

breach of his contract he did not discharge the liability of the shipowner under the Merchant Shipping Act to maintain him until he was returned to the port where he had originally joined the ship. In my opinion the liability was discharged by the act of the appellant. I do not doubt that the shipowners and he might have agreed that he should be discharged at Glasgow, and that he would be perfectly entitled to waive the benefits conferred on him by the Merchant Shipping Act. If so, it is obvious that their obligation of maintenance would cease. And it seems to me that the words of Lord Loreburn in the case of *M'Dermott* ([1911] A.C. 35) apply, and that the effect of the two Acts read together is that compensation is to begin exactly where the right to maintenance ends.

If I am right in the view that the action of the man in deserting his service and electing to take compensation under the Workmen's Compensation Act, which was his alternative remedy, terminated the liability of the shipowners, it follows that his right to compensation from that moment arose. Up to September 1920 it does not seem to me that he can possibly have any claim, because he has been maintained by the owners of the ship; and after all the allowance under the Workmen's Compensation Act is primarily an allowance with a view to maintenance. But as from the time when he discharged or repudiated his rights under the Merchant Shipping Act for further maintenance, I am of opinion that his right to compensation emerged.

Your Lordships have said nothing as to the footing upon which the arbitrator, who is now to proceed under our judgment to award compensation, is to proceed; but I think it right to say that *prima facie* it does not seem to me that the fact that the man has broken his contract should place him in a better position than if he had duly implemented it, and that therefore it may very well be that some of the considerations that appealed to the learned arbitrator as a ground for suspending the award altogether may be quite relevant in assessing the amount. I say no more than that, because, no doubt, the arbitrator will consider the whole circumstances of the case. But I can quite understand that the position of a native of India, who elects to remain in this country, where perhaps there may be great scarcity of employment suitable for him as compared with the facilities which he might have in his own country, may have a possible bearing upon the amount of compensation to be awarded.

LORD ORMDALE—It is not necessary again to recite the circumstances in which the present application for an award of compensation was presented.

The arbitrator, while holding that the respondents were liable to pay compensation to the appellant during his incapacity for work, has refused to make an award on the ground that the respondents are liable, under their contract and under the provision of section 34 of the Merchant Shipping Act 1906, to defray the expenses of the main-

tenance of the appellant until he should be returned to Bombay, and that as they are willing to discharge this liability and return him to Bombay, no weekly sum of compensation is payable. He reaches this conclusion because of the terms of section 7 (1) (e) of the Workmen's Compensation Act 1906, which provides that the "weekly payment shall not be payable in respect of the period during which the owner of the ship is under the Merchant Shipping Act . . . liable to defray the expenses of the maintenance of the injured . . . seaman. . . ." It was maintained by the respondents that that period necessarily endures in this case until the appellant is returned to Bombay or some other proper return port.

I agree in thinking that the period was terminated by the action of the appellant when, as stated in the Case, after joining the "Circassia" in Glasgow he in September 1920 left the ship without leave and deserted his service "while the respondents were in process of returning the appellant to the port of Bombay." That was, it appears to me, an absolute repudiation or waiver of any claim competent to him under the Merchant Shipping Act for the expenses of his maintenance. The stated facts do not disclose what became of the appellant after his leaving the ship, although he appears to have attended the proof led in his application in December 1920, or whether the respondents took any steps to recover him for repatriation purposes, but he has on the facts stated continued to be recalcitrant, and has cut himself adrift from all connection with the respondents, and so discharged them of all liability for the expenses of his maintenance.

The Court answered the question of law in the negative, recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to proceed.

Counsel for the Appellant—Mackay, K.C. —Aitchison. Agents—W. G. Leechman & Company, Solicitors.

Counsel for the Respondents—Moncrieff, K.C. —Gentles. Agents—Macpherson & Mackay, W.S.

COURT OF TEINDS.

Friday, May 27.

MACKENZIE, PETITIONER.

SIMPSON, PETITIONER.

Church — Glebe — Application for Authority to Feu — Expenses of Application — Glebe Lands (Scotland) Act 1866 (29 and 30 Vict. cap. 71), secs. 18 and 19 — Feudal Casualties (Scotland) Act 1914 (4 and 5 Geo. V, cap. 48), sec. 18.

The Glebe Lands (Scotland) Act 1866 provides (sec. 18) that the expenses of applying for authority to feu, and also those of making the necessary streets and drains, shall form a permanent bur-

den upon the glebe, the interest thereon until the burden is extinguished to be a first charge on the revenue of the glebe; and (sec. 19) that the casualties of superiority of the feu shall be invested to form a sinking fund to meet the said burden.

The Feudal Casualties (Scotland) Act 1914 provides (sec. 18) — “In feus granted after the commencement of this Act the annual feu-duty shall be a fixed amount or quantity, and no casualties shall be payable to the grantor of the feu or his successors in the superiority. . . .”

In an application for authority to feu the glebe under the Glebe Lands (Scotland) Act 1866 the Court while granting the application and declaring the expenses of the application a permanent burden on the glebe *refused* to make a proportion of the feu-duties liable in contribution to the sinking fund, in respect that it was not within the power of the Court to impose such a modification on the statutory enactments.

The Glebe Lands (Scotland) Act 1866 enacts—Section 18—“The Court, on the granting of any such order or interlocutor, or at any time thereafter, on the summary application of the minister on whose application the interlocutor or order was granted, or his heirs, executors, administrators, or assignees, shall inquire into and ascertain the sums which shall have been paid as the costs, charges, and expenses of applying for and obtaining such order or interlocutor and incidental thereto, and of making and constructing streets, roads, passages, sewers or drains in or through the glebe or any part thereof, and shall decern the amount thereof a permanent burden upon the glebe; and the interest thereof until extinguished, as after provided or otherwise, shall form a first charge on the whole produce and revenue of the said glebe.” Section 19—“As long as any such burden shall remain unpaid the casualties of superiority which shall become payable under any contracts, dispositions, or charters of feu, or writs by progress for entering heirs or successors to be granted as aforesaid, as well as any payments which may be received from the grantees thereof in respect of the construction of roads, sewers, or drains, shall be invested, at the sight of the heritors and presbytery, on such securities and in such manner as the Court of Teinds shall approve as a sinking fund to meet the said burden, and the interest of the said fund shall be paid to the minister for the time being, and as soon as the said fund shall amount to a sum sufficient to pay the said burden, the same shall be paid off, and thereupon the casualties of superiority thereafter to become due shall form part of the income of the minister for the time being and be payable to him.”

The Feudal Casualties (Scotland) Act 1914 enacts—Section 18—(*supra*).

The Rev. Neil Kennedy Mackenzie, minister of the parish of Longforgan, and the Rev. James S. Simpson, minister of the

parish of Kennoway, presented petitions for authority to feu the glebes of their respective parishes. Authority having been granted, counsel for the petitioners was heard on the Auditor's reports, when the attention of the Court was drawn to the effect of section 18 of the Feudal Casualties (Scotland) Act 1914 upon the provisions of the Glebe Lands (Scotland) Act 1866—the effect of the Act of 1914 being to render section 19 of the Glebe Lands (Scotland) Act 1866 inoperative by depriving the sinking fund of its principal source of revenue, viz., the casualties.

Counsel suggested that the Court might provide a remedy by authorising a temporary increase in the amount of the feu-duties and allocating the increase to the sinking fund in place of the casualties which were no longer available.

At advising, the opinion of the Court (which consisted of the LORD PRESIDENT, LORDS MACKENZIE, SKERRINGTON, CULLEN, and BLACKBURN) was delivered by

LORD PRESIDENT—These are two petitions for authority to feu glebe land under section 5 of the Glebe Lands (Scotland) Act 1866. Owing to a practical difficulty regarding the disposal of the expenses referred to in section 18 of the Glebe Lands Act—a difficulty caused by the provisions of the Feudal Casualties (Scotland) Act 1914—we found it necessary to take these petitions *avizandum*. By said section 18 the expenses of and incidental to the applying for and obtaining such an order as is asked, and also those of making the necessary streets and drains, are to be ascertained, and the amount thereof decerned to form a “permanent burden upon the glebe.” The interest of the amount—“until extinguished as after provided or otherwise”—is to form “a first charge on the whole produce and revenue of the said glebe.”

The reference to a subsequent provision of the Act is to section 19, according to which, as long as the burden of the expenses remains unpaid, the casualties of superiority arising under the feu-contracts to be granted, together with payments from feuars in respect of the construction of roads and drains, must be invested in order to provide a sinking fund to meet the said burden, the interest of such fund being paid to the minister for the time being. When this fund becomes sufficiently large the burden is to be paid off, and thereafter the casualties become payable to the minister for the time being. But by section 18 of the Feudal Casualties (Scotland) Act 1914 casualties are prohibited in feus granted after 10th August 1914, the date of the commencement of the Act. It follows that in the case of the applications under consideration the whole machinery of section 19 of the Glebe Lands (Scotland) Act 1866—except as regards payments for roads and drains—becomes inoperative. Section 16 of the Feudal Casualties Act contains a provision designed to meet the case of the redemption of casualties arising under feus of glebe lands, but I have not been able to discover any provision in the statute meeting cases like the present

in which no casualties can ever arise or can ever be the subject of redemption. It might have been equitable that the feu-duties, being presumably larger than would be the case if the feus were subject to casualties as well as feu-duties, should be laid under contribution to the sinking fund. But the statute makes no provision for this, and it is not within the powers of this Court to impose such a modification on the statutory enactments.

The only other reference in the Glebe Lands Act to the payment of the expenses of an application under section 5 is to be found in section 17. In the event of a coterminous proprietor exercising the option given to him by that section in the form of purchase, such expenses are directed to be deducted from the price before investment thereof. This provision is intact, but the contingency on which it proceeds is probably only rarely realised.

The expenses must of course be declared a permanent burden on the glebe, and the interlocutor will be in the ordinary form. It must remain a matter for consideration by the authorities of the Church whether a remedy for the state of matters produced by the Feudal Casualties Act should be sought by legislation or otherwise.

The Court approved of the Auditor's report in each petition and decreed the taxed amount to be a permanent burden upon the glebe of the parish, and the interest thereof to be a first charge upon the whole produce and revenue of the said Glebe until the said burden should be extinguished in manner provided by the Glebe Lands (Scotland) Act 1866.

Counsel for Petitioners—Keith, Agents—(for Rev. N. K. Mackenzie) J. Douglas Gardiner & Mill, S.S.C.—(for Rev. J. S. Simpson) Henry Bower, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, May 23.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Dundas, Lord Salyesen, and Lord Mackenzie.)

HIS MAJESTY'S ADVOCATE *v.*

M'GLINCHEY.

CARR AND OTHERS *v.* HIS MAJESTY'S ADVOCATE.

Justiciary Cases—Bail—Admission to Bail—Bailable and Non-bailable Offences—Discretion of Court to Grant or Refuse Bail—Act 1701, cap. 6—Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), sec. 18—Bail (Scotland) Act 1888 (51 and 52 Vict. cap. 36), sec. 2—Explosive Substances Act 1883 (46 Vict. cap. 3)—Firearms Act 1920 (10 and 11 Geo. V, cap. 43).

Certain persons who had been committed for trial for offences against the Explosive Substances Act 1883 and the Firearms Act 1920, applied for liberation

on bail on the ground that the offences were bailable and that the Court was bound to grant bail unless it were satisfied that a risk would thereby be involved of the accused failing to appear at the trial, and that on no other ground could bail be refused. *Held* that it was within the discretion of the Court to grant or refuse bail; that this discretion was not limited to the one case where there might be danger, if bail were granted, of the accused absconding; that it must be used solely with a view to the public interest and to secure the ends of justice; and bail refused.

Observations per the Lord Justice-General as to the duties and responsibilities of the Lord Advocate in opposing applications for bail.

Opinion of Lord Dunedin in A B v. Dickson (1907 S.C. (J.) 111, 5 Adam 372, 44 S.L.R. 672) commented on.

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35) enacts—Section 18—“Any person accused of a crime which is by law bailable shall be entitled immediately after he has been brought before a magistrate for examination on declaration to apply to such magistrate or to the sheriff for liberation on his finding caution in common form to appear at any diet to which he may be cited for further examination, or in order to answer any indictment or complaint which may be served upon him: Provided always that the prosecutor shall be entitled to be heard against any such application, and that the sheriff or other magistrate shall be entitled in his discretion to refuse such application before the person accused is committed until liberated in due course of law. . . .”

The Bail (Scotland) Act 1888 (51 and 52 Vict. cap. 36), which repealed the Act of 1701 so far as it related to bail, enacts—Section 2—“. . . From and after the passing of this Act all crimes and offences except murder and treason shall be bailable, and any magistrate having jurisdiction to try the offence or to commit the accused until liberated in due course of law may henceforth at his discretion, on the application of any person who has been committed until liberation in due course of law for any crime or offence except murder or treason, and after opportunity shall have been given to the prosecutor to be heard thereon, admit or refuse to admit such person to bail. . . .”

On 17th May 1921 James M'Glinchey was committed for trial in the Sheriff Court of Dundee on a complaint at the instance of the Procurator-Fiscal of Court charging him with a contravention of section 3 of the Explosive Substances Act 1883, as extended by section 7 of the Firearms Act 1920.

He applied to the Sheriff for warrant for liberation upon his finding bail on the ground that the offence upon which he was indicted was bailable.

The Sheriff-Substitute (MALCOLM) having granted bail, the Procurator-Fiscal appealed to the High Court of Justiciary.

On 13th May 1921 Edward Carr and four others were committed for trial in the