

assignment could only be reduced properly by an action of reduction—*Drummond v. Watson*, (1850) 12 D. 604, *per* Lord Justice-Clerk Hope at p. 607, and *per* Lord Moncreiff at p. 611. The present case was really decided by the case of *Robertson v. Ogilvie* (*cit.*).

LORD JUSTICE-CLERK—In this case I am quite content with the judgment of the Sheriff. I think that he puts the point exactly as it ought to be and that the authorities he refers to warrant the conclusion at which he has arrived.

The Bank were creditors of the bankrupt as holders of a promissory-note for £180 granted by the bankrupt which was falling due and which he was anxious to meet. There was a sum of £200 due to the bankrupt by the burgh of Paisley, and he took to the Bank an assignment of £200 and a cheque for £180, and giving these to the Bank they handed him over his promissory-note. I think that closed that bill transaction.

If bankruptcy had supervened and the Bank had sought to take advantage of the assignment for the purpose of liquidating the amount due under the promissory-note, it may be that a question would have arisen. But that is not the case here, because what took place was that after the date of the note transaction the debit balance on the bank account was converted into a credit balance, and thereafter the Bank being still in possession of the assignment, which they duly intimated, made advances to the bankrupt, which ultimately produced a debit balance of £200.

The result of that is that this case falls precisely within the judgment in the case of *Robertson v. Ogilvie*, the soundness of which has not been impugned, although counsel sought to distinguish it from the present. I think it was a sound judgment.

I am therefore for refusing this appeal.

LORD DUNDAS—I agree with your Lordship and the learned Sheriff, and do not desire to add any words of my own.

LORD SALVESEN—I am of the same opinion. The Bank here holds an assignment, absolute in its terms, for a sum of money admittedly due to the bankrupt by the Paisley Corporation. The question is—on what grounds do they claim to hold it? If they claimed to hold it in satisfaction or security of a debt prior in date to the assignment, *prima facie* the assignment would be cut down by the bankruptcy. But they claim to hold for advances subsequently made on the faith of the absolute assignment which remained in their possession—in short, for a *novum debitum* and to the extent of the *novum debitum*.

In these circumstances I see no reason for doubting the soundness of the Sheriff's decision. The Bank are entitled so to hold and to apply the proceeds of the assignment, and that is the only question that arises in this case.

LORD GUTHRIE—I am unable to distinguish this case from *Robertson v. Ogilvie*,

which is not referred to by the Sheriff-Substitute, and which does not appear to have been before him.

The Court adhered to the judgment of the Sheriff.

Counsel for the Defender Whyte—Christie, K.C.—Wilton. Agent—Walt. M. Murray, S.S.C.

Counsel for the Defenders The Union Bank of Scotland, Limited—Anderson, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, June 12.

SECOND DIVISION.

[Sheriff Court at Peterhead.]

BUCHAN v. SCOTTISH STEAM HERRING FISHING COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—Workman—Seaman—Fishing Vessel—Share of "Scum" and "Stoker"—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 7, sub-sec. 2.

By section 7 of the Workmen's Compensation Act 1906 the Act applies to seamen, but by sub-section 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 gross earnings of the working of such vessel."

The widow of a fireman on board a steam drifter sought to recover compensation from the owners in respect of the death of her husband by a fatal accident which happened to him in the course of his employment. *Held* that as the fireman was entitled to share in the profits realised from the "scum" and "stoker," and thereby participate in the gross earnings of the working of the vessel, she was not entitled to compensation under the Act.

An arbitration was held in the Sheriff Court at Peterhead, under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between Mrs Christina Strachan or Buchan, 7 High Street, Buchanhaven, Peterhead, *appellant*, and the Scottish Steam Herring Fishing Company, Limited, *respondents*, to fix the amount of compensation payable by the respondents to the appellant in respect of the death of the husband of the latter in consequence of an accident sustained whilst in their employment.

The appellant being dissatisfied with the decision of the Sheriff-Substitute (YOUNG) brought a Case for the opinion of the Second Division of the Court of Session.

The Case stated—"This is an arbitration instituted by initial writ before the Sheriff at the instance of the appellant against the respondents, under which the appellant, for herself as an individual and as tutrix and administratrix for her said pupil children, craves an award of compensation in respect of the death of her husband George Buchan

above designed, in terms of the Workmen's Compensation Act 1906.

"The following are the facts admitted or proved, viz.—1. That the appellant Mrs Christina Strachan or Buchan is the widow of George Buchan, who followed the occupation of fireman on a steam drifter, and the respondents are the Scottish Steam Herring Fishing Company, Limited, having their registered office at Peterhead. 2. That the appellant claims £300 as compensation for herself and her pupil children in respect of the death of her husband by a fatal accident which happened to him at Fraserburgh harbour on Monday, 7th February 1916, while he was in the employment of the respondents as fireman of their steam drifter the s.s. 'Petunia.' 3. That in the forenoon of 7th February the 'Petunia,' which was on her way from Peterhead to the herring fishing on the west coast, put into Fraserburgh on account of some engine trouble and took up a berth in the south harbour there, being moored to the outside of the s.s. 'Speedwell,' which was lying next the quay. 4. That the only way of access to the 'Petunia' from the quay was had by descending to the 'Speedwell' by means of an iron ladder fixed to the face of the quay, and then by crossing the deck of the 'Speedwell' to the 'Petunia,' which lay alongside. 5. That in the evening of the said 7th of February the deceased George Buchan went ashore between six and seven o'clock with leave, but for his own purposes and not on ship's business, and he returned between eight and nine to the place where the 'Speedwell' and the 'Petunia' were berthed. 6. That when on shore the deceased had some refreshment but he was not the worse of drink, and on his return he was sober and able to take care of himself. 7. That the night was dark, the surface of the quay was extremely slippery through hard frost, and there was a deal of ice at the top of the ladder. 8. That the deceased had reached the access to the 'Speedwell' and was endeavouring to find his way down by the ladder when he slipped or lost his foothold and fell over upon the deck of the 'Speedwell' at a point abreast of the ladder. 9. That in consequence of his fall the deceased received serious injuries and died almost immediately the same night. 10. That in the respondents' service the deceased as one of the crew of the 'Petunia' had before and at the time of his death a fixed wage of 35s. a-week in addition to food, which was of the value of 10s. weekly, and along with the engineer and cook he was further entitled to a one-third share of 'scum' and 'stoker' as part of his remuneration. 11. That drifters belonging to Peterhead like the 'Petunia' are engaged in fishing for herrings the whole year round practically, and there are usually employed a crew of nine men—the skipper and four deck hands and the engineer, fireman, and cook. 12. That in drift-net fishing a string or fleet of nets, connected together and to the drifter by a bush-rope or strong warp, is passed or shot out in a long line extending, it may be, for more than a mile or for nearly two from the vessel, and the fish are caught

not by being enclosed in a sweep of the nets but by being immeshed—that is, by running their heads and gills into the meshes of the nets. 13. That when the nets are being raised from the sea and taken on board the drifter, which moves slowly alongside the fleet of nets with that object, it happens that some of the fish captured fall from the meshes in which they have been caught, and it is the custom for the engineer, who is on deck for the purpose, to intercept these fish as they fall, or pick them up out of the water with a net attached to a pole, the take so made being known as the 'scum.' 14. That while the engineer is engaged in seeing to the gathering of the 'scum' the fireman attends to the coiling of the bush rope at the capstan as the nets are drawn on board. 15. That in practice, as well as in accordance with express agreement between the respondents and the other owners of steam-drifters at Peterhead and the Peterhead branch of the Scottish Steam Fishing Vessels Enginemen and Firemen's Union, the 'scum' is divisible in equal proportions between the engineer, the fireman, and the cook as part of their remuneration, and but for this right to the 'scum' a higher fixed wage would require to be paid. 16. That the quantity of the 'scum' depends in a great measure on the success or non-success of the fishing, and the net proceeds obtained from the sale of the 'scum' are of considerable value, and form a substantial portion of the remuneration of each man entitled to a share. 17. That after the nets have been put out, and while the drifter is riding at them, it is usual for those on board to fish for white fish with hand lines to which an instrument called a ripper is attached, and the take of fish which may thus be made by the engineer, and fireman, and cook is called stoker, and is regarded as belonging to them in equal shares, and as forming also a part of their remuneration. 18. That the value of this 'stoker' is ordinarily of some consequence, but of considerably less account than that of the 'scum.' 19. That the others of the crew have also a 'stoker,' which consists of white fish caught by them in like manner with hand lines while the fleet of nets is on the drift. 20. That the 'scum' is disposed of by fish-salesmen employed by the owners of the drifter, and the proceeds of the sale, after deduction of expenses, are divided equally among the three men entitled to a share. 21. That the owners' books show the 'scum' as part of the catch of herrings, but the value of the 'scum' is stated as a cross-entry, and is not treated as income in ascertaining net profits; and 22. That the 'scum,' if not also the 'stoker,' to which the deceased was entitled in consideration of his services, formed a portion of the gross earnings of the drifter 'Petunia' on which he was employed as fireman.

"On the foregoing facts I held that the accident to the deceased George Buchan arose out of and in the course of his employment, but that as he was remunerated by a share in the gross earnings of the 'Petunia,' within the meaning of section 7 (2) of the Workmen's Compensation Act 1906, the re-

spondents, his employers, are not liable in compensation. I found no expenses due to or by either party.

"There is no dispute now between the parties as to the condition of the deceased George Buchan at the time he met with his accident, or as to whether the accident arose out of and in the course of his employment."

The question of law for the opinion of the Court was—"Whether I was entitled to hold that the deceased George Buchan was remunerated by a share in the gross earnings of the 'Petunia,' within the meaning of section 7 (2) of the Workmen's Compensation Act 1906."

"Note.—The supposition has been put forward that the accident which unfortunately befell the deceased was due to his being under the influence of drink at the time and not fit to look after himself, but I am satisfied on the evidence that this was not the case. So far as I can see there is no good reason for attributing the event to intoxication.

"The true cause, it seems to me, was a risk incidental to his employment. The night was very dark and there was a keen frost. Then there was the slipperiness of the quay, and in particular its icy state at the place where the ladder formed the access to the 'Speedwell' and by it to the 'Petunia.' The dangerous condition of things indeed affords a natural and reasonable explanation of the occurrence. The deceased, it must be noted, had gone ashore with leave. He was returning for the purpose of getting on board his ship as he was bound to do. Having reached the ladder he was attempting to descend when he slipped and fell. I think his fall was due to a risk attending the use of the means of access to his ship, and may thus be said to have arisen out of his employment—*v. Kitchenham v. Owners of s.s. 'Johannesburg,'* (1911) 1 K.B. 523, affirmed 1911 A.C. 417, 49 S.L.R. 626, and *Moore v. Manchester Liners Limited,* (1909) A.C. 523, 48 S.L.R. 709.

"In my opinion then there would have been good ground for compensation in this case were it not for the terms of section 7 (2) of the Workmen's Compensation Act 1906. It provides that the 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 deceased was a member of the crew of the 'Petunia,' and was remunerated for his services not merely by receiving a fixed wage of 35s. and his board, but by having a right to 'scum' and 'stoker.' There may be some doubt as to whether the 'stoker,' which consists of white fish caught with the ripper, is part of the earnings of the fishing industry as carried out by the vessel. But the 'scum,' which is the important item and a valuable one, is in my view part of the catch of herrings captured in the fleet of nets, and is therefore part of the drifter's earnings. When at the time that the catch is being brought on board the engineer as one of the crew takes his stand on deck and assists in the operation by recovering the herrings which may fall from the meshes, he is

making an effort—in his own interest and that of others of the crew it may be—to preserve the catch and to lose as few herrings as possible. If there be no catch there will be no 'scum.' The 'scum' is simply that part of the catch which drops and is recovered as the herrings are being taken on board; and in obtaining a share of the 'scum' a fireman is I think getting a share in the gross earnings of the vessel. Reference may be made to two decisions in the English Court of Appeal—*Stephenson v. Rossall Fishing Company,* (1915) 84 L.J., K.B. 677, and *Burman v. Zodiac Steam Fishing Company,* (1914) 3 K.B. 1039."

The appellant argued—The scum was a mere perquisite, not a remuneration. It was not part of the catch of the vessel. It was entirely due to the private energies of the engineer and the fireman acting out with the scope of their ordinary duties. The case should be remitted to the Sheriff-Substitute. Counsel referred to *Ayr Steam Shipping Company v. Lendrum,* 1914 S.C. (H.L.) 91, per Dunedin at 102, 51 S.L.R. 733; *Woolfe v. Colquhoun,* 1912 S.C. 1190, 49 S.L.R. 911; *Costello v. Pigeon,* 1913 A.C. 407, per Halsbury at p. 412, 50 S.L.R. 976; *Burman v. Zodiac Steam Fishing Company,* (1914) 3 K.B. 1039; *Gill v. Aberdeen Steam Trawling and Fishing Company,* 1908 S.C. 328, 45 S.L.R. 247; *M'Kenna v. Niddrie and Benhar Coal Company,* 1916 S.C. 1, 53 S.L.R. 1.

The respondents argued—It required express contract to take the profits accruing from the "scum" and "stoker" out of the gross earnings of the vessel. The "scum" primarily belonged to the owners of the drifter.

LORD JUSTICE - CLERK — The question raised in this case is in some respects novel, but I think it falls within the decisions which have already been given on section 7 (2) of the statute. In coming to that result I think we might quite safely lay aside the findings which it was suggested were so ambiguous or so unsupported by evidence that a remit or the transmission of the process would be necessary to enable us to arrive at a sound conclusion. These portions, as I understand, were the phrase "part of his remuneration" in article 10 of the Stated Case, the same phrase in article 15, the words "by fish salesmen employed" in article 20. Article 21 was also objected to on the ground apparently that it only applied to a particular port. Leaving these portions out of account altogether—several of which I agree seem to involve mixed questions of fact and law—I think enough remains to render the case free from difficulty.

[His Lordship referred to articles 13-16 of the case, and continued]—As the result of these facts, it seems to me that the money realised by the sale of the "scum" ought to be regarded as part of the remuneration of the men who share it, and that the fish which provide the catch from which the "scum" is produced are, properly speaking, part of the takings of the ship. It appears to me that the money got as the price of the "scum" should be

properly regarded as part of the gross earnings of the working of the vessel as distinguished from profits, and accordingly I think that each of the three men in question, and in particular the deceased fireman, was remunerated by a share of the gross earnings of the working of the vessel. I do not think that in order to bring him within the section of the Act it is necessary that there should be an arithmetical proportion of the whole taken as the part to be paid to the workman; in my judgment it is enough to read the section in this sense that if any of the hands employed gets a share of the proceeds of a part of the catch—that share being so large as to give them a substantial sum—then they are brought within the scope of the exception. I am therefore for answering the question put to us by the arbitrator in the affirmative.

LORD SALVESEN—I agree. It seems to me that the question we are called upon to decide is whether the “scum,” the meaning of which is explained by the Sheriff-Substitute, forms part of the gross earnings of the working of the steam-drifter “Petunia,” on which the deceased was engaged as a fireman. I think finding No. 15 is practically conclusive on that subject. It is stated that in accordance with practice, and also with express agreement between the respondents and certain unions, the “scum” is divisible in equal proportions between the engineer, the fireman, and the cook, and that but for this right to the “scum” a higher fixed wage would require to be paid. In other words, if it were not for this agreement the “scum” would in law form part of the gross earnings of the working of the vessel, and would go to the owners of the vessel if their servants were all paid by wages.

That being so, the agreement is to the advantage of both parties, because a larger proportion of the “scum” is secured if the men whose duty and interest it is to secure it get the whole benefit. On the other hand, if that benefit is substantial it is reasonable to infer, what is found in fact, that it enters into the question of the rate of fixed wages which such men will accept. But I cannot doubt that the “scum,” which is really part of the catch of the vessel—saved no doubt from loss by the exertions of the three men who get the value of it between them—is part of the gross earnings of the working of the vessel. I accordingly think that the appellant’s husband was excluded from the benefits of the Workmen’s Compensation Act.

LORD DUNDAS—I am of the same opinion. I think that we are quite in a position to decide this case as it stands, and that we ought not to entertain either of the alternative branches of the motion made to us for the appellant, to have the process transmitted here in order that we may look at the evidence, or to remit to the arbitrator in certain terms. That motion in both its branches, which we refused some days ago *in eo statu*, should be refused definitely now that we have heard the case opened, especially in view of the fair concession made by

counsel for the respondents that certain words of the learned arbitrator should be taken not as findings in fact but rather as inferences, as to the legality of which we can judge for ourselves. As regards the merits of the case I have nothing to add to what your Lordship has said, except that I think we must hold that the Scottish case of *Colquhoun*, 1912 S.C. 1190, was definitely overruled by the House of Lords in the case of *Costello*, [1913] A.C. 407, and that the two English decisions referred to by the learned arbitrator seem to me to be not unhelpful in the consideration of this case. I am for answering the question as your Lordship has proposed, in the affirmative.

LORD GUTHRIE was not present.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Christie, K.C.—Gentles. Agents—W. & J. Burness, W.S.

Counsel for the Respondents—Anderson, K.C.—Scott. Agents—Alex. Morison & Co., W.S.

Tuesday, June 12.

FIRST DIVISION.

[Lord Cullen, Ordinary.

N. G. FERGUSSON & COMPANY,
LIMITED v. BROWN & TAWSE.

(Reported *supra*, p. 309.)

War—Contract—Furthcoming—British Arresters Suing British Arrestees for Debt Due by the Latter to a German Firm—Debt Matured after the Outbreak of War, when Payment Illegal.

British subjects arrested in the hands of other British subjects a debt due by the latter to a German firm. The obligation of the latter was to pay the German firm in marks at Duisburg on 15th August 1914, by which time war had been declared and payment of the debt had become illegal. *Held (rev. Lord Cullen)* that an action of furthcoming by the arresters against the arrestees must be sisted for so long as the arrestees were not liable to make payment to the German firm.

N. G. Fergusson & Company, Limited, *pursuers*, brought an action of furthcoming against Brown & Tawse, *arrestees* and *defenders*, and Eisenwerk Kraft Aktiengesellschaft, Duisburg, Germany (against whom arrestments had been used *ad fundandam jurisdictionem*), *principal debtors*, for payment of sums arrested by the *pursuers* in hands of the *arrestees* and due by them to the *principal debtors*.

The *defenders* *pleaded, inter alia*—“1. The action is incompetent as laid (a) in respect that the proceedings founded on are inept; (b) in respect that the liability to pay the debt in question is suspended by war; and (c) in respect of the terms of the Trading with the Enemy Amendment Act 1914.” 2.