

ride them. They and he remain with separate and possibly conflicting responsibilities, though for purposes of litigation they can be treated as though they were one legal personality. These contracts were made with one of His Majesty's Principal Secretaries of State and with his Council, or with the concurrence of a majority of his Council, it matters not which, for they were made at all events with him.

Under these circumstances, though no suggestion has been made of any improper motive, and though the construction placed upon the statutes by Sir Stuart Samuel finds some countenance in former proceedings before committees of the House of Commons, their Lordships are obliged to answer the question of law referred to them as follows:—They will humbly advise His Majesty that by reason of the facts which have been reported by the above-named Select Committee of the House of Commons the said Sir Stuart Samuel was disabled from sitting and voting in the House.

Counsel for the Crown—Sir R. Finlay, K.C.—J. R. Atkin, K.C.—Alexander Neilson. Agent—Solicitor to the Treasury.

Counsel for Sir Stuart Samuel—Danckwerts, K.C.—Buckmaster, K.C.—W. P. Spens. Agents—Freshfields, Solicitors.

## HOUSE OF LORDS.

Friday, June 13, 1913.

(Before the Earl of Halsbury, Earl Loreburn, and Lords Atkinson, Mersey, and Parker.)

COSTELLO (PAUPER) *v.* OWNERS OF SHIP "PIGEON."

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 7, sub-sec. 2—Member of a Fishing Crew Paid Partly by Receipt of a Proportion of the Profits.*

The Workmen's Compensation Act 1906, sec. 7 (2), enacts—"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."

Where a member of a crew of a fishing vessel was paid under agreement partly by a fixed wage, partly by a share of the profits of the venture, held that he was remunerated by a share in the profits within the meaning of the Workmen's Compensation Act 1906, sec. 7 (2), and was thereby excluded from the benefit of the Act.

*Woolfe v. Colquhoun*, 1912 S.C. 1190, 49 S.L.R. 911, not followed.

This was an appeal from the judgment of the Court of Appeal, reversing that of the Deputy-Judge of the Kingston-upon-Hull County Court, acting as arbiter under

the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). The appellant in the course of a fishing expedition had lost a finger through an accident while acting as boatswain of the trawler "Pigeon" under an agreement whereby he was paid a fixed wage of £1 a-week and poundage out of the ship-owner's share of the net profits of the voyage at the rate of 3d. per £1. The agreement also provided for payment of the skipper and mate of the vessel by a proportion of the profits without any fixed wage. The arbiter found that the poundage was by way of a bonus to the appellant's fixed wage, and not therefore within the meaning of the sub-section a share of the profits. On the employers appealing the Court of Appeal held that the case was ruled by *Admiral Fishing Company v. Robinson*, 1910, 1 K.B. 540, and allowed the appeal.

Costello appealed to the House of Lords, and the case was heard on 30th April 1913 before Earl Loreburn, Lords Atkinson, and Parker. Their Lordships reserved judgment and the case was afterwards re-heard.

At the re-hearing counsel for the appellant adduced the judgment of the First Division of the Court of Session in the case of *Woolfe v. Colquhoun*, 1912 S.C. 1190, 49 S.L.R. 911, which decided that in doubtful cases it is a question of fact for the arbiter to decide whether the workman is remunerated by a share of the profits or not.

Their Lordships' judgment was delivered at the conclusion of the arguments as follows:—

EARL OF HALSBURY—There is no doubt that this is a very small point, but it is a very important one. I am very clearly of opinion that the judgment of the Court of Appeal was right. At the same time when I find a difference of opinion I wish to speak with all respect of those who differ from me. This matter it is very obvious has occupied the attention of a great number of learned persons, among whom there has been up to the present time a difference of opinion, and I regret to find, now that it has come to the final Court of Appeal, that there is a difference among us.

The question is, what is the meaning of the language as it stands? I think the true mode of construing the statute is to look simply at the words as they stand, unless there is something in the facts which gives them a different meaning from their ordinary meaning. To my mind the enactment is one which is intended to draw a distinction between different classes of persons who are actually engaged in the particular labour which is the subject-matter of the enactment, and I think I can paraphrase what is intended by the Legislature by putting it in this form:—There are a certain number of men who are in the ordinary sense servants. They are persons who engage for wages at a particular rate, and the Act is intended to give workmen certain rights to compensation,

But it was, I should have thought, probably argued in Parliament, and it would probably be the meaning which was intended to be enacted by the language used, that for a variety of reasons a distinction ought to be drawn between what I will call the ordinary workmen and the shareholding workmen who become co-adventurers, or as one of the Scottish Judges said, partners in the concern. It is obvious, I think, that the Legislature would strive to draw a distinction between persons of that class and persons who are in the nature of employers or partners in the joint-adventure, and to say that those co-adventurers should not claim the rights of the mere workmen, and they have accordingly used the phrase that is now in debate.

To my mind, if the words are read literally, it is impossible to say that this man Costello was not remunerated by a share. It may be that it was not his whole remuneration. It may well be that when you are considering another entirely different region of inquiry—namely, what is he to receive as compensation for any injury received during the course of his employment—you would give the word "remuneration" the meaning of everything he received. But when you are drawing a distinction between two sets of workmen, one of whom would be only wage-earners and the other would be persons who are co-adventurers, the word "remuneration" would probably receive and ought to receive a different meaning, and it is quite susceptible of a different meaning, according to the circumstances under which and the purpose for which you use the word.

I am not much impressed by the question what the man in the street would say if he were asked whether his remuneration was of such a character or not. The man in the street by hypothesis is not dealing with such questions as are now vexing us in construing this Act of Parliament. He would say the meaning was what the man got by his work. But the question is whether the Legislature which is contemplating different classes of workman is to be treated as the man in the street who has only one dominant idea in his mind. What the answer to the question is to be must depend upon the hypothesis upon which you put it, and what sort of matter is being discussed when the question is put. For my own part I read the words simply as they are, and I think the natural and ordinary meaning of the words is that which the Court of Appeal has adopted, and I move your Lordships accordingly that this appeal be dismissed.

EARL LOREBURN—I have, I need hardly say, the greatest diffidence when I differ from my noble and learned friend, and from others of your Lordships and from the Court of Appeal, but I have not changed my mind since this case was first heard, although I have listened with the greatest attention and with the desire to be convinced by the argument which has been addressed to your Lordships. I think

the learned junior for the appellant, who made a most admirable contribution to this subject, was right when he pointed out that this is a remedial Act, and that we ought not to read into it an exception without bearing in mind the nature of the remedy which is proposed by the Act itself. This Act includes fisherman among those who are to receive its benefits, but with the exception of such members of the crew as are remunerated by shares in the profits, and your Lordships have to say whether the appellant is within that exception. He was employed on a fishing boat as boatswain, and he and all the other men on board slept in bunks. This seems to me to have no bearing on the question how they were remunerated, being merely a necessary convenience for every man on board. In point of pay or return for their services, they were not all of the same footing; some received a share of the profits and nothing more; another class received wages, with or without some little perquisites, and their food. The appellant received his wages of £1 a-week, together with a small share of profits and his food, with other little perquisites. These distinctions in the way of rewarding men for their services may or may not be common.

Parliament must be supposed to know, what is very obvious, that some men might be paid wholly by a share of the profits, others by mixed profits and wages, perquisites, and food, and others by wages and food and perquisites not amounting to a share of the profits, and Parliament must be supposed to have passed this law with the knowledge that there might be these or other varieties. Reading this Act in its plain and popular sense, as I am bound to do, I cannot think that this appellant was one of those who are remunerated by a share of the profits. He was remunerated by a share of the profits and a wage of £1 a-week, his food and some perquisites. If he had been asked, and he had answered that he was one of those who were remunerated by a share of the profits, his answer would not have been entire truth but only a part of the truth. The same answer would have been the entire truth, if given to a similar question by some other members of the crew. With the most sincere respect, it seems to me rather a refinement to say that some word must be introduced into the text—either the word "wholly" or the word "partially"—in order to place a construction on the statute. The effect, on my construction, would have been imposed upon us without possibility of doubt if the word "wholly" had been inserted, but it is not necessary to that construction, and while I must always feel anxious when I find myself differing, in my view when this Act says that all fisherman are to be compensated unless they be such as are remunerated by a share of the profits, it means that those shall be compensated who are remunerated by something besides a share of the profits.

LORD ATKINSON—I too feel the diffidence which my noble and learned friend who

has preceded me said he felt, in finding that my opinion is at variance with that which my noble and learned friend on the Woolsack has expressed, and in which I understand some of my colleagues are about to concur. But I have heard nothing upon this occasion which induces me to come to a different conclusion from that which I arrived at on the first hearing of this appeal. I have had the advantage and pleasure of reading the judgment which has just been delivered by my noble and learned friend Lord Loreburn; I concur in it, and I feel that I have nothing to add to it, and I arrive at the conclusion at which he arrives, namely, that the decision of the Court of Appeal is wrong, and that this appeal should be allowed.

LORD MERSEY—I confess that I have very little difficulty about this case. The question turns entirely upon three or four words in sub-section 2 of section 7 of the Act, and those words are these, "remunerated by a share in the profits." The question is, was the appellant remunerated by a share in the profits? That he did receive shares is conceded. Were those shares not remuneration for his services? In my opinion they were, and if they were remuneration for his services, then it seems to me that he was remunerated within the meaning of the Act. It is immaterial that he also received some wages. I think this appeal ought to be dismissed.

LORD PARKER—I am also of opinion that this appeal fails. There appear to me to be two substantial questions, the first of which is this—Was Costello under the contract of service on which he founds his claim to compensation entitled to a share of the profits? That appears to me to be a question simply and solely of construction, and having regard to the express words of the contract, it appears to me that the construction is reasonably clear. He is to have, according to the words of the contract, for wages and remuneration, the shares or share of profits specified against his name in the schedule. That contemplates that he will be entitled to a share of the profits, and that alone would, I think, in equity give him a specific right to the profits themselves as distinguished from a claim for further

remuneration measured by those profits. But the point is made additionally clear, because the agreement goes on to provide that after the venture is over, and so much time before the day for settlement, an account is to be delivered, not only to persons who are wholly but to persons who are partly remunerated by shares in the profits; and it is impossible to give a meaning to those words "partly remunerated by a share in the profits" unless they be taken to refer to those members of the crew who were in the position of Costello, remunerated partly by wage and partly by a share of the profits.

The second question is simply and solely a question of construction of sub-section (2) of section 7 of the Act, and that question depends entirely on the answer to the question, was Costello remunerated by a share of the profits in the venture? I can entertain no doubt that the only possible answer to that question is in the affirmative. It is true that if Costello was bound in answer to that question to give the whole truth, he might have to qualify the affirmative answer by saying "Yes; but I am also entitled to wages," but by no possibility could he make an answer in the negative the true answer. He could not say "No, I am not remunerated by profits, but I am remunerated by wages plus a share of the profits." That would not be a correct answer in any sense.

That being so, I am of opinion that the Act must be construed according to its literal meaning, and that it is impossible to introduce the word "solely" or "wholly" or even "substantially" as was done in the Scottish case; and the only answer to the question being an affirmative, it follows, in my opinion, that the decision of the Court of Appeal was right.

Judgment appealed from affirmed.

Counsel for the Appellant—Greer, K.C.—Addington Willis. Agents—Windybank, Samuell, & Lawrence, for Benno Pearlman, Hull, Solicitors.

Counsel for the Respondents—Sankey, K.C.—Neilson. Agents—Pritchard & Sons, for Wallace & Macfadzean, Sunderland, Solicitors.