an *a fortiori* example of the same view. On the whole matter, while I have no hesitation in rejecting it as a plea in bar, I wish in terms to reserve my opinion as to what the effect of this long lapse of time will be upon the question, how far the pursuer can make out his case.

What I have said as to the weight of these matters in proof applies equally also to the facts which will arise upon what has been called the transaction. There again, although we are repelling the plea as a plea to stop the action, we are far from deciding that the bargain which was arrived at in the Act of Parliament by the persons then alive will not have a most weighty effect in the judgment of the question. Upon the whole matter I think the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR—I concur.

LORD JOHNSTON—I also concur.

The Court adhered.

Counsel for Defender and Reclaimer—Blackburn, K.C.—Macmillan—Maconochie. Agents—Dundas & Wilson, W.S.

Counsel for Pursuer and Respondent—Fleming, K.C.—Macphail. Agents—Tods, Murray & Jamieson, W.S.

Tuesday, February 8.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

CARSWELL *v.* SHARPE AND OTHERS.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13—*Employer—Workman—Co-Owner of Ship Employed as Master by Managing Owner—Right of Master's Dependants to Recover Compensation from Managing Owner.*

A person who owned ten sixty-fourth shares of a trading schooner was employed as master by the managing owner, and met his death while in the course of his employment. *Held*, in the absence of any proof of partnership or joint-adventure in a course of trading, that the master was a 'workman' and his dependants were entitled to recover compensation from the managing owner.

Ellis v. *Ellis & Company*, [1905] 1 K.B. 324, *distinguished.*

Question as to whether a partner employed by the partnership would be entitled to claim compensation from the partnership.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13, enacts—"'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two huudred and fifty pounds a-year . . . but save as aforesaid means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing."

In an arbitration in the Sheriff Court at Kirkcudbright under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between Mrs Robertina Fleming or Sharpe, widow of William M. Sharpe, master mariner, Kippford, Kirkcudbrightshire, and Mrs Janet Aitken or Sharpe, his mother, *pursuers and respondents*, and John Carswell, merchant, Dalbeattie, managing owner of the sailing schooner "Dolphin," *defender and appellant*, the Sheriff-Substitute (NAPIER) found the pursuers entitled to compensation, and at the request of the defender stated a case for appeal.

The following *facts* were found proved or admitted—"(1) The appellant admits—(*a*) that the respondents are the sole dependants of the late William Martin Sharpe, and were wholly dependent upon his earnings; (*b*) that William Martin Sharpe had for fully seven years prior to his death acted as master of the schooner 'Dolphin,' and that his earnings during the three years preceding his death amounted to £234, 16s.; (*c*) that Sharpe died in Liverpool on 7th January 1909, as the result of injuries sustained by him on board the 'Dolphin' the previous day, and while acting in the course of his employment as master thereof. (2) That the appellant was the managing owner of the 'Dolphin,' and as such managing owner, and on behalf of the part-owners, he employed Sharpe to act as master of that vessel. (3) That Sharpe owned ten sixty-fourth shares of the 'Dolphin,' and that the appellant, who owned thirty-three shares, and one other person, namely, John Tait, master mariner, Kippford, who owned twenty-one shares, were the other part-owners. (4) That the 'Dolphin' was not 'hired out,' that is, was not chartered, but was employed generally in carrying cargoes between Dalbeattie and Liverpool. The appellant generally found the cargo for the voyage from Liverpool to Dalbeattie, which was usually consigned to him for the purpose of the business of grain merchant and miller which he carried on at Dalbeattie, and Sharpe generally found the cargo for the voyage from Dalbeattie to Liverpool. . . . (6) That Sharpe performed all the duties and had all the powers of a master of such a vessel as the 'Dolphin'; that he received a fixed remuneration for his services as master; that in addition thereto, that he, the appellant, and Tait shared the profits and bore the losses made by the 'Dolphin' in proportion to the respective shares which they held."

On these facts the Sheriff held that Sharpe was simply a part-owner and master of the 'Dolphin,' and that Sharpe was not a partner of nor did he enter into a joint-adventure in a course of trading carried on by means of the "Dolphin" with the

appellant, nor with the appellant and Captain Tait. He therefore held that the respondents were entitled to compensation.

The *questions of law* for the opinion of the Court were—"(1) Whether the deceased William Martin Sharpe at the time of his death was a workman in the employment of the appellant within the meaning of the Workmen's Compensation Act 1906? (2) Does the fact that Sharpe was a part-owner of the 'Dolphin' debar the respondents from claiming compensation from the appellant? (3) Whether Sharpe at the time of his death was (*a*) a partner of, or (*b*) a joint-adventurer, with the appellant, or with the appellant and Captain Tait, in a course of trading carried on by means of the 'Dolphin'?"

Argued for the appellant—The relation between the deceased and the other co-owners was one of partnership, and if there was partnership, then there could be no liability. Partnership might not follow from joint-ownership, but from the facts found in this case it did. There were two *criteria* of partnership—(1) sharing of profits, (2) mutual agency—Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 2; *Cox* v. *Hickman*, 1860, 8 Clark (H.L.) 268; *Stewart* v. *Buchanan*, October 23, 1903, 6 F. 15, 41 S.L.R. 11. Both these *criteria* existed here. The fact that deceased supplied the cargo at the home port supported this contention, because the authority of the captain, as captain, to get necessaries depended on his being away from the home port—Carver on Carriage by Sea (4th ed.), p. 48; Abbot on Merchant Ships and Seamen (14th ed.), p. 159; "*The Fanny*," 1883, 5 Asp, M.C. 75, *per* Lord Esher, M.R. Joint-adventure was in the same position as partnership. But if there was partnership there was no liability—*Ellis* v. *Ellis & Company*, [1905] 1 K.B. 324. The case of *Ellis* was decided under the Act of 1897 (60 and 61 Vict. cap. 37), but the terms of the Act of 1906 were even more favourable to the appellant's view—Workmen's Compensation Act 1897, secs. 1 and 7; Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), secs. 1 and 13. This, however, would not apply to workmen profit-sharing—*Clark* v. *G. R. & W. Jamieson*, 1909 S.C. 132, 46 S.L.R. 73, and *Gill* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1908 S.C. 328, 45 S.L.R. 247. *Gorman* v. *Gibson & Company*, December 2, 1909, not yet reported—*v. infra*. There the employee was not a partner. The appellant acted as agent for disclosed principals—the registered owners of the ship—and they were the real employers—Bell's Principles (10th ed.), 224A; *M'Donald* v. *Owners of "Banana"* [1908], 2 K.B. 926. There was here really no contract of employer and employed, but merely an arrangement as to the duties of the partner.

Argued for the respondent—Section 7 of the Act of 1906 brought within the scope of the Act masters and seamen if workmen. This led to the definition of "workman" in section 13, and the facts found by the Sheriff-Substitute agreed with that definition. *Gorman* v. *Gibson & Company, cit. sup.*, was an authority for the proposition that where there is a contract of employment made by the managing owner the managing owner is liable. But even if there was a partnership the claim for compensation was not barred. The *ratio decidendi* of *Ellis, cit. sup.*, did not apply to Scotland, because in England a firm had no separate *persona*, whereas in Scotland it had—Partnership Act 1890, sec. 4 (2). A partnership in Scotland therefore was in the same position as a limited company in England, and in *Ellis*, Collins, M.R., recognised that there would in the latter case have been a claim.

LORD ARDWALL—I have come to the conclusion that this case was rightly decided by the Sheriff-Substitute. It appears that the late Mr Sharpe was master and part-owner to the extent of ten sixty-fourth shares of a small vessel called the "Dolphin." So far as I can see, these two characters have nothing to do with each other. He was a part-owner and held and could dispose of his shares independently of his co-owners. But besides being the owner of ten shares he was employed by the appellant to act as master of the vessel. That enables us to answer the first question, because, having regard to the terms of section 7 and section 13 of the Act of 1906, I cannot doubt that he was a "workman" within the meaning of the Act. It is stated in the case that he was employed by the appellant to act as master of the "Dolphin," and accordingly I have no doubt that the first question must be answered in the affirmative.

I must, however, take notice of the argument for the appellant, founded upon the statement that he as managing owner of the "Dolphin," and on behalf of the part-owners of the "Dolphin," employed Mr Sharpe to act as master of that vessel; and it was argued that that brought the present case within the law laid down in the English case of *Ellis* v. *Ellis & Company*, [1905] 1 K.B. 324. This argument would be entitled to consideration if it could be shown that the deceased, in respect of his being a part-owner of the ship or otherwise, was in law a partner of the other part-owners, but for the reasons I shall mention later on I do not think this was so.

Coming to the second question, and putting aside for the time the question of partnership, I am unable to see why the fact that Mr Sharpe was a part-owner of the "Dolphin" should debar the respondents from claiming compensation from the appellant. It was not the part-owners who employed Mr Sharpe as master, but the appellant as is stated in the case, and that statement implies that he selected Mr Sharpe for the post of master, and that he was liable to him for payment of the fixed remuneration for his services as such. The fact that a managing-owner is put in charge of a vessel and manages the same on behalf of the various part-owners, of whom there may be any number up to

sixty-four (see Merchant Shipping Act 1894, section 5, sub-section 2), and when so acting employs workmen in connection with the work of the ship, does not establish the relation of employer and employee for the purposes of this Act between each one and all of the registered owners on the one hand and the workman on the other; it would be absurd if it were to be held to do so, and shipping business could not be carried on on such a footing. This Division of the Court had occasion to consider and decide this matter recently in the case of *Gorman* v. *Gibson & Company*, and it was there held that it was the managing-owners who were the employers of a stevedore's labourer, and not the registered owners of the vessel in the loading of which the accident happened. Of course, ultimately, in an accounting for the profits and losses of the "Dolphin" for the last or the present year, the respondents as part-owners of that vessel will have to bear their share of the loss caused by the compensation found payable in the arbitration out of which this case arose, but that does not affect any of the questions now under consideration.

The third question is, "Whether Sharpe at the time of his death was (*a*) a partner of, or (*b*) a joint-adventurer with, the appellant, or with the appellant and Captain Tait, in a course of trading carried on by means of the 'Dolphin'?" When I try to discover in the stated case what was the course of trading I cannot find it. There was no course of trading carried on apart from the use of the ship. The fact that Mr Sharpe generally found the cargo for the ship on her voyages from Dalbeattie to Liverpool cannot be the foundation for a partnership or joint-adventure between him and the other part-owners, entitling them to bind each other in obligations undertaken in connection with the business of the vessel. Therefore in attempting to argue that there was a partnership or joint-adventure in this matter, the appellant is forced to rely solely on the fact that Mr Sharpe was an owner of shares in the ship along with the appellant and Captain Tait. Now it is quite settled that the fact of persons being co-owners of shares in a ship does not make them partners. They have little power as regards each other, and the majority cannot pledge the credit of the minority against their will, and if they disagree as to the management of the vessel any of them may bring an action of sett and sale for disposal of their shares or of the whole vessel—in short, joint-owners are not partners, but are separate individuals holding definite shares in a common subject, and where there are several of them the subject in which they are all interested is in the ordinary case managed by a manager or managing-owner, who within certain limits is empowered to act for them in the management of the ship, but this does not render them either partners or joint-adventurers.

Accordingly I am of opinion that Mr Sharpe was neither a partner nor a joint-adventurer with the appellant or Mr Tait or one or other or both of them.

I accordingly think that the first question should be answered in the affirmative, and the second and third in the negative.

LORD GUTHRIE—It looked at one time as if this case raised an important general question, namely, whether the decision in the English case of *Ellis* (1905, 1 K.B. 324) could be applied in Scotland in view of the difference between the Scots and the English law of partnership. In *Ellis* there was a partnership, and it was held that one of the partners who had been employed by the partnership, and who had been injured while so employed, could not recover compensation from himself and the other partners under the Workmen's Compensation Act on the ground that a person who is both employer and employed is not a workman in the sense of the Act. If that question arises in Scotland it will have to be carefully considered. In Scotland a firm is a separate *persona*, and it may be a question whether the reasoning of the Master of the Rolls, dealing with the case of an incorporated company, and holding that in that case a shareholder of a company doing work for the company is not in the position of employer and employed, does not equally apply in Scotland to the case of a proper partnership. But that question does not arise here, because I concur in the view that on the facts of the present case no partnership existed between the deceased and the other joint-owners of the ship. I think, therefore, that the questions should be answered as your Lordship proposes.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the affirmative, and the second and third questions in the negative.

Counsel for the Appellant—Hamilton. Agents—Hill, Murray, & Brydon, S.S.C.

Counsel for the Respondents—Chree—J. A. Christie. Agents—Henry Bower, S.S.C.

Thursday, February 10.

FIRST DIVISION.

SNEDDON AND OTHERS *v.* THE GREENFIELD COAL AND BRICK COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of and in the course of his Employment*"—*Miner Leaves Cage at Wrong Level, and is Found Dead, having been Scalded to Death by Exhaust Steam from a Pump—Fact and Law.*

A miner descending by a cage which stopped at only two levels, got out at the higher instead of the lower. He tried to get back into the cage, but it had resumed its descent. He then got down to the lower level by means of a perpen-