[HIGH COURT OF AUSTRALIA.]

LAWRENCE . . . . . APPELLANT;
PLAINTIFF,

AND

HUDDART PARKER LIMITED . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1930.

SYDNEY, *Mar.* 26, 27; *April* 14.

Isaacs C.J., Rich, Starke and Dixon JJ.

Ship—Seaman incapacitated by accident—Left ashore at port other than home port—Maintenance—Wages—Evidence—Certificate of "his medical attendant"—Liability of shipowner—Navigation Act 1912-1926 (*No.* 4 *of* 1913—*No.* 8 *of* 1926), *secs.* 127, 132.*

By sec. 127 of the *Navigation Act* 1912-1926 a right to maintenance by the shipowner is given to an injured seaman "until he is cured, or dies, or is brought or taken back . . . to the port" agreed upon.

Held, that one of such events must actually occur before the shipowner's liability to pay maintenance terminates.

Held, also, that the certificate of the medical attendant or the medical inspector of seamen to which sec. 132 of the Act refers is not made evidence of the occurrence of any one of such events for the purpose of sec. 127, either conclusive or presumptive.

* Sec. 132 of the *Navigation Act* 1912-1926 provides that "(1) Where a seaman or apprentice belonging to a ship registered in Australia is left on shore at any place in Australia, in any manner authorized by law, by reason of illness or accident in the service of the ship incapacitating him from following his duty, he shall be entitled—(*a*) if landed at his home port, as specified in the agreement, to receive wages, at the rate fixed by his agreement, up to the expiration of one week after the date of his recovery, as certified by his medical attendant or by a medical inspector of seamen: . . . (*b*) if landed at a port other than his home port, to receive, after his recovery, certified as provided in the last preceding paragraph, a free passage to his home port, with wages, at the rate fixed by his agreement, until arrival at that port: Provided that if, after recovery, the seaman or apprentice rejoins his ship, or takes other employment, or is offered and refuses employment on some other vessel proceeding to his home port, at a similar rate of pay to that received by him immediately prior to his being left on shore, and with the right of discharge from that vessel on arrival at his home port, his right to continue to receive wages under this sub-section shall then cease."

Semble: The words "his medical attendant" in sec. 132 of the *Navigation Act* 1912-1926 mean the medical practitioner who attends the seaman, and are not confined to the medical attendant who is employed by the seaman.

Judgment of the Supreme Court of New South Wales (Full Court): *Lawrence* v. *Huddart Parker Ltd.*, (1929) 29 S.R. (N.S.W.) 542, reversed.

APPEAL from the Supreme Court of New South Wales.

The plaintiff, Charles William Lawrence, was a seaman trimmer employed on the s.s. *Riverina* owned by the defendant Company, Huddart Parker Ltd. On 16th August 1926 he met with an accident during the course of his employment whilst the vessel was moored at Hobart, and on the following day was admitted to the Hobart Public Hospital for treatment for a compound fracture of the left leg above the ankle. On the departure of the vessel from Hobart he was left ashore there, a port other than his home port (which was Sydney). Several operations were performed on Lawrence by Dr. Ratten, the Surgeon Superintendent of the hospital during the period from the date of his admission until his final discharge as an in-patient of that institution on 23rd January 1927. Lawrence continued to attend at the hospital as an out-patient until November 1927, being attended to and given advice by Dr. Ratten until 8th August 1927, on which date the doctor gave Lawrence a certificate to the effect that he had a bony union of both bones of his leg, and was fit to return to light duty. On 14th November 1927 a representative of the defendant Company took the plaintiff to Dr. Ratten's surgery to be examined, and obtained a certificate from the doctor that Lawrence had "union of both bones of his injured leg" and that "no further treatment is necessary." On the following day the plaintiff was paid wages up to the date of the certificate pursuant to clause 22 of an agreement between the Company and the Federated Seamen's Union of Australasia, of which union the plaintiff was a member. The clause in question is framed upon analogy to sec. 132 of the *Navigation Act* 1912-1926, and, so far as material, is as follows:—"If a seaman belonging to a ship for which articles are signed in Australia is landed and left at any port by reason of illness or accident in the service of the ship, incapacitating him from following his duty, he shall be entitled:—(*a*) If landed at the home port to receive wages . . . up to the expiration

H. C. OF A. 1930.

LAWRENCE v. HUDDART PARKER LTD.

of one week after the date of his recovery, as certified by his medical attendant or by a medical inspector of seamen, if the employer at his own expense requires an examination . . . (*b*) If landed and left at a port other than his home port, to receive wages until his recovery, certified as provided in the preceding sub-clause (*a*), and until arrival at his home port at the rate payable to him when he was landed and after his recovery (certified as aforesaid) to a free passage to his home port. Provided that if after recovery the seaman rejoins his ship or takes other employment or is offered and refuses employment on some other vessel proceeding to his home port at a similar rate of pay to that received by him immediately prior to his being left on shore, and with the right of discharge from that vessel on arrival at his home port his right to continue to receive wages under this sub-clause shall then cease." In addition to wages the plaintiff was paid maintenance up to 19th November 1927 pursuant to sec. 127 of the *Navigation Act* 1912-1926, by which an injured seaman is given the right to maintenance "until he is cured, or dies, or is brought or taken back . . . to the port at which he was shipped" or some other port mutually agreed upon. On 23rd November 1927 the Company's representative, without further examination, obtained from Dr. Ratten a certificate that "C. Lawrence has been examined by me. I am of opinion that he has recovered from the injuries to his leg as union of both bones of his leg has taken place. No further treatment is now necessary." The Company's representative then suggested to the plaintiff that he should return to his home port, but the plaintiff refused on the ground that his leg was not better. Lawrence remained in Hobart until 19th April 1928, when he left for Sydney, his passage being paid by the Company. Upon his return to Sydney he brought an action in the District Court to recover wages from 15th November 1927 until 21st April 1928, and maintenance from 15th November 1927 until 19th April 1928. The defendant Company paid £7 0s. 8d. into Court, representing wages and maintenance from 15th November 1927 until 23rd November 1927, and defended the action as to £129 0s. 2d., the balance of the claim, on the ground that as the plaintiff had on 23rd November 1927 recovered from his accident and had refused to return to his home port, it was not liable either

under the agreement or the *Navigation Act* 1912-1926. There was no evidence that the certificate of 23rd November 1927 was shown to Lawrence, nor that the fact that the doctor had given any further certificate of recovery had been communicated to him; but there was evidence that on occasions Lawrence had been examined by other doctors. It was also in evidence that Dr. Ratten assessed the plaintiff's disability at 15 per cent. The District Court Judge found a verdict for the plaintiff for £136 0s. 10d., and stated his reasons as follows :—" I had no opportunity of seeing the witnesses Dr. Ratten and Sargent (the Company's representative) whose evidence was taken *de bene esse*, but I did regard the plaintiff as being a witness of truth and believed him. I did not think that Dr. Ratten was plaintiff's medical attendant. No suggestion was made that a medical inspector of seamen was not available, and no explanation was given why the certificate of recovery was not obtained from a medical inspector of seamen." The Full Court of the Supreme Court, by a majority, allowed an appeal by the defendant Company, the Court being of opinion that the whole question to be determined turned on the interpretation of the words " his medical attendant," and that as the only evidence as to medical supervision or treatment was that Dr. Ratten had handled the case from start to finish—that is, up to 23rd November 1927—it was not open to the District Court Judge to find that Dr. Ratten was not plaintiff's medical attendant and he should have found a verdict for the defendant Company : *Lawrence* v. *Huddart Parker Ltd.* (1).

From this decision Lawrence now, by special leave, appealed to the High Court.

Other material facts appear in the judgment hereunder.

Evatt K.C. (with him *H. G. Edwards*), for the appellant. The form of agreement used between the parties in this matter was drafted after the decision in *Bruhn* v. *Australian Steamships Proprietary Ltd.* (2). It was essential to the jurisdiction of the Supreme Court that there should be a question of law involved in the action tried in the District Court, which question alone is revisable by the Supreme Court, and that such question of law should be " raised " at the

(1) (1929) 29 S.R. (N.S.W.) 542. (2) (1922) 31 C.L.R. 136.

H. C. OF A. 1930. LAWRENCE v. HUDDART PARKER LTD.

hearing in the District Court as a question of law (*Abrahams* v. *Dimmock* (1)). In the present case the question of law—that there was no evidence to justify a finding that Dr. Ratten was other than the plaintiff's medical attendant—was no doubt involved, but the question was not treated as one of law and the Judge was allowed to treat it as a question of fact, which he did. The evidence clearly shows that both parties contested the matter as one of fact. The Supreme Court erroneously treated the matter as one of law and reversed the decision of the District Court. The plaintiff is entitled to retain his verdict for the wages claimed by him under the agreement because there was evidence on which the Judge could find as a fact that Dr. Ratten was not the plaintiff's medical attendant at the relevant time within the meaning of clause 22. The relevant time is 23rd November 1927, not because it was the date of the certificate but because it was the date in respect of which Dr. Ratten certified. During the course of his sickness the plaintiff had several medical practitioners in attendance upon him, one of whom was Dr. Ratten, and the question arises as to which of those practitioners was the plaintiff's medical attendant for the purpose of furnishing a certificate under clause 22. Dr. Ratten was engaged by the defendant Company and his fees were paid by the Company. During the time the Company had endeavoured and was endeavouring to obtain a certificate of recovery from Dr. Ratten it was also endeavouring to obtain a similar certificate from the medical inspector of seamen, but without success. On these facts it was quite open to the Judge of the District Court to find that the relationship of medical attendant did not exist as between Dr. Ratten and the plaintiff. On 23rd November 1927 the plaintiff had ceased to be a patient of Dr. Ratten. The agreement contemplates that if the employer requires an examination of the seaman it shall be at the employer's expense and be conducted by the medical inspector of seamen. So long as the seaman remains away from his home port, apart from recovery or death, he is entitled to the benefits under the clause. " Recovery " here means recovery to full capacity ; if as a result of an injury a seaman is permanently partially incapacitated he would be entitled to wages proportionate to his disability.

(1) (1915) 1 K.B. 662, at p. 674.

The certificate relied upon by the defendant is not a certificate of recovery, whether recovery means recovery from the accident or the recovery of full capacity to work. Under the agreement wages are payable to the seaman until actual recovery and certification thereof. The defendant has not discharged the onus of proof which was upon it in this regard. Sustenance money is payable under the *Navigation Act* not until certification but until actual cure. The plaintiff was not cured and was away from his home port during the time for which the claim is made. The *terminus ad quem* for the purpose of maintenance was Sydney, and there is no evidence of a cure having been effected prior to the plaintiff's return to that port. No question of law was either involved or raised in the District Court, and the facts in evidence justified the finding of the Judge. In any event the judgment of the Supreme Court should be varied to give the plaintiff a verdict for the amount paid into Court by the defendant without a denial of liability.

Brissenden K.C. (with him *McGhie*), for the respondent. Having regard to the length of time the plaintiff was treated by Dr. Ratten, it is obvious that Dr. Ratten was the medical attendant of the plaintiff. The employer has the right to choose whether he will obtain the requisite certificate from the medical attendant or from the medical superintendent of seamen. This is not a case where there is a conflict between those two practitioners. As to whether the question of law was not raised in the District Court was not mentioned in the Supreme Court, but the question was raised in the District Court whether Dr. Ratten was qualified to give the certificate, which was as much a question of law as of fact. There is nothing in the Act to show that a doctor must be actually attending on a seaman on the day on which he gives his certificate. As to whether the appeal to the Supreme Court was one of fact or of law, see *Dennis* v. *A. J. White & Co.* (1). Here the facts are undisputed, and the District Court Judge has drawn an inference from those facts which is wrong in law. Sec. 127 of the Act does not mean that a seaman must be taken back to the port at which he was shipped. The alternatives are not necessarily exclusive. The seaman cannot say

(1) (1917) A.C. 479, at pp. 488, 490, 494.

H. C. OF A. 1930.

LAWRENCE v. HUDDART PARKER LTD.

that he will remain in the port wherever he may be without limit of time. Both the seaman and the master of the ship may go to either the medical attendant or the medical superintendent of seamen for a certificate. It is conceivable that a seaman may have "recovered" within the meaning of the Act although he retains the marks of his disability, e.g., recovered from wounds caused by loss of leg. If the report which was made by Dr. Sprott, the medical inspector of seamen, is not relied upon and the certificate of Dr. Ratten is not accepted, the plaintiff is in the position of having no certificate as to recovery and cannot sue for wages under sec. 132. "Cured" must mean "as far as he can be cured by medical science." If there is any permanent disability the plaintiff's remedy is for compensation under the *Seamen's Compensation Act*. The facts before the Court show that Dr. Ratten was the medical attendant of the plaintiff. There was an implied contract between the plaintiff and Dr. Ratten, and the relationship has at no time been disavowed by the plaintiff.

H. G. Edwards, in reply. As to recovery and certification thereof, see *Waller* v. *Thomas* (1). The main discussion before the Supreme Court was as to whether Dr. Ratten was the medical attendant of the plaintiff.

Cur. adv. vult.

April 14. THE COURT delivered the following written judgment:—

The appellant was employed by the respondent as a seaman. His home port was Sydney. While his ship was moored at Hobart he sustained serious injuries, for which he was treated at the Hobart General Hospital as an in-patient from 17th August 1926, with intervals, until 23rd January 1927, and as an out-patient from that date until 14th November 1927. Until 14th November 1927 the respondent paid him wages pursuant to a clause in his agreement framed upon analogy to sec. 132 of the *Navigation Act* 1912-1926, and maintenance pursuant to sec. 127 of that statute. Upon that date the Surgeon Superintendent of the Hobart General Hospital,

(1) (1921) 1 K.B. 541.

under whose care the appellant had been, gave a certificate which the respondent at first considered a certificate of recovery. The appellant was then offered a free passage back to Sydney, which he declined upon the ground that he had not recovered, and as from 14th November 1927 he was paid no further wages or maintenance. Misgivings appear, however, to have been felt as to the sufficiency of the medical certificate, which in fact did not amount to a certificate of recovery, and on 23rd November 1927 the appellant was again submitted to examination by the surgeon, who this time gave a document to the respondent which probably does amount to such a certificate.

This document was not shown to the appellant, nor was the fact that the surgeon had given any further certificate of recovery communicated to him. He did not avail himself of his right to a free passage to his home port until 19th April 1928, when he left Hobart for Sydney. There he sued in the District Court for wages from 15th November 1927 until 21st April 1928 (presumably taken as the date of his arrival in Sydney), and for maintenance from 15th November 1927 until 19th April 1928.

The respondent paid into Court sums representing wages and maintenance from 15th November to 23rd November 1927, but the District Court gave judgment for the plaintiff for the whole amount he claimed. Upon appeal to the Supreme Court (1) this judgment was wholly set aside by *James* and *Halse Rogers* JJ. (*Ferguson* A.C.J. dissenting), and judgment was entered for the defendant. The case was treated as if it depended upon the question whether the Surgeon Superintendent of the Hobart General Hospital, who certified his recovery, was "his medical attendant" within the meaning of that expression, which occurs in sec. 132 and is transcribed in clause 22 of the agreement. We have come to the conclusion that the answer to this question does not determine the case.

The right to maintenance is given to the injured seaman by sec. 127 "until he is cured, or dies, or is brought . . . back . . . to the port where . . . he is entitled to be discharged" or to some other agreed port. We think one of these events must actually

(1) (1929) 29 S.R. (N.S.W.) 542.

H. C. OF A. 1930.

LAWRENCE v. HUDDART PARKER LTD.

occur before the shipowner's liability to pay maintenance terminates. The certificate of the medical attendant or inspector to which sec. 132 refers is not made evidence of the occurrence of any one of these facts for the purpose of sec. 127, either conclusive or presumptive. At the trial no finding was made nor was any evidence given that in point of fact the appellant had recovered before 19th April 1928. The appellant was therefore, in our opinion, entitled to maintenance up to that date.

The agreement upon which he recovered wages before the District Court, although founded upon sec. 132, was evidently designed to extend the injured seaman's rights, and it does not follow exactly the terms of the section. Its material parts are as follows:— "If a seaman belonging to a ship for which articles are signed in Australia is landed and left at any port by reason of illness or accident in the service of the ship, incapacitating him from following his duty, he shall be entitled . . . (*b*) If landed and left at a port other than his home port, to receive wages until his recovery, certified as provided in the preceding sub-clause (*a*)" (*scil.*, certified by his medical attendant or by a medical inspector of seamen) "and until arrival at his home port, at the rate payable to him when he was landed and after his recovery (certified as aforesaid) to a free passage to his home port. Provided that if after recovery the seaman rejoins his ship or takes other employment or is offered and refuses employment on some other vessel proceeding to his home port at a similar rate of pay to that received by him immediately prior to his being left on shore, and with the right of discharge from that vessel on arrival at his home port his right to continue to receive wages under this sub-clause shall then cease."

Subject to the proviso, this clause confers, in terms, upon the seaman a right to wages until both of two events have taken place, namely, until his certified recovery and until arrival at his home port. If there is a certificate of recovery and if the seaman has been given a free passage to his home port, the shipowner is relieved from further liability for wages. It is not necessary in that case that the seaman should be aware of the existence of the certificate. The seaman did not in fact arrive at his home port before 21st April 1928, and none of the conditions specified in the proviso occurred.

It follows that the shipowner is liable for wages up to 21st April 1928 unless the seaman by his conduct at some earlier date dispensed the shipowner from further payment of wages. By one of its pleas the defendant, the shipowner, alleged that the plaintiff, the seaman, refused a free passage back to his home port, and it relied upon this as such a dispensation. But there is not any satisfactory evidence that after such a certificate of recovery had been given, and before 19th April 1928, the plaintiff was offered a free passage to his home port or that he refused one. Moreover, a seaman's refusal to set out for his home port could not dispense the shipowner from further payment of his wages unless the seaman knew, or at least ought to have known, that a certificate had been given. In this case he was not informed of the only certificate of recovery given, and he neither knew nor ought to have known of it. Therefore, whether the surgeon who gave it was, or was not, " his medical attendant," the shipowner's liability for wages continued until the seaman arrived in Sydney. These views dispose of the case.

For the guidance of the parties, however, it may be as well to add that we think the words " his medical attendant " mean the medical practitioner who attends the seaman, and are not confined to the medical attendant who is employed by the seaman.

The appeal should be allowed.

Appeal allowed. Judgment of Supreme Court discharged. Judgment of District Court restored. Respondent to pay costs in the Supreme Court and in this Court.

Solicitors for the appellant, *Sullivan Brothers.*

Solicitors for the respondent, *Norton, Smith & Co.*

J. B.