arise whether the deciding factor would be an unserved notice fixing the date of first hearing, or a subsequent notice that was returned served. If, therefore, the interpretation put upon the words in that case is to be accepted, then the apparent meaning of the words will have to be still further extended.

In the absence of a statutory definition I do not think that we should be justified in treating the meaning of the words "first hearing" as something entirely different from what it appears to be on the face of it. But I agree that section 20 of the Act might usefully be amended so as to make it of some practical effect when applied to appeals.

Order accordingly.

J. G. R.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Macklin.

1935
November 15

NADIRSHA HORMUSJI SIDHWA (ORIGINAL OPPONENT), APPELLANT *v.* KRISHNABAI WIDOW OF BALA AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.*

Workmen's Compensation Act (VIII of 1923, as amended by Act XV of 1933), section 2 (1) (n), Schedule II, clause (viii)—Whether "repair" includes repainting of a building—Workman employed over three months for painting and whitewashing a large house—Employment not of a casual nature—Finding as to nature of employment is a finding of fact.

The word "repair" in Schedule II clause *(viii)* of the Workmen's Compensation Act, as amended by Act XV of 1933, includes renewal of the paint of a building where repainting is necessary.

Dredge v. *Conway, Jones & Co.*,[1] referred to.

Where a workman was engaged for a period over three months and was concerned with the painting and whitewashing of a large house and was employed from day to day and not for the whole job, his employment could not be considered as of a casual nature within the definition of section 2, sub-clause *(1) (n)*, of the Workmen's Compensation Act, 1923.

*First Appeal No. 205 of 1934.

[1] [1901] 2 K. B. 42.

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NADIRSHA HORMUSJI v. KRISHNABAI

When there is any evidence to support the finding of the Commissioner for Workmen's Compensation that the employment of the workman is, or is not, casual, then the finding must be treated as a finding of fact, and is not subject to appeal.

FIRST APPEAL against the decision of J. F. Gennings, Commissioner for Workmen's Compensation, Bombay.

Claim to recover compensation.

One Laxman Bala, a painter, was killed while working on a building called Jer Manzil at Olive Road, Colaba. The building was let as a whole for the purpose of a boarding house and contained over thirty rooms and the painting work was being done in accordance with the requirements and to suit the convenience of the tenants.

The widow and mother of the deceased claimed compensation from the owner under Workmen's Compensation Act, 1923.

The owner denied liability on the following grounds: (1) that he did not employ the deceased, who was engaged by one Rama, to whom the contract for painting the building was given for a lump sum; (2) that the deceased, Laxman Bala, was not a workman because his employment was of a casual nature and he was employed otherwise than for the employer's trade or business; and (3) that he was not a workman according to the Schedule because he was not engaged in the construction, repair or demolition of a building, painting not being repair within the meaning of the Schedule.

The Commissioner for Workmen's Compensation, Bombay, held, first, that Rama did not enter into a contract with the owner for painting the building for a lump sum, but was employed as a *mukadam* to supply labour, including his own and to do the work in the manner and in the time required by the owner and that he paid the workmen with money supplied from time to time for

that purpose by the owner; secondly, he was of opinion that the workman's employment was not of a casual nature. His reasons were :—

"The work on which he was engaged extended over a period of three months and was concerned with the painting and whitewashing of a large house on several floors containing thirty rooms. The fact that the workman, like every workman employed in the building trade and in many other trades, was not permanently employed on any job but shifted from job to job as work offered, is not the point for consideration. This proviso to the definition of a workman is intended to protect persons who engage a workman for odd jobs. It is not intended to cover a case of this kind, where four to ten people are engaged over a period of three months on an extensive work such as the painting of a building of this size. The deceased himself worked for seventeen days continuously."

Thirdly, he held that the word "repair" included painting and whitewashing. His reasons were :—

"It is true that painting is sometimes done for pure adornment, but in the case of houses, particularly the exterior, it is well-known that the object of painting is preservation of the structure, which without painting would decay and become defective. A bridge for example, made of iron or steel, has to be painted to preserve it, and the covenant, almost invariably found in a long lease, which requires painting and/or whitewashing of the building to be done at stated intervals illustrates the fact that painting is done to stop decay. Therefore, in my opinion painting is repair in ordinary understood sense of the word as well as in the sense of repair as meaning renovation or restoration. My attention has been drawn to the fact that in another occupation in the Schedule to the Act, that relating to the construction, etc., of ships the word painting is specifically inserted, whereas it is omitted where reference to a building is made. I do not know why it should be used in one case and not in others, but I would suggest that the reason is that, in the case of buildings, the Legislature did not consider it necessary to differentiate between the legal position of two workmen working side by side on a scaffolding, one filling up the holes in the wall of a house and the other one painting the wall after the stopping had been done. The hazard to both men is precisely the same."

The learned Commissioner made an award for Rs. 1,200 and costs in favour of the applicants.

The owner—opposite party—appealed to the High Court.

Bahc durji, with *Pochaji Jamshedji*, for the appellant.

S. C. Joshi, with *B. G. Modak*, for the respondents.

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NADIRSHA HORMUSJI v. KRISHNABAI

BEAUMONT C. J. This is an appeal from an award by the Commissioner for Workmen's Compesation, Bombay. The three contentions raised by the employer upon which the learned Commissioner had to adjudicate, are (1) that the employer the present appellant did not employ the deceased who was engaged by one Rama to whom the contract for painting the building had been given for a lump sum; (2) that the deceased Laxman Bala was not a workman because his employment was of a casual nature and he was employed otherwise than for the employer's trade or business; and (3) that he was not a workman according to the schedule because he was not engaged in the construction, repair or demolition of a building, painting not being repair within the meaning of the schedule.

On the first point the learned Commissioner held that it was the appellant, and not Rama, who employed the deceased workman. That seems to me to be a pure finding of fact with which we cannot deal in appeal.

Upon the second question, whether the employment was of a casual nature within the definition of section 2, sub-clause (*n*), of the Act, the learned Commissioner held that it was not casual. He held that the work on which the deceased was engaged extended over a period of three months and was concerned with the painting and whitewashing of a large house on several floors containing thirty rooms, and he held that the fact that the workman was employed from day to day, and not for the whole job in the circumstances did not render the employment casual. We have been referred to various decisions on the English Act in which the language is similar. I think that the rule adopted in England is this, that it is impossible to define what casual employment is. There are some cases in which the employment is obviously not casual, and other cases in which the employment is obviously casual.

There are a number of debatable cases between those two extremes and the Courts have held that in those debatable cases the decision of the County Court Judge must prevail. In other words, the rule seems to me to come to this that where there is any evidence to support the finding of the County Court Judge, or in India the Commissioner, that the employment either is, or is not, casual, then the finding must be treated as a finding of fact, and is not subject to appeal. The present case is clearly within the debatable area, and the Commissioner having come to the conclusion that the employment is not casual, and there being evidence to support that finding, I think we are bound by it, and that it is not necessary to consider whether we should ourselves have taken the same view or not.

In regard to the third question, whether the painting of the house, which was the work on which the deceased was engaged, was "repair" within the meaning of clause (*viii*) of the second schedule, the learned Commissioner held that it was, and I think there was clearly evidence to support that finding. In so far as the question involves the construction of the Act and the schedule, it is one of law, and I entirely agree with the view of the learned Commissioner. I should say that in normal cases the paint of a house becomes part of the structure, and if it falls into disrepair and has to be renewed, I should say that the renewal forms part of the repair of the house, or building, and that view has now been adopted in England: see *Dredge* v. *Conway, Jones & Co.*[1] Mr. Bahadurji for the appellant has argued that "repair" does not include painting, and in support of that argument he relies on clause (*vii*) of the second schedule which is dealing with ships, and includes loading, unloading, fuelling, constructing, repairing, demolishing, cleaning, or painting any ship. It is argued that, inasmuch as the two words "repairing" and "painting" are included in that clause the legislature

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Beaumont C. J.

must have considered that repairing would not include painting and that, therefore, the word "repairs" in sub-section (*viii*) should also be held not to include painting. I see no reason for drawing that conclusion. The legislature may have considered that it was less clear in the case of a ship, than in the case of a building, that repairs would include painting. For the reasons I have given it seems to me to be clear that repair must include renewal of the paint of a building. We are not dealing with a case, which might possibly arise and in which at any rate the point would be more arguable, where a house is being repainted simply because the owner wishes to change its colour, and not because the old paint is in a bad state of repair. In the present case the building was being repainted because repainting was necessary. In my opinion that clearly falls within the word "repairs" in sub-section (*viii*) of the second schedule.

I think, therefore, that the appeal must be dismissed with costs.

MACKLIN J. I agree.

Appeal dismissed.

J. G. R.

APPELLATE CRIMINAL.

Before Mr. Justice Barlee and Mr. Justice Divatia.

1935
December 3

MANCHERSHA ARDESHIR DEVIERWALA (ORIGINAL COMPLAINANT), PETITIONER *v.* ISMAIL IBRAHIM PATEL No. 1 AND OTHERS (ORIGINAL ACCUSED), OPPONENTS.*

Indian Penal Code (Act XLV of 1860), sections 421, 423 and 109—Contract to cut trees situated in foreign State—Transfer of right under the contract—Right in moveable property—Insolvency of the transferors—Right vests in Receiver even if property is situated in foreign State—Moveables follow the person where he resides.

By the rules of private international law, immovable property can only be transferred in accordance with the *lex loci rei sitæ*; moveables on the other hand follow

* Criminal Application for Revision No. 278 of 1935.