

sciously, is necessarily affected by a desire to prevent what they naturally consider injustice to the children of both families, and a tendency to minimise the intensity of the estrangement between the spouses, and to magnify the expectation on Dr Barker's part, and on the part of others, of reconciliation. Reading these letters I do not think Mrs Barker greatly exaggerated when writing to her sister, Mrs Fraser Campbell, on 12th May 1901, a month after the testator's death, she thus described her husband's conduct during the whole crucial period in this case—"He has not stuck to me, but threw me over when our first trouble came."

The question is not one of approval or disapproval of Dr Barker's feelings or conduct. I am disposed to make much greater allowance for him than the Lord Ordinary does, and, differing from the Lord Ordinary, I find exasperated human nature strained beyond the breaking-point amply sufficient to explain all his actings. But the question is one of fact in relation to a condition in a settlement, which, however unreasonable and ill-considered, the testator was entitled to prescribe, and which therefore we are bound to enforce. I am prepared to take any stateable construction of the word "reconciled," and of the phrase "living together as husband and wife," which has been suggested by any of the parties, except the literal one contended for by the defenders in one part of their argument, and I hold that on any construction, and making every allowance for the peculiar circumstances of Dr Barker—a physician struggling single-handed to build up a practice involving close and continuous personal attention, and to live down injurious and unfounded stories circulated against him by his wife—the parties were not in any reasonable sense reconciled, and, in particular, taking the testator's gloss or test of living together as husband and wife, they were not so living at the dates of either of the codicils or at the date of the testator's death.

As to the pursuers' plea sustained by the Lord Ordinary, that the condition of living together as husband and wife must in the circumstances be disregarded as an impossible one, I adopt the views of Lord Dundas both in fact and in law.

The Court recalled the interlocutor reclaimed against, and assoltized the defenders from the conclusions of the summons.

Counsel for the Pursuers (Respondents)—
Lord Advocate (Clyde, K.C.)—Wilton.
Agents—J. & R. A. Robertson, W.S.

Counsel for the Defenders (Reclaimers)—
Solicitor-General (Morison, K.C.)—Mac-
laren. Agents—Cumming & Duff, W.S.

Friday, November 15.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'LELLAND v. J. & P. HUTCHISON
AND OTHERS.

Master and Servant—Workmen's Compensation—“Contract of Service”—Deserter from Army—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), secs. 1 (1) and (13).

A deserter from the army was employed by shipowners, who did not know that he was a deserter, as a marine fireman or trimmer. He was drowned by the loss at sea of the vessel on which he was employed. *Held* that his widow was entitled to recover compensation in respect that the contract of employment with her deceased husband was not void but voidable, and had not been avoided at the date of the accident.

Mrs Robertson or M'Lelland, widow of Samuel M'Lelland, *appellant*, being dissatisfied with an award of the Sheriff-Substitute (MACKENZIE) at Glasgow in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by the appellant against J. & P. Hutchison and others, the trustees of the late Thomas Holt Hutchison, *respondents*, appealed by Stated Case.

The Case stated—"The arbitrator having heard parties' procurators and considered the cause, found—1. That the [appellant is] the wife . . . of the deceased Samuel M'Lelland, sometime dock labourer in Glasgow, and that the s.s. 'Dartmoor' was owned by the deceased Thomas Holt Hutchison, whose trustees have been sisted as parties to this action. 2. That in February 1917 the deceased Samuel M'Lelland was engaged by the respondents under the name of John Fitzsimmons to sail as a fireman or trimmer on board said ship; that the said Samuel M'Lelland, who was a deserter from the army, sailed on said ship under the name of John Fitzsimmons. 3. That the said deceased Samuel M'Lelland while on board the s.s. 'Dartmoor' was drowned owing to the loss at sea of the said vessel in or about the month of May 1917. 4. That the wages of the said deceased when in the employment of the respondents were at the rate of £9, 10s. per month with his food, which would amount to about £4 per month; that his service in the army was in accordance with the particulars contained in No. 2 of process, and that he deserted therefrom for the second time on 30th December 1915. 5. That the . . . appellant Mrs M'Lelland was married to the deceased Samuel M'Lelland on 14th October 1907; that they lived together until August 1914, with the exception of a period of two months in 1908, a period of three months in 1910, and a period of six weeks in 1914, when they lived separately owing to domestic quarrels; that during all this time the . . . appellant was supported by her husband; that in August 1914 the spouses again quarrelled, and the

deceased enlisted in the army on 18th August 1914; that the . . . appellant was paid an allotment of 3s. 6d. per week from his pay until 17th January 1916; that he deserted in March 1915 and was apprehended in July 1915; that he again deserted in December 1915; that in January or February 1916 the deceased gave his wife 15s., and that they lived together for two days in August of that year; that in October 1916 he gave his wife £2; that in January 1917 they stayed together for two days at 35 Nicholson Street, when he gave her £1 on leaving; that he called on her before sailing and gave her 24s.; that the . . . appellant obtained employment as a charwoman from 2nd August 1914 to the month of May 1917 at an average wage of 16s. per week.

"I found in law (1) that the deceased Samuel M'Lelland having been at the time of his contract of service with the respondents a deserter from the army such contract was null and void, and was entered into by the respondents under essential error induced by the said deceased, (2) that there having been no legal contract of service with the respondents compensation is not due to any dependants of the deceased under the Workmen's Compensation Act 1906 . . . , and (4) that no compensation is due to [the appellant].

"I therefore assailed the respondents from the conclusions of the action. . . ."

The *question of law* was—"Was she debarred from claiming under the Workmen's Compensation Act 1906, by reason of the fact that her deceased husband was a deserter from the army during the time while he was in the respondents' employment?"

The Sheriff-Substitute appended to his decision the following *note*:—"This case raises a point of some difficulty on which I have not been able to find any authority in decisions of the Scottish courts. But there are decisions in the English Court of Appeal—*Kemp v. Lewis*, (1914) 3 K.B. 543, and *Pountney v. Turton*, (1917), 10 B.W.C.C. 601—which lead me to the conclusion that no contract of service made, as in this case, by a deserter from the army can be regarded as a legal and valid contract of service under the Workmen's Compensation Act 1906. In the first case it was so held with regard to a contract which was in violation of the Truck Acts; in the second as to one which contravened the Employment of Children Act 1903. This principle applies also in my opinion to a man who has illegally deserted from service in the army. The obligation to serve in that capacity exists until he is discharged, and while in desertion he is subject to arrest. He cannot in these circumstances enter into a valid contract of service. . . ."

Argued for the appellant—A contract was void for illegality or immorality only where there was illegality in the contract itself, or if there was no illegality in the contract where it was entered into for an unlawful purpose—*Bell's Prin.*, section 35. Here there was no illegality in the contract itself, nor was it entered into for an unlawful purpose. No doubt there was fraud, but that merely rendered the contract voidable, and when

the accident occurred the contract had not been avoided. One of the parties was under a disability, which would have enabled the military authorities to withdraw him from his employment or his employers to dismiss him, but he was not totally unable to contract. He had performed services and earned wages, and was entitled to receive the wages he had earned. The case was analogous to a terminable contract of service under which the employer could dismiss the employee, but he was bound to pay for the services rendered—*Fraser, Master and Servant*, p. 324. Desertion, though severely punishable as a military offence, was not penalised by the infliction upon the deserter of such express disabilities as were found in *Kemp v. Lewis*, [1914] 3 K.B. 543; *Pountney v. Turton*, 1917, 10 B.W.C.C. 601, and the Workmen's Compensation (Illegal Employment) Act 1918 (8 and 9 Geo. V, cap. 8). Service as a soldier was simply a form of State employment, and was not essentially different in character from service with any other employer. But for express statutory provisions the military authorities could not have retained in the Militia a man who had joined in breach of his contract with an employer—*Army Discipline and Regulation Act 1879* (42 and 43 Vict. cap. 33), section 138.

Argued for the respondents—The contract in question was void, for a voidable contract could always be enforced by one of the parties. Here neither of the parties could enforce the contract, which was accordingly void—*Bell's Prin.*, section 7; *Stair's Inst.* i, x, 1, 2, and 4. A deserter was liable to imprisonment for desertion, and was under a statutory disability to become anything other than a soldier. The Court could not enforce the present contract against either party—*Army Act 1881* (44 and 45 Vict. cap. 53), section 12; *Reserve Forces Act 1882* (45 and 46 Vict. cap. 48); *Territorial and Reserve Forces Act 1907* (7 Edw. VII, cap. 9); *Military Service Act 1916* (Session 2) (6 and 7 Geo. V, cap. 15).

LORD PRESIDENT—The pursuer and appellant's husband was engaged on board the steamship "Dartmoor" as a trimmer or fireman in the month of February 1917, and whilst performing his contract of service was drowned in May 1917. His widow claims compensation under the Workmen's Compensation Act, and confessedly she would be entitled to have her compensation were it not said that her husband entered into a contract which was null and void.

It appears that when the appellant's husband took service with the respondents he was a deserter from the Army, and was in consequence liable to arrest and punishment. But there was no inherent disability in the man to enter into a contract of service if he chose. He was not an outlaw. It is quite true that that contract could not have been enforced by him against his employers, and the employers on the other hand could not have enforced the contract against the appellant's husband. And if the facts had been discovered no doubt difficulties might have arisen. But the question we have to

decide is whether the appellant is disabled from recovering because her husband entered into a null and void contract. I am clearly of opinion that the contract was not null and void although it might have been voidable. And accordingly, the contract having been partly performed at the date when the accident happened for which compensation is now claimed, the remuneration that he was entitled to as fireman or trimmer could have been recovered from the shipping company. Consequently they are liable in compensation to his widow.

The learned arbitrator apparently went wrong because he thought that he was bound to follow the authority of two cases that are referred to in his note—*Kemp v. Lewis*, [1914] 3 K.B. 543; *Pountney v. Turton*, 1917, 10 B.W.C.C. 601. These cases were not founded upon by the respondents in the argument before us. I have not examined them, but from the description of the cases which we have heard from the bar it appears to me that they were clearly inapplicable to the case before the arbitrator, because in each case the contract entered into was declared by statute to be an illegal contract into which people could not enter.

Accordingly I think in this case that the contract not being null and void but only voidable, we ought to answer the question put to us in the negative.

LORD MACKENZIE—I am of the same opinion. The statutory provision upon which the appellant founds here is section 1 of the Act of 1906, which provides that "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." It is not disputed that the deceased was in the employment of the respondents in this case, and it is not disputed that he completely fulfilled his duties as an employee.

The question is not whether during the period of employment the employer could have enforced the contract of service against the employee, or the employee have sued the employer on the contract. The question is whether, the contract having been performed, certain statutory consequences flow from the performance of the contract or not.

I am of opinion, with your Lordship, that the contract of service was not void but only voidable, and that in the circumstances of the case there is nothing to prevent the appellant recovering under the Act.

LORD SKERRINGTON—So far as appears from the papers before us the employers were not aware when they engaged him that this man was a deserter. If that was so, the contract was not void though it was voidable at their instance, because they were not bound to retain in their service a man who was liable to be taken away at a moment's notice by the military authorities. But that view would not suit the respondents, because if the contract was merely voidable, as it was not in fact avoided, the Workmen's Compensation Act applies. It is possible that in certain circumstances

an employer and an employee might appear to have entered into a contract that was null and void as contrary to the policy of the Army Acts. I reserve my opinion as to such a case.

LORD CULLEN—I am of the same opinion. Unknown to the employer the deceased was in such a position that he might have been prevented by arrest at any time from performing his part of the contract. But that does not, in my opinion, render the contract *ab initio* null and void.

The Court answered the question of law in the negative.

Counsel for the Appellant—Constable, K.C.—J. A. Christie. Agents—Oliphant & Murray, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Gentles. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, November 26.

FIRST DIVISION.

[Sheriff Court at Airdrie.]

LOGAN v. SHOTTS IRON COMPANY,
LIMITED.

Master and Servant—Workmen's Compensation—Average Weekly Earnings—Remuneration Partly Wages as Miner and Partly Profits as Contractor—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13, and First Schedule, sec. 2 (a).

An employee, engaged as an electric coal-cutting machine contractor, hired a squad of men to work coal. He himself actually worked with the squad as an ordinary miner. He was paid a tonnage rate upon the coal sent to the surface by the whole squad, including himself. His income consisted of the balance remaining out of the tonnage rate after paying his squad the wages he had agreed to pay them, which balance represented payment for his own work as a miner and his profit on the contract. He was injured while working as a miner. The mine-owners admitted liability, and paid him compensation as for total incapacity for some time. The man partially recovered his capacity. In a question as to the amount of compensation payable to him as for partial incapacity, held (*dis.* Lord Skerrington) that the amount of compensation fell to be calculated upon the man's average weekly wage as a miner, and not upon such wage plus his profit upon his contract for working the coal.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (2) (a), enacts—"Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated: Provided that where by reason of . . . the