

Friday, March 2.

SECOND DIVISION.

THAIN v. BOARD OF TRADE.

Ship—Process—Expenses—Appeal from Decision in Board of Trade Inquiry—Fees of Nautical Assessors—Consignment of Sum Sufficient to Pay Fees—“Cost to be Occasioned by the Appeal”—Shipping Casualties and Appeals and Re-Hearings Rules 1907, Rule 20 (c).

At a formal investigation, made at the instance of the Board of Trade under the Merchant Shipping Act 1894, into the circumstances attending the abandonment and loss of a British steamship, the Court found the skipper of the vessel to be in default and cancelled his certificate. The skipper appealed to the Second Division of the Court of Session, and consigned the sum of £80, the amount of the sum having been fixed by the Sheriff-Substitute, as security for the costs to be occasioned by the appeal. In the Second Division the respondents having moved that the appellant be ordained to consign an additional sum to defray the cost of the nautical assessors who by statute must sit with the Court, the Court refused the motion and ordered delivery to the clerk of process of the deposit-receipt for £80 in order that the £80 might be made available *primo loco* for payment of two nautical assessors to be appointed for the hearing of the appeal.

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) enacts—Section 475—“(4) Any re-hearing or appeal under this section shall be subject to and conducted in accordance with such conditions and regulations as may be prescribed by rules made in relation thereto under the powers contained in this part of this Act.”

The Shipping Casualties and Appeals and Re-Hearings Rules 1907, provide—Rule 20—“(c) If the appeal is brought by any party other than the Board of Trade, the appellant shall before the appeal is heard give such security, if any, by deposit of money or otherwise, for the costs to be occasioned by the appeal, as the judge from whose decision the appeal is brought, on application made to him for that purpose, may direct. . . . (e) The Court of Appeal shall be assisted by not less than two assessors. . . .”

A formal investigation under the Merchant Shipping Act 1894 was held at Aberdeen before the Sheriff-Substitute (LOUTTIL LAING), assisted by assessors, into the circumstances attending the abandonment and loss of the British steamship “Morning Star” of Buckie.

On 8th June 1922 the Court reported as follows:—“Finds . . . that the loss of the steam vessel ‘Morning Star’ was caused by the tampering by the skipper Peter Thain with the vessel’s sea connections and consequent flooding of the engine-room and the failure to make effective use of the vessel’s

pumping appliances. The Court is of opinion that the loss of the vessel was caused by the fault of the skipper Peter Thain as above stated. . . . The Court accordingly finds the skipper Peter Thain to be in default and cancels his certificate accordingly. . . . The Court makes no order as to costs.”

The skipper Peter Thain appealed to the Second Division of the Court of Session against the decision so given, in terms of the Merchant Shipping Act 1894, section 475 (3) and (4), and the Shipping Casualties and Appeals and Re-Hearings Rules, dated 22nd November 1907, and craved that the same, in so far as the appellant was in default and in so far as it cancelled his certificate, might be recalled and that the Board of Trade be found liable in expenses. The general grounds of the appeal were that the decision was contrary to the evidence adduced.

The appellant consigned the sum of £80, the amount of the sum having been fixed by the Sheriff-Substitute, as security for the costs to be occasioned by the appeal.

On the case appearing in the Single Bills counsel for the appellant drew the attention of the Court to the position of the appellant in regard to the payment of the nautical assessors’ fees and argued that there was no obligation on him to consign money to defray the cost of the nautical assessors, and that in any event the sum of £80 which he had already consigned was sufficient. Counsel referred to the Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 475 (4); the Shipping Casualties and Appeals and Re-Hearings Rules 1907, Rule 20 (c) (printed in Maclachlan’s Law of Merchant Shipping (5th ed.), p. 1027); the Nautical Assessors (Scotland) Act 1894 (57 and 58 Vict. cap. 40); C.A.S., A, viii, 9.

Counsel for the respondents maintained that the expense of the nautical assessors’ fees should fall on the party appealing even though he might not be the party who originated the inquiry.

The hearing was adjourned till 31st January 1923, when counsel for the respondents stated that the practice in the English Courts was that the appellant’s agents should undertake to be responsible for the expenses of the nautical assessors and that they were agreeable that that practice should be followed. It was a condition-*precedent* to the exercise of the right of appeal that the appellant should meet these charges. Counsel accordingly moved the Court to ordain the appellant to consign the sum of £40 to meet these charges.

At advising—

LORD JUSTICE-CLERK—The Court have very carefully considered this motion which has been made on behalf of the respondents, and they are of opinion that it falls to be refused.

The Court (which consisted of the LORD JUSTICE-CLERK, LORDS ORMDALE, HUNTER, and ANDERSON) pronounced this interlocutor—“*Edinburgh, 1st February 1923*—The Lords having considered the motion made by counsel for the respondents that the appel-

lant should be ordained to consign a sum sufficient to defray the cost of the nautical assessors, who by statute must sit with the Court in hearing the appeal, refuse the said motion."

Thereafter on the case being enrolled for the purpose of having the nautical assessors appointed, the Court expressed a desire to know the footing upon which the £80 had been consigned, and on 2nd March 1923 counsel for the appellant read a letter from the Sheriff-Clerk-Depute at Aberdeen stating that he was present when caution was discussed before the Sheriff-Substitute; that the Sheriff-Substitute in fixing the sum to be consigned at £80 had "so fixed it as a reasonable amount to cover the whole expenses of the Board of Trade in connection with the appeal, or at all events what in his discretion he could reasonably ask the appellant to consign or find caution for," but that particular items of expense such as payment of the nautical assessors were not under consideration.

The Court (which consisted of the LORD JUSTICE-CLERK, LORDS ORMDALE, HUNTER, and ANDERSON) pronounced this interlocutor—

"... Having heard counsel for the parties on the question of consignment of a sum sufficient to meet the fees of two nautical assessors to be appointed for the hearing of the appeal, appoint the agents for the parties forthwith to deliver up to the Clerk to this process the deposit-receipt for £80 of the North of Scotland and Town and County Bank, representing the sum consigned by the appellant by order of the Sheriff-Substitute, the said deposit-receipt to be endorsed by the agents in favour of Edwin Adam, Esq., K.C., P.C.S., in order that the same or so much of the said £80 as is necessary may be made available *primo loco* for payment of the two nautical assessors to be appointed."

Counsel for the Appellant—Normand. Agents—Alex. Morison & Company, W.S.

Counsel for the Respondents—Jameson. Agent—Henry Smith, W.S.

Friday, March 9.

FIRST DIVISION.

EWING'S TRUSTEES v. CRUM EWING.

Property—Real Burden—Constitution—Uncertainty—Personal Obligation—Disposition—Construction.

An heir of provision succeeded to an estate in terms of a destination to himself and the heirs-male of his body under a declaration in the testator's will that in case he or his foresaids "shall sell the said estate, then and in that event he and they shall pay to my trustees for the purposes of the trust the further sum of £20,000, and which sum or sums shall be declared a real burden on said estate until the same are paid and discharged."

The heir of provision in a disposition of the estate to him by the testator's trustees undertook a personal obligation, which he transmitted to his gratuitous successors, one of whom proposed to sell an undefined portion of the estate. The trustees and the successor in question having presented a special case to the Court, *held* that the obligation was constituted in words which were so far lacking in definiteness and precision as to prevent the formation of a valid real burden on the estate. *Held further* that it was impossible to lay down *ab ante* that the sale of a portion of the estate would or would not amount to a sale of the estate within the meaning of the personal obligation.

John Thomas Sheriff Watson, Chartered Accountant, Edinburgh, and others, the trustees appointed by the Lords of Council and Session to act under the trust-disposition and settlement of the deceased James Ewing of Levenside, sometime merchant in Glasgow, *first parties*, and Humphry Ewing Crum Ewing of Strathleven, *second party*, brought a Special Case for the opinion and judgment of the Court upon questions which had arisen with reference to the construction of the fourth purpose of the said trust-disposition and settlement.

By his trust-disposition and settlement the testator, who died on 29th November 1853, conveyed to trustees therein mentioned his whole means and estate, heritable and moveable, for the trust purposes therein set forth, and, *inter alia*, for conveyance of the estate of Levenside to his widow in lifeferent for her lifeferent alienarily, and failing heirs-male or female of the trustor's body, then to Humphry Ewing Crum, merchant in Glasgow, and the heirs-male of his body.

The fourth purpose of the trust-disposition and settlement provided, *inter alia*, as follows:—(*Fourth*) "It is hereby expressly provided and declared that as the said estate of Levenside has now cost me about £111,000 sterling, I hereby direct my trustees to burden the said Humphry Ewing Crum and his foresaids and the said estate with the payment to themselves, for the purposes of the trust, of the sum of £40,000 sterling as a condition of their granting the conveyance of said estate of Levenside and others aforesaid to him and his foresaids; and in the event of my purchasing Dumbarton Muir, in which case it will be added to and form part of the estate, the said Humphry Ewing Crum and his foresaids shall further pay to my trustees for behoof of the trust the price which the said muir may cost me, and that in addition to the foresaid sum of £40,000 such sum or sums to be payable by the said Humphry Ewing Crum and his foresaids to my trustees and their foresaids within two years after he or they shall succeed to the said estate, with interest from his term of entry and thereafter till paid: Declaring further that in case the said Humphry Ewing Crum or his foresaids shall sell the said estate, then and in that event he and they shall pay to my trustees for the purposes of the