COURT OF SESSION.

Wednesday, November 19.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

CAIRNS AND OTHERS *v.* HARRY WALKER LIMITED AND ANOTHER.

Reparation—Actionable Wrong—Wrongful Use of Property—Ship—Sale of Goods on Credit to Ship's Steward for Purpose of Smuggling—Conspiracy to Defraud—Liability of Seller.

A, an outfitter, sold to B, a ship's steward, dutiable goods not required for the purposes of the voyage, which was to a duty-charging port. The goods were sold on credit, payment to be made at the end of the voyage. It was found after a proof that the goods had been bought by the steward for the purpose of smuggling, and that the seller was aware of this fact. The goods having been seized by the Customs officer at the foreign port and a fine imposed on the ship, *held*, in an action of damages at the instance of the shipowners against the seller, that the defenders having been accessory to the wrongful and illegal use of the pursuers' ship for carrying goods on a smuggling adventure were liable in the amount of the fine.

Robert Cairns, shipowner, Leith, and others, registered owners of the steamship "Cairngorm" of Leith, *pursuers*, brought an action against Harry Walker Limited, general drapers and outfitters, incorporated under the Companies' Acts and having their registered office at Grange Street, Grangemouth, and H. Walker, general draper and outfitter, Grangemouth, *defenders*, in which they craved decree against the defenders, jointly and severally, and severally, for payment of the sum of £89, 2s. 6d. and interest thereon, the penalty the pursuers had incurred at Buenos Ayres in respect of contraband goods being on board their ship, to the illegal use of which, *i.e.*, for the purpose of smuggling, they averred that the defenders had, in conjunction with the ship's steward William Post, been accessory.

The pursuers pleaded—"(1) The defenders having conspired with the said William Post to use the pursuers' ship for the purpose of concealing dutiable goods on board, and smuggling them ashore at Buenos Ayres, for the mutual benefit of the said William Post and the defenders, and the pursuers having suffered loss and damage thereby to the amount sued for, decree ought to be granted as craved. (2) The defenders are liable for the loss and damage sustained by the pursuers in respect that they supplied the said goods in the knowledge that the same were to be smuggled. (3) *Separatim.*—The defenders, being aware of the destination of the ship, and that the said goods could not be introduced into Buenos Ayres without payment of duty, and having as unpaid sellers an interest in the goods, were bound to disclose to the pursuers that the said goods were on board the said vessel, in order that duty might be paid on them, and not having done so, are liable in damages."

The defenders pleaded, *inter alia*—"(1) The averments of the pursuers being irrelevant and insufficient to support the conclusion of their summons, the action should be dismissed with expenses. (4) Any goods furnished by the defenders to the said William Post having been sold and delivered by them in the ordinary way of trade, they as sellers are not responsible for the actings of Post which are complained of, and they should be assoilzied. (5) The defenders not being due and owing to the pursuers the sum sued for, or any sum, should be assoilzied with expenses."

The *facts* of the case appear from the opinion of the Lord Ordinary (SKERRINGTON), who on 26th November 1912 found that the defender Harry Walker having been accessory to the wrongful and illegal use of the pursuers' ship "Cairngorm" for carrying goods from Grangemouth to the Argentine on a smuggling adventure, the defenders were liable jointly and severally to the pursuers in damages, which he assessed at £89, 2s. 6d. with interest thereon.

Opinion.—"The pursuers are the owners of the steamship 'Cairngorm' of Leith, which in December 1910 sailed from Grangemouth to Montevideo for orders, under a charter-party which named (articles 1 and 17) Montevideo, Buenos Ayres, and certain other places on the River Plate as the port or ports of discharge. On reaching Montevideo the steamer was ordered to Buenos Ayres, and she there discharged her cargo. While she was lying in that harbour the Custom-House officers found concealed in the steward's cabin and pantry a number of articles which were liable to duty according to Argentine law. These articles were seized, and the ship was condemned to pay a fine equivalent in our currency to £89, 2s. 6d. The receipt given by the Custom-House treasurer bears (as translated) that the fine was imposed upon the steamer 'for failing to declare the goods found concealed in the steward's cabin.' The steward deserted the ship and has disappeared. The articles seized formed part of a large assortment which the defenders had sold to the steward on credit, and which they had delivered to him at the ship's side before she left Grangemouth. The pursuers claim damages from the defenders, whom they allege to have been accessories along with the steward in the wrongful and illegal use of their ship for the purpose of smuggling. The defenders first called are a limited company which carries on business as general drapers, clothiers, hatters, and outfitters at Grangemouth, and the individual defender Mr Harry Walker is their managing director. The defenders' counsel expressly admitted that if Mr Walker had made himself personally liable to the pursuers the limited company was also liable jointly and severally. Accordingly I do

not need to consider whether it was within the scope of Mr Walker's authority to act in the manner alleged by the pursuers.

"Mr Walker, acting for his firm and afterwards for the limited company, has for a number of years sold what are called 'slopchests' to the masters of sailing ships and tramp steamers, and occasionally to stewards, but in the latter case only if the master knew and approved. According to its original and proper meaning, a slopchest is an assortment of slops, *i.e.*, of articles such as clothing, soap, &c., which are likely to be required by seamen while absent from a home port. In the days of sailing ships, when voyages were lengthy, a slopchest was usually carried. It is now much less common, but it is carried on some tramp steamers, and the defenders still sell some in every year. Sometimes if a slopchest is carried, the master or steward, as the case may be, orders some goods which are not intended to be sold to the ship's company, but which are intended to be sold to the inhabitants of any port where the ship may happen to touch. Presumably in such cases the shipmaster acts upon the assumption that his owners would not object to petty trade of this kind. At anyrate no one could blame a shopkeeper merely because he did not communicate with the owners before supplying a shipmaster with a few trade goods as distinguished from slops. But if the shopkeeper knew that the goods were intended to be smuggled into a foreign country by means of a particular ship, and if he delivered the goods on board that ship or contracted that they should be carried by it, and that he should be paid the price out of the proceeds of the sale, he would in my opinion be an accessory to the commission by the master of a wrongful and illegal act, unless of course he in fact believed that the owners approved of such a use of their ship. I refer to the summary of the criminal law as to accession given in Macdonald's Criminal Law (3rd ed.), p. 6, and I see no reason why a different rule should apply in the case of a civil delict. A servant who, for his own purposes and without permission, makes use of his master's property in a manner calculated to cause him serious loss or even inconvenience is guilty of a breach of contract and also of a positive delict, because he is certainly in no better position than if he had been a mere stranger who used the property of another without permission. According to Bell (sec. 479) it is barratry on the part of a shipmaster if he 'enters into any smuggling concern or evades duties to the loss of the ship.' In the present case the only question in my view is whether the pursuers have proved that the defender Mr Walker knew that the steward intended to smuggle into the Argentine a portion of the contents of the so-called slopchest. Though it is not necessary for me to decide the point, I am disposed to think that it would be enough for the pursuers to prove that Mr Walker did not in fact believe that the steward intended to pay or arrange for the payment of duty upon any of the dutiable goods which he might sell in a foreign port to persons other than members of the ship's company.

"The price of the slopchest which the defenders sold to the steward amounted to £96, 3s. 8½d., and I think that both the value and the quantity of the goods were greatly in excess of what is usual. Further, the quantity was out of all proportion to what could have been required by a company of twenty-four during a voyage which was to last little more than a month. The largest items in the invoice were for waterproof coats, which are not the same as the oil-skins used by seamen. . . . In addition to the articles which the defenders stock, Mr Walker, by special request, procured from Glasgow a quantity of cheap watches and jewellery. . . . Such articles are not usually included in a slopchest, and it was out of the defenders' ordinary course of business to procure and sell them. As regards the nature of the contract between the defenders and the steward, there is no evidence to support the pursuers' averment of joint-adventure. I am disposed to think that the contract was really one of sale and return, such as is often made by a wholesale dealer when he provides a small shopkeeper with a certain quantity of stock. In the absence, however, of any notice on record or of any questions to Mr Walker at the proof as to the time at which he intended that the property in the goods should be transferred to the buyer, it would not be legitimate for me to decide that the goods when seized at Buenos Ayres were the property of the defenders. Even on that assumption the steward's possession of the goods would have been as prospective purchaser and not as the defenders' agent, so that the pursuers would still have required to prove guilty knowledge on the part of Mr Walker. I assume, however, that the property of the goods was transferred to the steward as soon as the articles had been selected and purchased. None the less the contract was peculiar in respect that the steward was to have credit until the ship returned to her first English port, the object being to enable him to pay for the goods out of the proceeds of the trading. Miss Mackenzie, who was one of the defenders' saleswomen, deponed — '(Q) Was it the understanding that Post should pay for these goods when he had traded with them? — (A) I understand on the arrival of the ship, or else when the ship came back to an English port. Mr Walker said that at the time the slopchest was made up. He said it was to be paid for with the proceeds of the trading. It was the understanding that when Post had sold these goods and made his profit, he was to pay us with the proceeds of these goods.' The important point about this evidence is that the credit was given upon the footing that the goods should leave Grangemouth in the pursuers' ship, and I regard that as a term of the contract. Though I decide the case on the assumption that the steward had no legal right to return any goods which he had been unable to sell, Mr Walker deponed that he would probably have been willing to

take back any such goods. Obviously Mr Walker, though not technically a partner in the adventure, had a direct interest in its success. He deponed that the shipmaster verbally guaranteed to see him paid, but that meant nothing more than that the master promised not to allow the steward to be paid off without seeing that the debt to the defenders had been provided for. Accordingly Mr Walker arranged with the master that he was to be informed of the date and port of the ship's arrival in England, in time to enable him to travel there and get payment of his money. Newport, Mon., was mentioned by the master as being probably the first home port. It will be noticed that the master knew that the steward was buying a slopchest, and that is a strong point in favour of Mr Walker, as he was entitled to trust that the master would restrain any smuggling propensities which the servant might develop in the course of the voyage, and that the master would also personally see that all legal requirements were complied with, so as to protect the goods from seizure and the vessel from being fined in a foreign port. On the other hand, if there is evidence to prove complicity between Mr Walker and the steward, one must assume that the latter informed the former of his reasons for believing that there was a fair prospect of success in smuggling the goods into the Argentine. For this purpose it was necessary either to deceive the master into believing that the bulk of the articles had been sold to the crew before the arrival of the ship in the Argentine, or alternatively, it was necessary to make the master an accomplice. In point of fact, out of the whole contents of the slopchest the manifest declared only 20 waterproofs. It ought to have declared in addition the articles detailed in the list annexed to the receipt by the Custom-House treasurer, and also a number of other articles which the steward sold to persons who came on to the ship at Buenos Ayres during the few days between the first visit of the Custom-House officers and their second visit, when the seizure was made. I do not express any opinion as to how it came about that the master signed a false manifest. He deponed that he was deceived by the steward, and as he had no opportunity of cross-examining the witnesses, it would be unfair on my part to express any opinion to the contrary. In any case the procuring of a false manifest was a natural incident to the smuggling adventure initiated by the steward. If Mr Walker was a party to that adventure, the pursuers are, in my judgment, entitled by way of damages to the sum sued for, £89, 2s. 6d.

"Apart from some hearsay evidence of statements by the steward, which, of course, are inadmissible as evidence of complicity on the part of Mr Walker, there is no direct evidence that he knew that the steward intended to smuggle any of the contents of the slopchest, and one must start with a strong presumption in favour of his innocence. But this presumption may be, and in my opinion has been, completely rebutted by the inferences to be drawn from the character of the mercantile adventure, from Mr Walker's conduct when he was first charged with having smuggled, and from his testimony and demeanour in the witness-box. Of course he is not to be found guilty of using the pursuers' ship for the purpose of smuggling merely because he entered upon a speculation which, if it was innocent, was unbusinesslike and foolish, or because he wrote an uncandid letter to the pursuers' solicitors. Business men do occasionally make foolish speculations, and innocent men have not always the moral courage to speak the truth. After seeing Mr Walker and hearing his explanations, I am quite satisfied that he was not innocent, but that, on the contrary, he was aware of the steward's scheme, and that the sale would not have taken place unless he had known that the steward saw his way to open a profitable market for a large part of the goods by smuggling them into the Argentine. It is proved that the steward could speak Spanish, and that he boasted after the ship had sailed that he knew the officials at Buenos Ayres and how to bribe them. According to Mr Walker's evidence he himself neither inquired nor knew, nor cared when, where, or how the steward intended to dispose of the goods. He knew nothing as to the steamer's destination except that he understood that she was going to Las Palmas for orders, after which she might be absent for an indefinite time sailing from port to port as the owners might arrange. He explained that if she was away for a long time the bulk of the goods might be sold to the crew; or again, she might touch at a duty-free port; or if she touched at a tariff port, the steward might get an advance from the master in order to pay the duties on any goods which he wanted to sell on shore; or he might arrange with a purchaser to pay the duties. All these were matters as to which Mr Walker felt no interest or even curiosity at the time when he handed over goods to the value of £100 to a complete stranger upon credit. In cross-examination, when confronted with the letter quoted below, Mr Walker had to admit that the steward had said that he had a friend out at the River Plate who could do with some ladies' mackintoshes if the steward could take them out. The letter, which was addressed to the pursuers' London agents in reply to their letter intimating the present claim, was as follows:—"Yours to hand *re* 'Cairngorm.' The steward, as customary in deep-water steamers, bought certain goods as a slopchest to supply crew on voyage and never mentioned the word smuggling. He also bought some mackintoshes, which he said were for a friend of his in the Argentine. I have no arrangement or connection with it in any shape or form. It was purely a business transaction, same as we have had for over twenty years, and I will be sorry to hear that either the owners or anyone else should lose through him. I have a balance of account to get, as he had not sufficient cash to pay all when here. I repudiate any liability.' This letter falsely suggests that,

apart from the mackintoshes, the goods were all of the kind which it is customary to supply to a crew on voyage, and it falsely states that the transaction, so far as concerned the writer, was of an ordinary character. It also falsely suggests that the steward had made a payment to account of the slopchest. Mr Walker's explanations as to this letter were unsatisfactory. As my decision depends upon considerations of credibility, I do not refer to the evidence in greater detail.

"The defenders having been parties to the wrongful and illegal use of the pursuers' ship for carrying goods from Grangemouth to the Argentine, have infringed the pursuers' legal right and must pay damages. Even if no fine had been imposed on the ship, the case would not have been one for merely nominal damages—"*The Mediana*," 1900, A.C. 113. I have already stated that in my view the imposition of a fine upon the ship was a natural consequence of Mr Walker's wrongdoing. The defenders' counsel argued that even assuming that Mr Walker had been privy to the steward's scheme, he committed no wrong, or at least no wrong inferring liability to compensate the pursuers for the imposition of the fine. He argued that there was no competent evidence of the existence of a tariff at Buenos Ayres or of the goods being dutiable. The alleged Custom-House officers might have been brigands. Again, the ship was fined not for attempted smuggling, but in respect of the master's failure to declare the goods. It was the master's duty to enter all dutiable articles in the manifest of stores, and his failure, whether innocent or wilful, to perform this duty was the proximate cause of the ship being fined. Counsel further argued that the natural method of smuggling goods into Buenos Ayres was not to conceal them as was done by the steward but to declare them in the manifest. The receptacle containing the goods would then be sealed by the Custom-House officers, but a single officer might break this seal when stores were required for use. In return for a bribe the goods might be smuggled ashore without risk to the ship, though the actual smuggler might be punished if he was caught. I have mentioned these arguments in order to show that I have considered them, but I do not think it necessary to answer them.

"I give decree for the sum sued for, with interest as part of the damages."

The defenders reclaimed, and argued—The defenders were simply unpaid sellers of the goods, and an unpaid seller of goods could not be made liable in respect of the subsequent illegal actings of the purchaser, unless it were proved that he had entered into a conspiracy or a known form of joint adventure with the latter. Such a conspiracy in the present case could not be established unless the complicity of the captain were proved, and for this there was no evidence. On the other hand, the present case was clearly not one of joint adventure. Reference was made to Macdonald on the Criminal Law of Scotland, p. 6.

The pursuers were not called upon.

LORD SALVESEN—In this case I have come to the conclusion that the Lord Ordinary is right, and that in the finding in the interlocutor under review he has put his judgment upon the right ground.

The facts so far as material are that the defenders seem for many years to have carried on a business of supplying to shipmasters and members of crews of ships which are going on long voyages what are known to them as "speculative slopchests." The meaning of "slopchest," when slopchests were in general use, was quite well known amongst persons in the seafaring profession. The slopchest contained a number of articles that were likely to be used by the crew on the voyage, and with which they might not have adequately supplied themselves before the voyage commenced, and in order to prevent inconvenience to the crew it was customary for the captain with his owners' consent to purchase a slopchest, from which the crew's wants were supplied from time to time. But it is clear—indeed it was not seriously disputed—that the so-called speculative slopchest that was supplied to the steward in this case was not a slopchest of that kind. It consisted of a great many articles which could in no sense be regarded as reasonably required by the crew in the course of the voyage, but was professedly a collection of articles to be used by the steward in trading. The defenders say that they have frequently supplied similar articles for trading purposes to masters of ships going on long voyages, and that in these transactions they treat the master as if he were the owner, and do not concern themselves with the question whether the owners consent to their master being a trader as well as a navigator. I think the clear implication of that is that the defenders are perfectly well aware that in the ordinary case the owners of a vessel would not sanction their master buying quantities of goods in this country for disposal at the ports to which the vessel may be destined, on the footing that these are to be carried on the ship free of freight for the master's benefit, still less would they sanction their master purchasing such goods if they could only be advantageously disposed of on the footing that they must be smuggled into a port where there is a duty upon them. If that applies to the master, it applies with all the greater force to the steward of a vessel like this. The defenders in this case seem to have taken the master into their confidence too, and I think for a very obvious reason. Unless the master sanctioned the carrying of these goods by the steward the whole adventure would be frustrated, because he would in all probability come to know of such goods having been brought on board, and could interfere with the steward in disposing of them. Accordingly, as I read the evidence here, I think it is plain that the master from the first was conniving at the scheme of the steward to purchase the goods on credit from the defenders with the inten-

tion of smuggling them into a port and there disposing of them for his own benefit.

Now perhaps that by itself would not be sufficient to attach liability to the defenders, but I think that they throughout had an interest in this adventure. They could not have got the goods sold unless they had supplied them upon credit, because the steward was a person of no means. He was also a person whom they so little trusted that they had in their mind from the first that they would have to go and meet him at the first port at which he had arrived in this country in order to make sure that he paid them the price of the goods with which they had supplied him. That does not indicate that they had any exuberant confidence in his honesty. But the goods would not have been supplied without their intervention, because apparently the steward could only get credit from them or from somebody who was prepared to take the same risk as they were. Their interest therefore in the transaction was this, that they were supplying goods on a large scale to a man of no means at cash prices—no doubt without giving him the discount that is generally given on such a large order for cash—and they expected that the steward, having realised the goods at prices largely beyond the sale price, would account to them for the price at which he had bought them. In all this the defenders seem to have taken no account of the persons who were mainly interested, to wit, the pursuers. They were putting goods on board the vessel of these pursuers, as I hold, in the knowledge that they were to be traded with by the steward, and in the knowledge that, in order that the trade might be successful, the goods would have to be smuggled into the port to which the vessel was destined. I find therefore no fault with the Lord Ordinary's view that the defender Harry Walker was accessory to the wrongful and illegal use of the pursuers' ship "Cairngorm" for carrying goods from Grangemouth to Argentina in a smuggling adventure. That is the inference that I think may be legitimately drawn from all the facts that are proved in this case; and the inference is not displaced by the denial of Mr Walker, because the Lord Ordinary thinks that reliance cannot be placed upon his evidence, and he gives reasons for the conclusion at which he arrives on that subject.

If that be the true inference to be drawn from the facts as a whole, then I think the legal result is clear. Mr Mackenzie Stuart had to admit that the steward would have been liable for the sum sued for, and if the defenders were accessory to his illegal and unwarrantable actings they incurred the same liability. They were not merely accessories in the ordinary sense, but without them the adventure could not have been embarked upon at all. It was the goods which they supplied at the steward's request which, not having been entered in the manifest, were discovered at Buenos Ayres, with the result that a fine was imposed upon the vessel; and I think the reason why the goods did not enter the manifest was that the captain from the first was a party to the whole scheme, no doubt having a promise of some consideration from the steward in the event of the adventure being successfully carried through. I cannot otherwise understand the evidence of the first mate, who was examined on commission, and who speaks in great detail to what passed at Buenos Ayres when the seizure was made. The captain did make a partial disclosure in the manifest of the goods. I think the fact that he made that partial disclosure, looking to the other evidence that we have from the defenders' witnesses—*e.g.*, that he had been himself engaged in the selection of the goods—is extremely significant, as showing his complicity in the matter from the first.

That being the view which I take, and which the Lord Ordinary has also taken, of the evidence, I think the defenders must bear the consequence. It is perfectly true that it is not illegal to sell goods to a customer who informs the seller at the time that he intends to smuggle them; but it is a totally different thing if the seller sends goods on board a vessel belonging to the employer of the person who has conveyed to him the information that he intends to smuggle them and to use that vessel for the purpose. The seller thereupon makes himself a party to the wrongful use of the pursuers' vessel; and as the defenders acted in this way, and continued to have an interest in the adventure up to the end, it is but just that they should suffer the consequences that through their means have been brought upon the pursuers.—[*His Lordship then dealt with a question with which this report is not concerned, deciding that a deduction of* £3, 12s. *should be made from the Lord Ordinary's award for certain goods declared in the manifest and left on board the vessel.*] Accordingly I think we should adhere to the interlocutor reclaimed against, with the small variation as to the sum to which I have referred.

LORD DUNDAS—I entirely agree with the opinion which has been delivered and do not desire to say anything more.

LORD GUTHRIE—I am of the same opinion. The Lord Ordinary has found in fact that the defender has been accessory to the wrongful and illegal use of the pursuers' ship "Cairngorm" for carrying goods from Grangemouth to the Argentine on a smuggling adventure, and he has held in law that in those circumstances the defenders are liable jointly and severally to the pursuers in damages. The interlocutor is traversed by the defenders both in fact and in law. They argued that the Lord Ordinary's finding in fact was not well founded, and that even if it were well founded in fact, the Lord Ordinary's conclusion in law does not follow, because it would only be if there were a known form of joint-adventure that the defenders would be liable. I think the reclaimers are wrong on both points.

The Lord Ordinary starts with the ordi-

nary presumption in favour of the defender Harry Walker's innocence. He thinks, however, that this presumption is rebutted from (1) the character of the mercantile adventure, (2) Walker's conduct when first charged with smuggling, and (3) his testimony and demeanour in the witness-box. The Lord Ordinary says — "My decision depends upon considerations of credibility." I prefer to put my opinion on the lines suggested by Lord Salvesen in the course of the argument, namely, on what the Lord Ordinary calls "the character of the mercantile adventure," and the irresistible inferences therefrom, unless displaced by the reclaimers by their witnesses and documents. So far from the inference being rebutted, it seems to me confirmed by the oral evidence of the reclaimers and their witnesses and by the documents produced. As to the character of the adventure, it is noticeable that although the reclaimers have been engaged for years in trade similar to the trade in question in this case, no evidence of merchants has been brought to show that this is an ordinary kind of trade. It is on the face of it a very curious kind of trade. The person to whom the goods are sold for trade purposes is the steward of the ship. So far as trade on board is concerned, that is natural. But so far as the trade on shore is concerned, it is clear that he is in an exceptionally favourable position for smuggling. He is a member of the crew who sticks to the ship throughout the length of the voyage, and he is a man who can go backwards and forwards to the shore in a way that an ordinary seaman cannot do. In this particular case the steward was a man who knew the Spanish language, and he knew some of the officials at the port of Buenos Ayres. Then it appeared from the nature of the goods that a very large proportion of them would be sold not on board but on shore. The ship was known to be going to what I think we must assume were duty-charging ports. The captain of the ship was interested in the result, and therefore had a direct motive to omit the goods from the manifest and thus to evade the payment of duty. Mr Walker himself says—"What I suppose is that the captain and the steward share their slopchest as a rule." Lastly, the sale was on credit, and credit of a very curious kind. It is said that the voyage might have lasted more than a year, so that it came to this, that the steward was getting goods at cash prices on a credit of possibly two years. If that is so, then Mr Walker had a very direct interest in the adventure, and I think the result of the whole case is to lead to an inference from the nature of the transaction which the defenders have failed to rebut. Perhaps a key to the whole case may be found in Mr Walker's view to the effect that "we look upon the captain as owner, and we never think of the owner." Clearly the captain's mandate could never bind the owners in a transaction of this kind.

LORD JUSTICE-CLERK—I agree with the opinion which your Lordships have expressed. I came very early, in the course of the speech of Mr Mackenzie Stuart, to the conclusion that unless something more was shown, it must be held that Captain Magub, the master of the vessel, and Mr Walker had both come here, not as candid witnesses, but, as I venture to say, untruthful witnesses. If we wish to be sure that there is no mistake about that — because sometimes witnesses express themselves badly and do not say exactly what they mean, although I do not think this is a case of that kind—I think it is only necessary to refer to two of the letters produced. In one Captain Magub writes to his owners upon the footing that he never knew that the stuff was on board his vessel — "It appears that a man by the name of Walker" —indicating that he wishes it to be understood that he knew nothing about him— "who has a tailor's shop in Grangemouth, let him have all this stuff." If anything is conclusively proved in this case it is that Captain Magub was himself a party to the stuff being got at Walker's and put on board his vessel. He writes—"I thought all my papers were in order, little thinking I had such a rogue on board." I am afraid there was more than one rogue on board. Then as regards Messrs Walker, we have this letter from H. Walker—"The steward, as customary in deep-water steamers, bought certain goods as a slopchest to supply the crew on voyage"—the slopchest consisting among other things of 84 shirts and 82 pieces of jewellery, the value coming to about £100, in the case of a crew which only numbered 24—"and never mentioned the word smuggling." I have no doubt that this is about the most true statement in the whole letter. It was quite unnecessary to mention the word in order that it might be understood what was being done. He goes on to say—"It was purely a business transaction, same as we have had for over twenty years, and I will be sorry to hear that either the owners or anyone else should lose through him. I have a balance of a/c to get, as he had not sufficient cash to pay all when here." In point of fact there is not the slightest doubt that he never paid a penny for these goods before the voyage began, and the very fact that the defenders applied to the captain to let them know at what home port they would arrive is proof positive that no money had been paid for these goods. I need not go further into the matter. I agree with all that Lord Salvesen has said, but I wished to state my reasons for thinking we have not a truthful statement on the part of the defenders. That throws considerable light on the question whether the defenders were accessories to what was done. As to that I have no doubt, and I am of opinion that they are liable in terms of the conclusions of the summons.

The Court refused the reclaiming note; varied the interlocutor of the Lord Ordinary by finding that the damages found due amounted only to £85, 10s. 6d.; *quoad ultra* adhered to the said interlocutor, and decerned.

Counsel for the Defenders and Reclaimers —Roberton Christie—Mackenzie Stuart. Agent—C. Strang Watson, Solicitor.

Counsel for the Pursuers and Respondents —Lippe—J. G. Jameson. Agents—Boyd, Jameson, & Young, W.S.

Saturday, November 29.

FIRST DIVISION.

[Sheriff Court at Glasgow.

FRASER *v.* JOHN RIDDELL & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising "out of" Employment—Fall from Footplate of Engine—Finding by Arbiter that Deceased was under the Influence of Drink and Unfit for Work at the Time of the Accident.*

An engine-driver while driving a traction engine fell off the footplate and was fatally injured. At the time of the accident he was under the influence of drink and unfit for his work. In an application for compensation at the instance of his widow the arbiter drew the inference that the fall was due to the deceased's intoxicated condition and refused compensation, holding that while the accident arose "in the course of," it did not arise "out of" the deceased's employment.

Held, on appeal, that the accident had arisen "out of" the deceased's employment, and that accordingly the claimant was entitled to compensation.

Mrs Agnes Turner or Fraser, widow, 80 South Portland Street, Glasgow, for her own interest and also as tutor for her pupil children, *appellant*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VIII, cap. 58) from John Riddell & Company, contractors, Bishopbriggs, *respondents*, in respect of the death of her husband James Fraser, engine-driver there, who was fatally injured while in the service of the respondents. The Sheriff-Substitute (MACDONALD) refused compensation, and at the claimant's request stated a Case for appeal.

The *facts* were as follows—"1. On 26th March 1913 the deceased James Fraser was a traction engine-driver in the employment of the respondents John Riddell & Company. 2. About 11·30 p.m. on said date, while driving a traction engine belonging to the respondents in Bilsland Drive, Maryhill, Glasgow, he fell off the footplate on to the roadway. 3. One of the wheels of a waggon attached to the engine passed over him. 4. As the result of the injuries he received he died on the following day. 5. When he commenced his duties on the said date, and when he was last seen prior to the said accident by any person in authority over him in his employment, he was sober. 6. At the time of the said accident he was under the influence of drink and was unfit for his work. 7. The appellants were dependent upon him at the time of his death."

The Sheriff-Substitute further stated—"Apart from his intoxicated condition, there was nothing proved which would account for the deceased's fall off the engine, and I drew the inference that it was due to his intoxicated condition. I held that while the said accident arose in the course of, it did not arise out of the deceased's employment, and I found that the respondents were not liable to pay compensation to the appellants."

The *question of law* was—"Whether upon the evidence I could competently find that the said accident did not arise out of the employment of the deceased within the meaning of the Workmen's Compensation Act 1906?"

Argued for appellant—*Esto* that the deceased was drunk at the time of the accident, that was not enough to deprive the appellant of compensation. To exclude it the deceased must at the time have been doing something entirely without the ambit of his employment, and thereby exposing himself to an "added peril," *i.e.*, to a risk not involved in or incidental to his contract of service—*Barnes* v. *Nunnery Colliery Company, Limited*, [1912] A.C. 44; *Watkins* v. *Guest, Keen, & Nettlefolds*, (1912) 5 B.C.C 307; *Revie* v. *Cumming*, 1911 S.C. 1032, 48 S.L.R. 831. There was no exposure here on the part of the deceased to any risk not incidental to his employment, and unless that were so the defence of serious and wilful misconduct was irrelevant where, as here, death had resulted from the accident—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (2) (*c*); *Mawdsley* v. *West Leigh Colliery Company, Limited*, (1911) 5 B.C.C. 80; *Harding* v. *The Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747; *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632; *M'Lauchlan* v. *Anderson*, 1911 S.C. 529, 48 S.L.R. 349. The cause of death was the fall, which might have been due to a stumble. There was no finding that it was due to intoxication, though the arbiter had drawn the inference that it was so. *Esto* that the appellant must prove that the accident arose out of the employment—*O'Brien* v. *The Star Line, Limited*, 1908 S.C. 1258, 45 S.L.R. 935—she had done so here, for what the Court had to look to was the "proximate cause" of the death, viz., the fall from the footplate—*Wicks* v. *Dowell & Company, Limited*, [1905] 2 K.B. 225. The case of *Frith* v. *S.S.* "*Louisianian*," [1912] 2 K.B. 155, was distinguishable, for there the deceased was so drunk as to be totally incapable. He never got back to his employment at all.

Argued for respondents—The question whether an accident had arisen "out of" the employment was one of fact on which the arbiter was final, unless he had misdirected himself in law or drawn an unreasonable inference from the facts. There was here no evidence of the cause of death apart from intoxication, and that being so the arbiter was entitled to find as he did.