

1869
 Hodgson
et al.
 v.
 Rupchand
 Hazarimal

account-sales, being less than it ought to have been. He says he was present when it was weighed here, and has given the weights, and deducts twenty-five hundred-weights for tare; but there is no evidence to show that the weight of the cotton which was received by the plaintiffs in England was not as stated in the account-sales. I think it was necessary for the defendant to meet the *prima facie* evidence of the account-sales by better evidence than has been given, and that the plaintiffs are entitled to recover the deficiency claimed.

On the second issue I find for the plaintiffs, and the judgment will be for the amount claimed, Rs. 5,168-4-0, and interest on Rs. 5,168-4-0 from the 4th of August 1868 to this date, at nine per cent. per annum, with costs and interest at six per cent. on the amount of the judgment.

Attorney for the plaintiffs: *Acland, Prentis and Bishop.*

Attorney for the defendant: *Khanderao Moroji.*

Jan. 23.

Crown side.

*In the matter of GEORGE LEWIS, Master of the Ship
 "Glen Tilt," and of 17 & 18 Vict., c. 104.*

*Shipping Master—Discharge of Seaman—Discretion—Merchant
 Shipping Act—17 & 18 Vict., c. 104, s. 207.*

The Shipping Master of Bombay has a discretion vested in him of refusing to sanction the discharge of a seaman, shipped from a foreign port, whose articles have not expired, though the seaman consents to such discharge.

On the 16th of January 1869, *Dunbar*, before Couch, C.J., on behalf of George Lewis, master of the Ship *Glen Tilt*, obtained a rule directing J. D. Freeman, Shipping Master of Bombay, to show cause why a writ of mandamus should not issue to compel him, J. D. Freeman, to discharge Frederick Whyte and two other seamen from the ship *Glen Tilt*, and to sign and attest a release of all claims between Frederick Whyte and the two other seamen and the master

of the ship, and to do all things necessary to complete the discharge of the said seamen.

1869

In re
George Lewis.

The rule was granted on the affidavit of George Lewis, in which he stated that he took Frederick Whyte and the other two seamen on board the *Glen Tilt* at the port of London under articles as able seamen, about the 12th of August 1868, previous to the sailing of the *Glen Tilt* for Bombay; that the *Glen Tilt* arrived in Bombay harbour about the 7th of January 1869: that on the arrival of the *Glen Tilt* the seamen applied for their discharge, to which he consented; that on the 11th of January 1869 he attended with the seamen at the office of the Shipping Master, and, at the request of the seamen, applied for their discharge, but that the Shipping Master refused to grant the seamen their discharge, and did not assign any reason for his refusal; that at the time of making the application he produced the account of the seamen's wages, which he offered to pay, but the Shipping Master would not entertain the subject of the seamen's discharge except upon the terms that he (George Lewis) should engage other seamen in their stead within a week, to which terms he (George Lewis) declined to accede. The seamen also made a joint affidavit corroborating these facts.

George Lewis and the seamen went a second time, after giving notice, to the office of the Shipping Master, and with a like result.

Before the rule came on for argument, the Shipping Master filed an affidavit in which he stated the reasons for his refusal to discharge the seamen, which reasons he said he explained to George Lewis and the seamen when they came to his office. "I had," he stated, "a considerable number of distressed seamen then upon my hands chargeable to the State, and, therefore, I could not sanction the discharge of the seamen unless George Lewis would ship three other seamen in their place within four days, which he declined to do.

"I say that the three seamen were not entitled by their articles to be discharged in the port of Bombay.

1869

In re
George Lewis.

“ I lastly say that on the 12th of January there were seventeen distressed seamen fed and supported at the expense of the State in Bombay, and that there then were a large number of unemployed seamen in Bombay liable to become chargeable to the State. Many of these unemployed seamen arrive in Bombay from various parts of Western India, and sometimes from Madras and Calcutta: and in the months of November and December last the subsistence bills paid by Government for the relief and support of distressed seamen amounted to Rs. 540-12-0 and Rs. 576 respectively.”

The rule came on for argument before COUCH, C. J., and ARNOULD, J., on the 21st of January 1869.

The Honorable L. H. Bayley (Advocate General) showed cause. The case of the *Milton* (a), which was relied upon when the rule *nisi* was granted, cannot be supported. It was not argued, as counsel for the Shipping Master gave up the point. Here the facts stated in the affidavit of Mr. Freeman show that he has exercised a sound discretion in refusing the discharge of the seaman: the only question, therefore, is, has the Shipping Master any discretion in the matter. I contend that he has. The solution of this question depends upon the construction to be put upon sec. 207 of the Merchant Shipping Act of 1854 (b), a section contained in Part III. of the Act, and, therefore, by sec. 109, applicable to all sea-going British ships, of which the *Glen Tilt* is one. Sec. 207 enacts that if the master of any British ship discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped) without previously obtained the sanction in writing, endorsed on the agreement, of some public Shipping Master, or other officer duly appointed by the local Government in that behalf; he shall for such default be deemed guilty of a misdemeanour; and the said functionaries shall examine into the ground of such proposed discharge * * * in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction,”

(a) Ind. Jur. N. S. 371. (b) 17 & 18 Vict., c. 104.

&c. These provisions have a twofold object—(1) the protection of the seaman in respect of the contract he has entered into ; (2) the protection from being overrun with discharged seamen of the possession where such seaman may be discharged. The Act contains no preamble, it being a consolidating Act : we must, therefore, have recourse to the preambles of the Acts which it consolidates for the explanation of anything that may be ambiguous in its terms. By 5 & 6 Wm. IV., c. 13, s. 40, it is enacted that “whereas great mischiefs have arisen from masters leaving seamen in foreign parts, who have thus been reduced to distress, and thereby tempted to become pirates &c., that the forcing on shore, or leaving behind, a seaman in such places shall be a misdemeanour ; and by sec. 41 seamen are not to be discharged without the sanction of certain functionaries, who are thereby given the same powers as are now conferred by sec. 207 of the Merchant Shipping Act, 1854. The same preamble is to be found in 7 & 8 Vict., c. 112, s. 46. That Act has been repealed by 17 & 18 Vict., c. 120, but the same reasons that then operated operate still : therefore, the provisions of that Act are re-enacted in the section we are considering. These preambles clearly show that the Legislature had in view the protection of the colonies as well as of the seamen. This construction is borne out by the rules published by the Board of Trade in pursuance of the powers given it by the Act (c). Besides, the latter portion of the section in question clearly shows that the Shipping Master has a discretion ;

(c) Rule 12 :—“As great evils have arisen from British seamen being left destitute in foreign ports, and as great expense is incurred by the Government in relieving them and sending them home, very stringent provisions are made to prevent their being so left, except in cases of necessity, and unless due precautions are taken for their return to their native country. The degree of stringency with which certain of these provisions should be enforced must depend in some degree upon the circumstances of the case. Thus in a colony where demand for labour is great, there is comparatively little fear that able-bodied seamen, if left behind, will become destitute, and the reason for objecting to their discharge will not apply to the same extent as in countries where they will probably become a burden to the public resources. While, therefore, the provision of the Act must be observed in all cases, it must rest with the local authorities to determine the mode and extent in and to which the powers given by the Act are to be exercised.”

1869

In re

George Lewis.

1869

In re

George Lewis.

for otherwise why should he examine into the *grounds* of the proposed discharge? He also cited Reg. I. of 1820, and Browne's Collection of Acts and Regulations, p. 20; Act XIII. of 1856, Schedule of Laws repealed; Act I, of 1859; 13 & 14 Vict., c. 93, s. 76; Abbott on Shipping, ed. of 1847, pp. 169 to 172, omitted in last edition.

Pigot (with him *Dunbar*), in support of the rule :—The point is undoubtedly a nice one, but it is concluded by authority. The decision of Phear, J., in the case of the *Milton* did not turn on the particular facts of that case, but is general in its application, and the arguments upon which his decision is founded are strong. Looking at the Act, there is no ground for supposing that it was intended to protect the seamen against their own improvidence, or to protect the colonies. Its object is to protect the seamen in respect of the contract they have entered into. The omission of preambles they contained in former Acts, and of the texts to the same effect from text-books, shows that this is so. The object of the Act seems to be to protect seamen from arbitrary discharge, which is necessary, seeing the enormous powers of masters in foreign ports. Such protection is not required in a seaman's own domicile: therefore, the exception is introduced into the clause. If the object contended for on the other side were contemplated, there should be a clause to prevent seamen from shipping for the outward voyage only. In that case the Shipping Master must discharge; why not in this? How can it matter whether the consent of the sea-

14. "Whenever the master of any British ship discharges or leaves behind at any place, in any colony or British possession abroad, except that in which he was shipped, any person belonging to his ship, he must apply to the officer appointed for the purpose. The officer will then inquire into the grounds of the proposed discharge, or into the grounds on which the man is to be left behind, and may, if he thinks it necessary, administer oaths for that purpose.

15. "The steps to be taken in cases of desertion are mentioned below
 "••• In all other cases in which men are left behind, the sanction of the officer must be obtained before the discharge can be effected. For considering the propriety of granting or withholding his sanction the officer will be guided by the rules of law by which the relations between master and seamen are governed, and if questions of difficulty arise they may be determined by an appeal to the courts of law."

man to be discharged in Bombay is given at home or here? The wording of the Act at present in force is different from that of the preceding Acts. In 5 & 6 Wm. IV., c. 19, s. 41, after the words "shall grant or refuse such sanction" follow these expressive words: "*according to their discretion, having regard to the objects of this Act;*" and in 7 & 8 Vict., c. 112 s. 46, the phrase is shall grant or refuse such sanction *according to the circumstances*, and as it shall appear to them to be just;" whereas in the section in question the words used are "shall grant or refuse such sanction, as appears to them to be just," thus plainly showing an intention on the part of the Legislature to narrow the circumstances under which a discharge may be refused.

1869

In re

George Lewis.

Cur. adv. vult.

Jan. 28.—COUCH, C. J. (after stating the facts of the case, proceeded) :—

The question we have to determine is, whether under these circumstances the Shipping Master has any discretion, and is not bound to sanction the discharge.

The words of sec. 207,—“discharges any seaman without previously obtaining the sanction in writing, endorsed on the agreement, of some public Shipping Master or other officer duly appointed by the local Government in that behalf”—are general, and, according to their ordinary meaning, would enable the Shipping Master to exercise a discretion. But it is argued that the latter part of the section—“and the said functionaries shall, and the said merchants may, examine into the grounds of such proposed discharge, and may either grant or refuse such sanction or certificate as appears to them to be just,”—shows that the intention of the Legislature was only to protect the seaman from a wrongful or improper discharge, and that where the seaman freely consents to his discharge the Shipping Master is bound to sanction it.

By the 5 & 6 Wm. IV. c. 19, s. 40, it is recited, “And whereas great mischiefs have arisen from masters of merchant ships leaving seamen in foreign parts, who have been

1869

In re

George Lewis.

thus reduced to distress, and thereby tempted to become pirates, or otherwise misconduct themselves, and it is expedient to amend and enlarge the law in this behalf," and it is enacted "that if any master of a ship belonging to any subject of the United Kingdom shall force on shore and leave behind, or shall otherwise wilfully and wrongfully leave behind, on shore or at sea, in any place in or out of His Majesty's dominions, any person belonging to his crew, he shall be deemed guilty of a misdemeanour." And by sec. 41—"that no such master shall discharge any individual person of his crew, whether British subject or foreigner, at any of His Majesty's colonies or plantations, without the previous sanction in writing of the Governor, Lieutenant-Governor, Secretary, or other officer appointed in that behalf by the Government there, or, in the absence of all such authorities at or near to the port or place at which the ships shall be then lying, then of the chief officer of customs of such colony or plantation resident at or near to such port or place, nor shall he discharge any such person at any other place abroad without the like previous sanction in writing of His Majesty's Minister, Consul, or Vice-Consul there, or in the absence of any such functionary then of two respectable merchants resident there, all which said functionaries respectively are hereby authorised and required, and all which said merchants are hereby authorised in a summary way to inquire into the grounds of any such proposed discharge by examination on oath, and thereupon to grant or refuse such sanction, according to their discretion, having regard to the objects of this Act."

Not only do the words of this section expressly show an intention that the functionaries named should exercise a discretion in granting or refusing the sanction in all cases; but also, as the discharging a seaman without his consent, and without sufficient cause, before the completion of the voyage for which he had been engaged, might come within the terms of sec. 40, and the mischiefs referred to are public mischiefs, it may be inferred that sec. 41 was intended to include a discharge with the consent of the seaman. Sec. 43

makes this still more clear. That enacts "that if any such master shall leave behind any one of his crew as aforesaid, contrary to this Act, in any indictment or proceeding the proof of his having obtained such sanction or certificate shall be upon him, it being the intention hereof that, except in the case of entering into His Majesty's naval service, no person of the crew shall be discharged, either *with or without his consent*, in any place abroad where such functionary can be found, unless he shall have given such sanction thereto."

1869

In re

George Lewis

The Act 5 & 6 Wm. IV., c. 19, was repealed by the 7 & 8 Vict., c. 112, which is entitled "An Act to amend and consolidate the laws relating to merchant seamen, and for keeping a register of seamen." Sec. 46 of this Act contains the same recital as is in sec. 40 of the repealed Act, and then enacts "that if any master of a ship belonging to any subject of Her Majesty shall discharge any person belonging to his ship or crew at any of Her Majesty's colonies or plantations without the previous sanction in writing (to be endorsed on the agreement) of the Governor or other officer holding the chief authority there, or of the Secretary or other officer duly appointed by the Government there in that behalf, or in the absence of such functionaries then of the chief officer of customs resident at or near such port or place, or shall discharge any such person at any other place abroad without the like previous sanction, to be endorsed on the agreement by her Majesty's Minister, Consul, or Vice-Consul there, or in the absence of any such functionary then of two respectable merchants resident there, such master shall be guilty of a misdemeanour; or if any master of any such ship shall abandon or leave behind at any such colony or plantation any person belonging to his ship or crew, on the plea or pretence of unfitness or inability to proceed upon the voyage, or of desertion or disappearance from the ship, without a previous certificate in writing (to be endorsed on the agreement) of the Governor, Secretary, or other officer as aforesaid, or in the absence of such functionary then of the chief officer of customs resident at or near such port or place, certifying such unfitness

1869
in re
 George Lewis

inability, desertion, or disappearance, or shall abandon or leave behind any person belonging to his ship or crew at any other place abroad, on shore or at sea, upon such plea or pretence, without the like previous certificate of Her Majesty's Minister, Consul, or Vice-Consul there, or in the absence of any such functionary then of two respectable merchants, if there be any such at, or within a reasonable distance from, the place where the ship shall then be, such master shall be guilty of a misdemeanor; or if any master of any such ship, in case any person belonging to his ship or crew shall desert from the said ship at any place abroad, shall neglect to notify the same in writing to one of such functionaries as aforesaid, if there be any such resident at or near the place, and in their absence, if it be out of Her Majesty's dominions then to two respectable merchants, if there be such at or near the place, within twenty-four hours of such desertion, such master shall be guilty of a misdemeanour; and the said functionaries are hereby authorised and required, and the said merchants are authorised, to examine into the grounds of such proposed discharge, or into the plea or pretence of such unfitness, inability, desertion, or disappearance, as aforesaid, in a summary way, upon oath (which oath they are hereby respectively authorised to administer), and to grant or refuse such sanction or certificate, according to the circumstances, and as it shall appear to them to be just."

In sec. 41 of the repealed Act the words were "according to their discretion, having regard to the objects of this Act;" but we think this change of expression is not enough to indicate an intention that in the case of a discharge with the consent of the seaman there was not to be any discretion. In a consolidating and amending Act the mere change of phraseology is not to be construed as a change of the law, unless it evidently purports an intention to work a change. And probably the change may have arisen from the draftsman having in the new Act included in one section what was provided for by secs. 41 and 42 of the repealed Act, the letter of which required a certificate in writing in the case of incapacity to proceed on the voy-

age, desertion, or disappearance. By sec. 47 it is also made a misdemeanour, as it was in the repealed Act, "wrongfully to force on shore and leave behind, or otherwise wilfully and wrongfully to leave behind, in or out of Her Majesty's dominions, any person belonging to the ship or crew before the completion of the voyage;" and sec. 48 makes it incumbent on the master, in any information, indictment, or other proceeding against him, to produce or prove the sanction, whether the discharge was *with or without the consent* of the seamen. This provision seems to be inconsistent with an intention that where the discharge, was *with consent* the functionary was bound to sanction it.

1869

In re

George Lewis

This being the state of the law, the act Act 17 & 18 Vict., c. 104, upon which the question before us arises, was passed. It enacts that it is expedient to amend and consolidate the Acts relating to merchant shipping; and so much of the 5 & 6 Wm. IV., c. 19, as was not already repealed, and the whole of the 7 & 8 Vict., c. 112, are repealed. In this Act there is a series of sections, 205 to 213, headed "Leaving seamen aboard," one of which, 211, provides for the relief and sending home at the public expense of seamen, being subjects of Her Majesty, who have been shipwrecked, *discharged*, or left behind at any place abroad, re-enacting what was the law by the repealed Acts 11 Geo. IV., c. 20, s. 82, and 7 & 8 Vict., c. 112, s. 52. Of this series of sections, sec. 206 provides, as 7 & 8 Vict., c. 112, s. 47, did, for the wrongfully forcing a seaman on shore and leaving him behind, or otherwise wilfully and wrongfully leaving him behind, in any place in or out of Her Majesty's dominions; and sec. 207 enacts that if the master of any British ship does any of the things stated,—one of which is "discharges any seaman or apprentice in any place situate in any British possession aboard (except the possession in which he was shipped,) without previously obtaining the sanction in writing, indorsed on the agreement, of some public shipping Master or other officer duly appointed by the local Government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place," he shall for each such default be deemed guilty of a misde-

1869

In re
George Lewis

meanour; and then follow the words which were much relied on in support of this application—"and the said functionaries shall and the said merchants may, examine into the grounds of such proposed discharge, or into allegation of such unfitness, inability, desertion, or disappearance as aforesaid, in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate, as appears to them to be just."

In the Act now in force there is no recital, as in the former Acts, of great mischiefs having arisen from leaving seaman in foreign parts. It was probably not thought necessary to repeat this, the law having been in force for many years; but the necessity for preventing these mischiefs still continued; and, when we find the Legislature re-enacting the provisions of the repealed Act, it may reasonably be inferred, notwithstanding some change in the language, that they were intended to have the same operation. It would require a plain indication of a contrary intention to justify the Court in putting a different construction upon them. The argument that the law is intended only for the benefit of the seaman, and to protect him from a wrongful or improper discharge, we think, fails, when we consider that the mischiefs are of a public nature, and also that a discharge in the possession in which he was shipped is excepted. The law seems to be intended to prevent the public mischiefs, and as a provision is made for the seaman being relieved and sent home at the public expense when discharged, it is reasonable that the power of terminating the contract by mutual consent, and giving him a right to relief, should be subject to some control.

Looking at the previous legislation on the subject, and at the policy as well as the language of the Act now in force, we are of opinion that the Shipping Master had a discretion in this case, and we are unable to concur in the view which Mr. Justice Phear took of sec. 207. The rule must be discharged; but as the case of the applicant was supported by the union of a learned Judge of the High Court at Calcutta, we think it should be without costs.

Rule Discharged.