was reduced in consequence of the accident. If it were so, it lay upon him to prove it, which he had not done.

Counsel for the respondent was not called upon to reply.

LORD M'LAREN—The points in this case have been brought clearly before us by Mr Lippe, and I am not satisfied that there is any good objection to the Sheriff-Substitute's decision. It was argued, first, that it does not appear from the findings in fact of the Sheriff-Substitute that the pursuer was in the position of a workman as defined by the Act of 1906, and second, that the Sheriff-Substitute has found the pursuer incapacitated only for work as a stonebreaker, and not for work of any other kind.

I am not surprised that the first question should have been raised, nor am I surprised that work, in consequence of the passing of this Act, should be given out by contract, but in the present case there are no facts from which it may be inferred that the pursuer stood in the position of a sub-contractor. The Sheriff-Substitute finds that the pursuer was employed by the defender and appellant in breaking stones for road metal. The defender had entered into a contract for the supply of road metal with the road authority of the County of Ayr, and he employed the pursuer at a fixed rate per cubic yard of the road metal broken by him. However the hierarchy of labour may be arranged, you must come down eventually to the man who does the work with his hands, and the Sheriff-Substitute has held that the pursuer was in that position. It is not suggested that the duty of supplying material devolved upon the pursuer. He had merely to break the stones in consideration of a fixed rate for his labour.

Now if one turns to the definition given in section 13 of the Act under the head "workman," it amounts to this, that, save in the excepted cases, anyone who enters into a contract of service is covered by it. We are not here in any of the excepted cases, so the definition does not help us much. The Sheriff-Substitute's finding amounts to this, that the pursuer has only to do the work, and has nothing to do with the supply of material, and he therefore holds that the pursuer is a "workman" in the sense of the Act. This, in my opinion, is a sound conclusion from the facts of the case.

Coming to the second point, the ground of the Sheriff-Substitute's award is that the pursuer is permanently incapacitated from work. His finding is "that in consequence of said injury the pursuer and respondent is permanently incapacitated for work at his trade as a stonebreaker," Now that must be compared with the words of Schedule I (1) (*b*) of the Act, which are—"Where total or partial incapacity for work results from the injury. . . ." The statute does not say "incapacity for work of any description," but uses language of a more general nature, and which I think has been properly chosen, because otherwise it might be open to an employer to state in defence some fanciful work which the injured workman might get and might be supposed to be capable of performing. What therefore the Sheriff-Substitute had to consider was whether this was a substantial case of incapacity for work for a man in the grade of a stonebreaker. He is satisfied that this man is not fit for stonebreaking, and I can quite understand his taking the view that, if not fit for that, he is not fit for any other description of unskilled labour.

But I am satisfied to reject this second objection on the ground that it has been the practice of the Court not to interfere with a Sheriff's judgment when any possibility of injustice can be obviated by subsequent application for review, as would be permissible here on the part of the employer if there was any reason to suppose that the man was at any time fit for work.

LORD PEARSON—I am of the same opinion on both points.

The first point is completely answered by the Sheriff-Substitute's finding under head 1. The Sheriff-Substitute says that the pursuer was employed by the defender to break stones for road metal, and he goes on to say that he was so employed at a fixed rate per cubic yard of metal, the pursuer being under the defender's orders as to where he should work, and subject to dismissal by him. This seems to me to amount to a relevant statement that the pursuer was a workman in the sense of the Act.

On the second point I agree with your Lordship, and do not think it necessary to add anything.

LORD DUNDAS—I agree with your Lordships, and have nothing to add.

The Court answered the first and third questions in the affirmative, found it unnecessary to answer the second question, and dismissed the appeal.

Counsel for the Appellant—Morison, K.C. —Lippe. Agent—T. M. Pole, Solicitor.

Counsel for the Respondent—Constable, K.C.—Cochran-Patrick. Agents—Simpson & Marwick, W.S.

Friday, November 6.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

[Sheriff Court at Lerwick.

JAMIESON *v.* CLARK.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 1 (1) *and* 7 (1)—"*Workman*"—*Service, Hiring, or Joint-Adventure—Boatman—Remuneration by Share of Gross Earnings of Boat.*

A firm of fish curers engaged A to work a "flitboat" belonging to them, and authorised him to find another man

to go along with him. A engaged B to work under him on the boat, which was not in any sense a fishing boat, but was a boat used for carrying cargo between the curing stations and vessels lying off shore and landing goods from steamers. A and B were to be remunerated by one third each of the gross earnings of the boat, the remaining third going to her owners. The boat was maintained by the firm, and both the men and the boat were subject to their orders. When not required by the owners the boat did "flitting" for other curers, such work being undertaken by A as skipper on behalf of the boat, and the rates charged being the same as those paid by the firm to the boat for similar work. When the men were not employed afloat, the firm, whenever possible, supplied them with work ashore, *e.g.*, cutting peats, &c., for which they were paid. No part of the capital embarked was supplied by A or B, nor were they liable for any loss that might be incurred. In the course of his employment as boatman B was drowned. *Held* that B was a "workman" in the sense of the Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), enacts—section 1 (1)—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation . . ." Section 7 (1)—"This Act shall apply to masters, seamen, and apprentices to the sea service, and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members 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 . . . . (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 Partnership Act 1890 (53 and 54 Vict. cap. 39), enacts—section 2—"In determining whether a partnership does or does not exist, regard shall be had to the following rules:—(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived. (3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; . . . ."

Elizabeth Murray or Clark and Elizabeth Clucas Clark, Skelberry, Lunnasting, claimed in the Sheriff Court at Lerwick compensation under the Workmen's Compensation Act 1906, from the firm of G. R. & W. Jamieson, merchants, Sandwick, and the individual partners thereof, in respect of the death by drowning of Levie James Clark on the ground that he was at the time a workman in their employment. The claimants were respectively the mother and sister of the deceased.

The matter was referred to the arbitration of the Sheriff-Substitute at Lerwick (BROUN), who awarded compensation, and at the request of the firm stated a case on appeal.

The case stated that the following *facts* were admitted or proved:—"(1) The appellants are fishcurers, bakers, and general merchants at Brownie's Taing, Sandwick, and are also agents at Sandwick for the North of Scotland and Orkney and Shetland Steam Navigation Company, one of which company's boats calls as a rule once a week at Sandwick, during the herring fishing season from May to October. (2) For the purposes of their business of fishcuring, the appellants have for some years been the owners of a flitboat called the 'Narwhale.' This flitboat is laid up during the winter, but is utilised by the appellants during the herring fishing season. (3) A flitboat is a sailing boat worked by two men as skipper and hand. It is chiefly used for conveying empty barrels and salt from vessels lying off the shore to the fishcuring stations, and conveying barrels filled with herring from the stations to vessels. A flitboat is not a fishing boat in any sense of the term. (4) On 6th April 1907 the appellants advertised in *The Shetland Times* for 'two men to work a barrel boat at Brownie's Taing.' (5) In response to said advertisement an application was lodged by Robert Robertson, Lunnasting, and on 12th April 1907 the appellants wrote to him in the following terms:—'We have a number of applicants for our flitboat, but the writer was in Lerwick on Wednesday last, when he spoke with William Spence, who strongly recommended you; and we have decided to give you the boat, and if you decide to accept, you will find another man to go along with you. You would require to come here about the middle of May, but we would let you know exactly later. Our terms is a third share to each man and a third to the boat. The boat is open along the sides, except about 15 inches along the side, and has a small forecastle which you could stay in. She is fitted for local work, but could make a trip between Lerwick and here if required. She is a good strong little boat; can carry 140 barrels herrings. We have had 200 barrels salt in her. We have a curing station, and you would have all our flitting when you could manage it, and if you were pushing it, you would pick up a lot of work among the other curers. When you were slack we would give you work on the station or elsewhere, when we had it, at 4d. per hour, and for working at the s.s. "Earl" we would allow you 6d. an hour, both you and your man.' (6) Robert Robertson, in accordance with the instructions in said letter, engaged Levie James

Clark, Skelberry, Lunnasting, as the hand under him for working said boat, and on 19th April the appellants wrote Robertson as follows—'We shall now consider the matter closed, and shall advise you when to come here, but we expect it will be about the middle or latter part of next month. The trustees is shortly to erect a temporary jetty near Brownie's Taing Pier for the accommodation of fishing boats while the big pier is being extended; and if this jetty prevents the "Earl" from getting to the pier we will have to boat ashore the goods, when we would require you and your boat to flit the goods, but will let you know as soon as we can. We are pleased to hear that you have got another good man along with you, and you can depend we will treat you fair and square at all times, and will expect you to do the same by us. You will bring your bedding, and you can get all other requirements from us here. We will endeavour to get the boat launched before you come.' The 'Earl' mentioned in said letters is one of the steamers of the North of Scotland and Orkney and Shetland Steam Navigation Company. (7) As regards remuneration, the terms of the engagement were—A third share of the gross earnings to the appellants, and a third share to each of the two men working the boat. The appellants supplied all the boat's furnishings and maintained the boat, while the men kept things aboard in order. This is the usual system on flitboats, and is adopted because it is impossible to get men to work them for fixed wages. (8) On 3rd May 1907 the appellants telegraphed to Robertson—'Take your man and come. "Earl" comes here next Wednesday evening;' and on Wednesday, 15th May, Robertson and Clark proceeded to Sandwick. (9) Robertson and Clark put up in a shed belonging to the appellants, beside the house inhabited by the appellants' foreman. They were charged nothing for said lodgings. They found themselves in provisions, &c., most of which were got from the appellants, separate accounts being opened in their names as individuals and as the crew of the 'Narwhale.' (10) The appellants had the first call on the services of the 'Narwhale' and her crew, and the boat did practically all the flitting connected with the appellants' curing station, and the landing of goods from the steamers of the North of Scotland and Orkney and Shetland Steam Navigation Company at Sandwick. There were only two occasions on which the appellants had work that was not done by the 'Narwhale.' On the first occasion the 'Narwhale' was found to be too small to flit a number of barrels belonging to the appellants, and Robertson, the skipper of the 'Narwhale,' arranged with the skipper of a flitboat belonging to another firm of fishcurers at Sandwick to perform the work. On the second occasion the appellants had granted the crew of the 'Narwhale' permission to go home for a week, and during their absence the appellants employed the flitboat of another fishcurer at Sandwick to do some necessary flitting. When the appellants had no work afloat to give to the 'Narwhale,' the boat did flitting for other curers at Sandwick, such flitting being undertaken by Robertson as skipper, on behalf of the boat, and the rates charged being the same as those paid by the appellants to the boat for similar work. When no flitting work could be got, the appellants, whenever possible, supplied Robertson and Clark with work ashore, such as cutting peats and hay, coaling, and discharging salt on the stations, and assisting at the construction of a boat which was being built by a brother of the said partners of the appellants' firm. (11) Robertson, as skipper of the 'Narwhale,' kept a cargo book in which he noted all the work done by the boat, both for the appellants and for other fishcurers. In this book he also entered the work ashore supplied by the appellants to the members of the crew of the 'Narwhale.' (12) On 27th July 1907 the appellants gave instructions to Robertson and Clark to proceed in the 'Narwhale' to Lerwick on 29th July, and to convey a cargo of empty herring barrels from James Mitchell & Sons' barrel factory there to the appellants' fishcuring station at Sandwick. (13) While Robertson and Clark were returning from Lerwick to Sandwick with these barrels on 30th July, Clark got into the small boat in tow of the 'Narwhale' for the purpose of fastening a loosened staple. The small boat capsized, and Clark was thrown into the sea and was drowned. (14) At the close of the herring fishing season in October, Robertson handed the cargo book to the appellants, who collected the freights due to the 'Narwhale' and divided up the gross proceeds made by the boat, in accordance with the arrangement stated in paragraph 7. The charges entered in the cargo book amounted to the following totals at the close of the season—(1) £24, 18s. 10d. due by the appellants for flitting in connection with their fish-curing station; (2) £32, 8s. due by the appellants for landing goods from the steamers of the North of Scotland and Orkney and Shetland Steam Navigation Company; (3) £12, 3s. 9½d. due by other fishcurers at Sandwick for flitting in connection with their curing stations; and (4) £8, 0s. 5d. due by the appellants to individual members of the crew of the 'Narwhale' for work done by them ashore. (15) On 25th October 1907 the appellants sent to the respondent Mrs Elizabeth Murray or Clark a statement of the amount of the earnings due to her son, the said Levie James Clark, at the date of his death, under deduction of accounts incurred to them by him as a member of the crew of the 'Narwhale' and as an individual. In the letter enclosing the statement the appellants wrote—'Our acquaintance of your son was very short, but we were highly pleased with him, and always found him a willing and capable hand.'

The Sheriff-Substitute's *finding* was—"Upon the foregoing facts I found that the said Levie James Clark, while in the employment of the appellants as a hand on board the flitboat 'Narwhale,' was on 30th July 1907 drowned by accident arising out of and in the course of his employment, and

that the respondents, his mother and sister, as both wholly dependent on his earnings, were entitled to receive from the appellants statutory compensation, which I assessed at £150."

The *question of law* for the opinion of the Court was—"Was the late Levie James Clark at the time of his death a workman in the employment of the appellants within the meaning of the Workmen's Compensation Act 1906?"

Argued for the appellants—It was sufficient to exclude the benefit of the Act here that there was no contract of service between the parties. The essentials of a contract of service were (1) power of selection, (2) power of dismissal, (3) payment of wages, and (4) control of workmen by employer—*Cairns* v. *Clyde Navigation Trustees*, June 17, 1898, 25 R. 1021, 35 S.L.R. 808. None of these essentials were satisfied here. The same tests had also been applied in *Hayden* v. *Dick*, November 26, 1902, 5 F. 150, 40 S.L.R. 95; *M'Gregor* v. *Dansken*, February 3, 1899, 1 F. 536, 36 S.L.R. 393; *M'Cready* v. *Dunlop & Co.*, June 16, 1900, 2 F. 1027, 37 S.L.R. 779; *Paterson* v. *Lockhart*, July 13, 1905, 7 F. 954, 42 S.L.R. 755. The contract was not one of service, but either of hire of the boat, the rent being one-third of the receipts, or of partnership for a joint-adventure between the men and the owners of the boat, each getting a share of the profits, which was in itself *prima facie* evidence of partnership in terms of the Partnership Act 1890 (53 and 54 Vict. c. 39), sec. 2 (3). The remuneration here was not wages—*Gill* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1908 S.C. 328, 45 S.L.R. 247. If any loss had occurred on any contract undertaken by this boat, the general fund in which all participated would have had to bear it. The whole facts were consistent with partnership or joint-adventure, but not with service. Even if deceased were held to have been a servant, he was the servant of a joint-adventure in which he himself was a partner, and he was therefore not entitled to compensation—*Ellis* v. *Joseph Ellis & Co.*, [1905] 1 K.B. 324. In any event, the burden lay upon the respondents of showing that the deceased was a workman in the sense of the Act—*Vamplew* v. *Parkgate Iron and Steel Co.*, [1903] 1 K.B. 851.

Argued for the respondents—The whole facts here were favourable to the theory of service rather than to hire of the boat or to joint-adventure. At all events, the position of the deceased sufficiently satisfied the conception of "employment" in section 1 of the Act—*Paterson* v. *Lockhart*, *supra*, *per* Lord M'Laren, 7 F. 957. There was nothing in the nature of a charter of the boat, so it could not be said to have been hired to the men, and there were no elements of joint-adventure or partnership in the facts stated by the Sheriff-Substitute—Bell's Prin., secs. 392-396. There was no contribution to capital of the adventure by the men, who were not subject to losses, expenses, &c. They received shares of gross earnings, an altogether different thing from profits, which might have afforded *prima facie* evidence of partnership under the Partnership Act 1890, sec. 2 (3). *Evans* v. *Penwyllt Dinas Silica Brick Co.*, November 13, 1901, 18 T.L.R. 58, was an authority to the effect that a man paid by piecework was entitled to compensation under the Act.

LORD M'LAREN—This is a carefully prepared stated case under the Workmen's Compensation Act 1906 coming from the Sheriff Court of Zetland, and the question raised is this—"Was the late Levie James Clark at the time of his death a workman in the employment of the appellants within the meaning of the Workmen's Compensation Act 1906?" The actual contract on which this man Clark was engaged when he was drowned was one under which his services had been engaged by another boatman, Robertson, on behalf of the common principals, the appellants, to work a boat belonging to them, which was to be used to carry produce and other cargo connected with the fishing industry, and also to land cargo at Sandwick from the vessels of the North of Scotland and Orkney and Shetland Steam Navigation Company. *Prima facie* this is very like a contract of service. The one party is the owner of the boat, the others are to work it. The owners were entitled to send the boat where they pleased, and when there was no work for the boat they were to provide work for the men on shore. But the specialty of the case is that instead of being paid by weekly wages those men were to be paid a share of the gross earnings of the boat. It is said that the remuneration being of that character displaces the *prima facie* aspect of the case, and suggests that the contract was of some other description. Two alternative suggestions have been made. The first alternative is that the boat was hired by the boatmen, and one-third of the earnings was to be paid as rent to the owners. That suggestion was not much pressed, but it was tabled for our consideration. The other alternative, which apparently Mr Constable thought the better view, was that the agreement constituted a joint-adventure between the owners of the boat and the men who were to work it, the profits being divisible between them. I need not say much as to the first alternative—I mean the theory of hiring—because I think the findings of the Sheriff-Substitute are absolutely inconsistent with such a theory. It is clear the owners never intended to part with the possession and custody of the boat. The boatmen were to be under the control of the owners. They were to go to such places and to do such work as the owners should direct. If the men were hirers of the boat it would have been for them to consider and determine where they should go and how they should use the boat to the best advantage. I think, therefore, that the theory of hiring is inadmissible. The theory of joint-adventure is more plausible, but it has no more solid foundation than the other. It would

be a strange kind of joint-adventure in which two out of three joint-adventurers contributed nothing to the capital embarked, and were not liable to contribute anything or to defray any losses which might be incurred. Further, there was here no *delectus personæ*. I allude to the fact that Robertson was to find another man. He was not to report or to bring the man whom he might select to the owners and introduce him to them. One would like at least to see the face of one's partner before entering into a contract of joint-adventure with him. These essential features of a contract of joint-adventure are awanting. Joint-adventure is just a partnership limited to a particular season, or a particular enterprise in which there is either no power in the partners to bind one another or such power is limited to the particular adventure. Only one point remains. Each of these two men, Robertson and Clark, was to receive a share of the gross earnings of the boat, not a share of the profits, for that would have implied deductions for expenses of management, repairs, stores, and perhaps bad debts. But as I read the agreement it is the gross earnings that are to be divided. Now the Partnership Act 1890, which to a large extent is an embodiment of principles of the common law familiar to lawyers, says —". . . [*His Lordship read sec.* 2 (2) *of the Act.*] . . . " The provision is different in the case of sharing profits, because the statute declares as follows—". . . [*His Lordship read sec.* 2 (3) *of the Act.*] . . ." Perhaps this latter provision innovates somewhat upon the case of *Cox* v. *Hickman* (1860), 8 H.L.C. (Clark) 268. But the statement in the leading part of the sub-section is so qualified in the subordinate paragraphs that the sub-section as a whole embodies accurately the distinctions made in the courts as to the effect of participation in profits. But we have nothing to do with sharing of profits, and as regards sharing of gross returns, with which we have to do, this under the statute is not even *prima facie* evidence of the existence of a partnership. I think the framers of the Act were well advised in so providing, because it is known that managers of departments of houses of business are often remunerated by a share of the gross returns of their departments. As sharing in the gross returns of the boat does not constitute a partnership between the persons who share the gross returns, I think this is not a case of joint-adventure. The result is what is sufficiently obvious even to one who is not a lawyer, that this is just a contract of service. That being so, the Workmen's Compensation Act applies, because the exception in section 7 (2) of that Act only applies to the fishing industry. [*His Lordship read the sub-section.*] But then as this was not a fishing boat, and consequently does not fall within the exception, the case falls within the rule which applies the Act to all kinds of service. I am therefore of opinion that we should answer the question in the affirmative and dismiss the appeal.

LORD PEARSON concurred.

LORD DUNDAS—I am of the same opinion, and do not desire to add anything to what has been said.

The Court answered the question in the affirmative and dismissed the appeal.

Counsel for the Appellants—Constable, K.C.—Mair. Agent—Alex. Mustard, S.S.C.

Counsel for the Respondents—M'Kechnie—Malcolm. Agents—Carmichael & Miller, W.S.

Friday, November 6.

EXTRA DIVISION.

[Sheriff Court at Ayr.

FERGUSSON & OTHERS (TRUSTEES OF PRESTWICK ST NICHOLAS GOLF CLUB) *v.* PRESTWICK TOWN COUNCIL.

Burgh—Water Supply — Supply at Meter Rate or at Domestic Water Rate — Golf Club-House — "House" — "Dwelling-House" — Domestic and Ordinary Purposes—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *secs.* 4 (13), 263, 264, 265.

The Burgh Police (Scotland) Act 1892 provides that houses within a burgh shall be supplied with water for domestic and ordinary purposes on certain terms. By section 4 (13) "house" is defined as "dwelling-house." *Held* that a golf club-house was not a house within the meaning of the Act, and that the owners were not entitled to a water supply on the terms applicable to houses.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55) enacts—Section 4, sub-section 13—"'House,' where not otherwise expressed, shall mean dwelling-house, and shall include outhouses and other erections, being pertinents of the house."

Section 263—"Where the commissioners resolve to supply the houses and tenements within the burgh with water for domestic and ordinary purposes, the owners of such houses and tenements shall be entitled to obtain such supply by connecting a service pipe with the main pipes to be laid down by the commissioners. . . ."

Section 264—"No person shall be entitled, without special agreement with the commissioners, to use the water supplied through the pipes of the commissioners, except for domestic and ordinary purposes; but where there is a supply of water more than is required for such domestic and ordinary purposes within the burgh, it shall be lawful for the commissioners to contract with any person or persons within the burgh to supply any public baths and washhouses, works, manufactories, or other premises within the burgh with