

In the course of the argument, in which the appellants' counsel had asked for a remit to a man of skill, in respect they had not been heard by the Commissioners, the respondents' counsel stated that if the appellants thought they had not had a proper opportunity of being heard by the Commissioners, he did not object to the case being remitted back to them for the purpose. The appellants' counsel refused the proposal.

At advising—

**LORD JUSTICE-CLERK**—Section 126 of the Dundee Police and Improvement Consolidation Act 1882 provides that “in every new building the chimneys and flues and hearths shall be constructed in such mode and of such materials and dimensions as shall be approved of by the Commissioners.” The question here is in regard to a chimney in certain works to be erected by the complainers which has been delineated on the plans as a certain height. The Commissioners, under the powers of the clause quoted, decline to approve of the plans, and specially object that the height of the chimney is too low and ought to be 150 feet high. This appeal has been taken against the Commissioners' non-approval of the plans as they stand, and the question is whether we can, on the statements made in the appeal case, interpose our approval and authorise the works to be erected as proposed. Now, if a case had been made out to us that the Commissioners were wrong in the mode of inquiry which they take, or that injury had been done through not hearing parties properly, or that some advice of importance had been neglected, then I think we might have interposed. But I have a strong impression we cannot substitute our approval for that of the Commissioners, who have special powers given them by the Legislature, and act on special information in the absence of such a case. Nothing had been stated to us here except that they take a different view from the complainers as to the height of the chimney, and as to its effect on the surrounding neighbourhood. In that matter I should be inclined to trust their judgment, and therefore in the absence of a special statement of the kind I have pointed out I am of opinion that we should refuse this appeal.

**LORD YOUNG**—I am of the same opinion. It was put to Mr Murray whether if the complainers thought they had not had an opportunity of stating their case to the Commissioners there would be any objection to their having such. He said none; but Mr Johnston said frankly that looking to the answers and mode of procedure of the Commissioners, it looked hopeless that it should be done and that he did not care to take the course. That is different from making a remit. With that explanation I entirely concur in your Lordship's judgment. No case has been stated here to induce our interference, and we should require such special cause to induce us to take the initial step towards substituting our judgment for the judgment pronounced by the Commissioners under powers given them by Act of Parliament. Anything extraordinarily wrong, or ascertained to be so, on a statement of it on remit, we should attend to, or any irregularity on the part of the Commissioners, but we cannot interpose in absence of statement of such in a matter involving as it does exercise of judgment.

**LORD CRAIGHILL**—I am of the same opinion. No cause has been shown to warrant our interference. A strong case would be required to do so.

**LORD RUTHERFURD CLARK**—I also think no case has been stated in respect of which we may make a remit to displace the deliverance of the Commissioners. But it is said the Commissioners did not hear the complainers, and I should have been disposed to remit to them to reconsider their judgment if the appellants had desired it. They do not desire it, and I dare say there would have been very little use in the remit.

The Court refused the appeal.

Counsel for Appellants—H. Johnston. Agent—Robert Menzies, S.S.C.

Counsel for Respondents—Graham Murray. Agent—J. Smith Clark, S.S.C.

Saturday, November 15.

## SECOND DIVISION.

NORTH BERWICK GAS COMPANY *v.* JOHN B. ROBERTSON & COMPANY.

*Process—Sheriff—Appeal—Amendment of Record—Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), sec. 24.*

In an action in a Sheriff Court for the price of goods sold and delivered, the defenders, while admitting the debt, pleaded compensation by reason of loss caused by alleged breach of contract on the part of the seller, consisting in a premature termination of a contract said to have been entered into first for one year, and renewed by tacit relocation. The Sheriff-Substitute having decerned against the defenders, they, in a reclaiming petition, alleged that there had been a new verbal contract, but did not formally propose any amendment. The Sheriff having adhered to the Sheriff-Substitute's judgment, the defenders appealed to the Court of Session and moved for leave to amend to the effect of making a specific averment of a new verbal contract for the year to which the dispute applied. *Held (diss. Lord Craighill)* that the defenders not having made the motion to amend at the proper time before the Sheriff, and having taken a judgment on the record as it stood, leave to amend should be refused.

This action was raised in the Sheriff Court at Haddington by the North Berwick Gas Company against John B. Robertson & Company, chemical manufacturers, Dunbar, for payment of £68, 18s. 6d. as the amount of an account from April 1882 to August 1883 alleged to be due to them for gas tar and ammoniacal liquor supplied to the defenders. The debt was admitted, “but under deduction always therefrom of the defenders' counter claim of damages.”

The defenders averred—“(Statement 2) For several years prior to the 31st day of July 1883 the defenders had an annual contract with the pursuers for the supply to the former of the gas tar and ammoniacal

liquor produced at the pursuers' works. In particular, in or about August 1878 the defenders entered into such a contract with the pursuers for the year from July 1878 to July 1879, and a similar contract between the parties was duly and effectually renewed from year to year thereafter, and that both by writing and verbally."

They further averred—" (Stat. 5) Apart altogether from the contract condescended upon and alleged by the defenders, it is the invariable custom of the trade to enter into such contracts for a period of not less than one year, so as sufficiently to guard against and meet the exigencies of the trade. It is likewise the custom of the trade, &c., besides subject of common law regulation, that due or reasonable notice is given by the one party to the other of the termination of the contract or dealings between them, and such was not done in the present case. (Stat. 6) In these circumstances the pursuers have been guilty of a grievous violation of the contract between them and the defenders, to the serious loss and damage of the latter. Said loss and damage is estimated at the sum of £40 sterling."

They calculated that during the remaining four months of the contract ending July 1883 they should have been supplied by the defenders with 5500 gallons of gas tar and ammoniacal liquor, which at 12s. 6d. per ton, including carriage and empty casks, would have amounted to £22, 19s. 6d., which deducted from the estimated market value (£63, 11s. 3d.) of the manufactured products would have left a balance of loss to them of £40, 12s. 5d.

The pursuers denied that there was any contract between them and the defenders during the year 1882-3 for the supply of the tar and liquor produced at their works, as the defenders averred and stated that the supply given was given during their pleasure only.

The defenders pleaded that there was a legal, solemn, and binding contract for the year from 31st July 1882 to 31st July 1883, and that they were entitled to plead the same as against the account sued for or amount thereof, and that by way of compensation.

The Sheriff-Substitute (SHERIFF) decerned against the defenders for the sum of £68, 18s. 6d., concluded for. The facts are fully explained in the note appended to this interlocutor, as follows:—"By letter, dated 9th August 1878, addressed to Mr Webster, then the manager of the North Berwick Gas Works, John B. Robertson & Company, chemical manufacturers in Dunbar, offered the sum of 12s. 6d. per ton for all the tar and 'ammoniacal liquor produced at the gas works for one year from the expiry of their last contract, or for any longer period, as may be mutually agreed upon.' On 12th August Mr McCulloch, the secretary of the Gas Coy., wrote in reply that the offer 'for one year from date of expiry of last contract' had been laid before the directors, and the writer was directed to accept the offer on condition that John B. Robertson & Coy. supplied all casks and paid all carriages, and that all accounts be paid quarterly.

"The parties continued to deal on the same terms till 24th March 1883, when the manager of the Gas Company wrote to Messrs Robertson & Co. stating that the Gas Company had contracted with a Glasgow firm for the sale of their tar and ammoniacal liquor, as from 1st

April 1883, and that Messrs Robertson & Co. would only be supplied to the end of the following week.

"The Gas Company have raised this action against J. B. Robertson & Co. for the sum of £68, 18s. 6d., being the value of the gas tar and ammoniacal liquor supplied to the defenders from 8th August 1882 to the 3d of April 1883.

"In defence it is maintained—1st That there was a current contract for the year from 31st July 1882 to 31st July 1883, and the defenders have a claim of damages against the pursuers for failure to implement said contract, on which they plead compensation. 2d That, in any view, the notice given by the pursuers that they would cease to supply the defenders with gas tar and ammoniacal liquors was 'insufficient' according to the practice of the trade and common law. . .

"I. The contract between the parties was constituted by the letters above referred to, and clearly was only for the year ending 31st July 1879. The pursuers continued to send their tar and ammoniacal liquors to the defenders on the same terms as was contracted for, but it cannot be maintained that by so doing the pursuers entered into any new contract after the contract for the year to 31st July 1879 expired. The pursuers were free to refuse to furnish the gas tar and liquor to the defenders, and the defenders were equally free to refuse to take them. The argument for the defenders seemed to be that the pursuers, by continuing to supply the tar and ammoniacal liquor, and sending in their accounts at stated intervals, as was done during the subsistence of the contract, and settling up annually in July, made yearly a new contract, which is acknowledged by the statement in the post-card dated 20th July 1880, addressed by the pursuers' manager to the defender, to the effect that 'the contracts are up.' That this writing proved, *scripto*, the existence of a contract which could only be overcome by the writ or oath of the defenders. The defenders' agent adduced many authorities for holding that *in rebus mercatoris* parties may bind themselves without the use of all the solemnities essential to some other contracts, but that is all the length the authorities cited by them go.

"The Sheriff-Substitute does not think he can concur in the view urged for the defenders. The use of the word 'contract' in the post-card sent by the pursuers' manager is scarcely sufficient to constitute a contract, and there is not even any averment that there was any communing between the parties regarding a renewal of the written contract. It may be that after the expiry of the contract, the pursuers continuing to send the gas tar and ammoniacal liquors as formerly without any fresh bargain, the pursuers were only entitled to charge the defenders the price agreed on under the contract and not the market price; that question is not raised by the pursuers, but the Sheriff-Substitute is clearly of opinion that after the expiry of the contract in July 1879, the pursuers were entitled at any time to cease to supply their goods to the defenders.

"II. The defenders maintain that they were entitled to longer notice that the pursuers were to cease supplying gas tar and ammoniacal liquor. The Sheriff-Substitute thinks this is an important matter, and it has caused him some difficulty. There is no doubt that manufacturers with large

works and heavy payments to make to workmen, are much inconvenienced if suddenly deprived of the materials used in their manufacture; but their remedy is, if they enter into contracts for supplies, to see that these contracts are regularly renewed and made binding. The defenders have averred that the notice was too short, according to the usage of trade, but they do not aver that according to the usage of trade any particular length of notice is given, or make any averment relevant to be admitted to probation. The Sheriff-Substitute is of opinion that after the expiry of the contract either party was at liberty at any time to cease dealing on the terms contracted for." . . .

The defenders appealed to the Sheriff.

In their reclaiming petition they stated that they desired to found upon a verbal contract between the parties, and were prepared to amend their record if necessary. They did not formally tender a minute of amendment.

The Sheriff dismissed the appeal.

*Note.*—The contract made in 1878 was quite distinctly for one year only. The defenders aver that a similar contract was renewed from year to year thereafter, both by writing and verbally—by writing in the offer of 1878, and the subsequently yearly accounts, &c. But the offer in 1878 for more than one year was not accepted, and the subsequent yearly accounts &c., do not constitute or imply any continuing contracts. The defenders do not condescend on the particulars of any verbal contract. They ask to be allowed a proof, but there are no facts stated to go to proof. After 1879 the parties were dealing without a contract for certain specified or implied periods, and their dealings might have been ended by either at any time, and without the necessity of notice, however proper some notice may in the circumstances have been. Of course it was the business of the defenders to secure themselves by contract against the stoppage of a precarious supply.

"It is not unimportant that in their written communication to the pursuers in March 1883 the defenders did not state that they could not be summarily disposed of, as the pursuers proposed to do, in respect of an existing contract up to the end of July 1883."

The defenders appealed to the Court of Session, and at the calling of the cause on the Short Roll proposed to amend their record by adding the following averment—"On or about 7th August 1882 the pursuers sold to the defenders, and the defenders bought from the pursuers, all the gas tar, &c., to be produced at the pursuers' works during the year ending 31st July 1883, at the price of 12s. 6d. per ton. The said contract was entered into at North Berwick on same date by Mr Black, the pursuers' manager, on their behalf, and Mr Robertson, sole partner of the defenders' firm. Thereafter the pursuers, in implement of said contract, delivered to defenders the quantities of gas tar, &c., mentioned on record."

Section 24 of the Sheriff Courts Act 1876 provides—"The Sheriff may at any time amend any error or defect in the record in any action, upon such terms as to expenses and otherwise as to the Sheriff shall seem proper, and all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made."

They argued—A verbal contract from year to year was relevantly averred on record. The Sheriff ought to have given effect to the proposal to amend contained in the reclaiming petition, but he had not taken notice of it. He was bound to allow it—(1) from the imperative terms of sec. 24 of the Sheriff Court Act; (2) because it was merely a specification of what was, though imperfectly, already set forth on record. Failing the Sheriff's having complied with the Act, it was the duty of the Court now to set the case right by allowing the amendment.

The pursuers replied—To allow the amendment now after the opportunity to make it before the Sheriff had been lost, and final judgment taken in the Inferior Court, was incompetent. Besides, the defenders were refuted out of their own mouth, for their own letter of 26th March, which proposed a new contract, negated any belief in the subsistence of a contract then. [This letter was to the following effect:—"Dear Sir,—Referring to the conversation our Mr R. had with you to-day, we now beg formally to make offer of the sum of 22s. per ton for your production of gas tar and water, as from 1st April till 31st July, that being, we presume, the close of your financial year, and, we may add, the time at which any alteration in the existing arrangements would naturally have been made. Considering that we have now done business with your Co. for eight or nine years, we think your directors might have afforded us the opportunity of tendering for a new contract before treating with a stranger, especially as all our business relations hitherto have been of a most amicable nature, and if not too late, we trust they may still see their way to do so, in which case we are prepared to continue our offer for an extended period. Trusting you will kindly lay the case before such of the directors as you may most easily approach, and hoping for your most favourable support."]

At advising—

LORD JUSTICE-CLERK—I have heard no reason stated in this argument for altering the judgment of the Sheriff. The defenders on a revised record based their defence on a renewal of the former contract, partly by verbal agreement and partly by the custom of trade. Now, the Sheriff has not sustained that defence, I think rightly, and I see nothing to show that the contract was renewed from year to year. And now the defenders, after having taken the judgment on that question, propose to place on record a definite allegation of an express renewal of the contract. I think they ought not to be permitted to do so now—I do not say in point of form—but because I think that the case having been tried before the Sheriff on the footing on which they placed it, and found insufficient, I think it should now have an end, if your Lordships are prepared to sustain his judgment on the case as it was before him. And I must own that what I gather from the correspondence—from the letter of 26th March—is entirely inconsistent with the defenders supposing that there was a contract existing at that date. I think the case should not be hung up longer in order that the defenders may make a counter-avertment of damage from breach of contract, which, if they wished to found on in this action,

they should have made in the Sheriff Court.

**LORD YOUNG**—I am of the same opinion, and I venture to think that the case is a clear one. Though I am generally in favour of allowing an amendment which is likely to lead to doing justice between the parties without causing unnecessary expense, I think that in a case so simple as this we are not called upon to do so. The defenders were supplied originally under a written contract, and subsequently under a tacit renewal of the contract which was expressed in writing. The written contract was for a year, and the supply was not discontinued at the end of the year, and was received and paid for; and then, after the lapse of some years, but prior to the expiry of the annual period then running, it was terminated by the seller. But that was not regarded by the defenders at the time as a breach of contract, but merely as unhandsome treatment on the part of the pursuers. This is distinctly so expressed in the defenders' letter of 26th March, and it appears from the Sheriff-Substitute's opinion that the only point argued before him was, whether after the expiry of the written contract the parties made a contract for another year, and again for another year, a year being the time to which the contract was limited, or whether the renewed contract was just a contract at will which could be terminated by either party at pleasure on due notice. That was the question decided by the Sheriff. Now, there is nothing of that kind on the record in the Sheriff Court or in this Court. Then, after judgment has been pronounced in the Sheriff Court on the question whether continuation of the dealings between the parties imported a contract at will or for a year, and the question being decided on that, and the appeal taken to this Court, the defenders propose to argue on a different footing that the case is a combination of that and a claim of damages, and they say that there was a proposal made by them in their reclaiming petition to amend the record to that effect. I can take no account of the reclaiming petition. There is nothing before the Court here to show that the defenders sought to amend their record in the Sheriff Court. Let it be that the proposal was in the reclaiming petition, the Sheriff did not take it up, nor apparently did the defenders press it. And so, without considering what the Sheriff should or might have done had the proposal been regularly made to him, I must take it as it stands before me, and as now made for the first time after judgment has been taken in the Sheriff Court. I have said I am generally favourable to amendments—indeed, I was truly the author of the words which were imported from the Court of Session Act of 1868 to the Sheriff Court Act—“and all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made.” But I do not think that an amendment is necessary here to do justice between the parties to the case. I think it would be doing injustice, for it would be presenting a totally different case from that argued and meant to be presented to the Sheriff; for it is not conceded that if the fact were that there was a current contract on 31st July, that is entirely inconsistent with the letter of 26th March, not containing any limit of such a claim, but acquiescing in the stoppage

of the supply, except in so far as saying that it was an unhandsome thing for the pursuers to do. Therefore I cannot think for a moment that it is essential to doing justice in this case to allow this amendment. I think it is a clear case for refusing it. If the defenders think they can overcome the whole course of procedure hitherto on another footing, and their own letter, they may bring a counter-action; but I think it is not necessary to the justice of their case to allow the amendment they propose to make in this action after judgment has been given in the Inferior Court in a totally different question. I think the appeal must be taken by this Court on the footing on which it is presented, and not on a different one.

**LORD CRAIGHILL**—I regret to say that I am of a different opinion. If the matter was one for the discretion of the Court, I should probably have come to the same conclusion as your Lordships; but I regard the enactments in the Sheriff Court Act of 1876 as imperative, and if it be applicable to the case we have no alternative but to allow the amendment to be made. Two questions are raised in this case—one by the pursuers, and the other by the defenders. The action is brought to recover a sum of £68, 18s. 6d., being the price of gas-tar and ammoniacal liquor supplied by the pursuers to the defenders. The defenders have set forth in defence a breach of contract on the part of the pursuers. The contract they say runs from 31st July 1882 to 31st July 1883, and they have sought to place against the pursuers' claim for £68 a counter-claim for £40 in name of damages for the loss they suffered by what they allege to be the pursuers' breach of contract in discontinuing the supply of goods in March 1882. Had the contract been observed and the goods been supplied, they would not have had to pay the extra price in obtaining them from another source. The consequent loss is estimated at £40. Now, this is a perfectly competent defence, and there can be no doubt the defenders were entitled to make their counter-claim. Now, was this defence properly before the Sheriff? I think it cannot be doubted that it was. It may be that it is not put in the specific way in which it is now proposed to be stated; but that the thing is there is perfectly clear from statements 2 and 6 of the defenders' statement of facts. I cannot for a moment think that the Sheriff would have entertained any doubt as to the right of the defenders to make this amendment had the proposal been definitely made to him. The defenders propose to make it now, and the question is, Are we entitled to refuse the defenders' offer to put on record the statement which is necessary to render that defence reasonably specific? I think not. I think the question whether there was a contract between the pursuers and the defenders is a question which is raised on the record, and is one which ought to be decided in this action. It is quite true that though this action be thrown out, justice between the parties may be done in another action. But where there is an imperative clause in the Act requiring the Court to allow an amendment which is necessary to do justice between the parties in the action which is before the Court, I think the Court is bound to allow it to be made. There would otherwise have been no use in the clause of the Act, for before the

Act was passed justice could have been obtained in another suit. The meaning of the Act is to do justice in this case, and not in another case. If the question now before us were whether the facts set forth in the proposed amendment would prove the defender's case, I might hesitate as to my judgment. But no proof has been allowed in the case, and we cannot enter on an inquiry whether the defence can be made out. I am sorry that, taking this view of the case, I cannot agree in the opinions which your Lordships have delivered. I think the Sheriff's interlocutor should be recalled and the amendment allowed.

LORD RUTHERFURD CLARK—I agree with your Lordship and with Lord Young.

The Court refused to allow the amendment, and dismissed the appeal.

Counsel for Pursuers (Respondents)—Rhind. Agent—William Officer, S.S.C.

Counsel for Defenders (Appellants)—Thorburn. Agent—James Reid, W.S.

Friday, November 14.

## SECOND DIVISION.

(Sheriff of Lothians.

THOMSON v. JOHN B. ROBERTSON &  
COMPANY.

*Master and Servant—Reparation—The Employers Liability Act 1880 (43 and 44 Vict. cap. 42), secs. 6 and 7—Notice—Omission to State Cause of Injury.*

A workman was injured at his employer's works and taken to an infirmary. Within six weeks thereafter his wife addressed to the employer a letter asking him for money. In it she gave her husband's Christian name and ordinary address, and the date and nature of his injury, but she did not give the cause of the injury. *Held* that the letter was a sufficient notice of injury under sections 4 and 7 of the Employers Liability Act 1880.

By the Act 43 and 44 Vict. cap 42, section 4 (The Employers Liability Act 1880) it is enacted—“An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks . . . from the occurrence of the accident causing the injury.”

By section 7 it is enacted—“Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or if there is more than one employer, upon one of such employers. . . . A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.”

On 31st October 1883, Adam Thomson, while in the employment of the defenders, John B. Robertson & Company, manufacturing chemists

and artificial manure manufacturers at Dunbar, fell from a wooden platform on which he was standing for the purpose of making some repairs on the pipes connected with some tar tubes at the defenders' works, and fractured his lower jaw in two places. He was taken to the Edinburgh Royal Infirmary, where he remained for eight weeks. On the 5th December 1883 his wife sent the following letter to Mr Robertson, the sole partner of the defenders' firm:—

“*Bone Mills, Dunbar, 5th December 1883.*

Dear Sir,—I find I will need some more money, and will you please oblige me with ten shillings. It is now five weeks since Adam got his accident. His jaw is so badly smashed that he will never be the same man again. Adam has been advised to get damages from you. James Hill got some money when he got hurt, and as the Insurance Company paid him, I do not see why Adam, who has been so badly hurt, should not get some too.—Yours respectfully, JANET THOMSON.”

Thereafter Thomson raised this action of damages under the Employers Liability Act 1880 for the sum of £100 as compensation for his injuries. He relied on the letter just quoted as a notice.

The defenders, *inter alia*, pleaded—“(1) The pursuer not having given the requisite notice under the Employers Liability Act, the action is incompetent under said Act, and ought to be dismissed.”

The Sheriff-Substitute (SHERIFF) sustained this plea and dismissed the action.

“*Note.*—This is an action founded only on the Employers Liability Act, and under the fourth section it is provided that such an action ‘shall not be maintainable unless notice that injury has been sustained is given within six ‘weeks’ from the occurrence of the accident causing the injury.’ By section seventh it is provided that the ‘notice’ shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained. It appears that the notice must be in writing, and there are special provisions as to the manner of serving it and as to the party on whom it may be served.

“The letter of date 5th December 1883, addressed by the pursuer's wife to the defender, is put into process as the notice given in terms of the statute, but what is required in a ‘notice’ is not contained in that letter. It may be that the date of a letter written by the pursuer's wife may be held to be the address of the pursuer, but the Sheriff-Substitute is inclined to think that what should be given is a statement of where the injured person is to be found, in order that the party sought to be made liable in damages may have an opportunity of procuring evidence as to the condition of the injured person. In this case, as it appears from the condescendence, the pursuer was at the date of the notice an inmate in the Royal Infirmary in Edinburgh. The pursuer's name is not stated. No doubt the defender would quite well understand who is referred to as ‘Adam,’ but that is only a part of the pursuer's name. Further, the cause of the injury is not stated. The result of the injury is very well stated, viz., that the poor man's jaw was so badly smashed ‘that he will never be the same man again,’ but that is not a statement of the cause of the injury. The letter goes on to state that ‘Adam’ has been advised to claim damages, but