nary's interlocutor of 10th January 1914, and I think she is entitled to make that demand. I propose to your Lordships that we should recall the interlocutor of 10th January 1914 and that of 13th January 1914, and should remit to the Lord Ordinary to adjust the issue.

Lord Johnston—I entirely concur in the judgment which your Lordship proposes, and for the grounds which your Lordship has stated. I would only add, very briefly, that I do not think the defenders can complain of the alternative mode of stating the pursuer's case in the light of their own refusal to give or to facilitate the obtaining that information which might have reduced the pursuer's case to one distinct issue of fact. But when I read more carefully than I did yesterday the averment in condescendence 6, I do not think it bears the criticism which the learned counsel for the defenders made upon it. I think that it is an unquestionable statement of fact in the first alternative, of fact which the pursuer evidently believes to be true; and that the second alternative is carefully and with very considerable success so stated as to be not an averment of fact, but an inference of one fact from a series of other facts.

I agree with your Lordship that it might have been better if the pursuer's case had not been so categorically stated, but stated in more general terms. But if the facts are to be stated in full detail I think that they have been stated in a manner which, having regard to the information to which the pursuer was restricted, is really quite good drafting. Accordingly I agree with your Lordship.

Lord Skerrington—I agree.

Lord Mackenzie was absen t.

The Court recalled the interlocutors of he Lord Ordinary of 10th and 13th January 1914, and remitted the cause to him to proceed.

Counsel for Pursuer—Maclaren. Agent—Geo. Meston Leys, Solicitor.

Counsel for Defenders — Watt, K.C. — Black. Agents — Macpherson & Mackay, S.S.C.

Tuesday, June 16.

FIRST DIVISION.

SCOTTISH INSURANCE COMMISSIONERS *v.* M'NAUGHTON AND OTHERS.

Insurance—National Insurance—Employment—Contract of Service—Share Fishermen—Trawl Share Fishermen—National Insurance Act 1911 (1 *and* 2 *Geo. V, cap.* 55), *sec.* 1 (1) *and* (2), *and First Schedule, Parts I* (*a*) *and* (*b*) *and II* (*k*).

Held that the following classes of employment, viz., (*a*) ordinary share fishermen, *i.e.*, fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who have no proprietary or other interest in such vessel or in the nets or other gear thereof, and (*b*) net share fishermen, *i.e.*, fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who receive a further share of said profits in respect of their ownership or part ownership of the nets of such vessel, but have no proprietary or other interest in the vessel itself, were not employments within the meaning of Part I of the National Insurance Act 1911.

Held further that share trawl fishermen were employed persons within the meaning of the Act, they being paid by wages.

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55) enacts—Part I, section 1—"(1) Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are employed within the meaning of this Part of this Act shall be . . . insured in manner provided in this Part of this Act. . . . (2) The persons employed within the meaning of this Part of this Act (in this Act referred to as 'employed contributors') shall include all persons of either sex, whether British subjects or not, who are engaged in any of the employments specified in Part I of the First Schedule to this Act, not being employments specified in Part II of that Schedule. . . ."

First Schedule, Part I, includes——"(*a*) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship, without any money payment. (*b*) Employment under such a contract as aforesaid as master or a member of the crew of any ship registered in the United Kingdom or of any other British ship or vessel of which the owner, or, if there is more than one owner, the managing owner or manager, resides or has his principal place of business in the United Kingdom."

First Schedule, Part II, excepts, *inter alia*—"(*k*) Employment as a member of the crew of a fishing vessel where the members of such crew are remunerated by shares in the profits or the gross earnings of the working of such vessel in accordance with any custom or practice prevailing at any port if a special order is made for the purpose by the Insurance Commissioners and the particular custom or practice prevailing at the port is one to which the order applies." [No such special order had been made by the Commissioners in the present case.]

On July 2, 1913, the Scottish Insurance Commissioners, established under the National Insurance Act 1911, presented a petition to

the First Division under section 66 (1) (*iii*) of the Act, in which they craved the Court to determine whether the classes of employment of (*a*) fishermen who were remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who had no proprietary or other interest in such vessel or in the nets or other gear thereof, and (*b*) fishermen who were remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who received a further share of said profits in respect of their ownership or part ownership of the nets of such vessels, but had no proprietary or other interest in the vessel itself, or either of the said classes of employment, were employments within the meaning of Part I of the Act.

Answers were lodged by J. L. M'Naughton, solicitor, Buckie, secretary of the Moray Firth Fisheries Association and of the Scottish Fisheries Association, for and on behalf of the share fishermen, in which he averred that in neither of the classes referred to were the fishermen employed persons within the meaning of the Act, the contract entered into by them being, as they maintained, one of joint-adventure and not one of service.

The *facts* relating to these two classes of fishermen in regard to whom evidence was led was thus narrated by Lord Mackenzie, before whom the proof was taken — "A large body of evidence has been led in the case with regard to the nature and conditions of the contracts under which the different classes of boats are worked, including steam trawlers, steam drifters, steam liners, and sailing boats. As regards the position of part owners of all classes of boats though members of the crew no question arises. It is admitted that they are outside the Act. Steam trawlers are usually owned by companies. There is no dispute as to the position of share trawl fishermen, and this is dealt with in the joint-minute of admissions lodged for the petitioners and for the respondents the Port of Hull Trawl Fishermen's Protective Society, and in accordance with the admissions of these parties there will be a finding that share trawl fishermen are employed persons within the meaning of the Act. Since the coming into operation of the Act the owners of boats as employers, and the trawl fishermen as employed contributors, have almost without exception regularly paid and continue to pay their contributions for insurance under the Act. It is only necessary to point out that the joint-minute states that if a particular voyage results in loss wages are yet paid to the whole members of the crew other than the skipper and mate, and shares of the net balance of the value of the fish, after certain deductions, to the skipper and mate.

"According to the system under which steam drifters, steam liners, and sailing boats are worked, it is unusual that there should be any agreement in writing, and though we were referred to certain forms of agreement the state of the evidence is such that, in my opinion, we are not called upon to deal with these as requiring any special treatment. It is usual for one or more of the owners to be on board but that is not necessarily the case. The "landowners", *i.e.*, those who own shares in the boat but who do not go to sea, take no part in making up the crew of the boat. The skipper, who is appointed by the owners is himself in general one of the joint-owners. When so appointed he attends to the management of the boat while in port and to the making up of the crew for the fishing to which the boat is going at the time. The bulk of the evidence shows that it is the practice for the skipper to approach his crew rather than for the crew to select their skipper. The skipper, when so appointed by the owners, has of course for the purpose of discipline and navigation complete control, including a power of dismissal. When a member of the crew is dismissed during a fishing the settlement to date is matter of arrangement. The owners of the boat may provide the nets or they may be provided by members of the crew, in which case the risk of loss of any net is with its owner. On liners the crew provide their lines. Fishermen change from one category to another, being on one voyage share fisherman or half-dealsman as they are called, on another voyage net men. I attach no importance to the evidence to the effect that occasionally discussions take place between the skipper and the crew as to where the boat should proceed to for the purpose of fishing, nor to the evidence to the effect that a man who may turn ill nominates another in his place. Each of these points is equally consistent with partnership or with service. The fact that arles are no longer paid, as used to be the case when fixed wages were paid to the hired man, does indicate a certain change in the system. Formerly ordinary share fishermen were remunerated by fixed wages with sometimes a poundage.

"The contribution of the owners of the boat is the use of the boat. The net owners and the owners of the lines contribute respectively their nets and their lines, and the crew, *i.e.*, skipper, net owners, or line owners as the case may be, and the hired men contribute their labour. The catch is realised by a fish salesman. Before a division is made the general practice (which, however, varies according to the custom of particular ports) is that all the expenses, including coal, oil, commission, harbour and other dues, food, &c., are deducted from the gross takings, and the balance is divided into three equal parts, one for the boat, one for the nets, and one for the crew. No charge is made for interest on capital. The practice varies in regard to charging the insurance of the boat, in some cases it is put against the general expenses, in others against the boat. In the case of motor boats a share is given to the motor owner. The engineer, stoker, and cook are paid by fixed wages, though sometimes the cook may have a share. It is the invariable practice that the crew's share is divided equally, no difference being made between the skipper, the net men (or the line men),

and the hired men. The fishing crew usually consists of six. This method of dealing with the proceeds appears to me to establish that what is shared is not gross returns but profits. The weight of the evidence is also to the effect that the custom is universal that if there is a deficiency at the end of a voyage every member of the crew, whether net share man or ordinary share man, has to pay his share of the loss. There is no distinction between ordinary share fishermen and net share fishermen in this respect. This custom goes further than an honourable understanding, it indicates that there is a legal liability. All this appears to me to differentiate the case from one of a contract of service and places it in the category of joint-adventure. No doubt instances of deficit at the end of a voyage are not common. They appear to arise mainly in the case of the winter herring fishing. When a loss is incurred the amount may be paid at once, or, what is more common in practice, the fisherman who is liable suffers a deduction from what is earned by him on a succeeding voyage. This is so in the case of liners as well as drifters. Instances are given in the case where liability for such loss was enforced by action in the case of the crews of drifters. An attempt was made on behalf of the petitioners to show that in each case the amount of the loss was less than the amount of the food bill, or in any event not more than the amount of the food bill plus the expense of the transport of the fishermen to and from the fishing ground. In my opinion this contention of the petitioners is not well founded. It is established that the liability of all the crew is for a share of the general loss. Even if it only resulted in the individual fisherman having to bear the cost of his own provisions and his share of the running expenses, this would none the less be a contribution on his part to the stock embarked in the joint-adventure. He gives the use of this along with his labour, just in the same way as the owner gives the use of his share of the boat, as the net share-man gives the use of his nets, and as the owner of the lines gives the use of his lines. I am unable to regard either nets or lines as mere tools; they are stock, the use of which is given to the joint-concern. I do not consider it necessary to go into the details of the decrees which have been obtained against crews for their shares of loss. The terms of these go far to corroborate what one of the witnesses says—that he has got the whole cost in many cases from part of the crew when others had not paid anything to him. Nor do I think it necessary to go into the details of the accounts which have been produced relating to the "Marys," "The Silver Thyme," "Cinceria," and "Lufra," of which the unprinted account relating to the "Lufra" is probably the most striking. I may incidentally call attention to the fact how inconsistent the position of the crew of the "Lufra" is with the idea of the provisions of the Insurance Act. The "Lufra" made a loss on the winter fishing, December 1911 to January 1912. This loss was carried to debit of the crew and was in no case paid up before October 1912, and in one case not until December 1912. So far from being in receipt of wages during the intervening months the earnings of the crew were represented by a minus quantity. Yet if they were to be held to be insured persons under the Act they ought during these months to be paying contributions. Their case is the same as that of an agricultural labourer asked on account of the failure of the crop to forego his wages, and also to contribute to the loss thereby occasioned to his employer; or that of a miner asked to contribute to the oncost charges of the pit because coal was not selling at a profit. The liability for loss is to my mind the determining factor in the case. These fishermen who are liable for a share of loss are not under a contract of service."

Answers were also lodged by the Port of Hull Trawl Fishermen's Protective Society —to which from 70 to 80 per cent. of the trawl fishermen of Scotland belonged—in which the following *facts* (which were admitted by the petitioners) were stated:— "Trawl fishing boats are owned by persons as individuals or as partners in private partnerships, or more generally by limited companies, and are manned by crews employed and paid by the owners. The conclusion of a contract of employment, which is generally for one particular voyage or fishing, is effected as follows:—The owners select a skipper or master and to him delegate the selection of the remainder of the deck crew, viz., a first fisherman or mate, a second fisherman, two or three deck hands, and a cook. The superintendent engineer of the owners usually appoints the engineers and trimmers, *i.e.*, the men below deck. In general practice the contract is not committed to writing. The crew are directly under the control and authority of the master, who, acting on behalf of the owners, has full power to dismiss any of the deck crew at any time for misconduct or disobedience or other sufficient cause, the engineers being subject to the superintendent engineer. The master is responsible to the owners, who alone can withdraw the said mandate granted to him and dismiss him. He is bound to obey any instructions which he may receive from the owners, who alone have the right to determine when, where, and how their boat is to proceed upon a voyage or fishing. In no case is either the master or any member of the crew an owner or part owner of either the boats or her nets or gear. Occasionally a man is employed as a member of the crew who owns one or more of the shares of the limited company which owns the boat and its gear, in which case he is remunerated in exactly the same manner as non-shareholding members of the crew, and the terms and conditions of his employment are in no way affected by the fact that he had an interest in the company in whose service he is employed. Trawl fishermen are paid wages upon a scale which was fixed by an award by the Aberdeen Conciliation Board on 7th December 1905, and which has been the exclusive method of determining their wages

since that date. . . . [*Here followed terms of award.*] . . . Accordingly the large majority of trawl fishermen, comprising deck hands, engineers, trimmers, and cooks, are paid entirely by fixed wage, with a possible additional bonus; second fishermen are paid partly by fixed wage and partly by share; and skippers and mates are paid entirely by share. The method, however, of paying the said share trawl fishermen their remuneration differs materially from the methods narrated by the petitioners of remunerating either the ordinary or the net fishermen who work on the sail fishing boat or the steam drifters. Share trawl fishermen are remunerated by neither a share in the profits nor a share of the gross earnings. It sometimes happens that a loss occurs to the owner upon a particular voyage or fishing, and yet wages are earned and paid to the master, the mate, and the second fisherman, as well as to the other members of the crew."

Argued for petitioners, *quoad* classes (*a*) and (*b*)—Where, as here, the respondents did not own the boats on which they worked, the presumption was that they were in the owner's service—*Hibbs* v. *Ross*, June 13, 1866, L.R. 1 Q.B. 534, *per* Blackburn (J.), at p. 543. The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) assumed that such members of the crew of a fishing vessel as were remunerated by shares in the profits or gross earnings of the vessel were servants, for it expressly excluded them—section 7 (2)—and that would not have been necessary had they not been regarded as servants —*Smith* v. *Horlock*, (1913) 6 B.W.C.C. 638, *per* Cosens-Hardy (M.R.), at p. 642. Similarly, the Merchant Shipping Act 1894 (57 and 58 Vict., cap. 60), by providing (section 389) that an agreement to remunerate an employee by a share of the profits must be in writing, inferred that the contract was one of service, for such a provision would not have been necessary had the contract been one of partnership or joint-adventure. The fact that a seaman agreed to accept a share of the profits as his remuneration did not make him a partner — *Wilkinson* v. *Frosier*, (1802) 4 Espinasse 181; *Mair* v. *Glennie*, (1815) 4 Maule and Selwyn 240; *Perrott* v. *Bryant*, (1836) 2 Younge and Collyer 61; *Clark* v. *Jamieson*, 1909 S.C. 132, 46 S.L.R. 73. *Esto* that an agreement for participation in profit and loss was *prima facie* evidence of partnership, that did not of itself create partnership—Lindley on Partnership (8th ed.), 26, and 49. The question always depended on the intention of parties—Bell's Com. ii. 499, *et seq.*; *Walker* v. *Hirsch*, (1884) L.R. 27, C.D. 460; *Sutton & Company* v. *Grey*, [1894] 1 Q.B. 285, *per* Esher (M.R.), at p. 286. What was to be looked at was the substance of the transaction as a whole — *Eaglesham & Company* v. *Grant*, July 15, 1875, 2 R. 960, *per* L.J.-C. Moncreiff, at p. 967, 12 S.L.R. 604. [Counsel for the Port of Hull Trawl Fishermen's Protective Society submitted that the Court should declare that share trawl fishermen were employed persons.

Argued for respondent J. L. M'Naughton—The contract of service implied a definite and fixed return in name of wages—Ersk. Inst. iii, 3, 14; Bell's Prin. 146; Fraser on Master and Servant, 3. No such return was present here. What the respondent received was a share of the profits, and that implied that the contract was one of joint-adventure and not one of service—Lindley (*op. cit.*), 48; *M'Gee* v. *Anderson*, January 19, 1895, 22 R. 275, 32 S.L.R. 207; *Gill* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1908 S.C. 328, 45 S.L.R. 247; *Hughes* v. *Postlethwaite*, (1910) 4 B.C.C. 105; *Boon* v. *Quance*, (1909) 102 L.T. 443. *Esto* that the property contributed was not the joint-property of all the parties interested, that was not essential to a contract of joint-adventure—Lindley (*op. cit.*). It was not essential for the respondents to establish that the contract was one of partnership or joint-adventure. It was enough if they showed, as they had done, that it was not a contract of service.

At advising—

LORD MACKENZIE—The duty of the Court in these proceedings is to decide whether any of the fishermen whose cases are under consideration are employed under any contract of service within the meaning of Part I of the First Schedule of the National Insurance Act 1911. Put shortly that Act provides that all persons over a certain age under any contract of service are to be insured, but there is an exception in Part II of the First Schedule, sub-section (*k*), in these terms—"Employment as a member of the crew of a fishing vessel where the members of such crews are remunerated by shares in the profits or the gross earnings of the working of such vessel in accordance with any custom or practice prevailing at any port if a special order is made for the purpose by the Insurance Commissioners, and the particular custom or practice prevailing at the port is one to which the order applies." No such order has been made by the Insurance Commissioners. They have availed themselves of the power conferred by section 66 (1) of the Act, which provides that they may, if they think fit, instead of themselves deciding whether any class of employment is or will be employment within the meaning of the Act, submit the question for decision to the Court of Session. They have done so by this petition, which puts the question for the determination of the Court as follows—"Whether the classes of employment of (*a*) fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who have no proprietary or other interest in such vessel or in the nets or other gear thereof, and (*b*) fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who receive a further share of said profits in respect of their ownership or part ownership of the nets of such vessels but have no proprietary or other interest in the vessel itself, or either of the said classes

of employment, are employments within the meaning of Part I of the National Insurance Act 1911." I should point out that there is in the prayer no distinction drawn between profits and gross earnings. It is assumed that what is divided is profit—a point which requires to be considered and decided. . . . [*His Lordship narrated the result of the evidence as given, supra*] . . . An agreement to share profits and losses, as is pointed out in Lindley on Partnership, p. 48, in the sense of making good the losses if any are sustained, may be said to be the type of a partnership contract. As already indicated, it is profits and not gross returns which are shared by these fishermen. The case is different in this respect from that of *Clark* v. *Jamieson*, where Lord M'Laren emphasised the distinction drawn in the Partnership Act 1890 between profits and gross earnings. As was pointed out, what was divided in that case was not a share of the profits, for that would have implied deductions for expenses of management, repairs, stores, and perhaps bad debts, but was a share of the gross earnings. A share of the gross returns is under the statute not even *prima facie* evidence of the existence of a partnership. No doubt it does not follow that each of several persons who share profits and losses has all the ordinary rights and is under all the ordinary liabilities of a partner in a question with his copartners. This is made clear in the case of *Walker* v. *Hirsch*, 27 Ch. D. 460. In the present case the liability of the joint-adventurers for, *e.g.*, furnishings, will depend on what the article furnished is, and on whose credit it was supplied. Members of the crew, as such, will not be liable for barking the nets—the nets being the property of the net owners. Nor again would the crew be liable for expenses in connection with the maintenance or repair of the boat, incurred on the orders of the boat owners. These consequences which follow from the separate ownerships of the stock do not the less make the adventure a joint one. Nor does the fact that the crew, as such, and the net men, have no share in the management of the boat or the financial arrangements connected therewith, place them in a position of mere servants. It is readily intelligible that the owners will not entrust the management of a valuable vessel—in the case of steam-drifters running from £2500 to £3500—to anyone in whom they have not absolute confidence. Upon the whole matter I am of opinion that the petitioners have failed to make good their contention on the general question.

In consequence of the way the prayer of the petition is framed I think it would be better that our determination should take the shape of findings. I therefore propose that we should find (1) that the classes of fishermen in regard to whom evidence has been led, are, with the exception of share trawl fishermen, not employed persons within the meaning of Part I of the National Insurance Act 1911; and (2) in terms of the joint-minute of admissions for the Scottish Insurance Commissioners and for the Port of Hull Trawl Fishermen's Protective Society, that share trawl fishermen are employed persons within the meaning of Part I of the said Act.

LORD SKERRINGTON—I concur.

LORD PRESIDENT—I agree in the opinion which Lord Mackenzie has delivered. The evidence has satisfied me (1) that there is a right on the part of all the members of the crew to participate in the profits in the proper sense of the term at the close of a fishing venture; and (2) that there is an obligation sanctioned by invariable custom—although only by custom, not an honourable obligation merely — to bear losses which are incurred in the course of the venture. These considerations appear to me—as they appear to your Lordships—to be decisive in favour of the view that the fishermen with whom we are concerned here are joint-adventurers and not employed persons. We shall therefore pronounce findings as Lord Mackenzie has proposed.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Find and declare (1) that the classes of fishermen in regard to whom evidence has been led are (with the exception of share trawl fishermen) not employed persons within the meaning of Part I of the National Insurance Act 1911, and (2) in terms of the joint-minute of admissions for the Scottish Insurance Commissioners and for the Port of Hull Trawl Fishermen's Protective Society, . . . that share trawl fishermen are employed persons within the meaning of Part I of the said Act: Find the compearing respondent John L. M'Naughton, as secretary of the Moray Firth Fishermen's Association and of the Scottish Fisheries Association, entitled to expenses; also find the compearing respondents the said Port of Hull Trawl Fishermen's Protective Society entitled to their expenses, and remit," &c.

Counsel for Petitioners—Sol.-Gen. (Morison, K.C.)—Graham Robertson. Agent—James Watt, W.S.

Counsel for Respondent J. L. M'Naughton—Horne, K.C.—Lippe—A. M. Hamilton. Agents—Garden & Steel, S.S.C.

Counsel for Respondents the Port of Hull Trawl Fishermen's Protective Society—Horne, K.C. — Smith Clark. Agents — Henderson & Mackenzie, S.S.C.