) Where the inquiry is held by a court of summary jurisdiction the inquiry shall be conducted and the results reported in the same manner, and the court shall have the like powers, as in the case of a formal investigation into a shipping casualty under this part of this Act, provided that, if the Board of Trade so direct, it shall be the duty of the person who has brought the charge against the master, mate, or engineer, to the notice of the Board of Trade, to conduct the case, and that person shall in that case, for the purpose of this Act, be deemed to be the party having the conduct of the case."

Section 473 of the said Act provides—" (1) A master, mate, or engineer whose certificate is cancelled or suspended by any court or by the Board of Trade, shall deliver his certificate (a) if cancelled or suspended by a court, to that court on demand; (b) if not so demanded, or if it is cancelled or suspended by the Board of Trade, to that Board, or as that Board direct. (2) If a master, mate, or engineer fail to comply with this section, he shall for each offence be liable to a fine not exceeding fifty pounds."

By section 475, sub-sec. (1), it is provided that the Board of Trade may in all cases, and shall in certain specified cases, when an inquiry into the conduct of a master, mate, or engineer has been held, order a re-hearing; and by sub-sec. 3 it is provided—"Where on any such investigation or inquiry a decision has been given with respect to the cancelling or suspension of the

certificate of a master, mate, or engineer, and an application for a re-hearing under this section has not been made, or has been refused, an appeal shall lie from the decision to the following Courts, namely, (a) If the decision is given in England or by a naval court, to the High Court; (b) If the decision is given in Scotland, to either Division of the Court of Session; (c) If the decision is given in Ireland, to the High Court in Ireland."

By section 742 of the Act it is further, *inter alia*, provided as follows:—"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them—that is to say, 'Court,' in relation to any proceeding, includes any magistrate or justice having jurisdiction in the matter to which the proceeding relates."

The Act of 1894 is a consolidating Act, and the parts of the Acts consolidated in secs. 469, 470, 471, and 472 are the Merchant Shipping Act 1854 (17 and 18 Vict. c. 104), secs. 241 and 242; the Merchant Shipping Amendment Act 1862 (25 and 26 Vict. c. 63), sec. 23, sub-sec. 1; and the Merchant Shipping (Payment of Wages and Rating) Act 1880 (43 and 44 Vict. c. 16), sec. 8.

Under section 241 of the Merchant Shipping Act 1854, the Board of Trade had power either to institute an investigation into a charge of incompetency or misconduct, or to direct a local marine board to do so; and under sub-sec. (1) of sec. 242 power was vested in the Board of Trade to suspend or cancel the certificate of any master or mate, if, upon any investigation made in pursuance of section 241, he was reported to be incompetent, or to have been guilty of any gross act of misconduct, drunkenness, or tyranny. Under sub-section (4) of section 242 power was vested in the Board of Trade to suspend or cancel the certificate of a master or mate if he is shown to have been convicted of any offence, and this provision was re-enacted in section 469 of the said Act of 1894 before quoted.

By the Merchant Shipping Act Amendment Act 1862 the power given by the Act of 1854 to the Board of Trade or to a local marine board of instituting an investigation was extended to charges of incompetency or misconduct on the part of certificated engineers.

Section 23, sub-section (1), of the Amendment Act of 1862 provides as follows:—"The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal Act conferred on the Board of Trade shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the local marine board, magistrates, Naval Court, Admiralty Court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the Board of Trade."

The Board of Trade, on 4th February 1896, remitted a case under section 471 of the Act of 1894 to the Local Marine Board at Leith for inquiry, and the latter made a report thereon on 7th February 1896, in which they "find

the charge proven, and recommend that his certificate be suspended," but refused to cancel or suspend the certificate of the person whose conduct was inquired into, on the ground that they had no power under the Act to cancel or suspend.

The Board of Trade maintained that a local marine board had power under the Merchant Shipping Act 1894 to cancel or suspend the certificate of a master, mate, or engineer, but the Leith Local Marine Board maintained that a local marine board was not a court within the meaning of section 470 (b) of the Act; that it had no power of itself to cancel or suspend such a certificate, and that its functions were limited to pronouncing a finding whether the person accused was or was not guilty of the charge made against him, and to report to the Board of Trade with a recommendation as to how his certificate should be dealt with. The Board of Trade, however, maintained that the Board of Trade had no power to cancel or suspend upon such a recommendation, but only when a master, mate, or engineer had been convicted of any offence.

For the settlement of these points a special case was presented to the Second Division of the Court of Session by (1) the Lord Advocate as representing the Board of Trade, and (2) the Secretary to the Local Marine Board of Leith as representing the Board.

The questions of law were—" (1) Whether a local marine board has power under the said Merchant Shipping Act 1894 to cancel or suspend the certificate of a master, mate, or engineer? (2) Has the Board of Trade power to cancel or suspend the certificate of a master, mate, or engineer when a local marine board has reported in favour of its cancellation or suspension?"

At advising—

LORD TRAYNER—There are two questions presented to us here for determination. The answers to be given to them depend on the construction of certain clauses in the Merchant Shipping Act of 1894. I deal with the second question first. By the Merchant Shipping Act of 1854 (sec. 242) power was given to the Board of Trade to suspend or cancel the certificate of any master or mate in certain cases there enumerated. No other authority could exercise such a power. But by the Amendment Act of 1862 (sec. 23) (1) the power of cancelling or suspending certificates (by that Act extended to engineers certificates) was taken from the Board of Trade except in one case, and vested in "the local marine board, magistrates, Naval Court, Admiralty Court, or other court or tribunal" involving suspension or cancellation of certificate by which the cases were investigated or tried. The one case in which power to deal with a certificate was reserved to the Board of Trade was where the holder of the certificate was "shown to have been convicted of any offence." So stood the law when the Act of 1894 was passed, which repealed the Act of 1854, and also the Amendment Act of 1862. The whole grounds, therefore, on which certificates of masters, mates, and

engineers can be cancelled or suspended, as well as the authority by which such cancellation or suspension can be ordered must be found in the provisions of the Act of 1894. By sec. 469 of that Act there is conferred on the Board of Trade power to cancel or suspend certificates where it is shown that the holder thereof "has been convicted of any offence"—that is, a re-enactment of the power reserved to the Board by the Amendment Act of 1862, when the general power (and indeed until then the exclusive power) of cancelling and suspending certificates was taken from the Board and vested elsewhere. No other power beyond what I have stated, of dealing with certificates is conferred on the Board of Trade by the Act of 1894. It is perhaps not necessary, in answer to the question before us, to define exactly what is meant by these words, "convicted of any offence." But I venture to say on this point that the "offence" here referred to is what is more commonly called a criminal offence—an offence, that is, which may be punished by fine or deprivation of liberty. It does not, in my opinion, extend to such delinquencies as drunkenness on board ship or acts of tyranny, and certainly not to incompetency, for all or any of which a certificate may be cancelled or suspended by the court or tribunal inquiring into such a charge. I am of opinion that the Board of Trade has no power to cancel or suspend any certificate except upon the ground that the holder of it has been "convicted of an offence," and therefore that the second question should be answered in the negative.

The first question is, whether a local marine court has power under the Act of 1894 to cancel or suspend a certificate. It has that power undoubtedly if it can be regarded as a "court" within the meaning of sec. 470, sub-sec. (b). Now, I am of opinion that the local marine board when holding an inquiry into the conduct of a master, mate, or engineer under that provision, as it may do when so directed by the Board of Trade, is a "court" within the meaning of the Act. The Board of Trade may direct such an inquiry to be made by any person it pleases to nominate, or by any local marine board or a court of summary jurisdiction. In all such cases the person or persons before whom the inquiry is made constitute the court of inquiry. I think it difficult to reach any other conclusion with reference to a local marine board, where the provisions of sec. 471, sub-sec. (3), are taken into consideration. By that section the local marine boards are directed to hold the inquiry with the aid of a legal assistant; they are authorised to summon the person to appear before them against whom the charge is made, to give him an opportunity of making his defence, either in person or otherwise (which includes appearance by agents or counsel), to summon witnesses and recover documentary evidence, and to make such order as to costs as they may think just. All these are the proper actions and functions of a Court. This clause (sec. 471) does not in terms give the power to suspend or cancel the certificate, any more

than give power to dismiss the charge or complaint. But that is because sec. 470 (sub-sec. 4) has already given the power to suspend or cancel, and of course to refuse to do so if the charge or complaint is not established.

The principal argument addressed to us in opposition to this view was that by the interpretation clause (sec. 742) the word "court" is said to include "any magistrate or justice having jurisdiction," &c. But that clause does not exclude from the meaning of "court" every person not a magistrate or justice. The clause does not say that the word "court" shall mean every magistrate or justice having jurisdiction, but only that it shall include such persons. The definition is not exhaustive, for it would not include, at least not necessarily, such a judge as a Wreck Commissioner.

On these grounds I think the first question should be answered in the affirmative.

LORD MONCREIFF—I am clearly of the same opinion. I do not think that the questions put to us present any real difficulty. Previously to the passing of the Merchant Shipping Act of 1894 a local marine board possessed the power of cancelling or suspending the certificate of a master or mate for any of the reasons specified in section 242 of the Act of 1854, the power of the Board of Trade in this respect being confined by the Amendment Act of 1862, section 23, sub-section (1), to the case provided for by the fourth paragraph of the said section, viz., of the master or mate having been shown to have been convicted of any offence.

I do not find that the Merchant Shipping Act of 1894 has either taken away any of the powers conferred in this respect upon a local marine board by the earlier statutes, or increased the powers of the Board of Trade. By section 469 the power of the Board of Trade as to cancelling or suspending a certificate is confined as before to a master, mate, or engineer having been convicted of an offence. As to the powers of a local marine board, I think that if section 471 is read before 470, it is quite plain not only that those powers are not taken away, but that by section 471, sub-section (3), local marine boards are rendered more efficient for the performance of their duties as a court.

The definition of the word "court" in the interpretation clause, section 742, does not I think create any difficulty. It is plainly not exhaustive.

I agree generally in the opinion which Lord Trayner has delivered, and in particular in his statement as to the meaning and effect of the successive statutory provisions bearing on the powers of a Local Marine Board, and need add no more.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for the First Party—Solicitor-General Dickson, Q.C.—Cooper. Agent—David Turnbull, W.S.

Counsel for the Second Party—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Wednesday, December 2.

FIRST DIVISION.

WADDELL'S TRUSTEES v. WADDELL.

Succession—Testamentary Writings—Holograph Notes.

In the repositories of a person who died leaving a formal trust-disposition and relative codicil there were found two holograph writings. The first was in the following terms:—"August 27th 1888.—Annuit for life Mrs Wood Waddell, 30 Queens Crescent, for £100, £3000 codicil to my will for Alexina Waddell, my late nephew W. Wood Waddell, daughter Alexina Waddell." It was signed in the left-hand bottom corner with the name and address of the writer. The second document was written in pencil in the following terms:—"May 14th 1894.—Moses Adamson the sum of £100, hundred pounds, 14th May 1894. The sum of one hundred pounds Peter Waddell." There was added in ink, "May 14th 1894." There was written in ink at the back of the paper, "May 14th, 1894, pay to Moses Addimson one hundred pounds stg." The trust-disposition contained a clause by which the trustees were directed to pay any legacy contained in any "memorandum or writing by me, clearly expressive of my will, though not formally executed."

Held that the documents were not testamentary.

Succession—Conditio si sine liberis—Bequest to Nephew.

Where a bequest is made by an uncle, without children of his own, to a nephew, the *conditio si sine liberis decesserit* applies, unless it appears from the will itself that the motive of the bequest was personal favour to the legatee rather than relationship.

A testator directed his trustees to pay to his sister the sum of £6000, to the "son of my late brother £5000," and to "the only surviving daughter of my said brother £5000." These three legatees were the only surviving near relations of the testator. In the same clause there were legacies ranging from £500 to £4000 bequeathed by the testator to distant relations, strangers in blood, and charities, the legacies amounting in all to £40,000. The residue of his estate was bequeathed to charities.

Held (dub. Lord Adam) that the *conditio si sine liberis* applied to the bequest to the testator's nephew.

Bogie's Trustees v. Christie, January 26, 1882, 9 R. 453, approved.

Mr Peter Waddell, 5 Claremont Park, Leith, died without issue on 18th June 1895, leaving a trust-disposition and settlement and codicil dated 18th June 1886 and 24th October 1888 respectively. The testator's father had four children, of whom he was the survivor. Only one of them was married and had issue, viz., Mr Andrew Waddell. One of his children, Mrs Mary Waddell or Wilson, survived the testator; and another, William Wood Waddell, who predeceased him, left a child, Miss Alexina Waddell, who is in pupilarity. Andrew Waddell's third child, Elizabeth, died in 1880 unmarried. The testator was thus survived by a niece and a grand-niece, who were his nearest relations.

By the third purpose of his trust-disposition Mr Peter Waddell directed his trustees to pay the legacies therein mentioned, and *inter alia*, "to the said Elizabeth Waddell the sum of £6000 sterling; to William Wood Waddell, presently residing in No. 6 Mansfield Place, Edinburgh, son of my late brother Andrew Waddell, the sum of £5000 sterling; to Mrs Mary Waddell or Wilson, only surviving daughter of my said brother Andrew Waddell, the sum of £5000 sterling." The further legacies contained in the clause, which were very numerous, amounting in all to about £40,000, and ranging in amount from £500 to £4000, were to distant relations, strangers in blood, and charities.

By the fourth purpose the trustees were ordered to deliver a certain picture to William Wood Waddell.

The fifth purpose provided—"That my trustees shall pay and deliver all such legacies, gifts, or provisions, and implement all such instructions as shall be contained in any codicil or any memorandum or writing by me clearly expressive of my will, though not formally executed, declaring that the same, whether formal or informal, shall be held and taken to be part and parcel of these presents."

By the sixth purpose the residue, which amounted to about £100,000, was disposed to certain charitable institutions.

By the second purpose of the codicil the trustees were directed to deliver to the National Gallery the picture bequeathed to William Wood Waddell, "the bequest thereof in the fourth purpose of the said trust-disposition and settlement . . . having lapsed by the predecease of the said William Wood Waddell; and I revoke and alter the preceding trust-disposition and settlement in so far as is necessary to give effect to these presents, but no further or otherwise."

The testator had on 27th August 1888 instructed his agent to prepare a codicil, and the draft contained a direction to pay "to my grandniece Alexina Waddell, daughter of my late nephew William Wood Waddell, . . . the sum of £1000." This clause was deleted on the execution of the codicil on 24th October.

Subsequent to the testator's death a holograph writing by him in the following terms was found in his repositories:—"August 27, 1888.—Annuit for life Mrs