

no proper warrant for his imprisonment. The words in the extract decree "all lawful execution" did not authorise imprisonment—Small Debt Amendment (Scotland) Act 1889 (52 and 53 Vict. cap. 26), sections 2, 7, and Schedule B; and therefore the charge following thereon was no proper warrant for imprisonment. The holder of a decree *ad factum præstandum* was not entitled at his own hand to enforce it by imprisonment; he required to apply to the Sheriff for a special warrant—Small Debt Amendment (Scotland) Act (*cit. supra*), section 2, Schedule B. The terms of Schedule B implied that imprisonment should only be competent, if at all, after an application to imprison had been made and granted. That was necessary under the Personal Diligence Act 1838 (1 and 2 Vict. cap. 114), section 6, and in analogous circumstances, and therefore necessary here.

Argued for the respondent—The Lord Ordinary was right. The procedure followed was authorised by the statutes. Small debt decrees were in a different position from ordinary decrees. The Small Debt Act of 1837 (7 Will. IV, and 1 Vict. cap. 41), read along with the Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34) and the Small Debt Amendment (Scotland) Act 1889 (*cit. supra*), authorised imprisonment on decrees *ad factum præstandum*. That was the only way in which such decrees could be enforced, and the extract of such a decree was a sufficient warrant for imprisonment. The defender had followed the statutory procedure both in the spirit and in the letter, and the action ought therefore to be dismissed. The Personal Diligence Act 1838 (*cit. supra*) did not apply to small debt procedure. Small Debt Acts formed a code by themselves.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has given a very careful judgment, with which I entirely agree. I have very little to add except this, that it is quite clear that the provisions of the Personal Diligence Act have nothing to do with the Small Debt Acts. The Small Debt Acts form a code by themselves. When you come to consider what took place in this case it is clear that the pursuer was not left in any doubt as to the diligence to be used against him or put to any hardship, and accordingly, for the reasons which the Lord Ordinary has given, I think it is out of the question that he should be allowed to proceed in an action of damages.

LORD M'LAREN—I am of the same opinion. It is clear that the words "all lawful execution" in a case of this kind do include imprisonment, for it has been laid down by an eminent judge in expounding the Debtors Act that unless imprisonment were retained to enforce a decree *ad factum præstandum* there would be no other method of enforcing such a decree. I am therefore of opinion that the present proceedings have been quite in accordance with the Small Debt Act and the amending statutes.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Morison, K.C.—A. A. Fraser. Agent—Arthur F. Frazer, S.S.C.

Counsel for the Defender (Respondent)—Scott Dickson, K.C. — Kemp. Agents—Guild & Guild, W.S.

Saturday, December 14.

SECOND DIVISION.

[Sheriff Court at Aberdeen.]

ABERDEEN STEAM TRAWLING AND FISHING COMPANY, LIMITED v. GILL.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 7 (2) — Fisherman — Remuneration by Shares in Profits or Gross Earnings.

The Workmen's Compensation Act 1906 is by section 7 made applicable to seamen, subject to certain modifications, including the following, sub-sec. 2:—"This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

The first fisherman of a trawler was remunerated while at sea by receiving one and one-eighth share (the shares being fourteenths) of the price of the fish sold after each trip, after deduction of certain charges for current expenses, such as salesmen's commissions and harbour dues. No deductions were made in respect of wages of crew, depreciation, or interest on capital. When the vessel was in harbour he received wages at the rate of five shillings a day. He was injured while trawling at sea, and claimed compensation under the Workmen's Compensation Act 1906. *Held* that he was remunerated by a share in the "profits on the gross earnings of the working" of the trawler, and accordingly was excluded from the benefits of the Act.

Opinion (per Lord Ardwall) that section 7 (2) was intended to cover, by the two categories of payments there set forth, all cases where the person employed was to a greater or less extent a co-adventurer or partner in the business in which he was employed.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 7 (2) of which is quoted *supra in rubric*, between William Henry Gill, trawl fisherman, Aberdeen, and the Aberdeen Steam Trawling and Fishing Company, Limited, the Sheriff-Substitute at Aberdeen (YOUNG) awarded compensation, and at the request of the company stated a case for appeal.

The case set forth the following facts, *inter alia*—“The respondent is a trawl fisherman in Aberdeen, and has served as such in the employment of the appellants intermittently for some years. The appellants are trawl owners in Aberdeen, and are owners of the steam trawler ‘Strathmartin,’ A 890, belonging to the port of Aberdeen, in which the respondent has served as mate or first fisherman from 7th August 1907 to the date of the accident after mentioned. . . . On or about 9th September 1907 the said steam trawler ‘Strathmartin’ was fishing in the North Sea about fifteen miles north-east of Fair Isle. . . . About 10.30 p.m. on said date, while the respondent was engaged removing some ice in the fish room, the vessel rolled in the sea, with the result that a large lump of ice, weighing about two or three cwts., accidentally fell upon and fractured the respondent’s right leg. . . . In the end of the year 1905 a dispute arose between the trawl owners in Aberdeen and the crews of the fishing vessels as to the rate of remuneration of the latter, and the matters in dispute were referred to the Aberdeen Conciliation Board by the Aberdeen Steam Fishing Vessels Owners’ Association, Limited, representing the owners and the Port of Hull Fishermen’s Protective Society and other bodies representing the men. On 7th December 1905 the Board issued an award fixing and determining the remuneration to be paid to crews for two years from and after 25th October 1905, to be as per the schedule annexed to the said award. The terms of the award are as follows:—‘The Aberdeen Conciliation Board hereby fix and determine that the rates and remuneration to be paid by owners to crews (including all hands) of steam trawl fishing boats sailing from the port of Aberdeen, for two years next ensuing after the 25th day of October 1905, are to be according to the schedule and bonus table hereto subjoined. *Schedule.*—All fish (excluding livers and roes, which shall be a requisite of the crews) shall be sold. From the gross price realised there shall be deducted—Salesmen’s commission at the rate of 5 per cent.; discount to the fish buyers at the rate of 2d. per £ on said gross price; one penny for every box used for the fish landed; the cost of all labour handling the fish till they are taken over by the buyers; all ice and coals required for the trip on which the fish were caught; all harbour, market, and water dues; the cost of watching, dan outfit, baskets, and stores. The nett balance shall be divided into fourteen shares, whereof the master shall be paid one and three-eighths of such shares. The first fisherman shall be paid one and one-eighth of such shares. . . . The deck hands shall be paid 5s. per day, and in addition be paid a bonus in terms of the annexed table. . . .’

“Immediately after the issuing of this award there was printed and circulated a notice giving effect to the findings of the award, and including the following table:—

‘*Wages in Port.*

‘When any vessel is in port cleaning

boilers or under repair, and the attendance of the crew or any of them is required, the scale of wages shall be as follows:—

‘Master	6s.	per day.
‘Engineer	6s.	„
‘First Fisherman	5s.	„

“The scale and method of payment specified are binding on all trawl owners in Aberdeen, and upon all members of the crews of vessels belonging to the port. In particular, they are binding on the respondent and the appellants, and were observed by them during the time the respondent was in the appellants’ employment. All the fish caught on each trip were sold, and from the gross price realised there was deducted—salesmen’s commission at the rate of 5 per cent.; discount to the fish buyers at the rate of 2d. per £ on said gross price; 1d. for every box used for the fish landed; the cost of labour in handling the fish; the cost of ice and coals required for each trip; all harbour, market, and water dues; and the cost of watching, dan outfit, baskets, and stores. The net balance was thereafter divided into fourteen shares, of which the respondent received one and one-eighth shares for each trip.

“The settling sheets of the ‘Strathmartin’ from 9th August to 11th September 1907 were based on the award of the Conciliation Board, and correctly set forth the sums paid to the respondent and to the other members of the crew during the said period. The sums so paid to the respondent in respect of that period were as follows:—

“For two days’ harbour wages, 7th to 9th August	£0 10 0
“For ten days’ trip ending 19th August	1 18 9
“For seven days’ trip ending 26th August	2 4 3
“For eight days’ trip ending 3rd September	3 8 10
“For eight days’ trip ending 11th September	2 7 4

“These sums are respectively the one and one-eighth, payable to the mate or first fisherman, of the fourteen shares into which the net balance of the proceeds of the fish sold was divided, after making the deductions provided for in the said award.

“The settling sheet, dated 11th September 1907, which is the settling sheet of the trip on which the accident to the respondent occurred, shows the gross price of the fish sold on that date to be £60, 4s. 6d. From that sum there are deducted various payments, amounting in all to £39, 15s. 3d., these payments representing the deductions to be made in order to ascertain the net balance in terms of the award. The net balance on said statement amounts to £29, 9s. 3d., which in terms of the foregoing notice falls to be divided into fourteen shares. In order to ascertain the value of one share the said sum of £29, 9s. 3d. is divisible by 14.

“The item for ‘two days’ harbour wages, 7th to 9th August, 10s., referred to above, has reference to a period when the vessel was in port either cleaning boilers or under

repair, the attendance of the crew being required. In terms of the notice of 25th October 1905 the first fisherman is entitled to be paid in said event 5s. per day; two days' wages thus amounting to 10s.

"No wages to any member of the crew are included among the deductions made from the gross earnings of the vessel before ascertaining the net balance which is divided into fourteen shares, whereof the respondent receives one and one-eighth share. . . ."

On the facts the Sheriff found "that the respondent while in the appellants' employment as mate or first fisherman on board their trawler 'Strathmartin,' sustained on 9th September 1907 personal injuries by accident arising out of and in connection with his employment; that in consequence of the personal injuries so sustained he was incapacitated for work, and unable to earn wages from 9th September 1907; that the amount of compensation payable under the Workmen's Compensation Act 1906 had not been ascertained by agreement between parties; that under his contract of service the respondent was not remunerated by a share or shares in the profits or the gross earnings of the working of the said trawler, but received harbour wages at five shillings a day, and for time at sea wages on a scale of which the said nett balance formed the standard; that his weekly earnings during the period when he was mate or first fisherman in the appellants' employment exceeded £2 per week; that the respondent was a workman in the sense of the Workmen's Compensation Act 1906, and entitled to compensation under the Act, and that the appellants are liable to pay him compensation at the rate of £1 weekly as from 9th September 1907, and I awarded him that weekly allowance accordingly, with expenses against the appellants."

The question of law for the opinion of the Court was—"Whether on a sound construction of the agreement between the appellants and the respondent, as above set forth, the respondent was at the time of the accident a member of the crew of a fishing vessel, and remunerated by a share or shares in the profits or the gross earnings of the working of such vessel, and is thereby excluded by section 7 (2) of the Workmen's Compensation Act 1906 from claiming compensation under said Act."

Argued for the appellants—The object of section 7 (2) was to differentiate between seamen earning a fixed wage and seamen whose remuneration depended upon the profits of the venture, and who might in some instances obtain a large sum of money and in other instances none. The respondent clearly fell within the latter class, and was therefore excluded from the benefits of the Act.

Argued for the respondent—The fund out of which the respondent was remunerated did not represent "profits," inasmuch as it was impossible to tell whether there were any "profits" until deductions had been made for wages, depreciation, interest on

capital, &c. It did not represent "gross earnings," because certain deductions, e.g., commissions to salesmen, harbour dues, &c., had in fact been made. It was, in truth, a fund which existed solely for the purpose of calculating the wages due to the captain and other officers. Section 7 (2) was meant to apply only to a partner or joint-adventurer—*cf. Ellis v. Joseph Ellis & Co.*, [1905] 1 K.B. 324. The respondent was a seaman under a contract of service, whose wages were "contracted for by the voyage, or trip, or the season." See Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), sec. 333.

LORD JUSTICE-CLERK—I am clearly of opinion that the Sheriff-Substitute's decision is wrong. The respondent was first fisherman or mate on board a fishing vessel. The mode in which his remuneration was fixed was as follows. From the gross price of the fish sold after any trip the owners were entitled to deduct commission, discount, one penny for every box used for the fish, cost of ice and coals, harbour, market, and water dues, and cost of watching, dan outfit, baskets, and stores, but not the wages of any of the crew. As regards the master and first fisherman, they are to receive a share of the earnings of the trip after making the deductions mentioned, the master one and three-eighths and the mate one and one-eighth. The result of that is plainly this, that these two men might get nothing for a trip although they did the work. That does not look like receiving wages for their work. It was really a speculation on their part, under which they were each to get a share of a fund out of which their shares were to come if there was any such fund. It is plain that the gross earnings of the trip might not be sufficient to pay the charges which the owners are entitled to deduct before calculating the shares. In that case the master and mate would get nothing. On the other hand, if it was a splendid season and the profits earned were large they might get a very large sum indeed. How could that be said to be wages. When stated in that simple way the case is clear. The statute provides that it "shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or gross earnings of the working of such vessel." How could the master and mate here be said not to be "remunerated by shares in the profits or the gross earnings." It is said that under the award the wages of the crew are not deducted before calculating the amount payable to the master and mate. The only effect of that is that if the gross earnings are not more than sufficient to pay the deductions the owners have to pay the crew out of their own pockets and are not entitled to set the amount so paid against any future voyage.

On the whole matter, I am of opinion that the Sheriff-Substitute was wrong in holding that the respondent was not remunerated by a share in the profits or the gross earnings of the trawler, and that the question should be answered in the affirmative.

LORD LOW—I am of the same opinion. The fact that the respondent got harbour wages of 5s. a-day for two days has no bearing upon the question. When the accident happened the respondent was a first fisherman on board a trawler actually engaged in trawling. At that time his remuneration was determined by the award of the Aberdeen Conciliation Board. On the other hand, at the time when he was being paid harbour wages he was not engaged in trawling, and the award of the Conciliation Board did not apply. The trawler had just undergone her Board of Trade survey, and the survey having been completed the crew were engaged preparing the fishing gear for going to sea, and it was during that time that the respondent was paid harbour wages. But after that the trawler went to sea, and then the respondent's remuneration was regulated by the award of the Conciliation Board, and according to that award all that he could get was a certain share of the nett balance of the gross price of the fish caught during the trip, after making certain deductions. If that is not remuneration by a share "in the profits or the gross earnings of the working" of the vessel I do not know what is. I therefore think the Sheriff-Substitute's decision was wrong and that the question should be answered in the affirmative.

LORD ARDWALL—I am of opinion that the question ought to be answered in the affirmative. The respondent, except when in harbour, with which time we have nothing to do in this case, was not remunerated by wages in the proper sense of the word; he was paid neither by time nor by work. His remuneration was arrived at in this way:—from the gross earnings of the vessel on which he was employed certain deductions specified in the first paragraph of the schedule quoted in the stated case were made. The gross earnings were then divided into 14 shares, and the respondent was paid one and one-eighth of such shares, or about a twelfth share of the total gross earnings. In this state of the facts I think it clear that the respondent was remunerated by shares in the gross earnings of the working of the steam trawler "Strathmartin," on board which he was employed at the date of the accident. I cannot accept the argument that because a certain small deduction for current expenses was made from the gross earnings before dividing them into shares, these shares were not shares of the gross earnings within the meaning of the Act. It might possibly be maintained that the shares paid to the respondent were shares of the profits before deducting certain fixed charges such as interest on capital, depreciation, and wages of the crew. But I think it is more appropriate to regard the respondent's remuneration as shares of the gross earnings.

On the general construction of section 7 (2) of the Workmen's Compensation Act 1906 I may say that in my opinion it was intended to cover by the two categories of

payments there set forth all cases where the person employed was to a greater or less extent a co-adventurer or partner in the business in which he was employed.

In the present case I have no doubt that the respondent must be treated as coming under the exception enacted by section 7 (2) of the said Act.

LORD STORMONTH DARLING was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Scott Dickson, K.C. — Lippe. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondent—Kennedy, K.C.—Gillon. Agents—Henderson & Macenzie, S.S.C.

Tuesday, December 17.

SECOND DIVISION.

[Sheriff Court at Perth.]

HAY & COMPANY v. TORBET.

Payment—Appropriation of Payments—Account Current.

When a debtor pays money on account to his creditor, if the debtor has not appropriated particular payments to particular debts the appropriation is governed by the intention of the creditor, either express, implied, or presumed. In the absence of contrary indications such intention may be presumed from the form of the account he has rendered to the debtor. Where it is in the form of an account-current, of the nature of that between a banker and his customer, the presumption is that the payments extinguish the items of debit in their order in the account.

An account between a farmer and a firm of cattle auctioneers, rendered by the latter to the former, set forth in a column in order of date the cattle, hay, etc., sold and the cash advances made by the firm to the farmer, and below it, in another column, in order of date the payments, generally in cash, but sometimes in cattle, made by the farmer to the firm. Each of these columns was then added up, and the latter deducted from the former, and the balance struck.

Held that the account was not an account-current giving rise to the above presumption. *Devaynes v. Noble (Clayton's case)*, 1 Merivale 530, 3 Ross L.C. (Commercial Law) 643; "*The Mecca*" [1897] A.C. 286, *discussed*.

On 7th May 1904 Robert D. Torbet granted to Hay & Co., auctioneers, Perth, an obligation under which he guaranteed "full and final payment of all purchases made, or that may be made, and of all sums advanced, or that may be advanced, by you to Alexander Cromb, dairyman, St. Martins, Balbeggie, with interest at the