

deducted, the items which make up the £1758 should be credited.

I am accordingly of opinion that the determination of the Committee is right.

The Court were of opinion that the determination of the Valuation Committee was right, and dismissed the appeal.

Counsel for the Appellants—Lord Advocate (Ure, K.C.)—Hunter, K.C.—Black. Agents—Webster, Will, & Company, W.S.

Counsel for the Corporation of Govan—Dean of Faculty (Dickson, K.C.)—Wilson, K.C.—M. P. Fraser. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Assessor—Cooper, K.C.—Munro—Dunbar. Agents—Ross Smith & Dykes, S.S.C.

COURT OF SESSION.

Saturday, December 4, 1909.

SECOND DIVISION.

[Sheriff Court at Edinburgh.]

GIBSON & COMPANY v. GORMAN.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), secs. 1 and 13—Employer—Ship-Agents—Regulations of Leith Dock Commissioners regarding Loading of Coal—Squad of Coal Trimmers with Head Man Selected by Commissioners—Accident to Trimmer.

Circumstances where held that a member of a squad of coal trimmers who had received injuries by accident arising out of and in the course of his employment in Leith Docks, was not employed by the Leith Dock Commissioners, nor by the head of the squad to which he belonged, nor by the registered owners of the ship, but was in the employment of the agents for the ship at Leith.

This was a Stated Case on appeal in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between George Gibson & Company (*appellants*), shipowners, 64 Commercial Street, Leith, and John Gorman (*respondent*), coal trimmer, residing at 46 Kirkgate, Leith, against a decision of the Sheriff-Substitute (GUY) at Edinburgh, acting as arbitrator.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906 in which the respondent craved an award of compensation for injuries he received while in the employment of the appellants at the Albert Dock, Leith, on 7th October 1907. The facts proved or admitted are as follows:—

"1. On 7th October 1907 the s.s. 'Quentin' was lying in the Albert Dock, Leith.

"2. The registered owners of the 'Quentin' are Robert Somerville and Campbell Gibson, both shipowners in Leith, two of the members of the appellants' firm. There

are other partners of the appellants' firm who are not registered owners of the 'Quentin.' The appellants act as agents or managers or managing-owners thereof.

"3. The appellants are shipowners and shipping agents in Leith, and their business includes the loading and discharging of vessels under their charge or management, including the s.s. 'Quentin.' The appellants have no tools to enable the work to be carried on by them direct, and they do not themselves load or discharge coal but employ workmen to do it.

"4. The appellants had agreed, conform to charter-party produced, with Messrs Endemann & Company of Glasgow, to 'reserve in their steamers, from Leith to Rotterdam and Amsterdam, for Messrs Endemann & Company,' room for 12/14,000 tons of coal for shipment between January and December 1907 at a freight of 3s. 9d. per ton.

"5. The cost of loading and trimming the coal was made a charge upon the freight, and the freight, less charges, was paid over by the appellants to the registered owners of the 'Quentin.'

"6. On 7th October 1907 the s.s. 'Quentin' was being loaded with coal under said contract, and the appellants required the coal to be trimmed in the holds when being loaded.

"7. For this purpose a squad of men, of which the respondent was one, was engaged.

"8. While so employed in trimming the coal on said date the respondent met with an accident arising out of and in the course of his employment, by being struck and knocked down by a beam which was being placed in position by the said squad by means of the ship's crane, whereby he sustained personal injury which incapacitated him for work.

"9. At the Albert Dock coals are loaded by means of fixed hydraulic cranes which belong to the Leith Dock Commissioners.

"10. In order to secure regularity, good order, and properly qualified men, the Commissioners many years ago instituted the practice and system of allowing shippers to engage at the hydraulic cranes only those squads of trimmers the heads of whom the Commissioners approved, and that practice and system are still followed. One of their printed and issued regulations (No. 18) is as follows:—'In every vessel, except lighters, using the cranes the trimming of the coal in the holds shall be done by a sufficient number of properly qualified men employed by the master, agent, or shippers, for whom and for whose actings or conduct the Commissioners shall not be in any way responsible.' In order to secure said purpose the Commissioners do not themselves select or choose the men forming a squad of trimmers, but having confidence in one particular man they select him as head of the squad, and allow him to choose the other properly qualified men to form the squad. The head of the squad in question was Owen Hughes, who had been selected by the Commissioners forty years previously, and he had the

power to dismiss any member of the squad. When the master, agent, or shippers require a squad of trimmers, they send notice of this to the office of the Commissioners, where the heads of the various squads obtain information as to trimming required.

"11. When the master, agent, or shippers require the use of one of the Commissioners' cranes, application is made at the Leith Dock Commission Office, and a permit obtained which is handed over to the crane inspector. A plan showing the manner in which the coal is to be trimmed is handed over to the squad by the shippers or ship-owners, or through their agents, either directly or through the medium of the crane superintendent.

"12. The squad of which the pursuer was a member have a monopoly of trimming coals loaded at the Leith Dock Commission cranes in the Albert Dock, Leith.

"13. The squad is paid by the master, agent, or shippers at a fixed rate per ton for the trimming of all coals in the Albert Dock. For the convenience of both shippers and trimmers the charges of the trimmers are payable at the office of the collector of harbour and dock rates, where the shippers pay in the total trimming charges and where the head of the squad receives the same, under deduction of a small commission for the trouble of receiving and paying said charges.

"14. The money on being handed over to the head of the squad is divided equally among the members, except that the head of the squad by agreement among its members gets an extra share in respect that he provides and maintains the tools used in the work. This practice was followed on the occasion of the accident to the respondent by the appellants as shipping agents paying in the trimming charges and the said Owen Hughes receiving them for division amongst the squad. On some occasions members of the squad received extra remuneration direct from the appellants for doing work in connection with the ship, such as shifting the ship and putting on hatches.

"15. The respondent's average weekly earnings prior to the accident were £2, 15s.

"16. The respondent on or about 27th March 1908 brought arbitration proceedings under the Act against the Commissioners for compensation, on the ground that they were his employers, or alternatively under section 4 of the Act that he was in the employment of Owen Hughes, who had contracted with the Commissioners to do said trimming. My award in said arbitration was that the respondent was not in the employment of the Commissioners, and that the work of trimming said coal was not work undertaken by the Commissioners in the course of or for the purposes of their trade or business. No appeal was taken from this award.

"17. In the course of that arbitration the said Owen Hughes and the appellants were made parties by being called in by the Commissioners under section 4 of the Act and section 7 of the Act of Sederunt of

26th June 1907. The appellants entered appearance, lodged answers, and took part in the proof and proceedings, and were well aware from that time of the whole circumstances of the respondent's accident.

"18. No notice of the accident provided for by section 2 of the Act was given by the respondent to the appellants. The appellants were not prejudiced in their defence to the claim by the failure of the respondent to give said notice. The claim for compensation by the respondent against the appellants provided for by section 2 of the Act was not made until 10th August 1908, being more than six months from the occurrence of the accident. The failure to make said claim within said period of six months from the occurrence of the accident was occasioned by mistake on the part of the respondent or other reasonable cause.

"19. The respondent had completely recovered his capacity for work on 12th January 1909. No objection is taken to the amount of compensation awarded. In the present proceedings I found in fact that the respondent was, along with all the members of the squad, employed by the appellants to do trimming of coals in the course of and for the purposes of their trade or business of shipping agents, and was not in the employment of the Leith Dock Commissioners.

"20. In these circumstances I found in fact and law that the appellants were the employers of the respondent, and that the respondent was a workman in the employment of the appellants, all within the meaning of the Workmen's Compensation Act 1906, and that the appellants were liable to the respondent in compensation, which I assessed and awarded at £1 per week from 7th October 1907 until 12th January 1909, as from which date I ended it, and I found the appellants liable in expenses."

The Case was heard before the Second Division on 19th October 1909, and was of that date remitted to the Sheriff-Substitute "to amend the same by stating in detail the actual facts as distinguished from practice regarding (1) the employment of the respondent to trim coals on board the s.s. 'Quentin,' and (2) the payment to the respondent of wages for said work; and to state, *inter alia*, (1) Whether in point of fact the said trimming of coal was or was not work falling to be performed by the owners of the s.s. 'Quentin' under their contract with the shippers of the coal; (2) Whether in fact the appellants had anything to do with the said trimming of coal except as agents for the owners of the s.s. 'Quentin,' and if so, what? (3) Were the appellants in point of fact ever brought into direct contact with the respondent, and if so, in what manner? (4) Were the wages paid to the respondent or the other members of the squad to which he belonged on the occasions in question paid out of money belonging to the said shipowners, or if not, out of whose money were they paid?"

The amendment on the Stated Case

stated, *inter alia*—"The Sheriff-Substitute . . . humbly begs to report that he has considered all the findings in fact stated by him in the case, and now reaffirms them as facts proved in the arbitration; . . . that in the arbitration proceedings condescendence by the respondent and answers by the appellants were duly given in obedience to interlocutor; that in these, although no record was formally closed, no point was raised by the appellants that they were only agents either for the actual owners of the ship or for the persons for whom the cargo of coal was at the time being shipped, the points expressly raised by the appellants being, that either the Leith Dock Commissioners on the one hand were the actual employers of the respondent within the meaning of the Workmen's Compensation Act, or that the respondent was, as a member of a trimming squad, in the employment of the head of the squad—neither of which contentions was proved. . . .

"The Sheriff-Substitute, in obedience to said interlocutor, now amends the Stated Case by adding the following statements of facts—(a) The appellants are 'shipowners and managing owners of the s.s. *Quentin*,' as expressly admitted by them in their answers in the arbitration.

"(b) The appellants 'give instructions with regard to the trimming of any coals which may be loaded as cargo,' as deponed to by their superintendent, and they did so give instructions in the present case.

"(c) The appellants 'issue a plan for the loading of the steamers as to how the different parcels are to be separated,' and that because 'it is necessary to deliver a plan showing how the work is to be done,' also as expressly deponed to by their superintendent, and they did in the present case issue and deliver such a plan.

"(d) The appellants 'superintend the loading of the cargo, including the loading of coals' also as expressly deponed to by their superintendent, and they did so superintend the loading of the cargo of coal in the present case.

"(e) The appellants are the only persons who asked for the services of the squad of which the respondent was a member, and are the only persons who obtained the services of the squad.

"(f) The appellants paid, and are the only persons who paid, the respondent for his work as a trimmer, though, as formerly stated, the payment was made for the convenience of all concerned through the office of the Leith Dock Commissioners.

"(g) There was no contract between the owners of the s.s. '*Quentin*' (if the appellants are not to be regarded as the owners) and the shippers of the coal. As is set forth in the Stated Case, the contract was between 'Messrs George Gibson & Company, shipowners, Leith' (*i.e.*, the appellants) and 'Messrs Endemann & Company,' the actual words of contract being, 'It is this day mutually agreed between Messrs George Gibson & Company, shipowners, Leith, and Messrs Endemann & Company that Messrs George Gibson & Company shall reserve in *their* steamers from Leith

to Rotterdam and Amsterdam for Messrs Endemann, &c. The trimming of the coal was not work falling to be performed by the actual owners of the ship, but fell to be performed by the appellants as the contracting parties.

"(h) Nobody but the appellants had anything to do with the trimming of the coal, and in connection therewith they instructed it, superintended it, paid for it, and controlled it in every way as the contracting parties, as managing owners, as shipping agents, and in pursuance of their business of shipping agents, from which they derive their income, and as having full control of the vessel while in the port of Leith.

"(i) The appellants were brought into direct contact with the respondent by contract. It was they who asked for his services along with the services of the other members of the squad, who obtained said services, and who paid for said services. The respondent had no knowledge who the actual owners of the ship were or who were the persons whose coal was being shipped or trimmed, and never came into contact with anybody but the appellants or their dock representatives.

"(j) The wages paid to the respondent and to the other members of the squad to which he belonged on the occasion in question were paid by the appellants out of their own money, and, as is stated in the fifth finding of the Stated Case, that payment was made a charge upon the freight—that is to say, that all Messrs Endemann & Company had to pay was 'freight' at a rate per ton. The interest of the actual owners was only represented by the profit and loss account arising out of the management of the ship by the appellants."

The *questions of law, inter alia*, were—
"(2) Whether the appellants were employers of the respondent within the meaning of said Act. (3) Whether the appellants are liable in compensation to the respondent under said Act."

Argued for the appellants—The respondent was not employed by the appellants. They had nothing to do with his selection or dismissal. They did not pay him. They had no power of superintendence over his work. The respondent was in the employment of Hughes, who was an independent contractor. Alternatively, the persons who should have been sued were the registered owners of the ship. It was the shipowners ultimately who paid the men engaged in the loading, it was out of their pockets that the wages came, and it was for their benefit that the work was done.

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK—We sent this case back to the Sheriff-Substitute because there was not sufficient brought out in it to enable us to decide it, but now that we have received his amendments I think that the case does not admit of the slightest doubt. Messrs Gibson & Company undertook to have the ship properly loaded at the Leith Docks under a contract of which

we have the terms. Now having undertaken to do that, it was necessary that they should have the assistance of a certain number of men to do the trimming of the coals which were being put on board; and according to the arrangements of the Leith Dock Commissioners the way in which they obtain men for that purpose is, not by going and engaging them themselves, but by going to the Commissioners, who say—"We will find you trimmers, and we will find you a head man in whom we have confidence to choose those trimmers;" and in that way they ensure for themselves the orderly and safe conduct of the proceedings in the docks. Now that of course is mutually an excellent arrangement between the Leith Dock Commissioners and the parties who may want to have coals trimmed and want to have their work done—either their work because they are doing it for themselves, or their work because they have undertaken to have it done for somebody else.

The Commissioners in regard to such arrangements have issued printed regulations, and the printed regulation which is quoted by the Sheriff-Substitute is very clear indeed in its terms—"In every vessel, except lighters, using the cranes, the trimming of the coal in the holds shall be done by a sufficient number of properly qualified men, employed by the master, agent, or shippers;" and it is expressly stated that the Commissioners are in no way responsible for the actings or conduct of the men so employed. It is said that the appellants had no responsibility for the men engaged in loading this vessel and no superintendence over them. That seems to me to be an absolutely unstateable view, and how it can be maintained in face of the regulation and the statements of fact I am unable to understand. It is suggested that the respondent was in the employment of the man Hughes, and the suggestion is based upon the fact that he had a power to dismiss men. I take it to be the fact that Hughes, who had charge of the squad in question, was a very competent man, and the Commissioners nominated him because they knew that he was thoroughly fit to choose other men, and it is also the fact that he had the power to dismiss the respondent. That, however, does not seem to me to amount to an assertion as matter of fact that neither the Commissioners nor the appellants themselves had a power of dismissal. Such work at such a place must be conducted in such a way as to be satisfactory and safe. But in any case it seems to me absurd to say that the mere fact that the head trimmer can at his own hand dismiss a man makes it necessary to hold that the man is in his employment. Then it is said that the appellants had no right to superintend the work of the men selected by Hughes. It would be very curious if they were not entitled to superintend the carrying out of the plan which they had prepared when it was clear that the men were engaged for no other purpose than to carry out that plan.

But all doubt is removed by the new

findings in the amended case. It is there stated as a fact that on the occasion in question the appellants did give instructions with regard to the trimming, and that they did superintend the loading of the cargo. The appellants were the only people who paid the squad, and it is found as matter of fact that they paid the respondent for his services.

The only remaining point is whether the appellants can escape responsibility by saying that they were merely acting as agents either for the owners of the ship or for Messrs Endemann & Company. I am clearly of opinion that they cannot take up this position. Neither the shipowners nor Endemann & Company had anything to do with the loading, and the appellants were the only people with whom this man had any dealings when he entered the work.

LORD LOW concurred.

LORD ARDWALL—When this case was formerly before us it was pleaded with very great force that the appellants here were merely agents, and that the parties who were the true employers of the respondent were the registered owners of the "Quentin," which was being loaded at the time of the accident in question. To reinforce this argument it was represented that this was a question of importance, because it was stated that as a rule it was the shipowners who insure themselves against accidents of this kind, and not the shipping agents, which was the character which the appellants said they alone occupied. I need hardly say that all questions of agency are questions of great difficulty and depend upon a vast number of considerations, for the obvious reason that while principal and agent may have relations *inter se*, yet the relations of the agent or the principal to members of the outside public may depend upon a vast number of different considerations, and hardly at all upon the private agreement or understanding between the principal and agents themselves. But when we examined the stated case with the view of attempting to solve the questions presented to us, we found in the case as originally stated by the Sheriff-Substitute that the words used in almost all his statements were these, "masters, agents, or shippers." Then it was said that the appellants acted as agents or managing owners thereof, and so on, and it was left perfectly ambiguous, so far as designation was concerned, what they were. Then when we came to consider what were the facts of this particular case, we were not much further on, because it stated a number of things regarding the practice in Leith, and it was not said whether the practice was followed in this particular case, and in short there were a number of ambiguities more or less latent.

Now in that state of matters we thought an amended case necessary. The Sheriff-Substitute explains that when the case was before him no point was raised by the appellants to the effect that they were only agents either for the actual owners of

the ship or for the persons to whom the cargo of coal was at the time being shipped, the points expressly raised by the appellants being that either the Leith Dock Commissioners, on the one hand, were the actual employers of the respondent within the meaning of the Workmen's Compensation Act, or that the respondent as a member of a trimming squad was in the employment of the head of the squad, neither of which contentions was proved. These being the only points raised before the Sheriff-Substitute, he was not much to blame for sending the former case up in the shape he did, but the important point raised before us led us to have it amended. Now as amended I entirely agree with your Lordship that there can be no doubt about the question. It was said that the appellants did not select the men. There was selection in the way which was arranged for the benefit of the public by the Dock Commissioners, and to say that there was no selection by the appellants because they got people better qualified than themselves to select the men seems to me to be something very like nonsense; it does not matter what means were taken for the selection of the workman if the appellants acquiesced in the way in which he was selected.

In the next place it was said that the appellants had no power of dismissal. That is not said in the case from beginning to end, and I think it pretty clear that if the appellants had wished a man to be dismissed he would have been at once dismissed by the gaffer.

Then it was said that the appellants had no power of control or superintendence. This argument is disposed of by the findings in the amended case where it is stated that the appellants did in fact give instructions for the loading of the coal, and that they superintended the work.

Last of all it was said that the appellants did not pay the wages of the men, and it is suggested that the shipowners paid the wages because it came somehow out of their pockets on a balancing of accounts between them and their agents. It would be quite as correct to say that Endemann & Co. paid the wages. In questions of this sort it is perfectly ridiculous to go into the question of where the money ultimately came from that paid the wages of a particular workman. It is perfectly clear that in fact they were paid by the appellants and by nobody else. Of course the appellants took credit for these wages in their accounts with the shipowners, and they in a sense recovered them from the charterers by receiving an increased freight, an arrangement entered into for the convenience of everybody. In that state of matters it seems to me that in a question with the respondent the appellants here were not agents at all. They were principals, and were the parties who in every sense of the word were the employers of the respondent. The shipowners had nothing whatever to do with the shipment of coals except as having an interest in the freight under deduction of all expenses as

appearing on an accounting between Messrs George Gibson & Co. and Messrs Endemann & Co., Messrs George Gibson & Co. being the only persons who had anything directly to do with loading the coal on board this vessel, as appears from the contract between them and Messrs Endemann & Co. annexed to the amendment to the case.

On the whole matter I have no doubt whatever that we ought to answer the questions in the stated case to the effect that the respondent was a workman, that the appellants were his employers, and that they are liable in compensation.

LORD DUNDAS was absent.

The Court answered the second and third questions in the affirmative.

Counsel for the Appellants—Hunter, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Respondent—G. Watt, K.C.—Aitchison. Agent—J. Stuart Macdonald, Solicitor.

Tuesday, March 8, 1910.

SECOND DIVISION.

STARK'S EXECUTOR v. STARK AND OTHERS.

Succession—Heritable and Moveable—Promissory-Note—Jus relictæ—Act 1661 cap. 32.

A promissory-note was granted in the following terms:—"3rd January 1907—One year after date I promise to pay to Daniel Stark, Esq., Burnbank Cottage, Kilsyth, the sum of One hundred pounds sterling, with interest at 5 per cent. per annum, for value received. JAMES M'CUBBIN." After the lender's death, ten months after the note became due, neither principal nor interest having been paid, held that the promissory-note was moveable *quoad jus relictæ*.

Succession—Heritable and Moveable—Receipt—Jus relictæ—Act 1661, cap. 32.

A receipt duly signed was granted in the following terms:—"Town Clerk's Office, Kilsyth, 14th November 1905—Received by us on behalf of the Provost, Magistrates, and Councillors of the burgh of Kilsyth, from Mr Daniel Stark, Burnbank Cottage, Kilsyth, the sum of Six hundred pounds sterling as a temporary loan, repayable with interest at the rate of three and three quarters per centum per annum." After the lender's death on 30th October 1908, interest having been paid half yearly up to that event, held that the receipt was moveable *quoad jus relictæ*.

Robert Stark, clothier, Kilsyth, a brother and the executor-dative of Daniel Stark, who resided at Burnbank Cottage, Kilsyth,