decide is whether the appellant is disabled from recovering because her husband entered into a null and void contract. I am clearly of opinion that the contract was not null and void although it might have been voidable. And accordingly, the contract having been partly performed at the date when the accident happened for which compensation is now claimed, the remuneration that he was entitled to as fireman or trimmer could have been recovered from the shipping company. Consequently they are liable in compensation to his widow.

The learned arbitrator apparently went wrong because he thought that he was bound to follow the authority of two cases that are referred to in his note—*Kemp* v. *Lewis*, [1914] 3 K.B. 543; *Pountney* v. *Turton*, 1917, 10 B.W.C.C. 601. These cases were not founded upon by the respondents in the argument before us. I have not examined them, but from the description of the cases which we have heard from the bar it appears to me that they were clearly inapplicable to the case before the arbitrator, because in each case the contract entered into was declared by statute to be an illegal contract into which people could not enter.

Accordingly I think in this case that the contract not being null and void but only voidable, we ought to answer the question put to us in the negative.

LORD MACKENZIE—I am of the same opinion. The statutory provision upon which the appellant founds here is section 1 of the Act of 1906, which provides that "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, subject as hereinafter mentioned, be liable to pay compensation." It is not disputed that the deceased was in the employment of the respondents in this case, and it is not disputed that he completely fulfilled his duties as an employee.

The question is not whether during the period of employment the employer could have enforced the contract of service against the employee, or the employee have sued the employer on the contract. The question is whether, the contract having been performed, certain statutory consequences flow from the performance of the contract or not.

I am of opinion, with your Lordship, that the contract of service was not void but only voidable, and that in the circumstances of the case there is nothing to prevent the appellant recovering under the Act.

LORD SKERRINGTON—So far as appears from the papers before us the employers were not aware when they engaged him that this man was a deserter. If that was so, the contract was not void though it was voidable at their instance, because they were not bound to retain in their service a man who was liable to be taken away at a moment's notice by the military authorities. But that view would not suit the respondents, because if the contract was merely voidable, as it was not in fact avoided, the Workmen's Compensation Act applies. It is possible that in certain circumstances an employer and an employee might appear to have entered into a contract that was null and void as contrary to the policy of the Army Acts. I reserve my opinion as to such a case.

LORD CULLEN—I am of the same opinion. Unknown to the employer the deceased was in such a position that he might have been prevented by arrest at any time from performing his part of the contract. But that does not, in my opinion, render the contract *ab initio* null and void.

The Court answered the question of law in the negative.

Counsel for the Appellant—Constable, K.C.—J. A. Christie. Agents—Oliphant & Murray, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Gentles. Agents—Boyd, Jameson, & Young, W.S.

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*Tuesday, November 26.*

## FIRST DIVISION.

[Sheriff Court at Airdrie.

## LOGAN *v.* SHOTTS IRON COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation — Average Weekly Earnings — Remuneration Partly Wages as Miner and Partly Profits as Contractor—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 13, *and First Schedule, sec.* 2 (*a*).

An employee, engaged as an electric coal-cutting machine contractor, hired a squad of men to work coal. He himself actually worked with the squad as an ordinary miner. He was paid a tonnage rate upon the coal sent to the surface by the whole squad, including himself. His income consisted of the balance remaining out of the tonnage rate after paying his squad the wages he had agreed to pay them, which balance represented payment for his own work as a miner and his profit on the contract. He was injured while working as a miner. The mine-owners admitted liability, and paid him compensation as for total incapacity for some time. The man partially recovered his capacity. In a question as to the amount of compensation payable to him as for partial incapacity, *held* (*dis.* Lord Skerrington) that the amount of compensation fell to be calculated upon the man's average weekly wage as a miner, and not upon such wage plus his profit upon his contract for working the coal.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (2) (a), enacts—"Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated: Provided that where by reason of . . . the

terms of the employment it is impracticable at the date of the accident to compute the rate of remuneration regard may be had to the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer. . . ."

Thomas Logan, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute at Airdrie (LEE) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by the appellant against the Shotts Iron Company, Limited, *respondents*, appealed by Stated Case.

The Case stated — "The following *facts* were admitted or proved:—1. That on 4th February 1916 the pursuer and appellant sustained an injury by accident arising out of and in the course of his employment as an electrical coal-cutting machine contractor with the defenders and respondents in their Rimmon Colliery, Shotts. 2. That as the result of said injury the pursuer and appellant was totally incapacitated for work. 3. That the defenders and respondents admitted liability for said injury, and paid compensation in terms of the Workmen's Compensation Act 1906 to the pursuer and appellant at the rate of 20s. weekly from 4th February 1916 to 15th August 1917. 4. That on 16th August 1917 the pursuer and appellant having ceased to be totally incapacitated obtained employment as a checkweighman, which he has continued to hold and still holds. 5. That as a checkweighman the pursuer and appellant's average earnings were £3, 13s. 8d. till 7th July 1918, when a rise in the shift wage gave him an increase equal to 9s. weekly. 6. That it is admitted that at the present time the pursuer and appellant is able as a checkweighman by working full time to earn £4, 4s. weekly. 7. That the pursuer and appellant's total income as a contractor for the year preceding said accident was £281, 9s. 1½d. 8. That said income included the pursuer and appellant's ordinary remuneration as a miner and his profit on the speculation after paying the other workmen engaged by him to work on the contract. 9. That the pursuer and appellant's average earnings as a workman for said year apart from said profit were £4, 4s. 6d. 10. That after stoppage of the weekly payments of compensation on 15th August 1917 the pursuer and appellant made no claim on the defenders and respondents until 16th or 23rd January 1918. 11. That said delay and the apparent acquiescence of the pursuer and appellant from 15th August 1917 to January 1918 have not prejudiced the defenders and respondents; and (12) that it is admitted that the pursuer and appellant was on 15th August 1917, has since continuously been, and still is partially incapacitated as the result of said injury by accident.

"In these circumstances I found the defenders and respondents liable to the pursuer and appellant in compensation in terms of the Workmen's Compensation Act 1906; assessed the said compensation at 5s. weekly from 16th August 1917 to 7th July 1918, and thereafter and until the same shall be varied or ended at 6d. weekly.

The *question of law* was—"On the facts stated was I entitled to proceed on the method of determining the pursuer and appellant's weekly earnings which I adopted, and to limit the weekly payments of compensation to the amounts awarded."

Argued for the appellant—The earnings of the appellant included the total amount which he received from his employers for the work which he himself did for them—*Great Western Railway Company* v. *Helps*, [1918] A.C. 141, *per* Lord Dunedin at p. 145; *M'Kee* v. *John G. Stein & Company*, 1910 S.C. 38, *per* Lord President Dunedin at pp. 39 and 40, and Lord Johnston at p. 42, 47 S.L.R. 39. They included what he was put in a position to earn by his service—*Skailes* v. *Blue Anchor Line, Limited*, [1911], 1 K.B. 360—and what was the fruit of his labour—*Midland Railway Company* v. *Sharpe*, [1904] A.C. 349, *per* Lord Davey at p. 351, 42 S.L.R. 478. The fact that he engaged others under him did not prevent him from being a workman—*Grainger* v. *Aynsley & Company*, 1880, 6 Q.B.D. 182, *per* Lindley, J., at p. 187—but what he paid to others was not included in his earnings. The remainder of what he received from his employers consisted of payment for the appellant's own manual labour, and another sum which represented the remuneration of the appellant for his trouble and responsibility in providing the labour required by his employers. That sum was as much his earnings as what he was paid for his manual work. Accordingly the Sheriff-Substitute was wrong in excluding that sum from his earnings, and should have ascertained his average weekly earnings on the footing that that he made £281, 9s. 1½d. instead of £220. The question should be answered in the negative. The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 13, and First Schedule, section 2 (*a*), were referred to.

Argued for the respondents—The respondents had admitted that the appellant was a workman, and had been injured by accident in the course of his employment. The question in the present case was what were the earnings of the appellant as a workman in the employment in the course of which he was injured. That employment was as a miner, and the earnings were £4, 4s. 6d. Consequently the Sheriff-Substitute had rightly ignored the profits made by the appellant from the work done by others engaged by him. The cases cited by the appellant were distinguishable, for in all of them the additional remuneration was obtained by the man in the work which he was employed to do as a workman.

At advising—

LORD MACKENZIE.—The question raised in this case is whether the learned arbitrator was entitled to determine the appellant's weekly earnings as a workman in the manner set out in the case. The arbitrator has distinguished between the appellant's profit as a contractor and his earnings as a workman, and has fixed the compensation on the basis of the latter, excluding the former.

The facts are that the appellant sustained an injury by accident arising out of and in

the course of his employment as an electrical coal-cutting machine contractor; the employers admitted liability and paid him compensation in terms of the Workmen's Compensation Act 1906 during the period of his total incapacity, which ended on 15th August 1917; on 16th August he obtained employment as a checkweighman, his average earnings being £3, 13s. 8d. till 7th July 1918, when a rise in the shift-wage gave him an increase equal to 9s. weekly; he is now able to earn £4, 4s. a-week. It is admitted that since 15th August 1917 the appellant has continuously been partially incapacitated as the result of the injury.

In these circumstances the arbitrator found the appellant entitled to compensation in terms of the Act, which he assessed at 5s. weekly from 16th August 1917 to 7th July 1918, and thereafter and until the same shall be varied or ended at 6d. weekly.

In so doing the learned arbitrator seems to me to have disposed of this case in a practical and sensible manner.

It is possible, no doubt, if a strict legal view is taken, to say that on the findings the appellant is said to be a contractor and not a workman, and that if the employers had stood on their legal rights he would not have been entitled to any compensation. The consequence of the employers not standing on their legal rights, argued the appellant, is that their admission of liability to him as a workman covers everything he got. This in my opinion will not do. The arbitrator in my opinion was justified in separating the appellant's earnings as a miner from his profit as a contractor. The former must be reckoned in assessing compensation; the latter not. It is, no doubt, true that for aught that appears in the case the appellant was not under any obligation to do any manual work himself. If he had merely superintended a squad of workmen, then if his net receipts had exceeded £250 he would, apart from the effect of any admission, have been outside the Act. But it sufficiently appears from the eighth finding that his income included "ordinary remuneration as a miner," which shows that he was cutting coal himself. It was admitted at the bar that he sustained his injury whilst so working. Instead of merely superintending he took his place as one of his squad, and part of the money paid him was the equivalent of what he would have got had he been entered as a miner on the pay-sheet of the mine. *De facto* he was a miner, and by their admission the employers recognise this fact. The true legal view is that there were here two contracts—one under which the appellant was a contractor, and as such entitled to no compensation; the other under which by working as a miner he established the relation of employer and employee between the Shotts Company and himself. There are instances among the old employers' liability cases of just such a relation between an employer and a contractor's servants in which the employer was held liable. The employers here recognised a liability arising out of the fact that the appellant was working at the date of the accident as a miner in their employment, and the arbitrator has given effect to this in his award.

In my opinion the question should be answered in the affirmative.

LORD SKERRINGTON — Where several workmen, all of whom may be skilled in their trade or some of whom may be unskilled, unite together in order to work in a squad under one of their number, who engages the other men and receives the price of the piece-work performed by the squad, as is common in mines, shipbuilding yards, and other industries, it is primarily a question of fact whether the head of the squad is in the position of an independent contractor, or whether he and his assistants are to be regarded as the servants of the mine-owner, shipbuilder, or other principal employer. Whether the relation of master and servant does or does not exist in any particular case depends very largely upon the extent and nature of the control which the person carrying on the business exercises over those who work for him. In the case of *Stephen* v. *Thurso Police Commissioners*, 1876, 3 R. 535, 13 S.L.R. 339, the question arose at common law whether police commissioners were liable to the public for the negligence of a man who had contracted with them for the cleaning of the streets and the removal of refuse, and it was decided that the latter was their servant and not an independent contractor. More frequently the question arises in the construction of a statute and is complicated by the statutory definition of the workers to whom the Act is applicable. Thus the Employers' Liability Act 1880, adopting the definition of "workman" in the Employers and Workmen Act 1875, applies not only to those who work under a contract of service but to those who are under a contract "personally to execute any work or labour"—an expression wide enough to include piece-workers who work in their own homes outwith the control of the employer. Again, in the Workmen's Compensation Act 1897, section 7 (2), "workman" was defined so as to include every person who worked in an employment to which the Act applied whether the agreement was "one of service or apprenticeship or otherwise." In the case of *M'Cready* v. *Dunlop & Co.*, 1900, 2 F. 1027, 37 S.L.R. 779, compensation was claimed under this Act by the dependants of a man who had worked as a "helper" in a squad employed in a shipbuilding yard. Upon the facts stated in the case the Court agreed with the arbiter that the deceased man was a workman in the employment of the shipbuilders and not an independent contractor. Though the Lord President pointed out in the course of his opinion that the benefits of the Act were not confined to persons under contracts of service or apprenticeship, it may, I think, be doubted whether the decision would not have been the same even if the words "or otherwise" had been absent from the statutory definition as they are absent from the definition of "workman" in the Workmen's Compensation Act 1906, section 13, which requires that the employment should be "under a contract of service or appren-

ticeship." The case of *M'Cready* may still be usefully referred to as illustrating the various facts and circumstances which are relevant to be considered in deciding whether a particular worker was under a contract of service within the meaning of the Act of 1906. There is another element in the same statutory definition which it would have been necessary to keep in view if either the arbiter or the Court had required to consider and decide whether the appellant in the case now before us was a workman within the meaning of section 13. The appellant's yearly earnings are stated in the case to have been £281, 9s. 1½d., whereas the definition excludes "any person employed otherwise than by way of manual labour whose remuneration exceeds £250 a-year." Accordingly if the question whether the appellant was or was not entitled to the benefits of the Act of 1906 had been raised in this arbitration it would have been necessary for him to prove not merely that he had been employed under a contract of service with the respondents but also that his employment was by way of manual labour.

When we now turn to the Stated Case the first thing that strikes one is that the Court of Appeal is not asked to decide a question which probably might have been fittingly raised upon the facts of the present case, viz.—Whether the arbiter was entitled to decide that the appellant was a workman or, as the case might be, that he was not a workman entitled to the benefits of the Workmen's Compensation Act 1906? No such question is put to the Court, nor does the case set forth the facts necessary for its determination. The reason is obvious. It appears *in gremio* of the case that no such question was either raised in the arbitration or decided by the arbiter seeing that it had been previously settled in favour of the appellant by the admission of the respondents. This appears from the arbiter's first and third findings in fact, which are as follows—"1. That on 4th February 1916 the pursuer and appellant sustained an injury by accident arising out of and in the course of his employment as an electrical coal-cutting machine contractor with the defenders and respondents in their Rimmon Colliery, Shotts. 3. That the defenders and respondents admitted liability for said injury and paid compensation in terms of the Workmen's Compensation Act 1906 to the pursuer and appellant at the rate of twenty shillings weekly from 4th February 1916 to 15th August 1917."

As to the meaning of the foregoing findings there is no doubt or ambiguity. From the former it appears that the parties stood towards each other in the relation of employer and employee in respect of a coal-cutting contract entered into between them, but the finding is silent on the question whether that contract was one of service, or on the other hand was one which placed the appellant in the position of an independent contractor. The third finding explains why the arbiter did not decide this crucial question. The necessity for a decision was obviated by the respondents' admission of liability given at the time of the accident and by the subsequent payment of statutory compensation to the appellant. That admission was an agreement within the meaning of section 1 (3) of the statute, and it settled once and for all the defenders' liability for payment of compensation to the pursuer. When one reads the two findings together it is apparent that the injury referred to in the latter was the same as that mentioned in the former, viz., an injury by accident arising out of and in the course of the appellant's employment as an electrical coal-cutting machine contractor. It was therefore found as a matter of fact by the arbiter in the present case that the admission of liability which the respondents gave in February 1916 had reference to an injury sustained by the appellant in the course of his employment by the respondents under his coal-cutting machine contract. The arbiter's finding on this point might conceivably have been otherwise if the facts had justified such a finding. Thus the arbiter might have found that the appellant's coal-cutting contract constituted him an independent contractor who was not bound to do any manual labour, and that the accident did not arise out of and in the course of his employment under that contract. The arbiter might then have gone on to find that subsequently to the making of this contract the appellant proceeded voluntarily to work as a miner with his own hands in the same way as the subordinate members of his squad, and that the respondents having permitted him to do so an implied contract of service had been entered into between the parties subsequent to and different from the coal-cutting contract. Lastly, the arbiter might have found that the respondents' admission of liability had reference solely to the appellant's employment under this second contract. From these findings it would have followed that the compensation due by the respondents in respect of injury by accident arising out of and in the course of the appellant's employment under this second contract must be estimated with reference to his earnings as a manual worker and not with reference to his earnings under a contract which the arbiter had held to be outside the purview of the statute. So far as I understand the judgment about to be pronounced, your Lordships propose to proceed upon the assumption that this purely hypothetical view of what might have happened in this arbitration corresponds with what is stated in the case to have actually happened.

If there were room for doubt in regard to whether the arbiter pronounced any decision one way or the other in regard to the legal character and effect of the contract mentioned in his first finding, such doubt would be set at rest by the following passage in his note. After describing generally the duties and position of a coal-cutting contractor, he summarises the matter as follows—"In short, his contract is *prima facie* exactly that which an independent tradesman makes when he undertakes a specific job at a prearranged price. But

it is not contended for the defenders that as a contractor he is excluded from the operation of the Workmen's Compensation Act. They admit that he is a workman in the sense of the Act, and that he is so is probably incontestable. Certainly in practice it is always assumed that he is. He and the other members of his squad are all entered on the pay-sheets of the coalmasters as workmen; they are subject to the orders and control of the mine officials in all matters covered by the statutory rules and regulations, and I think both he and his squad can claim against the mineowners as workmen for the minimum wage." In other words, although *prima facie* the appellant's contract looked like that of an independent contractor, the respondents' admission was to the contrary effect, and a closer scrutiny of the facts showed that this admission could not have been withheld. It is noteworthy that in this passage the arbiter uses the familiar and technical expression applicable to one who contracts to do work otherwise than as a servant, viz., "independent tradesman" or contractor. The absence of the word "independent" from the first finding is pointed and intentional.

The only question of law which we are asked to answer is substantially as follows, viz., whether in the case of a man who has been injured by accident arising out of and in the course of his employment under a contract which admittedly falls under the Workmen's Compensation Act 1906, the compensation in respect of that injury can legitimately be estimated upon any other basis except his whole earnings under the contract? In other words, where the contract of employment is one and indivisible, is it legitimate for the arbiter to proceed as if there were two contracts? Is he entitled to treat the contract as a "composite" one, and to assess the compensation with reference to so much only of the man's earnings as was referable to the work done by the claimant's own hands, while excluding from his consideration so much of the workman's earnings under his contract as was referable to the work done by the other members of the squad? The manner in which the arbiter has dealt with the appellant's earnings appears from the following findings—"7. That the pursuer and appellant's total income as a contractor for the year preceding said accident was £281, 9s. 1½d. 8. That said income included the pursuer and appellant's ordinary remuneration as a miner and his profit on the speculation after paying the other workmen engaged by him to work on the contract. 9. That the pursuer and appellant's average earnings as a workman for said year apart from said profit were £4, 4s. 6d."

No argument was offered by the respondents' counsel in support of the arbiter's view that a workman's earnings under a single contract of employment which falls under the Act of Parliament can be dealt with in this arbitrary fashion, and the proposition is plainly unarguable. The main ground upon which counsel attempted to justify the result arrived at by the arbiter was by representing that according to the true intent and meaning of his award there were two contracts of employment, the first of which did not, and the second of which did, fall under the statute, and that the accident arose out of and in the course of the man's employment not as a coal-cutting contractor but as a miner. This argument goes straight in the teeth of the first finding, which affirms that the accident arose out of and in the course of the appellant's employment as a coal-cutting contractor. It also predicates the making of a second contract of employment, of which no trace is to be found from beginning to end of the Stated Case. Ultimately counsel suggested that the appellant had no legal right to any compensation, and that the award was purely *ex gratia*. This suggestion is not supported by, but is in direct contradiction of, the arbiter's findings.

For the reasons sufficiently indicated in the course of the foregoing opinion I am at a loss to understand how your Lordships see your way to pronounce the proposed judgment. On the case as stated my opinion is that the question of law can only be answered in the negative. On the other hand, if there is reason to suspect that there is room for a misunderstanding as to what the arbiter actually decided, the proper course is to remit to him to state whether he intended to pronounce the two verdicts which your Lordships attribute to him—viz. (1) that the coal-cutting contract was not a contract for service by way of manual labour, and (2) that the accident to the appellant arose out of and in the course of his employment under another and different contract. Where there is doubt as to the true meaning of an arbiter's finding it is usual and proper for the Court to ask him to explain his meaning, but your Lordships have refused to do so in the present case. I respectfully but emphatically protest against a refusal to exercise this discretionary power in circumstances where its exercise is, in my opinion, imperatively demanded by the interests of justice.

LORD CULLEN concurred in the opinion of Lord Mackenzie.

LORD PRESIDENT — I agree with the majority of your Lordships that the arbiter has reached a sound conclusion in this case. No remit was asked for on either side of the bar, and I do not think a remit was necessary for the purpose of ascertaining the meaning of the findings of fact in the case. But although I do not dissent from the reasoning by which the majority of your Lordships have reached the conclusion which you have, I for my own part prefer a shorter and, as I think, a surer route to that conclusion.

The keynote of the controversy here, it appears to me, is sounded in the first finding in fact, which is to the effect that the appellant sustained his injury by an accident arising out of and in the course of his employment as an electrical coal-cutting machine contractor. If that finding stood alone and unqualified, then I think there is no doubt that the appellant would be out of Court,

because a contractor is not a workman within the meaning of the Workmen's Compensation Act. It was, however, explained to us by counsel for the respondents, and was not disputed, that at the time when the accident befell him the appellant was actually working as a miner with his tool in his hand, and accordingly that the respondents quite fairly and reasonably, as I think, admitted liability for the injury, and paid compensation in terms of the Workmen's Compensation Act 1906. That is the third finding in fact.

Now, taken in conjunction with the first finding in fact, that means, as I think, that waiving all objection to the appellant's claim on the ground that his occupation as a contractor disentitled him to the benefit of the Act the respondents admitted liability nevertheless, and were willing to treat the appellant on the same footing as if he were a workman within the meaning of the Act and entitled to its benefits—that is to say, *quoad* services rendered, duties performed, earnings gained, and compensation to be paid, this man was to be treated although a contractor exactly as if he was an ordinary miner. That appears to me to be the true meaning of the first and third findings taken in conjunction. I have a difficulty otherwise in reconciling these two findings.

But if the conclusion I have reached is correct, then the only remaining question is —What were this workman's earnings as a workman within the meaning of the statute? To that question we find an explicit answer in the ninth article of the Stated Case, where we are told that the earnings were £4, 4s. 6d. a-week, and that must be taken, I think, as the basis for awarding him compensation. It is said, no doubt, that as a contractor his income for the year preceding the accident was £281 odds, but that appears to me to be a wholly irrelevant consideration, because as a contractor he is, I think, entirely outside the scope of the Act of Parliament, and it signifies nothing what his income as a contractor was. It is only because by the admission of his employers he is to be regarded in this question as a workman—*de facto* he was working when the accident befell him—that he is entitled to the benefit of the Act. In short, I think he must be treated as a workman in all respects, including earnings.

For these reasons, although I do not differ from those given by the majority of your Lordships, I consider that the learned arbiter has rightly estimated the amount of this man's earnings and reached a correct conclusion in this arbitration. I move your Lordships that we should answer the question put to us in the affirmative.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Macphail, K.C.—Dods. Agents—Balfour & Manson, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Gentles. Agents—W. & J. Burness, W.S.

*Wednesday, November* 13.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## BLACKLOCK & MACARTHUR, LIMITED *v.* KIRK.

*Contract—Construction—"Usual Requirements"—Course of Dealing.*

A glazier, following similar contracts in the five previous years, contracted with putty manufacturers that the latter should supply his "usual requirements" in putty for the ensuing year at a certain price. In the five previous years the amount required fluctuated from 88 tons to 134, and the manufacturers supplied those varying amounts without demur. In the year in question the amount required for the *bona fide* purposes of the business was 189 tons, the increase being due to contracts for glazing munition works, and the manufacturers after supplying 81 tons refused to make further deliveries. There was no change in either the character or the *locus* of the buyer's business. In an action by the manufacturers for the price of the putty supplied, the buyer counter-claimed for the loss he had sustained in respect of his being obliged to buy elsewhere the remainder of the putty required by him. *Held*, after a proof, that "usual requirements" meant, in view of the previous course of dealing between the parties, the amount of putty *bona fide* required for the purposes of the business in the year in question, and that, the character of the business not having altered, the manufacturers were in breach of contract in failing to supply the whole 189 tons.

*Contract — Suspensory Clause — "War or other Exceptional Cause."*

A contract between a glazier and putty manufacturer provided that in the event of the work being interrupted by "war or other exceptional cause" the sellers should not be bound to deliver at the time specified. In an action between the parties in which the sellers founded on this clause in answer to a claim at the instance of the buyer for damages for failure to deliver the full amount contracted for, it was proved that while there was delay owing to the war there was no real difficulty in making delivery. *Held* that the manufacturers' failure to deliver was not due to "war or other exceptional cause," and that they were accordingly liable in damages for breach of contract.

Blacklock & Macarthur, Limited, Clydesdale Paint, Colour, Varnish, and Oil Works, Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against George G. Kirk, glass merchant and glazier, Glasgow, *defender*, concluding for decree for payment of £260, 16s. 9d., being the price of goods supplied by the pursuers to the defenders.