the Workmen's Compensation Act and the Factory Acts to warehouses. As to the meaning of the word "warehouse," I desire to reserve my opinion on the larger question, whether the Workmen's Compensation Act applies only to such warehouses as are part of or related to a dock or place for the loading and unloading of sea-going ships.

It may be that the association of "warehouse" with "dock, wharf, or quay" does not limit the application of the Act of Parliament to warehouses which are in actual proximity to a landing-place for goods, and yet the association or collocation of these words may legitimately be considered as explanatory of the sense in which this ambiguous word "warehouse" is used. For the purposes of the present case it is sufficient to say that in my opinion a "warehouse" under the Workmen's Compensation Act must be a warehouse *ejusdem generis* with such warehouses as are usually found in connection with a dock or other landing-place.

In other words, if there may be an inland warehouse in the sense of the Act, it must be a warehouse for the storage of goods such as might form part of the equipment of a dock, and not any building which in a loose sense of the word might be called a warehouse. I therefore concur in the judgment proposed.

LORD KINNEAR concurred.

The Court answered the question in the case in the negative.

Counsel for the Appellant—A. S. D. Thomson—M'Robert. Agent—T. Stuart Macdonald, Solicitor.

Counsel for the Respondent—Graham Stewart—W. L. Mackenzie. Agents—Clark & Macdonald, S.S.C.

---

*Thursday, December* 18.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## THE BOWHILL COAL COMPANY, FIFE, LIMITED *v.* TOBIAS.

*Sale—Contract to Deliver Coal for Export f.o.b.—Export-Duty Imposed after Contract Made—Seller or Purchaser Liable to Pay Duty—Finance Act* 1901 (1 *Edward VII. c.* 7), *sec.* 3 (1).

In the beginning of April 1901 a firm of coalowners in Fife sold 6000 tons of coal to a coal importer in Germany. Under the contract delivery was to be f.o.b. at certain specified ports in Scotland, the shipments to extend over twelve months beginning 1st April 1901 in as nearly as possible equal quantities per month. It was also a condition of the contract that the coal sold was to be for *bona fide* exportation only. On 19th April, when the contract had just begun to be executed, the Finance Act 1901 came into operation. By section 3 (1) of this Act a duty of 1s. per ton was imposed "on coal exported from Great Britain and Ireland."

*Held* (*aff.* judgment of Lord Ordinary Kyllachy, *diss.* Lord Young) that under the contract the sellers and not the purchaser were liable for the export duty.

In October 1901 the Bowhill Coal Company, Fife, Limited, raised an action against A. Tobias, Oldenburg, Germany, (1) for a balance still due and resting owing of the price of coals sold and delivered to the defender; and (2) for damages for breach of contract.

The facts of the case were as follows—By contract dated 3rd and 6th April 1901 the Bowhill Coal Company agreed to purchase from the Tobias 6000 tons of treble nut coal, to be shipped from 1st April 1901 to 1st April 1902 in as nearly as possible equal portions per month, delivery f.o.b. at Burntisland, Methil, and Charlestown, at 10s. per ton. The contract expressly provided that "the quantity of coal herein named is for *bona fide* exportation by the purchaser, and not for sale by other export merchants or any other person in Great Britain, unless specially permitted by us (the sellers) in writing."

On 19th April, when the contract had just begun to be executed, the export-duty on coal imposed by the Finance Act 1901 came into operation.

By section 3 (1) of this Act it is enacted:—"There shall, as from the 19th day of April 1901, be charged, levied, and paid on coal exported from Great Britain or Ireland a duty of 1s. per ton, but a rebate of the duty shall be allowed on any coal the value of which free on board is proved to the satisfaction of the Commissioners of Customs not to exceed 6s. per ton."

The sellers and the purchaser differed as to who should pay this duty. The sellers claimed that it should be paid by the purchaser as being the exporter. The purchaser contended that as delivery was to be f.o.b., and the duty had to be paid before shipment, the burden fell on the sellers. The purchaser had chartered certain vessels to proceed to the port of loading for the purpose of loading the coal which the sellers were to supply, but the sellers refused to load any of these vessels unless the purchaser paid the tax. As the Customs authorities insisted on payment as a condition of shipment the purchaser, in order to get the vessels loaded, and to prevent loss from demurrage and other claims, paid the tax under protest and reservation of his rights. Thereafter, on 18th September 1901, as the sellers persisted in their refusal to pay the tax, the purchaser intimated to them that he cancelled the contract, reserving his claim for damages. When the contract was cancelled, 2157 tons 5 cwts. out of the 3000 tons to be taken during the months of April, May, June, July, August, and September had been supplied, for which a balance of £578, 7s. 7d. was still owing by the purchaser to the sellers. Of this

balance the purchaser on 27th September sent £214, 10s. 1d. to the sellers as payment in full, the purchaser holding that the remainder had been paid by the sums disbursed by him under protest as export duty.

The sellers thereupon raised the present action, in which they concluded (1) for payment of the balance of the £578, 7s. 7d. withheld by the purchaser; and (2) for damages for breach of contract.

On 6th June 1902 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Finds that the pursuers are bound to give credit to the defender for the sums paid by him under protest on account of the export-duty on the coals shipped under the contract libelled: Finds that on that footing the pursuers have been paid in full for the coal delivered: Finds further that the defender's rescission of the contract was justified by the pursuers' refusal to pay the duty, and that the pursuers have therefore no claim for damages in respect of the defender's rescission of the contract: Therefore assoilzies the defender from the conclusions of the action, and decerns."

*Note.*—"The pursuers in this case, who are coalowners in Fife, sold in the beginning of April 1901 to the defender, who is designed as a coal importer at Oldenburg, Germany, 6000 tons of coal. It was a condition of the contract that the coal should be *bona fide* exported by the purchaser, and delivery was to be f.o.b. at certain specified Scotch ports, the shipments being made, beginning the 1st of April, in as nearly as possible equal monthly quantities. On the 19th of April, and when the contract had just begun to be executed, the export duty on coal imposed by the Finance Act of 1901 came into operation, and the parties differed as to who should pay the duty. The pursuers claimed that it should be paid by the defender as being the exporter. The defender, on the other hand, claimed that as delivery was to be f.o.b., and the duty had to be paid before shipment, the burden fell on the pursuers. The pursuers did not, as it happened, take advantage of the power to apply to the Treasury contained in subsection 2 of section 3 of the Finance Act. Nor did they seek a solution of the matter by paying and seeking relief as against the defender under the 6th section of Schedule 4 of the Act. They were probably satisfied that the defender being a foreigner the provisions of this last section would not apply. Or it may be that they knew that the case was within the exception expressed in the last clause of the section. At all events the pursuers declined to pay the duty, and the upshot of the matter was that, the Customs authorities insisting on payment as a condition of shipment, the defender paid the duty under protest, and the pursuers still persisting in their refusal, he ultimately rescinded the contract, reserving his claim for damages.

"The present action is brought by the pursuers, the sellers, for the balance said to be due on the shipments in fact made, and for damages in respect of the defender's alleged breach of contract. The defender maintains that if he gets credit for the duty paid by him under protest, as I have said, there is nothing due, and on that assumption it does appear that such is the fact. The sole question therefore (putting aside in the meantime the question of damages), simply is whether the pursuers or the defender is under the contract liable for this export duty.

"It appears to me that the defender's contention is right. The Finance Act 1901 Schedule 4, sec. 1, provides expressly that 'Coal shall not be shipped for exportation or carriage coastwise unless entry and clearance thereof shall have been made before shipment,' and it is not disputed that entry and clearance involves in the case of export the due payment of the export-duty just as (by the succeeding section) it involves in the case of coal carried coastwise liability to find security for the due carriage coastwise. The duty therefore has unquestionably to be paid before shipment, and that being so it seems to me to follow that in a f.o.b. contract the payment falls necessarily on the seller. It does so in my opinion just as much as any other charge existing or supervening incident to the land journey to the port or to the shipment, or requiring to be incurred and paid before the coals are delivered over the ship side. I do not, I confess, see that it makes any difference whether the seller or the buyer is to be deemed the exporter. It is nowhere provided that the exporter shall pay the duty: nor does it seem material whether the seller puts the coal on board a general ship addressed to the foreign buyer, or delivers the coal to that buyer over the side of a ship which the buyer has chartered. I do not say that it is quite immaterial that the coals here were expressly sold for export. Had it been open to the defender to have shipped the coal to what place he pleased there might possibly have been an argument—I do not say a good argument, but an argument—to the effect that in that case the f.o.b. delivery was satisfied by the seller paying everything necessary for shipment or a clearance coastwise. But the contract here being expressly for exportation, that question, if it be a question, does not arise.

"The result, therefore, is that I propose to find that the pursuers are bound to give credit to the defender for the sum paid by him on account of export duty, and that on that footing the pursuers have been paid in full for the coal delivered under the contract, and further, that as the defender's rescission of the contract was justified by the pursuers' refusal to pay or provide for the duty, the pursuers have no claim for damages against the defender, and that therefore, on the whole matter, the defender is entitled to absolvitor, with expenses."

The pursuers reclaimed, and argued—As far as the statute was concerned it did not impose the tax on the seller of the coal. It was absurd to assume that the Legislature meant to impose the tax on any person who contracted to put the coal on board, such as a porter at the wharf. The duty was imposed on the coal exported. Therefore *prima facie* under the statute the

person liable to pay was the man who exported the coal. Under section 104 of the Customs Consolidation Act 1876 (39 and 40 Vict. c. 36) a bond in security had to be given to the Commissioners of Customs before certain goods could be exported, and the person who was required to give this bond was the exporter or his agent. This showed that it was the exporter who in the intention of the Legislature was the person bound to pay export duty. The words f.o.b. were not to be construed as relieving a purchaser of coal from paying such a duty as the present—*Glengarnock Iron and Steel Company, Limited* v. *Cooper & Company*, June 12, 1895, 22 R. 672, 32 S.L.R. 546.

Argued for the defender and respondent—Under an f.o.b. contract the seller was bound to deliver the goods on board ship at his own expense—Benjamin on Sale (4th ed.) 685; *Stock* v. *Inglis*, 1884, 12 Q.B.D. 564. Until the coals were put on board they remained the property of the seller. The obligation to pay any tax to which the goods were liable before they were put on board therefore lay upon the seller. F.o.b. under the Finance Act 1901 simply meant "free of duty." The case of the *Glengarnock Iron and Steel Company, Limited* v. *Cooper & Company, supra*, did not bear on the present case, because in that case the purchaser was the shipowner as well, and the cost of storing the cargo was naturally held to have fallen on the owners of the ship. The judgment of the Lord Ordinary should be affirmed.

At advising—

Lord Justice-Clerk—I see no reason for interfering with the decision at which the Lord Ordinary has arrived. This statute imposes a certain tax after a certain date on all coals leaving this country, and in carrying out the operation of the statute all coals which leave any port of this kingdom must either be in the position of this duty having been paid on them, or else of the parties having charge of the collection of the taxes being satisfied, and if necessary obtaining a bond to the effect that the goods are not for exportation but are to be carried by sea from one place in the United Kingdom to another only. Now, the pursuers in this case contracted to deliver coals free on board to the defender, and after that the duty was imposed as on coals to be exported. The pursuers were unable to fulfil their contract to deliver these coals free on board unless they paid the duty. The officers of the port had nothing to do with any question as between the pursuers and the defender in this case—as between the seller and the shipper; their duty was to stop all operations by which that coal could be put on board a vessel at any port until they were satisfied that the duty was paid, or they were satisfied that the vessel was a coasting vessel that had to be dealt with exceptionally. Accordingly in this particular case the shipper rather than be detained paid the duty, and he maintains that he is in right to have the accounts settled between him and the sellers on the footing that he is entitled to credit with them for it. I think the view the Lord Ordinery has taken on that matter is right. It is impossible that on the passing of any such statute as this, imposing a new tax and involving a question of shipping between this country and abroad, hard cases may not arise at early stages of the operation of the statute, and accordingly the statute has provided for certain cases in which hardships may arise, and has declined to provide for others—that is to say, that where a contract is made under which as matter of fact the price of the coals or the value of the coals does not exceed 6s. per ton, in that case the party who pays the duty, whichever it may be, is entitled to a rebate. In this case the price of the coals was considerably higher, and therefore a right of rebate does not arise. The view I take of the whole matter is that "free on board" meant that the sellers had to deliver coal, whatever it might cost them to do so, at the ship's side to be delivered, and they were bound to deliver, they having agreed to do so. They did not do so. The defender had to pay a considerable sum of money in order to get the coals in their possession taken over from them, and I think he is entitled to receive credit for that amount.

Therefore I am for adhering to the interlocutor of the Lord Ordinary.

Lord Young—I have, after the best consideration I have given to the argument stated upon both sides, to which I have attended carefully, arrived at a different conclusion.

The facts of the case are very few and very simple, although the question which arises may possibly be illustrated by putting other cases. By the Act of the first year of Edward VII. a duty was for the first time imposed on the exportation of coal from this country, it being provided that the duty should be paid before the coal was shipped for exportation. A short time before the passing of that Act the contract between the pursuers and the defender was made. Under that contract the defender was the purchaser of coal for exportation, it being provided in the contract that he did purchase them for exportation and was to be regarded as the exporter. At that time there was no tax, as I have said, because the contract was made a short time before the statute imposing it was passed. But before the coal was sent under the contract to the ship by which the defender, the purchaser, intended that it should be exported, and which he had chartered for that purpose, the tax had been imposed, and was exacted before the coal was put on board. The seller who had contracted to put it on board, that is to say, who had sold it free on board, declined to pay the tax, in the view that by the statute—upon a fair and reasonable construction of the statute—it ought to be borne not by the seller but by the purchaser, who was the exporter. The purchaser, the exporter, did not assent

to that view, but nevertheless paid the tax; and the question here is really whether he has a claim for repetition of what he so paid against the seller. That is truly the question in the case. It is true that the duty here is of small amount; it is only a shilling per ton. But it might be any amount, and it might raise a very serious question indeed. The case of the seller, the pursuer of the action, is neither more nor less than this, that a duty on the export of coal is *prima facie*, unless there is some other provision in the statute, payable by the exporter, and not by the seller. The argument stated against that is—"Well, but the seller here was bound to put the coals free on board, and they cannot be put free on board until the tax which is a condition of putting them on board the ship for exportation has been paid." Well, one understands that argument, but it appears to me, although intelligible, to be a very weak one, and with no soundness in it at all.

Let me put a case, for as I said the case here standing upon facts few and simple might nevertheless be capable of illustration by putting cases for argument. Let me put the case that the seller had contracted to put the coals sold free on board a named ship at a named port, there being no question of exportation at all. The purchaser, before the ship's coals are put on board, before they arrive alongside the ship, resolves that the ship shall carry the coal abroad, and therefore be used for exporting them. A duty of one shilling per ton, or it might be any amount, is exacted on exported coal. Then the argument would be, "But the tax, the duty, has to be paid before the coal can be put free on board, and you the seller having undertaken to deliver them free on board must pay the tax. True, you did not know they were to be exported, but whether you knew or not they are to be exported, and the true meaning of the statute, which provides that the tax has to be paid before the coal is put on board, is that it is intended to be a burden on the person who has contracted to put them free on board." Now, I cannot assent to that as even a sensible argument. It occurred to me that the only reasonable difficulty which arose in this case—but it was not treated as a matter of any importance, and I rather think with the Lord Ordinary that it is not—was that the seller here understood and indeed contracted that the purchaser should export them. It was not contended, and I do not think could be, that that was of any use either in the interpretation of the statute or in the construction of the contract otherwise. Therefore what we have to deal with is simply this, whether the true meaning of the statute is to put the tax on exportation not upon the shipper but upon the seller if he is bound by contract to put the coals free on board, or on any carrier who is under contract to put them free on board, because the condition of putting them free on board is that the tax, however large, shall be paid. Now, I cannot assent to such a construction of the statute as sustainable either by reason, good sense, or law. I think the fair view and import of the statute is that the tax upon exportation must fall, unless the contrary is provided, on the exporter, and that the contrary is not provided by the provision that the tax should be paid as a condition of putting coal free on board a ship by which they are to be exported. In my opinion it is a wrong interpretation of the statute to say that such a provision requires any person to pay the tax who is under contract and obligation to put the coals free on board, even a carrier, on the ground that he cannot fulfil that obligation without paying the tax which is the condition of his executing the contract. That is the argument which I myself have no hesitation in rejecting, though there must be more in it than I have been able to see, seeing that it has had the approbation not only of the Lord Ordinary but of your Lordship.

LORD TRAYNER—I concur in the judgment pronounced by the Lord Ordinary.

Whether regarded in the light of the Finance Act 1901 or of the contract between the parties, I think the pursuers must fail. First, as regards the statute. It does not, as the Lord Ordinary has pointed out, impose the duty of 1s. per ton on any person. It is a duty laid upon a British product in the hands of a British owner. If that owner chooses to sell his coal for consumption in Great Britain, as he may do if he pleases and can find a customer, no duty is payable, but if the coal is exported then the duty becomes exigible. The pursuers chose the latter alternative, and I think thereupon became liable for the duty. The statute imposes no duty on foreigners, only upon subjects or the property of subjects of the King. If it was necessary to the defender's case to maintain that the duty fell upon the exporter I think a good deal might be said in support of the view that the pursuers were the exporters. They were sending their coal out of the country under a contract stipulating that it must not be taken to or delivered at any home port. It was expressly sold for exportation. This, however, need not be determined, as the duty is not imposed on the exporter. Second, as regards the contract. The pursuers bound themselves to deliver the coal contracted for free on board at 10s. per ton. They have no right to demand the price of that coal until it is so delivered. But before they can so deliver they must pay the duty, as the statute provides that the duty shall be paid "before shipment." Now, if anything impedes or obstructs the shipment the pursuers must remove it—they cannot otherwise fulfil their contract. It was said that in all fairness the defender should pay the duty, as it was imposed after the contract price had been fixed. I am unable to agree to that. The imposition of the duty and the payment of it by the pursuers makes their coal more valuable to them by 1s. per ton, or, in other words, will require them to charge 1s. per ton more for their coal than formerly if they

are to receive the same profit out of it. But it might equally have been occasioned by many causes. If the expense of working the coal had become greater, or the expense of carriage from the pit to the port of shipment had been increased, the result would have been to reduce the pursuers' profit or raise the pursuers' price. Yet in these circumstances a price previously contracted for would not be subject to any increase. Your Lordship in the chair, I think, suggested as illustrative a case which I thought quite apposite. A man who had contracted to cart goods from one point and deliver them at another at 1s. per ton found when carrying out his contract that he had to pass a bridge or toll bar, where in order to pass he had to pay a penny per ton. Would that entitle him to charge 1s. 1d. for cartage and delivery? I think clearly not, and yet that is what the pursuers propose to do. They are bound to deliver the coals free on board for 10s. a ton, but because they cannot put the goods on board and so earn the price without paying a toll of 1s. they propose to charge the defender 11s. a ton. I think this clearly in excess of their right.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Clyde, K.C.—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for the Defender and Respondent—Younger. Agents—Boyd, Jameson, & Young, W.S.

---

*Thursday, December* 18.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## DOUGLAS *v.* M'KINLAY.

*Process—Caution for Expenses—Bankrupt Father as Curator of Minor Pursuer.*

Circumstances in which an undischarged bankrupt, appearing in an action as the curator and administrator-in-law of his minor son, was ordained to find caution for expenses.

*Process—Caution for Expenses—Past or only Future Expenses Included.*

A reclaimer was ordained "to find caution for expenses." *Held* that this meant caution for future expenses, not for those already incurred in the Outer House.

George Dickie Rutherford Douglas, a minor aged sixteen, with the special advice and consent of his father William Douglas, 33 Partickhill Road, Glasgow, as his curator and administrator-in-law, brought an action against Alexander M'Kinlay, horse-dealer, 130 London Road, Glasgow, concluding for payment of damages for breach of a contract for the purchase of a patent fishing-net, for which a provisional patent had been taken in the pursuer's name.

A proof was taken, and on 22nd August 1902 the Lord Ordinary (KINCAIRNEY) assoilzied the defender from the conclusions of the action, and found him entitled to expenses against the pursuer and consenting pursuer.

The pursuer reclaimed, and on 25th October 1902 the defender and respondent lodged the following minute:—"The proof has declared, and it is the fact, that the pursuer of this action is a lad of seventeen years of age; that he has no interest in the subject-matter of the action; that the whole interest therein is in his father William Douglas, who has had the sole charge of and has conducted for his own interest all negotiations in connection with the said fishing-net and the said contract. The pursuer has no interest in the action, and any damage recoverable will go to the said William Douglas and not to the pursuer. In these circumstances the pursuer ought to be ordained to find caution for expenses."

On this minute counsel for the respondent moved alternatively that G. D. R. Douglas, the pursuer, and William Douglas, the consenting pursuer, should be ordained to find caution. It was stated at the bar and admitted that William Douglas was an undischarged bankrupt.

The following interlocutor was pronounced:—"Appoint William Douglas, 33 Partickhill Road, Glasgow, curator and administrator-in-law of G. D. R. Douglas, the pursuer, to find caution for expenses within fourteen days from this date."

Thereafter William Douglas lodged a bond of caution for future expenses.

The respondent presented a note wherein, after stating that the bond was not in terms of the interlocutor of 23rd October in respect that it bound the cautioner for future expenses only, he prayed the Court, in respect of the failure of the pursuer's father to find caution in terms of the said interlocutor, to dismiss the reclaiming-note and decern."

Counsel for the reclaimers argued that he had implemented the interlocutor by the bond of caution which he had lodged. "Caution for expenses" in an interlocutor meant caution for future expenses only—*Maxwell* v. *Maxwell*, March 3, 1847, 9 D. 797.

Counsel for the respondent argued that expenses were a *unum quid*, and that an order to find caution for expenses must therefore mean caution for the whole expenses of the action.

LORD PRESIDENT—All we can do now is to construe the interlocutor pronounced on 25th October, by which William Douglas the pursuer's father was ordained "to find caution for expenses within fourteen days." Reading that interlocutor by itself, I think that the expenses to which it relates are future expenses, and future expenses only. It may be a question whether we should have required caution for past as well as for future expenses if the point had been brought under our notice at the time when the interlocutor was pronounced. It is