can hold, without stretching their meaning unduly, that at the date of the death of her son the respondent was in any proper sense dependent on his earnings for support.

The Court pronounced the following interlocutor:—

"Answer the question of law by declaring that the applicant was not dependent upon the earnings of her deceased son at the time of his death in the sense of the Workmen's Compensasation Act 1897: Therefore recal the award of the arbitrator and remit to him to dismiss the claim."

Counsel for the Claimant and Respondent — George Watt, K.C. — D. P. Fleming. Agents—Laing & Motherwell, W.S.

Counsel for the Respondents and Appellants—Salvesen, K.C.—Hunter. Agents—W. & T. Burness, W.S.

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*Wednesday, November* 23.

## SECOND DIVISION.

[Sheriff Court at Dundee.

## TYLER *v.* LOGAN.

*Agent and Principal—Agent's Responsibilities to Principal—Manager of Retail Branch of Wholesale Business Carried on by Dealer—Responsibility of Manager to Account for Goods under his Charge.*

A wholesale dealer in Leicester carried on a branch retail business in Dundee under a local manager. The manager signed acknowledgments from time to time for parcels of goods supplied by his employer, the acknowledgments being not for specified quantities of goods but for consignments of specified values. The stock in the premises was gone over at intervals, and at each stock-taking the manager signed an acknowledgment of the cash value of the amount of stock under his charge. On a stock-taking as at 28th February 1903 a shortage of £62 was found to have arisen since the previous stock-taking, which was as at 25th October 1902. Between the dates referred to the manager had received and signed acknowledgments for goods of the value of £471.

In an action at the instance of the employer against the manager for an accounting and for payment of £62 a proof disclosed no fraud or embezzlement on the part of the defender, but the shortage was not accounted for.

*Held* (*diss.* Lord Young) that the defender was accountable for the stock committed to him, and that he was liable to the pursuer in payment of the sum of £62, being the amount of the shortage.

This action was raised in the Sheriff Court at Dundee by Henry Peters Tyler, shoe and leather factor, Rutland Street, Leicester, against George Logan, 186 Lochee Road, Dundee. The pursuer carried on a retail branch business for the sale of boots and shoes at 15 West Port, Dundee, where from 25th December 1899 to 3rd March 1903 the defender was employed by him as manager. The conclusions of the action were that the defender should be ordained to produce an account of his intromissions as such manager, and to pay the pursuer a sum of £62, 1s. 9d.

The pursuer averred—"(Cond. 3) The pursuer supplied the stock kept and used in the carrying on of said business at West Port. The stock as from time to time supplied was valued and each pair of boots or shoes or other article was separately priced and marked and invoiced to the defender at the retail values at which they were intended to be sold. The defender, as manager foresaid, took charge of the stock in the premises at the time of his appointment and of all further stock supplied by the pursuer from time to time and granted acknowledgments therefor, and the defender has managed the said business, including the retail selling of the stock, during the said period that he acted as manager. The acknowledgments were (not for specified quantities of boots and shoes but for goods received of value amounting to a sum specified). The servants employed in the shop were under the control of the defender, who had the engagement of and power to dismiss them. (Cond. 4) Each week the defender reported to the pursuer the amounts of the drawings from sales in said premises, and the net amount so reported, after deducting the sums paid for wages and other expenses, was paid weekly to the National Bank of Scotland, Limited, Dundee, for the credit of the pursuer at Leicester. . . . (Cond. 5) During the period of defender's managership the stock was (at intervals varying from about one to four months) regularly gone over and taken, and at each stock-taking the stock in the premises was detailed in a list and the defender signed an acknowledgment of the amount of the stock under his charge. Up to and including the stocktaking as at 25th October 1902 the defender duly and regularly accounted for his intromissions as manager foresaid. The acknowledgments were in form similar to (those given for goods received). (Cond. 6) As at said 25th October 1902 the stock on hand under the defender's charge in the shop at West Port was taken and found to amount to £978, 6s. 8d., and the defender signed an acknowledgment thereof. The next stocktaking was as at 28th February 1903, when it was found that the stock on hand amounted to £947, 12s. 9½d., leaving a shortage of £62, 1s. 9d. unaccounted for. . . . During the period from 6th December 1902 up to the said 28th February 1903 there was a large decrease in the weekly drawings (as reported by defender) in comparison with the drawings for the corresponding period in the previous year. Defender's management closed on the 4th of March 1903, and the weekly drawings for that and following weeks reverted to more than

equal in amount the drawings for the corresponding period in the previous year. An analysis of the stock-lists in defender's books show that there is the value of about 350 pairs of boots unaccounted for."

Between 25th October 1902 and 28th February 1903 the amount of goods received by defender from pursuer according to his acknowledgments was £471, 1s. 3½d.

The pursuer pleaded—"(1) The defender as manager of the pursuer's branch business as condescended on is bound to account for his intromissions with the stock under his charge, and to make payment for any shortage unaccounted for."

The defender pleaded—"(2) The defender having exercised all diligence in pursuer's service, and having served him faithfully and honestly, is not liable to the pursuer in any alleged shortage of stock unless he be personally in fault, which he was not, and no personal fault being alleged, the defender is entitled to absolvitor with expenses."

Proof was led. The facts disclosed sufficiently appear from the notes of the Sheriff-Substitute and Sheriff.

On 8th March 1904 the Sheriff-Substitute (J. C. SMITH) pronounced the following interlocutor:—"Finds that the pursuer has failed to prove that the defender, when acting as manager for him in his shop No. 15 West Port, Dundee, misappropriated his boots and shoes, or the money for which he sold them, by theft or embezzlement or in any manner of way: Therefore assoilzies the defender from the conclusions of the petition," &c.

*Note.*—"The pursuer is proprietor of a number of shops scattered through the towns of this country for the sale of cheap boots and shoes. Each shop is in charge of a manager, who appoints the necessary assistants and dismisses them at pleasure, and who is himself liable to be dismissed at the pleasure of the pursuer or some other higher official in charge of the business. The defender was one of those managers and had charge of a shop in Dundee. The business appears to have been conducted with a view to rapid sales, large turnovers, and the minimum of expense, at least in the matter of bookkeeping. Intimation of the kind of stock and important uncommon items required by the manager was given from time to time by some kind of unexplained markings on printed lists. From Leicester stock, generally corresponding to the manager's intimation, with the selling prices marked on them in some way capable of being understood, but also of being obliterated, were sent in response to the manager's intimation on more or less special request. The particular items sent by railway were not, so far as I can understand, identified individually in any way, but the gross amount of their selling prices was summed up, and a receipt or rather acknowledgment for that gross amount, not as boots and shoes, but as money received, was or should have been signed by the manager. Generally, but not always, he had an opportunity of checking the gross value of the goods in accordance with the marked selling prices. The pursuer's case is that the defender has not accounted for the gross total of these sums of marked selling prices to the extent of £62, 1s. 9d., and the present action is raised to obtain payment of that deficit just as if the defender had bought the goods himself and had them invoiced to him in common form as a buyer, or as if he had stolen £62 worth of the unspecified goods entrusted to him as a servant, or as if he had appropriated this £62 by way of breach of trust and embezzlement. All these thin theories have a superficial aspect of plausibility, but not one of them is, according to my deliberate judgment, supported by adequate and convincing legal evidence. . . . I have no hesitation in finding that, in discharging the onus laid upon him, this pursuer has failed.

"Very little in this case is clear and free from doubt or ambiguity to me, but one conviction is clear, and that is, that the defender seemed to me to be an honest man and a credible witness, and that, in so far as the *prima facie* case against him seems to be a true case, it depends upon his unconscious mistakes or errors, or upon blunders in working details by carriers and others in the large, loosely managed, widespread business of the pursuer. . . .

"Beyond question it is difficult to account for the disappearance of 360 pairs of boots, which at the proof was stated to be the probable stock covered by £62, but it is difficult to convict a man of the theft of 360 articles without the means of identifying any one of them. . . . My belief upon the matter of probability is that the bulk of the missing goods have never been delivered to the defender at his shop, but have been sent by mistake or accident to some other of the pursuer's shops, or are still in the pursuer's store at Leicester. The pursuer may, when he sees fit, punish by dismissal a manager seriously suspected of dishonesty, but, so far as I can understand his system of bookkeeping, it will require to be altered before he can convict him of a crime. More complete systems have proved inadequate to that end. Under a system practically identical, every librarian who has signed a catalogue of books, and every butler who has signed an inventory of silver plate, runs the risk of being branded as an embezzler or as a thief."

The pursuer appealed to the Sheriff.

On 10th May 1904 the Sheriff (H. JOHNSTON, K.C.) pronounced the following interlocutor—"Sustains the appeal . . . Finds that from the nature of the defender's employment the defender was accountable for the stock committed to him: Finds that he has failed to account for said stock to the value of £62, 1s. 9d., and accordingly that he is liable in that sum to the pursuer: Therefore ordains him to make payment to the pursuer of the sum of £62, 1s. 9d."

*Note.*—"I so far agree with the Sheriff-Substitute that I think it not improbable that the judgment I feel bound to pronounce in this case may bear hardly upon the defender, but I cannot on that ground abstain from pronouncing it. The defender is called upon to account for goods delivered to him or for their proceeds. That the

pursuer should succeed in his demand I do not think that he is tied up to proving fraud or embezzlement as in a criminal case. I should be sorry to attribute either to the defender without more definite proof, but I think that in the circumstances he may be civilly liable for negligence just as completely as for embezzlement.

"The facts of the case are simple. The pursuer is a large boot and shoe factor, which is, I understand, a dealer in boots and shoes and not a manufacturer. His chief place of business is Leicester, but he has a great number of retail branches throughout the country, and one of these is his branch at 15 West Port, Dundee. In 1899 the defender was appointed manager of this shop, and no question arises as to his intromissions until 25th October 1902. But between 25th October 1902, when stock was taken, and 28th February 1903, when it was again taken and the defender was dismissed, a shortage to the extent of £62, 1s. 9d. in value was found to have occurred, for which shortage the defender has been unable to account.

"It appears to me that the pursuer's system of accounting with his branch managers, though simple, is effective and easily understood. And when the productions are examined, it appears to me that they conclusively fix the defender with the shortage of said sum of £62, 1s. 9d., which is the sum sued for.

"Stock was taken on 25th October 1902. The stock-list, which is a perfectly intelligible document enumerating the whole articles of the stock on hand on that day, shows the total value as priced at £978, 6s. 8d., and it is in evidence that the prices are those marked on each article as it is sent out from the Leicester store, and are the only prices which the branch manager is authorised to accept for the goods. Stock having been so taken on 25th October 1902, on that day the defender signs an acknowledgment of the amount as being said sum of £978, 6s. 8d. He is thus fixed with a definite sum at the commencement of the period in dispute.

"Next, he receives, either in answer to special orders made by himself or sent on at the discretion of the pursuer from the central stores, supplies of additional stock at various periods between said 25th October 1902 and 28th February 1903. These deliveries are vouched by two sets of documents. There are (*first*) the invoices, and (*second*) the acknowledgments under the hand of the defender that goods to the amount invoiced were received by him as of the dates of the invoices, in the form of signed counterfoils of received notes amounting, within the period in question, to £471, 1s. 3½d., making, with the stock as taken on 25th October 1902, a total amount of stock for which the defender was accountable at 28th February 1903 of £1449, 7s. 11½d.

"Stock was again taken at 28th February 1903 in precisely the same way as it had been taken on 25th October preceding, and as it had been in use to be taken periodically during the defender's management. The stock was then found to amount to £947, 12s. 9½d., as per the stock-list.

"As the shortage was then ascertained, the defender signed no acknowledgment for the stock as at that date, but he took part in the stocktaking, was given every opportunity of checking the stock-lists, and in cross-examination admitted that he could take no objection to the correctness of the said stock-list. Deducting this sum of £947, 12s. 9½d. from the total stock for which the defender was accountable, there remained £501, 15s. 2d., which should have been represented by sales in the *interim*.

"The practice of the business was for the branch manager to render weekly a stock-sheet showing the amount of stock at the end of the preceding week, the amount, if any, received during the week, and the amount of drawings, the difference being the amount of stock at the end of the week to be carried on to the next week; and on the same date as this stock-sheet was made out and rendered it was his duty to bank the amount of drawings to the credit of the pursuer. Carbon duplicates of the defender's stock-sheets for the period in question are to be found in the books. These, though not signed, are admittedly in the handwriting of the defender, and from these can be ascertained the amount of drawings banked, these, with £4, 3s. of credit-notes added, amount within the period in question to £439, 13s. 5d. Deduct this sum of £439, 13s. 5d., being the sum paid into bank by the defender, from the sum of £501, 15s. 2d., for which he was accountable, there remains the sum of £62, 1s. 9d. unaccounted for, being the shortage sued for.

"As matter of accounting therefor the proof is, it appears to me, complete.

"There remains the question of accountability at law. Now, the defender was not appointed under any written agreement, but I can have no doubt that Mr Cave, the pursuer's superintendent, was justified in saying that the defender was made thoroughly to understand that he was responsible for the goods delivered to him, or their value. Indeed, I cannot contemplate any other result from the circumstances and mode of conducting the business in which the defender had been brought up and from the documents relating thereto, to which he was a party, even without any formal contract imposing as a term responsibility for the goods at the branch upon him as manager. He was manager with control of the branch, with authority to order in supplies, with the duty of banking to his employer's credit the weekly drawings, and with power to engage and dismiss his subordinates. I think that he was as much responsible to account for the goods committed to him or for their price as he would have been for cash remitted.

"The defence is that the shortage may be accounted for in half-a-dozen ways, though the defender is unable to prove any one of them. For instance, he suggests that the goods, though invoiced, may never have left Leicester, or at any rate may never have reached him. Conceivably this may be so, but unfortunately they are regularly invoiced, and he signs a

receipt as though they were delivered. Moreover, he had an opportunity before signing the receipt, of which on the evidence of the subordinates in the shop he availed himself, of checking the invoices before signing for delivery, and where the proof fixing him with the goods is so complete, it is impossible to accept the mere suggestion that the shortage might be accounted for if we had evidence, which we have not, as a defence to the pursuer's action.

"That there was leakage somewhere is evident from what I have said, and this is corroborated by proof of the marked falling off in the apparent takings in the last three or four months of the pursuer's management, coupled with the fact that immediately after the dismissal of the defender the business resumed its former dimensions."

The defender appealed to the Court of Session, and argued—The onus was on the pursuer to prove dishonesty on the part of the defender; this he had failed to do. The Sheriff's judgment left only one conclusion possible, viz., that the defender had stolen either goods or money, but neither was proved. The degree of agency contended for was too high to be put on a servant in the position of the defender, who could not be held to take the risk of his master's goods deposited with him.

Argued for the respondent—The defender was accountable as an agent to his principal to the full amount of the goods received by him as ascertained by the acknowledgment signed by himself.

LORD JUSTICE-CLERK—I think the Sheriff here has arrived at the right conclusion. The appellant was employed as the manager of an establishment in which there were a large number of goods for sale, and it was part of his duties to take the management and care of these goods. The history of the case is that when goods were sent to this establishment they were all duly labelled, with classes and prices mentioned, and invoices were presented and signed for all the goods that were sent. These invoices were signed by the appellant on the footing that the goods mentioned in the invoices and the goods received corresponded—it cannot be taken off his hands that they did not. If he did not see when he passed the invoices that the goods invoiced corresponded with the goods received, he was not fulfilling his duties as a manager. For a considerable time the stock showed a proper balance—there may have been some slight errors, but there was a reasonable balance in the circumstances. Then on this particular occasion, when the appellant was about to be promoted to another establishment under the same employer, the general manager came to examine the stock, and his examination disclosed a shortage of more than sixty pounds. That shortage has never been accounted for. It is suggested that there may have been theft. That might account for the loss of a few pairs of boots, but as a general explanation of the deficiency it is quite out of the question. In these circumstances I think the Sheriff has come to the right conclusion—that the appellant as manager is responsible for the loss. In so deciding I express no opinion whatever against his honesty. I think there is no evidence of dishonesty, but that he is responsible I have no doubt.

LORD YOUNG—As I understand your Lordship's opinion to be that of my other brethren on the Bench, I shall confine my observations to what I think is due to the defender here with respect to his character.

The defender was employed, at a very small salary, from December 1899 till March 1903, as manager of a boot shop where hundreds of pairs of boots were sold nearly every week. Let me call attention to the pursuer's statement as to the defender's character as set forth in condescendence 4 and 5. I think a more distinct statement in favour of the character of an employee could not be given by an employer. That statement refers to his work down to 25th October 1902, the date of the last stock-taking before the shortage now in question was discovered. It was at the next stock-taking, as at 28th February 1903, that the shortage was discovered, amounting to £62, 1s. 9d.

Of course, if the defender had received money which he did not account for, that would be a case of gross dishonesty. But that is not attributed to him by the pursuer, and is negatived by the evidence in the opinion of the Sheriff-Substitute who took it, and that opinion is not dissented from by the Sheriff. The Sheriff thinks, however, that the defender "may be civilly liable for negligence just as completely as for embezzlement." I think the question is whether there was any negligence to lead to liability. That is not shown. What is the negligence attributable to the defender? It is not that he should have discovered the shortage sooner supposing it to have occurred between October and February. It occured to me in the course of the argument that some of the goods consigned to the defender might have been stolen or lost in transit between Leicester and Dundee, and that he had nevertheless acknowledged that they had all arrived, his acknowledgment being, as described by the Sheriff-Substitute, an acknowledgment that goods of the value specified in the invoice had arrived. If that were the case, the defender may have been careless in signing the acknowledgment, but his carelessness was not the cause of the loss. In such a case I should have been disposed to hold that there was no ground of liability for negligence any more than in the case of a domestic servant signing a receipt for goods delivered for his or her master.

I find no ground for interfering with the view of the Sheriff-Substitute. I think the defender is an honest man, that no dishonesty is proved against him, but that his honesty is established by the evidence; and no such negligence is imputable to him as should induce us to pronounce decree for a sum which would be ruinous to a man in his position.

LORD TRAYNER—I agree with the Sheriff.

LORD MONCREIFF—I also agree with the Sheriff.

The Court dismissed the appeal.

Counsel for the Pursuer and Respondent — Constable — Duncan Smith. Agent — George H. Boyd, Solicitor.

Counsel for the Defender and Appellant —Crabb Watt, K.C. — A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

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*Thursday, November* 24.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary

## HUNTER *v.* HUNTER.

*Trust—Constitution of Trust—Sums Paid by Newspaper to "Person Adjudged by the Editor to be Next-of-Kin of Party Killed in Railway Accident"—Payment Received as Individual or as Trustee for All the Next-of-Kin—Insurance.*

The proprietor of a newspaper advertised that £1000 would be paid to the person adjudged by the editor of the paper to be the next-of-kin of any person who having the current number of the paper on him at the time was killed in a railway accident.

Payment was made in terms of this advertisement to a sister of the person killed. This sister was selected by the editor as being the chief sufferer by the death of the deceased, the selection being made *in bona fide*, after inquiry and in knowledge of the existence and claim of other next-of-kin.

Thereafter in an action raised against this sister by the other next-of-kin of the deceased for payment of shares of the sum recovered from the newspaper, *held* (*aff.* judgment of Lord Kyllachy) that the defender had received the sum in question as an individual for her own use and not as a trustee for the deceased's next-of-kin, and defender *assoilzied*.

*Law* v. *George Newnes, Limited*, July 17, 1894, 21 R. 1027, 31 S.L.R. 888, *followed*.

On 27th July 1903 William Simpson Hunter, painter, Glasgow, was killed in a railway disaster at St Enoch's Station, Glasgow, while a passenger in a train which was wrecked. At the time of his death the deceased had in his possession the current number of two weekly newspapers, *Answers* and *Tit-Bits*, each containing an insurance coupon which entitled the person or persons adjudged by the editor of the paper to be the deceased's next-of-kin to sums of £1000 and £100 respectively.

Both coupons were in similar terms, and it is sufficient for the purposes of this report to refer to the coupon contained in *Answers*, which was as follows—"£1000 FREE INSURANCE.—In the event of any person having the current number of *Answers* on him or her at the time, being unfortunately killed *by an accident in the United Kingdom to any train in which he or she may be travelling as a passenger*, we have made arrangements whereby the person adjudged by the Editor of *Answers* to be the next-of-kin of the deceased will receive One Thousand Pounds, . . . provided notice in every case be given to the Editor within seven days from the occurrence of the accident. . . . . The person or persons who shall be adjudged by the Editor of *Answers* to be the next-of-kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." . . .

Margaret Farquhar Hunter, a sister of the deceased, duly notified the Editor of *Answers* of her brother's death, and claimed payment of the £1000 through her agent, who wrote, *inter alia*, as follows:—"We observe that it is you who are to judge who is the next-of-kin entitled to the insurance money. The deceased was forty years of age. He has a father alive and three brothers besides our client, who was his only sister. Both were unmarried, and the deceased and his sister had lived for many years in family together, and by his death the sister has lost her means of support. The other members of the family did not live with our client."

Miss Hunter's claim was followed by a claim from one of her brothers. The course adopted by the editor of *Answers* is conveniently described in the following excerpt from a subsequent number of that paper:—"It was evident that this was a case in which the editorial discretion would have to be used in deciding as to whom the money was to go. The legal formalities, such as the preparation of affidavits of witnesses, &c., took some time, but in the end it was found that, as had been stated by Miss Hunter's solicitors, she had been to a large extent dependent on the earnings of the deceased man for her support, and that, to put the matter briefly, she had been the principal sufferer by her brother's death. Upon this we had no hesitation in adjudging Miss Hunter the next-of-kin of the deceased man, and we lost no time in intimating that decision to our agents and Miss Hunter's solicitors. At the same time we advised the gentleman who had preferred the claim on behalf of the brother that we had so decided."

As the result of these decisions the £1000 was paid to Miss Hunter by the proprietors of *Answers* in August 1903. For similar reasons and under similar procedure the £100 was paid to her by the proprietors of *Tit-Bits* in September 1903.

Thereafter in April 1904 the present action was raised by David Hunter and Alexander Hunter, both labourers, Glasgow, brothers of the deceased William Simpson Hunter, against their sister Miss Hunter for £275 each, being a fourth part of the two sums of £1000 and £100.