Counsel for Pursuers and Reclaimers (The Lindsey Steam Fishing Company, Limited)—A. R. Brown. Agents—Alexander Morison & Co., W.S.

Counsel for Defenders and Respondents—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

Wednesday, July 10.

FIRST DIVISION.

[Sheriff Court at Glasgow.

SORENSEN *v.* GAFF & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I* (3)—*Amount of Weekly Payment—Benefit during Period of Incapacity—Payment of Hospital Charges.*

The Workmen's Compensation Act 1906, Schedule I (3), enacts—"In fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity."

A seaman, injured by accident arising out of and in the course of his employment, received maintenance and medical treatment in a hospital, which was subsequently paid for by the employer on an account rendered by the hospital. In an arbitration under the Workmen's Compensation Act 1906 the arbiter found that the payment in question was a benefit received by the seaman during the period of his incapacity. *Held* that there was evidence before the arbiter on which he could reasonably come to this finding, and that it could not be set aside.

This was an appeal by way of Stated Case from a decision of the Sheriff-Substitute (LYELL) at Glasgow in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between Euliff Sorensen, seaman, West College Street, Glasgow, *appellant*, and John Gaff & Company, steamship owners, Glasgow, *respondents*.

The Case stated—"(1) That the appellant, who was a seaman in the employment of the respondents on board the s.s. 'Shakespeare,' was injured by an accident arising out of and in the course of his employment while the said s.s. was at sea on 26th December 1911. (2) That on said 26th December 1911, on the arrival of the said s.s. in Falmouth Harbour, the appellant entered the Falmouth Cottage Hospital, and was maintained and medically treated there until 16th February 1912. (3) That in respect of such maintenance and treatment the said hospital rendered to the respondents, prior to the raising of the arbitration proceedings, an account for £9, 5s., which the respondents settled in full, subsequent to the raising of the arbitration proceedings, by a payment of £6, 10s. 7d. (4) That the weekly earnings of the appellant averaged at 34s. 6d. (5) That the respondents paid the appellant compensation at the rate of 17s. 3d., being 50 per cent. of 34s. 6d., from the said 16th February 1912 up to 5th April 1912, at or about which latter date they aver that the appellant's incapacity came to an end.

"The only question upon which the parties desired judgment meantime was as to whether the payment by the respondents of the appellant's maintenance and treatment in Falmouth Cottage Hospital from the date of the accident to his discharge on 16th February was a benefit which the appellant received from the respondents during his incapacity to which regard must be had in fixing the amount of compensation.

"I *found in fact and law* (1) that the said payment of £6, 10s. 7d. for the appellant's maintenance and treatment in the said hospital was not payment of a debt due by the respondents to the appellant under the Merchant Shipping Act or otherwise; (2) that the said payment was a benefit received by the appellant during the period of his incapacity, and in respect of a period of incapacity covered by the Workmen's Compensation Act 1906, and I *found in law* (1) that in fixing the amount of the weekly payment regard must be had to the said payment of £6, 10s. 7d.; (2) that the respondents' liability to pay compensation to the appellant should be assessed at one penny per week from 26th December 1911 to 16th February 1912, and at seventeen shillings and threepence per week from 16th February 1912 during the appellant's total incapacity, and with these findings I continued the cause."

The *question of law* was—"Whether the payment by the respondents of the appellant's maintenance and treatment in Falmouth Cottage Hospital from the date of the injury by accident to his discharge on 16th February 1912, was a benefit received by the appellant from the respondents during the period of his incapacity to which the arbitrator was bound to have regard in fixing the amount of the weekly payment, by virtue of the provisions of paragraph (3) of Schedule I of the Workmen's Compensation Act 1906?"

Argued for the appellant—It was an inference of fact from the Sheriff's findings (1) that appellant went to the hospital of his own accord and not on his master's recommendation; (2) that he was not therefore in receipt of benefit from his master; and (3) that the respondents did not *ex post facto* convert the payment into a benefit. Payment of a debt due by a workman was not a benefit in the sense of the Act—*Suleman* v. *Owners of the 'Ben Lomond,'* 1909, 2 B.W.C.C. 499; *M'Dermott* v. *Owners of s.s. 'Tintoretto,'* 1909, 25 T.L.R. 691, 4 B.W.C.C. 123; *Kempson* v. *Owners of 'Moss Rose,'* 1910, 4 B.W.C.C. 101; *Simmonds* v. *Stourbridge Glazed Brick and Fireclay Company, Limited*, [1910] 2 K.B. 269.

Counsel for the respondents were not called on.

LORD PRESIDENT—I think this is a plain case. By the third head of the First

Schedule to the Workmen's Compensation Act 1906, "in fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." Now in this case the arbitrator has found as a matter of fact that the workman obtained a certain benefit, and that this benefit should be taken into account in settling compensation. The only point for us is whether on the facts as stated by the arbitrator there are no facts that would entitle a reasonable man to say that this was a benefit. I think, on the contrary, that all the facts point to the conclusion that this was a benefit, and accordingly I think that there is no case at all for the appellant.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Horne, K.C.—Carmont. Agents—J. & J. Ross, W.S.

Friday, July 12.

SECOND DIVISION.

[Sheriff Court at Dundee.

TYZACK & BRANFOOT STEAMSHIP COMPANY, LIMITED *v.* FRANK STEWART SANDEMAN & SONS.

Ship — Affreightment — Bill of Lading — Exemptions — Short Delivery — Goods Unmarked and with Wrong Markings —Bills of Lading Act 1855 (18 *and* 19 *Vict., cap.* 3), *sec.* 3.

In an action for payment of the freight of a consignment of jute shipped at Calcutta for delivery at Dundee, the consignee refused to take delivery of certain unmarked bales, on the ground that the bales tendered to him by the shipowners were not part of his consignment since they were not marked in the way described in the bill of lading. The bill of lading contained the following clauses—"(5) Weight, measure, quality, contents, and value unknown," and "(7) the ship is not liable for . . . inaccuracies, obliterations, or absence of marks, numbers, or description of goods shipped." The consignee admitted that the bales tendered at Dundee had been shipped at Calcutta, and had not been changed at any port of call on the voyage.

Held that the bill of lading exempted the shipowners from liability for representations contained in it as to the markings on the bales shipped, and consequently that as since the shipowners had tendered the bales actually shipped, the consignee was liable to pay the freight.

Ship—Affreightment—Short Delivery where Various Consignees — Commixtion — General Average.

Several consignments of jute were shipped at Calcutta for delivery at Dundee. On arrival at Dundee four of the consignees failed to receive the full number of bales specified in their bills of lading. It was found that out of the total cargo fourteen bales were missing, and eleven bales were unclaimed being without marks and incapable of identification. The shipowners offered to account for the value of the fourteen bales. In an action by them for payment of freight against one of the consignees whose consignment fell short to the extent of six bales, the defender claimed to deduct the value of the whole of the six bales from the freight.

Held that the eleven unmarked bales fell to be allocated between the consignees whose consignments were short in the proportions which the quantity shipped by each of them bore to the whole quantity shipped, in accordance with the rule of general average, and therefore that the defender was entitled to deduct from the freight the value of only so many bales as represented the difference between six bales and the number of unmarked bales so allocated to him.

Spence v. *Union Marine Insurance Company*, 1868, L.R., 3 C.P. 427, *followed.*

The Bills of Lading Act 1855 (18 and 19 Vict. cap. 111), sec. 3, enacts—"Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims."

Tyzack & Branfoot Steamship Company, Limited, Newcastle-upon-Tyne, *pursuers*, brought an action in the Sheriff Court at Dundee against Frank Stewart Sandeman & Sons, spinners and manufacturers, Dundee, *defenders*, for payment of £175, 1s. 6d., being the balance of freight due in respect of the carriage of bales of jute for which the defenders held bills of lading by the pursuers' steamship "Fulwell," of Sunderland.

The following *narrative* is taken from the opinion of Lord Salvesen, *infra*:—"The