

Tuesday, June 1.

## SECOND DIVISION.

[Justice of Peace Court,  
Lanarkshire.]

EWER v. BOARD OF TRADE.

*Shipping Law—Master—Neglect of Duty.*

Circumstances in which a master's certificate was suspended on the ground that he had neglected his duty.

The certificate of William Ewer, master of the steam-ship "Carfin," Glasgow, having been suspended for six calendar months after formal investigation under the Merchant Shipping Acts 1854 to 1876, on the ground that from want of proper and seamanlike care the ship had been stranded on the Gantock Rocks off Dunoon, Firth of Clyde, on or about 20th March 1880, he appealed to the Court of Session under section 2 of the "Shipping Casualties Investigation Act 1879," 42 and 43 Vict. c. 72, and the Shipping Casualties (Appeal and Rehearing) Rules 1880, craving that the decision pronounced in the investigation, so far as it suspended his certificate, should be recalled.

The said investigation was held at Glasgow on the 22d, 23d, and 26th of April 1880 before two of Her Majesty's Justices of the Peace for Lanarkshire, assisted by two nautical assessors, and after evidence had been adduced by the Board of Trade the Court found—"(1) That at the time the master left the vessel in charge of the first mate, when passing the Cloch Light, a proper course had been set, but was not afterwards steered.

"(2) That the master was not on deck at all times when the safety of the vessel required his personal supervision, inasmuch as he left the deck while the vessel was in a narrow channel in somewhat hazy weather.

"(3) That the master was not justified in leaving the bridge in charge of the first mate at the time and in the circumstances in which he did.

"(8) That the vessel was not navigated with proper and seamanlike care."

The circumstances with reference to which these findings were given were as follows:—The iron screwsteam-ship "Carfin," left Glasgow on the 19th March 1880, at about 11.30 p.m., bound for Bilbao. She was under the command of William Ewer, who held a master's certificate of competency, and who had very considerable experience in the navigation of the Clyde. Her crew consisted of 24 hands, including the master and two mates, who also held certificates from the Board of Trade. After the pilot had been discharged at Greenock at 3 a.m. on the 20th March, the master himself took full charge of the vessel, as no watches had been set up to that time, and the vessel steamed down the river on a flood tide at about 8½ knots an hour, the weather being somewhat hazy. After passing Gourrock Point she came abreast of the Cloch Light at 3.56 a.m. The channel at this point is a narrow one, the distance between the Cloch and the Gantocks being a mile and a quarter. The first mate now informed the master that there was something wrong with the second mate, who was below in his cabin in an apparently stupid condition. Determining to summon that

officer himself, the master left the first mate in charge of the vessel, ordering him to keep the ship's head steady, as she was then going S.S.W., which was the proper and safe course to steer down the river, and then went below. In 4 or 5 minutes he returned, and as he was at the foot of the bridge he heard the look-out man forward call out that the vessel was on a beacon, and at the same moment the mate called out to port the helm. On reaching the bridge he found the engines had been stopped, and he ordered them to be reversed at full speed. A few moments after the vessel struck on the Gantock Rocks off Dunoon, and when she was got off on the 25th March she was found to be materially damaged.

Their Lordships, who on hearing the case were assisted by two nautical assessors, unanimously affirmed the judgment appealed against, expressing an opinion that while peculiar circumstances might occasionally, as in this case, press hardly on a good seaman, it would be inexpedient to relax the general rule of law, that as life and property depend on the proper and skilful management of the ship, the officer in charge at the time must not when the weather is hazy or the channel narrow leave his post unless compelled by unavoidable necessity.

Counsel for Appellant—Asher—A. J. Young.  
Agent—A. Duncan, S.S.C.

Counsel for Respondents—Solicitor-General (Balfour)—Trayner. Agent—David Turnbull, W.S.

Friday, June 4.

## SECOND DIVISION.

[Lord Rutherford Clark,  
Ordinary.]SINCLAIR, MOORHEAD, & COMPANY v.  
WALLACE & COMPANY.*Agent and Principal — Powers of General Manager.*

An agent invested with all the general powers of agents managing a mercantile business, borrowed on the credit of his employers a sum of money for which he granted a bill of exchange blank in name of the drawer, accepted by him *per pro.* of his employers, and antedated six months prior to date of loan. In a suspension of a charge to pay the same brought by the principals, *held (rev. Lord Rutherford Clark)* that in the absence of express powers to borrow, a general agent representing the firm has no implied powers of so extensive a character and charge suspended.

*Agent and Principal — Fraud — Benefit to Principal.*

L., a general agent for a mercantile firm, received a loan of a sum of money for which he gave a bill of exchange, accepted by him *p. pro.* of his employers. He then handed the sum so obtained to T. in part payment of a larger sum borrowed from him, and placed the balance so borrowed to the credit

of his employers in bank. L. was largely indebted to his employers. *Held (rev. Lord Rutherford Clark)* that his employers were not *lucrati*, and therefore were not liable to the holders of the bill.

Messrs Sinclair, Moorhead, & Company were produce merchants in Glasgow, where the partners resided, and where the greater part of their business was conducted. They also had a branch establishment in Dundee, where they were represented by William Low, who under procuration had power to grant and subscribe receipts, discharges, vouchers of every kind in the name of the firm, and also to draw and accept, endorse, and discharge on their behalf bills, promissory-notes, cheques, and other obligations. On the 4th December 1879 Low applied to Mr David Stewart, one of the partners of the firm of John Wallace & Company, iron and steel merchants, Dundee, for a loan of money on the credit of his principals Sinclair, Moorhead, & Company, and received the sum of £200 in return for a cheque on the firm dated two days forward. On the 8th December he received another advance in the same way for £300, giving in exchange two cheques for the amount, dated two or three days still further forward. On the 13th December he received a third cheque for £150, for which he gave a cheque on the Capital and Counties Bank drawn in favour of the firm, and endorsed "*p. pro.* Sinclair, Moorhead, & Company—William Low." Lastly, on 26th December 1879 he received the sum of £150, in return for which he granted an I O U for £150 in the name of his principals, *p. pro.* of himself, and an acceptance of W. R. R. Thomas & Company, merchants in Dundee, to Sinclair, Moorhead, & Company, *p. pro.* W. Low, for £100 as collateral security. Thereafter he handed Mr Stewart a bill of exchange dated 15th November 1879, for £150, accepted in name of Sinclair, Moorhead, & Company, *p. pro.* W. Low, the drawer's name being left blank. Having then received this advance of £150, he proceeded to hand it over to a Mr Thomas, a merchant in Dundee, in part payment of an advance of £345 made to him on the same day (the 26th of December) as agent for Sinclair, Moorhead, & Company, although as appeared from the evidence the principals knew nothing of this, or of any of the other loan transactions. He then paid the said sum of £345 which he had thus obtained from Mr Thomas into his principals' account with the Bank of Scotland at Dundee. From the evidence it appeared that Mr Stewart while making some of the advances alluded to had made inquiries in Glasgow as to the condition of the house of Sinclair, Moorhead, & Company, and having received fairly satisfactory replies had been induced to make further loans, and that it was only on Low's absconding that he ascertained the true state of the case.

Sinclair, Moorhead, & Company having been charged at the instance of the firm of Wallace & Company to make payment of the sum of £150 contained in the bill dated 15th November 1879, and which had been accepted by Low *p. pro.* of his principals, brought a note of suspension of the charge and pleaded, *inter alia*, that—“(2) The bill having been granted for a loan of money, and such a transaction not being authorised by the procuration in favour of Low, the com-

plainers are not liable. (3) The complainers having received no benefit from the transaction, which was in no way authorised by them, are entitled to have the charge suspended.”

The Lord Ordinary (RUTHERFURD CLARK) repelled the reasons of suspension, and to his interlocutor appended the following note:—

“*Note.*—The complainers carried on business in Glasgow and Dundee. For some years prior to January 1880 their Dundee business was under the charge of William Low. He proved unfaithful to his trust, and a number of questions have in consequence arisen. The complainers took no personal charge of the Dundee business. Low, though not a partner, was sole representative, and in the mercantile community of Dundee he alone was known. In these circumstances he obtained an advance of money from the respondents, and granted therefor, the complainers' bill signed by him '*p. pro.*' It is alleged by the complainers that the respondents knew that the money was obtained by Low for his own use, but in the opinion of the Lord Ordinary this allegation has not been proved.

“It is not disputed that Low had authority to draw and accept bills '*p. pro.*,' but it is said that his authority was limited to the drawing and acceptance of proper trade bills, and that he had no power to borrow money. He certainly had no express power, and the question is whether he had an implied power.

“It is settled that a partner of a mercantile firm may borrow money on the credit of the firm. The principle is that ‘the sudden exigencies of commerce render it absolutely necessary that such a power should exist in the members of a trading partnership’—1 Lindley 216, 1st ed. But a partner is the agent for the firm, and when an agent is entrusted with the performance of the duties of a partner the Lord Ordinary is inclined to think that the necessity is the same, and therefore that the same powers are implied.

“But there is another ground on which this case must, it is thought, be decided in favour of the respondents. It has been proved to the satisfaction of the Lord Ordinary that the sum in question was applied for the behoof of the complainers.”

The complainers reclaimed, and it was argued for them—(1) A partner had no implied power to borrow except where it was absolutely necessary for the transactions of the partnership—Lindley on Partnership 288 and 269—*Hawtayne v. Bourne*, 7 M. and W. 595. (2) *A fortiori*, the same applied to an agent—Smith's Merc. Law, 126 and 127. (3) Low had no express power to borrow—*Ross, Skolfield, & Co. v. State Line Steamship Co.*, Nov. 17, 1875, 3 R. 134. (4) In the peculiar circumstances of the application by Low of the funds to their credit, they were not *lucrati*, and even assuming that they were, they were not bound, because there was no contract originally between them and the lender—*Emily v. Lye*, 15 East. 7—Cases cited in Lindley on Partnership, 862, note F.

At advising—

LORD YOUNG—This is an important case, but the facts on which it depends are short and not disputed. The complainers are Sinclair, Moorhead, & Company, merchants in Glasgow, with a branch establishment of some importance in Dundee—so

important that while it appears from a passage in the evidence that three-fourths of the business was conducted in Glasgow, where the partners resided, one-fourth was conducted in Dundee, where none of the partners were resident. The Dundee branch was conducted by William Low, the agent of the company, with all the general powers which agents managing mercantile business can possibly have—the powers to buy, sell, and to draw and accept bills, and to open a bank account—in short, his powers were of the generally extensive character which are placed in a general manager so situated as he was.

In the end of the year 1879 Low applied to the respondents for the loan of £150, saying that his principals required it for business purposes. This sum the respondents accordingly gave him as a loan on an I O U, which he subscribed as *p. pro.* of his principals. This I O U, which though not properly a document of debt, but an acknowledgment of some materiality, was replaced by a bill of exchange accepted in the name of the complainers *p. pro.* Low. There were some suspicious circumstances attending this bill, but perhaps the most suspicious was that the bill so given for this temporary loan was blank in name of the drawer, and dated six weeks prior to the date of the loan, and was in fact simply a piece of paper with a signature all ready at hand to fill in as occasion demanded. The question then is as to whether the complainers, for whom Low professed to act, are to be held liable, and it depends on this—Was Low acting or not according to authority given him as agent in Dundee to borrow money? If he was, then it must have been either expressly or by implication. Such a power is an important one, and where intended to be given by a principal to his agent ought to be given expressly and with limits; and indeed this is generally done, I think; and surely no ordinary prudent money-lender would consent to lend money on the credit of a principal without first requiring to see the authority to borrow. In this case, however, there was no express authority, and so the question comes to be, whether under the circumstances it is to be implied? I know of no circumstances which would warrant it except that Low was general agent, with all the general powers of a general agent, and I cannot think that these included a power to borrow.

The Lord Ordinary says, on the authority of Lindley, that an individual partner has an implied power to borrow on the credit of the firm and to make all responsible, and I think that this is true within limits, *i. e.*, if the business to be carried on is such as requires loans in its ordinary course of conduct; but I do not agree that because that power is implied in an individual partner, that it is to be so in a general agent representing the firm in another place; but even assuming that it is to be implied, contrary to my own opinion, and without any authority for it so far as I know, I should think that a lender who makes a loan confiding in the agent's integrity, without satisfying himself that the loan was one required in the ordinary course of conducting business, or demanding to be satisfied as to the authority on which the agent demands the loan, would not be hardly dealt with if he suffers for loss sustained by his foolish omission. In this case the agent was defrauding his principal, and we have only an instance of

cases, now unfortunately too common, of persons placed in a position of trust making free with their principal's credit and being obliged to abscond at last. I must say that it would require much stronger evidence and argument than we have had to induce me to pronounce a respectable mercantile firm in Glasgow like this liable where loans have been contracted in their names as if they were impecunious and needy in Dundee, by an agent on statements which could not be satisfactory to the lenders. I think there was no implied authority to borrow, and if the lender was deceived, he was so by a misplaced reliance in the agent, who was really borrowing for himself. And this brings me to the second ground on which the Lord Ordinary based his judgment—that the sum in question was applied for the complainers' behoof—but I think he may have put the sum to his employers' credit in the bank to postpone inquiry or to retire his own deficits, and surely this cannot be said to be placing money to his employers' benefit. But further than this, I am of opinion if there was no liability on the employers to begin with, no liability was created by their receipt of the money under any circumstances; and while I quite appreciate what your Lordships said as to the distinction upon this portion of the case between the receipt of a benefit and the case of an advance being made to the principal as to the firm, I concur in the observation as to the distinction between that case where there was credit given to the principal to begin with, and the case where the credit was given to the individual partner or to an agent—but with reference to the application of the legal argument and to the legal conclusion, I must say for myself that I think the case comes in the result to this—In neither the one case nor the other was there liability on the principal to begin with, and if the lender of money relied on the principal it was misplaced reliance. If he was entitled to rely upon the principal, he succeeds against the principal, and he succeeds against the principal by force of the obligation which he owns; if he was not, then the hypothesis is (it is a hypothesis with which I am dealing) that the principal is not bound to him. There is no contract between him and the principal. Therefore in both cases you have in common what is the material feature, that there is no contract between the principal and the lender to begin with, and therefore no liability by the principal to the lender—I mean by the firm or company to the lender. Well, is that liability which does not exist, and which can hardly be represented in either case—is that liability created by the money passing to them? I think the contrary is according to the authorities and according to the principle, for no liability arises under a contract of loan when this loan is against the party to whom the loan is alleged to have been given, and when the borrower gets the money. He might put it into his own bank account, or into the bank account of a friend, or anywhere he pleased. If, upon the principle of following the money, the respondents had followed it into the hands of others, he might recover his own in that way, but considering the contract he has made, he could never recover against the party to whom the contractor handed over the proceeds of the loan. Therefore I do not consider these circumstances proved which I think material. I do not

mean to say it is not proved that into the complainers' bank account the proceeds of the loan went. They went there to fill up a vacuum which Low himself had made. I suppose part of the defalcation of £5000 was relative to this account. The deficit would first have been so much more if this sum had not been paid to account. But the point is — and as a matter of my own observation I express the opinion — that if there is no liability upon the contract under which the loan was made, the liability upon the principal does not lie, because the benefit of the money has been received.

With reference to the case of *Paul*, I have already in the course of the argument expressed the opinion which I have upon it. There the party was acting within the authority. Whether that was right or wrong I am not concerned to inquire. It was the Court who held that he was acting within his authority in contracting a debt of £7000, and that therefore Paul as principal was liable to the creditor in that debt. For the reasons which I have stated, I am of opinion that the judgment ought to be reversed and that the suspension ought to be sustained.

LORD GIFFORD — I am of the same opinion. This is a charge by the respondents on a bill for £150 drawn *ex facie* by the respondents and accepted *p. pro.* by Low for the complainers. The question is between the drawers and acceptors themselves, and in the respondents' examination we find that it was simply a loan. Now, this raises the question whether Low had power to borrow as an agent. If he had not, then the respondents had no right to lend.

Now, on the whole matter, I think that in the position which Low held, the lender had no right to assume that Low had that power, and that Low could not bind his principals. It would be a startling thing if a general agent could bind without express powers given him, and the question would be, what is to be the limit? The question is one of mandate, and really comes to this. Has a general agent of a mercantile firm conducting the business of the firm power to bind his principal for borrowed money? I do not think so. It is quite a different question from that of a partner. The Lord Ordinary says — "It is settled that a partner of a mercantile firm may borrow money on the credit of the firm." The principle is "that the sudden exigencies of commerce render it absolutely necessary that such a power should exist in the members of a trading partnership (Lindley 216, 1st ed.). But a partner is the agent for the firm, and when an agent is entrusted with the performance of the duties of a partner, the Lord Ordinary is inclined to think that the necessity is the same, and therefore that the powers are implied" — but there are no authorities cited, and in the absence of them I cannot agree with the Lord Ordinary. As to the second ground of judgment, this would be intelligible if it could be shown that the complainers were *lucrati* in the sense of keeping money to which they had no right; but it only means that Low in applying the sum to the complainers' account in the bank was reducing a debt due to them, and therefore this is certainly not money got from the respondents and applied for the complainers' behoof in the sense of the Lord Ordinary's note. I think then that both grounds fail.

LORD ORMDALE — I must own that at first I thought this was a very hard case for the respondent Mr Stewart, because he had advanced £150 as he believed to meet the complainers' exigencies in Glasgow, and I thought that he had done so under circumstances which entitled him to some consideration at our hands, but on examining his evidence my sympathy with him has been displaced. The transaction about which the present action is raised took place on 26th December, and I find that the voucher which was given in return was antedated 15th November preceding — a very suspicious circumstance in itself. This however was not the first transaction between Mr Stewart and Low, for according to his own statement he had a transaction of the same nature on the 4th December, when he advanced Low £200 in return for a cheque *p. pro.* of complainers. The next was on the 8th December for £300, and the next on the 13th December for £150, when he was given in return a cheque drawn in favour of Sinclair, Moorhead, & Company, and endorsed *p. pro.* of the firm. Now, surely these are peculiar transactions to have with a house with a large business; and further, we find from his evidence that he found on inquiry that the house was of high standing, but still he went on making loans in this way to Low. Then comes the particular transaction in question. The respondent says he did not know the object of antedating the bill. There was some object, and not a very good one, and in any case he should have paused till he had asked for the meaning of what ought to have struck him as suspicious; it would have been an easy matter to have telegraphed to Glasgow for satisfactory information. Here there are circumstances which at the very outset deprive the respondents of my sympathy, and I rather think go to the very root of the claim, to a large extent against the complainers; it is impossible to believe that they could have thought he had a constructive authority to borrow.

I need not go into the other views expressed by your Lordships, and generally I concur.

The Court recalled the Lord Ordinary's interlocutor and suspended the charge complained of.

Counsel for Complainers — Guthrie Smith — Shaw. Agents — Rhind, Lindsay, & Wallace, W.S.

Counsel for Respondents — Keir — J. A. Reid. Agents — Finlay & Wilson, S.S.C.

Friday, June 4.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

MILLER AND OTHERS *v.* M'LAREN AND OTHERS.

*Friendly Society — Jurisdiction of Courts of Law where all Courts Excluded by Statute — Trades Union Act 1871 (34 and 35 Vict. cap. 31), sec. 4 — Interdict.*

Section 4 of the Trades Union Act 1871 is in these terms — "Nothing in this Act shall enable any court to entertain any legal pro-