*Wednesday, December* 11.

## SECOND DIVISION.

[Sheriff Court at Aberdeen.

## BURGOYNE *v.* WALKER.

*Reparation—Master and Servant—Liability of Master for Fault of Servant—Servant of A becoming pro hac vice Servant of B—Common Employment—Fellow Servant.*

The Fishery Board made an arrangement with a trawl owner to carry on his steam trawler one of their officials, who was to be allowed to select from the fish caught specimens for scientific purposes. In return the trawler was to be allowed to fish within restricted waters without liability to a charge for illegal trawling. The official, though entitled to indicate where he desired the fishing to take plaee, had no right to interfere with the navigation or management of the trawler, and if the skipper thought any spot indicated was unsafe he could refuse to go there. The trawler stranded owing to the recklessness and negligence of the skipper, and the Fishery Board official died from exposure.

*Held* that the skipper was not *pro hac vice* the servant of the Fishery Board, and that he and the Fishery Board official were not fellow servants, and, consequently, that the owner of the trawler was liable in reparation to the widow of the Fishery Board official.

Mrs Jeannie Peters or Burgoyne, 13 Skene Street, Aberdeen, widow of John Darling Burgoyne, raised an action as an individual and as tutor to her pupil child against Andrew Walker, registered and managing owner of the steam trawler "Star of Hope," to recover damages for the death of the said John Darling Burgoyne.

The deceased, who was a hatchery attendant in the employment of the Fishery Board for Scotland, was, under an arrangement between his employers and the defender, on board the defender's trawler collecting specimens of fish for his employers, when the trawler stranded, and as a consequence he perished from exposure. With respect to the arrangement between the Fishery Board and the defender the pursuer made the following averments, which were subsequently held to be accurate:—"(Cond. 2) In pursuance of their scientific investigations the officials of the Fishery Board for Scotland in charge of the Board's station at Nigg from time to time arrange with the owners of trawl-boats fishing from the port of Aberdeen to carry on board their boats an employee of the Fishery Board, who is allowed to collect from the catches, and retain for the use of the Board's officials, specimens of different kinds of fish. In return for this service, trawl-boats carrying a Fishery Board employee are allowed to fish within restricted waters, and are allowed to retain the catches got therein without rendering themselves liable to a charge of illegal trawling. . . . Neither the Fishery Board nor its representatives on board such trawl-boats, nor anyone in its employment, has, as a consequence of the arrangement referred to, any concern with the navigation or management of any trawl-boats so engaged. . . . (Cond. 4) In or about the beginning of December 1905 the officials of the Fishery Board at Nigg arranged with the defender, or with his servant, the skipper of the 'Star of Hope,' to take pursuer's husband to sea for the purpose of collecting specimens of fish, as mentioned in condescendence 2, and on the morning of the 4th of December 1905, the vessel left the port of Aberdeen and proceeded to sea with pursuer's husband on board for the purpose of fishing under the arrangement above condescended on. . . ."

The defender pleaded, *inter alia*—"(2) The pursuer's husband having lost his life, not through the negligence of the defender or that of anyone for whom he is responsible, he is entitled to be assoilzied from the conclusions of this action, with expenses. (3) The vessel in question, with her master and crew, having on the occasion condescended upon, been outwith the control and possession of the defender, he is not responsible to the pursuer for the acts or defaults of her master or crew at that time, and is entitled to absolvitor, with expenses. (4) *Separatim*—The said John Darling Burgoyne and the skipper of the 'Star of Hope' having, on the occasion in question, been engaged in the same work, on the same vessel, the defender is, in the circumstances founded on, under no liability to pursuer in respect of her husband's death, and is therefore entitled to absolvitor, with expenses."

On 11th January 1907 the Sheriff-Substitute (HENDERSON BEGG), after a proof, pronounced this interlocutor—"Finds in fact (1) that on 5th December 1905, about 1·30 a.m., the steam trawler 'Star of Hope,' belonging to the defender, stranded on the coast near Collieston, owing to the recklessness and negligence of the skipper of the vessel; (2) that as a consequence the pursuer's husband John Darling Burgoyne, a servant of the Fishery Board of Scotland, perished from exposure about six hours later; and (3) that at and before the time of stranding, the skipper and the said John Darling Burgoyne were engaged trawling for fish under an arrangement whereby the skipper remained the servant of the defender, and the said John Darling Burgoyne remained the servant of the Fishery Board of Scotland: Finds in law that the defender is liable in damages to the pursuer as an individual, and also as tutor for the pupil John Darling Burgoyne, the child of the pursuer and of her said deceased husband: Assesses the damages due to the pursuer as an individual at £300 sterling, and the damages due to the pursuer as tutor foresaid at the sum of £150 sterling: Therefore ordains the defender to pay to the pursuer as an individual the said sum of £300 sterling, and to pay to the pursuer as tutor foresaid the said sum of £150 sterling. . . ."

*Note.*—" . . . [*After reviewing the evidence, which showed the recklessness and negligence of the skipper*] . . . The arrangement between the Fishery Board and the defender was a very peculiar one. I think that it is accurately set forth in articles 2 and 4 of the pursuer's condescendence. . . . The chief question in the present case is whether that arrangement involved the doctrine of *collaborateur* as between Burgoyne and the skipper; and the answer to the question admittedly depends on whether the two men are to be held to have been in the service of a common master at the time of the accident—*Johnson* v. *Lindsay & Co.*, L.R. (1891), A.C. 371. The defender maintains that while Burgoyne continued throughout to be in the service of the Fishery Board, the skipper had become *pro hac vice* the servant of the Board, the vessel, with skipper and crew, having passed from the possession and control of the defender into the possession and control of the Board. Of course, from the time of leaving port on the voyage in question, the vessel was outwith the personal possession and control of the defender, just as she would have been in any ordinary trawling cruise in the North Sea. But what the defender means is that, through Burgoyne being on board the vessel, the Fishery Board possessed the vessel and controlled the master and crew. When one looks into the matter, however, the control exercised by Burgoyne turns out to have been of a very limited character. He was entitled to indicate the places in Aberdeen Bay where the trawling operations were to be conducted, and to prescribe the length of the drags, so as to get live fish. But I do not see that he had any further control of the skipper and crew; and, of course, he had no right to interfere with the navigation of the vessel. The skipper was on board, not merely to navigate the vessel, but also to look after the defender's interest in the fish caught, the defender's share of the fish being generally about 90 per cent. of the catch. Of course, the skipper and crew were engaged and paid by the defender, and Burgoyne could not have dismissed any of them. In these circumstances I do not think that any of the authorities to which I was referred in the course of the extremely able argument to which I had the pleasure of listening, would justify me in holding that the skipper was the servant of the Fishery Board *pro hac vice*. Adapting the words of Lord Watson, in the case above mentioned, to the present case, I hold that the circumstances are not such as to show conclusively that the skipper submitted himself to the control of the Fishery Board, and either expressly or impliedly consented to accept the Board as his master for the purpose of common employment—trawling for fish.

"The other authorities to which I refer are—*Rourke* v. *White Moss Colliery Company*, 1877, 2 C.P. Div. 205; *Donovan* v. *Laing*, 1893, 1 Q.B. 629; *Cairns* v. *Clyde Navigation Trustees*, 1898, 25 R. 1021; and *Connelly* v. *Clyde Navigation Trustees*, 1902, 5 F. 8.

"The defender's procurator further founded on the cases mentioned in Abbott on Shipping, 14th ed., page 65, and Maclachlan on Shipping, 4th ed. (1892), page 354 *et seq.*, in regard to a contract of *locatio navis et operarum magistri et nauticorum*. But the interest which the defender retained in the proceeds of the cruise now in question seems to me to render these cases inapplicable.

"An alternative argument put forward by the defender's procurator was that Burgoyne occupied the same legal position as a guest or licensee on board the vessel, taking the risk of negligence on the part of his host's servants. But what seems to me fatal to this argument is the fact that, under the arrangement between the defender and the Fishery Board, Burgoyne was as much entitled to be on board as the skipper and crew.

"Lastly, the defender's procurator argued that the defender and the Fishery Board should be regarded as joint-adventurers or partners in a trawling speculation, to which the Fishery Board contributed Burgoyne, with the right to trawl in closed waters, and the defender contributed all else. I can hardly accept this as a correct description of the arrangement between the parties; and there is nothing in the evidence to suggest that either the skipper or Burgoyne accepted the supposed joint-adventurers or partners as his new masters. . . ."

The defender appealed, and argued—(1) On the evidence there was no negligence on the part of the skipper of the vessel. (2) In any event the skipper, though the general servant of the defender, was not at the time of the stranding of the vessel his servant, but the servant of the Fishery Board. The servant of A might become *pro tempore* and *pro hac vice* the servant of B, so as to exclude the liability of A for injury, occasioned through the servant's negligence, to an employee of B—*Johnson* v. *Lindsay & Company*, [1891] A.C. 371, *per* Lords Herschell and Watson, pp. 377, 382; *Rourke* v. *White Moss Colliery Company*, 1877, 2 C.P.D. 205; *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Limited*, [1893] 1 Q.B. 629; *Connelly* v. *Clyde Navigation Trustees*, October 16, 1902, 5 F. 8, 40 S.L.R. 14; *M'Fall* v. *Adams & Company*, 1907, S.C. 367, 44 S.L.R. 259; *cf. Cairns* v. *Clyde Navigation Trustees*, June 17, 1898, 25 R. 1021, 35 S.L.R. 808. The question in whose employment the servant was for the time being depended on the power of controlling him in the matter in which he was engaged, and that in turn depended on two questions—(1) What was the nature of the work being executed? and (2) by whom was the work being executed? Here the work was fishing or trawling (not navigation) for the benefit of the Fishery Board, and it was being executed by the Board with hired plant. Under the bye-laws framed by the Fishery Board in pursuance of the Herring Fishery (Scotland) Act 1889 (52 and 53 Vict. cap. 23), sec. 6 (1) and (2), fishing within the prohibited areas could be conducted only by persons who were in the service of the Board or who had permission in writing. There was no written

permission here. Therefore the trawler and its master were *pro hac vice* in the service of the Fishery Board, otherwise the fishing would have been illegal. The defender also argued alternatively that if the control of the work was not in the Fishery Board, then either (1) it was in the hands of the defender, or (2) it was a joint adventure. In the first event Burgoyne was in the service of the defender; in the second he and the master of the vessel were in the service of the joint adventurers, and in either event the doctrine of *collaborateur* applied.

Counsel for the pursuer were not called on.

LORD JUSTICE-CLERK—In this case we have had a very able argument from Mr Murray. Having carefully considered the case and the interlocutor and note of the Sheriff-Substitute, I have come entirely to concur in everything that the Sheriff-Substitute has said. In this particular case the vessel undertook to fish in certain waters in which the Fishery Board were entitled to prevent anyone from fishing, although they were entitled to sanction fishing in these waters, on certain conditions, for the purposes of scientific research. These conditions were that the trawl owners were to take as their share the entire catch except a certain quantity of plaice, which were required for scientific purposes; and in order that the fishing might be conducted in such a manner as the Fishery Board considered suitable, an official of the Board was to be on the vessel to see that the fishing took place at such spots as were proper for the scientific ends in view. The Fishery Board officer had no other function whatever. He could not interfere with the navigation in any way, and if the master of the trawler thought that any particular spot pointed out for trawling by the Fishery Board officer was not safe for navigation, the master could refuse, and in the interest of his owners was bound to refuse, to take the vessel to the spot pointed out by the Fishery Board officer. Once the Fishery Board officer had pointed out where he wished the vessel to go, the manœuvres for taking her there were entirely in the hands of the master and crew. The master, in doing his work, was no doubt doing it in part to fulfil the objects of the Fishery Board, but he was also doing it for the profit of his owner, who would appropriate the balance of the catch. It was plainly a speculation for profit on the part of this trawl owner—a speculation for profit in exactly the same sense as in any ordinary case of trawling. He might bring up a large catch or a small catch or nothing at all. That is just what would happen in any ordinary trawling adventure. To say in these circumstances that the vessel had been so handed over to the Fishery Board that the Board became the employers of the master and crew appears to me to be out of the question. I am very well satisfied with the excellent note of the Sheriff-Substitute, and I move your Lordships to adhere.

LORD LOW—I am of the same opinion. There are two questions in the case—(1) whether the stranding was due to the negligence of the skipper of the trawler, and (2) whether the skipper was for the purpose of the adventure in question truly the servant of the Fishery Board. On the first question I entirely agree with the Sheriff-Substitute. [*His Lordship then discussed the evidence relating to the question of negligence.*] With regard to the second question, I have really very little to add to what your Lordship has said. No doubt Mr Burgoyne, as representing the Fishery Board, had right to indicate in what part of Aberdeen Bay he desired trawling operations to be carried on. But the conduct of these operations and the navigation of the vessel were entirely under the control of the skipper as the servant of the owner and in the owner's interest. I am therefore of opinion that the judgment of the Sheriff-Substitute was right.

LORD ARDWALL—I also agree. The main contention put forward by Mr Murray was that the defender was not liable, because at the time of the wreck the master of the trawler "Star of Hope" was not his servant but the servant of the Fishery Board, and that accordingly (1) the defender is not answerable for him, and (2) the deceased John D. Burgoyne having lost his life through the fault of a fellow-servant, the pursuer's claim in respect of his death is excluded. Now I think that the facts of this case do not bring it up to any of the cases in which it was held that a servant hired out to another person was so entirely under the control of that other person that the person whose general servant the servant so hired out was, was not liable for any accident which might occur through the negligence of the servant so hired out. In such cases two test questions arise—(1) For whom was the work being done at the time when the accident happened? and (2) What was the nature of the control retained over the hired-out servant by the person whose servant he generally was?

Now in regard to the work, the work in the present case was the ordinary work of a trawler, neither more nor less. Neither the defender nor anyone else got pecuniary remuneration from the Fishery Board. The owner, master, and crew of the trawler were paid just like those of any other trawler, out of the proceeds of the adventure. The only difference was that on this particular fishing voyage the vessel had on board an official of the Fishery Board, with tubs into which he put his live fish, and that the trawl owner instead of keeping the whole catch was bound to hand over to the Fishery Board a certain quantity of fish of a certain kind, and in return for this he received the benefit of being allowed to fish in waters where it was in the ordinary case illegal to fish and where the chances of success would certainly be much increased. That was quite an intelligible arrangement, but it did not convert the trawler and its crew into a trawler and crew of the Fishery Board engaged solely

or principally in their work. The leading object was trawling on behalf of the owner and others interested, and it was a mere incident of the particular voyage that the Fishery Board had a right to get a small portion of the fish.

If we compare the present case with the case of *Rourke* v. *The White Moss Colliery Company*, 1877, L.R., 2 C.P.D. 205, it is easy to see the broad distinction between the two cases. In *Rourke* the injured man was in the service of a pit-sinker. While the pit-sinking was going on no other work in the colliery was going on. The only work which was being carried on at the time and place when the accident happened was pit-sinking and not working coal. The pit-sinker was a contractor entirely independent of the colliery owners, and although they provided the plant and an engine and engineer they gave over the whole control thereof to the pit-sinker, or in other words lent both engine and engineer to the pit-sinker. It was accordingly held that the colliery owners were not liable for the injuries caused to the plaintiff by the fault of the engineer.

2. With regard to the question as to whether at the time of the wreck the vessel was under the control of the Fishery Board or their servant the deceased John Burgoyne, the evidence is I think clear to the effect that the control exercised by the deceased or the Fishery Board was of a very limited description. It is proved that the deceased was entitled to direct and did direct the master as to the parts of Aberdeen Bay he should trawl over, but he had truly no control, in the real sense of that term, over the master. For instance, if the master had thought that from any cause there was risk to the vessel in going where the deceased wished him to go, he had an absolute right to refuse to go, and the whole navigation and control of the ship as to steering, speed, engines, and everything else was in the master's hands as representing the defender and responsible to him. I am therefore unable to hold that it can be said in this case, as was said in others, that the defender had parted with the control of the vessel and its master and crew to the Fishery Board or its official.

[*His Lordship then dealt with the question of fault, coming to the same conclusion as the Sheriff.*]

LORD STORMONTH DARLING was absent.

The Court dismissed the appeal, affirmed the interlocutor appealed against, and found in fact and in law in terms of the findings in fact and in law in said interlocutor.

Counsel for the Pursuer (Respondent)—Kennedy, K.C.—A. M. Mackay. Agent—D. Hill Murray, S.S.C.

Counsel for the Defender (Appellant)—Dean of Faculty (Campbell, K.C.)—Murray. Agents—Alex. Morison & Company, W.S.

---

*Friday, December* 13.

## FIRST DIVISION.

[Lord Dundas, Ordinary.

## STEWART *v.* M'DOUGALL.

*Diligence — Reparation — Sheriff — Small Debt Decree ad factum præstandum — Imprisonment on Failure to Implement Charge—"All Lawful Execution hereon" —Small Debt Amendment (Scotland) Act* 1889 (52 *and* 53 *Vict. c.* 26), *secs.* 1, 2, *and Sched. B.*

In a small debt action *ad factum præstandum*, brought under section 2 of the Small Debt Amendment (Scotland) Act 1889, decree was given against the defender. The extract decree concluded by granting "warrant for all lawful execution hereon." The defender having disregarded the charge thereon was forthwith arrested and imprisoned. He brought an action of damages on the ground of illegal imprisonment.

*Held* that the extract decree being in terms of the statute, authorised, without further application to the Sheriff, imprisonment on failure to implement the charge, and consequently that the pursuer's averments were irrelevant and the defender fell to be *assoilzied*.

The Small Debt Amendment (Scotland) Act 1889 (52 and 53 Vict. cap. 26) enacts:—Section 1—"This Act . . . shall be construed as one with the recited Acts 1 Vict. cap. 41, and 16 and 17 Vict. cap. 80, so far as consistent with the tenor of these Acts respectively, and these Acts together may be cited as the Small Debt (Scotland) Acts 1837 to 1889."

Section 2—"Where a party claims to be owner, or to be entitled to the possession of any corporeal moveables, the value of which shall be proved to the satisfaction of the Sheriff not to exceed twelve pounds, and which are wrongfully withheld from him, he may apply in the Small Debt Court for an order for delivery thereof, and the Sheriff may grant such order accordingly; and the application therefor and the extract of the decree, if granted, to follow thereon shall be as nearly as may be in the forms of Schedules A and B respectively, but in other respects the procedure shall be conform as nearly as may be to the provisions of the first recited Act (*i.e.*, 1 *Vict. cap.* 41) so far as agreeable hereto: Provided always, that if delivery of any of the subjects sued for shall have become impossible, or if their value be alternatively concluded for, the Sheriff may give decree for their value to an amount not exceeding twelve pounds."

Schedule B—"At the day of One thousand eight hundred and the Sheriff of the shire of decerns and ordains the within designed , defender, to deliver to the pursuer [the subjects within referred to, *or state to what extent the order for delivery is granted*]; and finds the said defender liable to the pursuer in [the sum of, *any sum*