

## ORIGINAL JURISDICTION. (a)

*Ex parte* HURST.

In the Matter of the British Steam-Ship "Jason."

The local tribunal in India appointed under Sections 201 and 202 of Act I of 1859 can suspend or cancel the British certificate of a Master or Mate, and for that purpose its report need not be confirmed by the local Government.

1863.  
March 27.

ON the 27th December 1862, the British Steam-ship "Jason," James Thomas Hurst, Master, was stranded and abandoned as a total wreck on the coast of India, about six miles to the north of Madras. Under the provisions of Act I of 1859, Messrs. T. G. Clarke and J. B. Crowther, were, on the 13th January 1863, appointed by the local Government of Madras to investigate the causes of the loss of the "Jason." They proceeded to hold their enquiry, and at the conclusion of the investigation made their report to the local Government, containing a statement of the case and of their opinion thereon. But no copy of that report, nor any statement of the case upon which the investigation was ordered, was furnished to Captain Hurst before the commencement of such investigation.

The proceedings in this investigation being for this and other reasons considered void, the local Government of Madras, by orders dated respectively the 10th and 14th February 1863, appointed Lieut.-Colonel W. J. Wilson (a Police-magistrate) and Captain Martin of the "Isabella" to make a second enquiry into the circumstances connected with the loss of the "Jason," under the provisions not only of Act No. I of 1859, but also of the Merchant Shipping Act Amendment Act of 1862, (25 and 26 Vict. c. 63).

Lieut.-Colonel Wilson and Captain Martin accordingly held a second enquiry, and at the conclusion of the case, acting under Section 23 clause 3 of the Amendment Act of 1862, stated in open court the decision to which they had come, and suspended Captain Hurst's certificate for one year. Such certificate had been granted under provisions of the Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104).

(a) Present : Scotland, C. J. and Bittleston, J.

Captain Hurst refused to give up his certificate, whereupon Lieut.—Colonel Wilson and Captain Martin directed him to pay a penalty of Rupees 400, and in default to undergo three months' imprisonment. On his declining to pay the penalty Lieut.-Colonel Wilson issued a third distress warrant for the recovery of Rupees 400 against his goods and effects; and on his refusal to enter into a recognizance to appear on the return-day of the warrant, he was, on the 4th of March, placed in custody of the police.

1863.  
March 27.

On the 1<sup>st</sup> of March 1863, *Branson*, upon an affidavit of Captain Hurst to the foregoing effect, obtained a rule nisi that a writ of certiorari should issue to Lieut.-Colonel Wilson and Captain Martin to remove into this Court the record and decision which they had come to at the conclusion of their investigation. The following are the grounds on which the rule was granted. First, because Lieut.—Colonel Wilson and Captain Martin had no jurisdiction to suspend the certificate of Captain Hurst or to require him to deliver it up. Secondly, because Act No. I of 1859, which is the only Act under which the local Government have authority to direct an inquiry into the cause of wreck on the coast of India, authorized them to enquire and report their opinion only. Thirdly, because if the authority to suspend a certificate under the Merchant Shipping Act Amendment Act of 1862 did in fact authorize and empower tribunals directed to enquire and report to the local Government under Act I of 1859 to suspend certificates and demand their delivery up for that purpose, that authority vested in Mr. Clarke and Captain Crowther on their appointment, and could only be exercised by them; and Fourthly, because Act I of 1859 was the only Act in force and applicable to cases of this kind in India.

*The Advocate General (Smyth)* now shewed cause against the rule.

*Mayne* on the same side. In order to proceedings of Lieut.-Colonel Wilson and this case is as to the necessary to show, first, that the obtained in two statutes and effective as to amount to a native Council: and having had the

1863.  
March 27.

enquiry was regular throughout. Enquiries into shipwrecks are provided for by Parts III and VIII of the Merchant Shipping Act 1854. Part VIII only applies where the ship is lost on or near the coasts of the United Kingdom, or where the witnesses arrive in the United Kingdom. Part III (see Section 109) applies to all seagoing ships registered in the United Kingdom and their owners and masters wherever the same may be. To prevent any doubt upon this point, Section 109 provides that "if in any matter relating to any ship, or to any person belonging to any ship, there appears to be a conflict of laws, then if there is in the Third Part of this Act any provision on the subject which is hereby expressly made to extend to such ship, the case shall be governed by such provision, and if there is no such provision, the case shall be governed by the law of the place in which such ship is registered."

Under the Merchant Shipping Act of 1854, Section 242 when a wreck took place in India, a report was to be made by a tribunal authorised by the legislature, upon which report, when confirmed by the Governor, the Board of Trade might suspend the certificate. Act I of 1869, Sections 100—102 constituted such a tribunal, and so supplied the machinery required by the Merchant Shipping Act. The Merchant Shipping Amendment Act of 1862, Section 23, took away the power of the Board of Trade, and directed the power of suspension to be exercised by the local tribunal. This Act is to be construed as part of the Merchant Shipping Act of 1854, and by their combined effect, the tribunal appointed under Act I of 1859, Section 100, is given authority to suspend the certificate of a British Master. The enquiry conducted by Messrs. Clarke and Crowther was a mere nullity. Those gentlemen only professed to be acting under Act I of 1859. This Act merely authorised them (Section 102) to report to the local Government. The local Government could make no use of their report. They could not suspend the certificate under section 82, for that section only applies to Indian certificates. Nor could they send on the report to come, and suspended, for the Board would, under the Merchant Shipping Amendment Act, be unable to deal with it. Clarke and Crowther had professed

Merchant Shipping Act of 1859

(a) Present : Scotland, C. J. and Act of 1854 and 1862

1863.  
March 27.

Their proceedings were wholly void, as they had neither sent Captain Hurst before the investigation a copy of the report upon which that investigation was founded, as directed by the Merchant Shipping Act of 1862, Section 23, clause 6, nor had they announced their decision to him at the close of the enquiry as directed by clause 3 of the same section. This being so, their proceedings could be no bar to a subsequent enquiry. On the analogy of a plea of *anterfois* convict, it would be necessary to show that Captain Hurst could have been injuriously affected by their report, but it is evident that no result whatever could have followed from it. On the other hand Colonel Wilson and Captain Martin were both authorised, and professed to proceed under the three Acts of 1854, 1859 and 1862, and had strictly complied with all the formalities required by the last statute.

*Branson*, in support of his rule. First. The first question is whether the Merchant Shipping Act of 1854 applies. Section 288 contemplates the application of that Act to India. Act I of 1859 does not apply. Part III legislates independently.

Secondly. If the Act of 1854 applies, and Part III, the Act of 1862, Section 23, clause 6, requires the concurrence of the assessor on the report, that is, the report on which investigation is ordered.

SCOTLAND, C. J. :—No—that is impossible.]

Thirdly. The Acts of 1854 and 1862 must be read together. The Board of Trade could only punish after confirmation, therefore the report of the local tribunal must be confirmed by Government before such tribunal can suspend or cancel certificates.

Fourthly. The investigation first held was final. No one can be tried twice for the same matter. When once appointed the law authorised the Commissioners to act in all respects.

*The Advocate General* in reply.

SCOTLAND, C. J. :—The question in this case is as to the construction of enactments contained in two statutes and in an Act of the Legislative Council: and having had the

1853.  
March 27.

opportunity of hearing the arguments on both sides, and of looking at those enactments, I must say that I entertain no doubt whatever as to how they should be construed.

The question arises on a rule *nisi* calling on Lieut.-Colonel Wilson and Captain Martin to shew cause against a certiorari issuing, on the following grounds : first, because they had no jurisdiction to suspend Captain Hurst's certificate or to require him to deliver up the same ; secondly, because their power was confined to reporting the result of their enquiry to the local Government ; and, thirdly, because *if* the authority to suspend the certificate under the Act of 1862 empowered the local tribunals mentioned in the Indian Act of 1859 to suspend certificates, that authority vested in Messrs. Clarke and Crowther, and they alone could exercise it.

The Merchant Shipping Act of 1854 (17 and 18 Vict. c. 104) contains a code of law applicable to Merchant Ships and Seamen, and divided into eleven parts. Of these we are only concerned with Parts III and VIII. Part III, no doubt, relates to Masters and Seamen ; but it is plain, we think, that the provisions contained in that part are in general not intended to be put into operation in cases of wreck or loss at sea ; and such of them as relate to the money of seamen, their wages, discipline, and crimes committed on the High Seas and abroad are all clearly consistent with and contemplate the existence of the ship. The words used in Section 241 are, however, large enough to include cases where a Captain is charged with incompetency or misconduct by reason of the loss of his ship ; and if there were no other provisions in the Act I should doubtless hold that they did include such cases. But Part VIII expressly refers to wrecks, and casualties on or near the coasts of the United Kingdom, or elsewhere, when competent witnesses arrive or are found at any place in the United Kingdom.

That being the general view I take of the Act, there is then this enactment in Section 238 : " If the Governor General in India in Council or the respective legislative authorities in any British possession abroad by any acts, ordinances or other appropriate legal means, apply to adopt any of the provisions in the Third Part of this Act contained to any British ships registered at, trading with, or being at any

shall within their respective jurisdictions, and to owners, masters, mates, and crews thereof, such provisions, adapted as aforesaid, shall in respect of the ships and persons to which the same are applied be enforced, and penalties and punishments for the breach thereof shall be recovered and inflicted throughout Her Majesty's dominions, in the same manner as if such provisions had been thereby so adapted and applied, and such penalties and punishments had been hereby expressly imposed." That section clearly refers to Part III and to Part III only. Turning then to the Indian Act I of 1859, we find that its provisions, from Sections 1 to 99 inclusive, are with one or two exceptions in accordance with the enactments contained in Part III of the Merchant Shipping Act of 1854, and carry out the adaptation or application contemplated in the 288th Section of that Statute. Mr. Branson had therefore no ground for stating that the Indian Legislative Council has not adopted Part III of the English Statute.

1863.  
March 27.

Now as to Section 242 of the Act of 1854. That provides that *the Board of Trade* may suspend or cancel the certificate of any master or mate in the cases therein enumerated, the fifth of which is: "If upon any investigation made by any court or tribunal authorised, or *hereafter to be authorised by the legislative authority in any British possession* to make enquiry into charge of incompetency or misconduct on the part of masters or mates of ships, or as to shipwrecks or other casualties affecting ships, a report is made by such court or tribunal to the effect that he has been guilty of any gross act of misconduct, drunkenness or tyranny, or that the loss or abandonment of, or serious damages to any ship, or loss of life, has been caused by his wrongful act or default, *and such report is confirmed by the Governor or person administering the Government of such possession.*"

According to that provision, which exist solely by virtue of Imperial legislation, it is only the Board of Trade that is invested with power to suspend or cancel certificates; not only, it is to be observed, when the enquiry has occurred in the United Kingdom, but also when it has taken place in any British possession.

Turning now to the Indian Act No. I of 1859, we find Sections 100, 101, 102, making provision for any inquiry, an

1863.  
 March 27.

investigation and a report in four cases of wreck and casualty : first, whenever any ship is lost, abandoned or materially damaged on or near the coast of India ; second whenever any ship causes loss or material damage to any other ship on or near such coast ; third, whenever, by reason of any casualty happening to or on board of any ship on or near such coasts, loss of life ensues. These three cases are not confined to ships registered in India. The fourth case is whenever any such loss, abandonment, damage or casualty happens to or on board any ship *registered at any port or place in India*, under the Merchant Shipping Act 1854 or under Act X of 1841. The Act then goes on to provide for the giving notice to the local Government of the loss, abandonment, damage or casualty ; and then enacts that it shall be lawful for such Government, if a formal investigation appears to it to be requisite or expedient, to appoint two persons to make the same, one of whom shall be a Magistrate acting in or near the place where the investigation is held the other may be any person conversant with maritime affairs. The persons appointed are then to proceed to make the investigation, and upon the conclusion of the case are to send a report to the local Government, containing a full statement of the case and of their opinion thereon. With this report the provisions as to enquiries into wrecks conclude. From these sections, if read in connections with Section 242 of the Merchant Shipping Act of 1854, it appears that before the passing of the late Amendment Act, the machinery for enquiry into cases of wreck and for the suspension or cancellation of the certificate of incompetent masters, was both complete and clear.

Then came the Merchant Shipping Act Amendment Act 1862, 25 and 26 vict. c. 63. The first important provision is the first section, which provides that the Act shall be " construed with and as part of the Merchant Shipping Act of 1854," which is termed the Principal Act. The provision to which I am about to refer must accordingly be read if inserted in that Act. Then the 23rd Section provides for a new state of things with reference to the cancellation and suspension of certificates. The first clause runs thus: " The power of cancelling or suspending the certificate of a master or mate by the 242nd Section of the Principal Act conferred

the Board of Trade shall (except in the case provided for in the fourth paragraph of the said section) vest in and be exercised by the local Marine Board, Magistrates, Naval Court, admiralty Court, or other Court or tribunal by which the case is investigated or tried, and shall not in future rest in or be exercised by the Board of Trade.

No words could be used to express more clearly the intention of the legislature to put an end to the power of the Board of Trade to cancel or suspend certificates, (except when the master or mate is shown to have been convicted of any offence,) and to transfer such power to the Court or tribunal by which the investigation is made. The terms of the third clause support this conclusion. That clause provides that "Every such board, court or tribunal shall at the conclusion of the case, or as soon afterwards as possible state, in open Court the decision to which they may have come with respect to cancelling or suspending certificates, and shall in all cases send a full report upon the case, with the evidence, to Board of Trade, and shall also, if they determine to cancel or suspend any certificate, forward such certificate to the Board of Trade with their report." And section empowers the tribunal to inflict a penalty, as has been done in this case, if the master do not upon demand of such tribunal deliver his certificate to them.

It may be remarked, in passing, that persons subjected to inquiry before such tribunals are, notwithstanding these alterations, by no means deprived of any benefits or advantages possessed by them under the former law—for a power is subsequently given to the Board of Trade to overrule or modify the decision of the local Court, if they think the justice of the case require it.

It is also provided by the sixth clause that "no certificate shall be cancelled or suspended under this section, unless a copy of the report, or a statement of the case upon which the investigation is ordered, has been furnished to the owner of the certificate before the commencement of the investigation, nor in the case of investigation conducted by justices or stipendiary magistrates, unless one assessor at least expresses his concurrence in the report."



1863.  
March 27.

It seems to me clear that, if I were considering this question in England, there could be no doubt whatever that the Principal Act is repealed by this section, so far as regards the power of the Board of Trade in the first instance to suspend or cancel certificates; and that for such purpose a local Court or tribunal of enquiry is substituted for the Board of Trade. Why should not the same effect be given to that section in India? Section 242 of the former Act as to British registered ships applies to such ships of its own operation, and is not left to be applied to India by Indian legislation. And reading the Act of 1862 as I have said, it must be read as part of the Act of 1854: the repeal provision contained in the Act of 1862 must be taken to be a repeal in India as well as in England; and the provisions in Section 23 are in full operation here. Therefore, although at first there seemed some doubt, my mind is satisfied that the tribunal here was entitled to demand the delivery up of Captain Hurst's certificate, and that in the event of that demand not being complied with, the powers given by the 24th Section of the Amendment Act might be enforced.

There is no ground, I think, for the point put by Mr. Branson, that the report of the local tribunal must be confirmed by the local Government before such tribunal can suspend or cancel certificates. The provision requiring confirmation by Government is contained in the Imperial Statute, but is not to be found in the Indian Act.

Then it was contended that because of the former enquiry Government was *functus officio*. There was nothing in the case to bring it within the rule that a man shall not be twice vexed for one and the same cause. There is no ground for saying that Captain Hurst was ever before vexed in respect of the suspension of his certificate, or the consequences of his refusal to give it up. The circumstances that the Government on the first occasion did not expressly confer upon the former Commissioners the powers of the Acts of 1854 and 1862, with regard to suspending certificates, does not alter the case. Such powers would vest in the Commissioners on the passing of the order directing the enquiry. The mere fact of the Government directing them to report, without saying, you may go on and cancel the certificate if necessary, would not prevent the objection from being taken

and succeeding if it were well founded. But here the former Commissioner could not have exercised that power. For it is expressly provided by the Act of 1862, section 23 clause 5 that no certificate shall be cancelled or suspended under that section unless a copy of the report or a statement of the case upon which the investigation is ordered has been furnished to the owner of the certificate before the commencement of the investigation. Here no such report or statement was furnished to Captain Hurst by the former Commissioners, and they could not therefore have cancelled or suspended his certificate. They were never charged by law with the necessary functions, and never even purported to exercise them. The first was not a proper enquiry. The second Commissioners for the first time exercised the powers conferred by law on the local tribunal appointed for such an investigation, and their proceedings were regular and cannot be disturbed. Captain Hurst therefore was never before on his trial, or in peril upon the same matters, nor is he prejudiced in any way : and the objection based on the institution of the former inquiry falls to the ground. The rule must therefore be discharged.

1863.  
March 27.

BITTLESTON, J. :—This appears to be a plain case. Looking at the Acts it seems to me that the power of cancelling or suspending the certificates of masters of British registered ships is matter of imperial legislation. The Indian legislature has not interfered with this at all. What they have touched is the power of suspending Indian certificates granted under Act I of 1859. So far as this case is concerned, the Indian legislature has merely constituted a tribunal to enquire into cases of wreck or casualty on the coast of India.

The first question is whether section 23 of the Amendment Act of 1862 applies ? That Act is to be construed as part of the Act of 1854, and if section 242 of the latter Act applies, it is clear, I think, that section 23 of the Amendment Act applies also. Then does section 242 apply ? It clearly does, except in so far as the provision in clause 5 of that section as to confirmation is in effect repealed by section 23 of the Amendment Act.

Section 242 of the principal Act provides that the Board of Trade may suspend or cancel certificates in several inst-

1863.  
March 27.

ances the fifth of which is [His lordship here read clause 5.] Then has there been here an enquiry by a legally authorised tribunal? To answer that we must turn to Act I of 1859. Sections 100, 101, 102 provided for such an enquiry. If such a tribunal has been constituted by the Indian legislature, and if there has been an investigation by such tribunal, then, under the principal Act, if that tribunal has made its report, and that report has been confirmed by the Government, the Board of Trade were to act. Would that provision have been applicable to this case if the Act of 1862 had not been passed? It seems to me clear that it certainly would; and if so it seems equally clear that the Act of 1862 has taken away the power of cancelling or suspending certificates from the Board of Trade and vested it in the local tribunal. Then has that local tribunal, as constituted under the second commission, legally exercised the powers given to it? It is said that it has not, because it was bound, as alleged, to wait for the confirmation by Government before suspending the certificate. And in support of such allegation it was contended that the words in the principal Act requiring such confirmation are still in force. But reading section 23 of the Act of 1862, it is impossible to hold that the local tribunal is to wait for confirmation by any other authority. That section in effect, though not in words, repeals the provision in the fifth clause of section 242 of the principal Act with reference to the confirmation by Government.

Then as to the alleged exhaustion of the power of Government by ordering the first commission. It seems to me that the maxim *Nemo debet bis vexari* cannot apply to a case like this, when the second enquiry was only instituted when it appeared that the first was wholly futile and fruitless. Captain Hurst was never in any peril under the first enquiry and therefore there was no objection to the appointment of the second commission. The rule must accordingly be discharged:

*The Advocate General* asked for costs.

*Branson* contra. This is a case of the first impression.

SCOTLAND, C. J.:—The usual result must follow.

*Rule discharged with costs.*