

executorial powers being conferred, had been held to constitute the appointment of an executor. But in point of fact the deed of 1898 was the only valid one, superseding all others, and it alone could be looked at. It was a universal settlement, and all the legacies in the 1897 deed were wiped out, including that to "my executor Mr Torry"—*Tod*, November 25, 1890, 18 R. 152; *Sibbald's Trustees v. Greig*, January 13, 1871, 9 Macph. 399. In the 1898 deed Miss Aitchison recognised that she must have an executor, and gave him £100, but had not made up her mind who he should be. The claim of Mr Torry was founded solely upon an implication from a revoked legacy.

Argued for Mr Torry—1. It was competent to read the deeds together, and the appointment of executor made in the first was in no way revoked by the directions in the second. Though the legacies in the first were wiped out, there was practically no distinction in those given by the second, and the existence of an executor is referred to. The words "My executor Mr Torry" were sufficient to constitute the appointment. He could not have claimed the legacy without acting as executor—*Low's Executor*, June 21, 1873, 11 Macph. 744. The case should not be treated as if there were a regular formal deed, but there did exist under the hand of the testatrix an indication of her intention that Mr Torry should be her executor.

Argued for Mr Scott and others—Failing the appointment of Mr Torry, they were entitled to be conjoined with Lady Denman as executors—*Webster v. Shiress*, October 25, 1878, 6 R. 102.

LORD PRESIDENT—Lady Denman is the admitted and undoubted next-of-kin of the deceased. Of Mr Torry it can only be said that there is a possible claim on his part that a certain writing referring to him as executor has the same effect as if it appointed him as such; but we have heard enough of the case to show that this is an uphill contention, and that he cannot present us with a clear nomination as executor. In these circumstances I think that Lady Denman is entitled to be appointed, and I need hardly say that the gentlemen who are the third competitors have no good title at all. Apparently they come forward rather for the purpose of supporting Mr Torry's application, and if that application is not successful, they have nothing to say to oust Lady Denman from her right.

LORD M'LAREN—I am of the same opinion, and would only add that it is not out of place to notice as an element in the case that Lady Denman has the liferent of the residue of the estate, and accordingly has a large interest in it.

LORD KINNEAR—I agree and have only to add that I do not think that in questions of this kind we have anything to do with the comparative capacity of the respective claimants to administer an estate. That is not a relevant consideration. Lady Denman is the next-of-kin, and is entitled to

be confirmed as executrix, unless anyone having a prior title comes forward to defeat her claim. Whether she is incapacitated by age or infirmity for the permanent administration of an estate, is a different question.

LORD ADAM concurred.

The Court pronounced the following interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Sheriff dated 10th April 1899 appealed against: Remit said conjoined petitions to the Sheriff to proceed in the petition at the instance of the said Baroness Denman, and to decern her executrix-dative *qua* next-of-kin in terms of the interlocutor of the Sheriff-Substitute dated 31st March 1899 in said petition, and to dismiss the petition of the said John Torry, and decern: Find the said John Torry, respondent, liable to the appellant Baroness Denman in expenses in this Court, and also in the Sheriff Court so far as caused by his appearance, and remit," &c.

Counsel for Lady Denman—H. Johnston, Q.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Mr Torry—Guthrie, Q.C.—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for Mr Scott and Others—Sir John Cheyne, Q.C.—Horne. Agents—Menzies, Black, & Menzies, W.S.

Tuesday, May 30.

## FIRST DIVISION.

[Sheriff Court of Lanarkshire.]

M'LEAN v. CARSE & HOLMES.

*Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 2 (1) — Notice of Accident—Prejudice to Employer.*

In order to bar the claim of a workman who has failed to give notice of an accident to his employer in terms of section 2 (1) of the Workmen's Compensation Act 1897, it must be shown that the employer has been prejudiced by such want of notice.

In a case stated under the Act it appeared that the workman had not given notice till three weeks after leaving the employment in which he met with the accident, and that no satisfactory explanation of this delay was given. It did not appear that any inquiry was made as to whether the employer had been prejudiced by this failure, the Sheriff having decided without inquiry that he must necessarily be prejudiced after such lapse of time, and *dismissed* the claim.

The Court *recalled* the dismissal of the claim, and remitted to the Sheriff to proceed.



This was a stated case in an arbitration under the Workmen's Compensation Act 1897, in which the appellant Duncan M'Lean had claimed damages in respect of an injury sustained by him while in the service of the respondents Messrs Carse & Holmes, shipwrights, Glasgow.

The following was the case as stated by the Sheriff-Substitute (SPENS):—"This is an arbitration under the The Workmen's Compensation Act 1897, before the Sheriff of Lanarkshire at Glasgow, in which the Sheriff is asked to grant a decree against the respondents ordaining them to pay to the appellant the sum of 15s. weekly, beginning the first weekly payment on 19th November 1898, and to find them liable in expenses, in respect that, as alleged by the appellant, while he was in the employment of the respondents at work on the 4th November 1898 on board a vessel called 'The City of Bombay,' then lying in the Govan Dock, and while engaged screwing up a bolt, the screw key suddenly slipped, causing his right arm to strike violently against the 'knee' which is used for boring purposes. In consequence of said accident the appellant alleged that his right elbow had been very badly hurt and the bone affected. It is also alleged on the part of the appellant that he had been medically attended, that he is unable to earn any wages, and that it is not known when he would be able to resume his ordinary occupation.

"The appellant averred that while in the employment of the respondents he earned wages at the rate of 30s. per week.

"The application was heard before me on the 17th January 1899, when the following facts emerged from the statements and admissions made:—1. That the appellant was at work on the vessel referred to on the 2nd, 3rd, 4th, and 5th November 1898, and on the latter date, which was a Saturday, he was paid his wages up to date. 2. That on Monday the 7th November he returned to his work and completed his job at 2:30 p.m., and was paid for that day's work the same day, and on that date admittedly ceased to be in respondents' employment. 3. That although the appellant now alleges that he met with an accident to his elbow on Friday the 4th November, while in the respondents' employment, he gave no intimation of any kind of the alleged accident until the 28th November, fully three weeks after it is said to have taken place, and did not give notice under the Act until some days after the last-mentioned date. 4. The appellant was present and gave no satisfactory explanation in answer to me as to his reason for not reporting the accident. He further stated to me that, though not properly fit to work after the accident, he nevertheless drew his full pay.

"In these circumstances I dismissed the claim, and found the appellant liable in £1, 1s. of expenses, and I was of opinion that under section 2 of the Act it is imperative that the workman should give notice before he leaves his employment, unless there is some reasonable explanation why notice was not given, and no such explanation was offered in this case. I was further of

opinion that, after such a lapse of time, with regard to such accident as is here founded on, the employer is necessarily prejudiced by not being able to obtain the information which would have been available to him had he been advised of the accident at the time of its occurrence. I was further of opinion that to entertain such a case would be to hold out a premium to all sorts of *mala fide* and fictitious claims under the Act.

"The following is the question of law submitted for the opinion of the Court:—Whether the appellant's allegation that he had been injured in the employment of the respondents should be entertained (1) where the alleged injury happened three days before the completion of the employment; (2) where the employment was left without intimation of the alleged accident, and no intimation thereof given till three weeks thereafter; and (3) no satisfactory explanation given of the reason for concealment of the alleged accident, such concealment preventing respondents making inquiry into the *bona fides* of the claim at or about the alleged date of accident."

By section 2 (1) of the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) it is provided—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the time of death: Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause."

LORD PRESIDENT—I am of opinion that the Sheriff-Substitute has made a mistake. He gives the Court all the material which he had for determining the case in relation to the absence of notice, but he seems to have omitted from consideration or inquiry the question of fact as to whether in this particular case the employer suffered prejudice. He has ascertained in a rough and ready and probably quite legitimate way whether there was any good excuse for want of notice, and he says there was not, but he has omitted to recognise that the Act of Parliament says that even supposing there is no good reason for the want of notice, yet this shall not annul the application if it appear in the proceedings that the employer has not been prejudiced. So far as appears, this employer never said he was prejudiced in this particular case, and the Sheriff-Substitute has treated the case from an abstract point of view. He says that the employer in a case of this kind is necessarily prejudiced, and he goes on to say that "to



entertain such a case would be to hold out a premium to all sorts of *mala fide* and fictitious claims under the Act." But he ought to have ascertained whether in this case the respondent was prejudiced or not, and as he has cut the proceedings short without ascertaining that matter of fact, I think that his judgment cannot stand.

As it does not appear in the proceedings that the employer has been prejudiced, we should send the case back to the Sheriff Court.

LORD ADAM—The Sheriff has laid down as law that in every case where there has been a delay of three weeks in giving notice, it necessarily follows that the employer is prejudiced. That seems to me to be his *ratio decidendi*, and it is not good law.

LORD M'LAREN — I am of the same opinion, and only wish further to observe that on the question whether the employer has been prejudiced by want of notice, the facts will in many cases appear at the outset of the inquiry. If it were perfectly clear at an early stage of the inquiry that the employer has been prejudiced, it might not be necessary for the Sheriff to go further, or to determine the amount of damages which he had no power to award. The provisions of the Act may be reconciled by holding that as soon as it appears that the employer has been prejudiced the case is not maintainable. I agree that the Sheriff-Substitute was mistaken in not treating the question of prejudice in the present case as one of fact. The attempt to generalise, and to hold that in all cases of a particular class the employer is necessarily prejudiced, is contrary to the plain intention of the statute.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Find that the facts (1) that the alleged injury happened three days before the completion of the employment; (2) that the employment was left without intimation of the alleged accident, and no intimation thereof given till three weeks thereafter; and (3) that no satisfactory explanation was given of the reason for concealment of the alleged accident, do not preclude the claim from being entertained, it being (under the statute) open to the appellant to prove that the respondents Messrs Carse & Holmes were not in fact prejudiced in their defence by the want of notice: Therefore recal the dismissal of the claim: Find the appellant entitled to the expenses of the appeal, and remit," &c.

Counsel for Appellant—Hunter. Agent—Alex. Wylie, S.S.C.

Counsel for Respondents—A. J. Young. Agents—Gill & Pringle, W.S.

Tuesday, May 30.

SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

PARKER v. NORTH BRITISH  
RAILWAY COMPANY.

(See *ante*, vol. xxxv., 842, and 25 R. 1059.)

*Process—Lis alibi pendens—Supplementary Action—Competency—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 29.*

Apart from cases of *res noviter veniens ad notitiam* or other peculiar circumstances, a supplementary action brought for the purpose of claiming a larger sum than could be recovered under the original action is incompetent, in respect that it is an attempt to evade the provisions of the Court of Session Act 1868, section 29, with regard to the amendment of a summons.

*Bryan v. Glasgow and South-Western Railway Company*, March 18, 1869, 6 S.L.R. 445, *followed*.

*Roy v. Hamiltons & Company*, February 15, 1868, 6 Macph. 422, *distinguished*.

This was an action at the instance of Evelyn Stuart Parker, owner of the ship "Genista" of Liverpool, against the North British Railway Company, as proprietors of the dock, harbour, and jetty of Silloth, in the county of Cumberland.

The pursuers concluded (1) that the summons in the present action should be conjoined with an action then in dependence before the Court between the same parties (being the case which is reported *ut supra*); and (2), "the said summonses being so conjoined or whether the same shall be conjoined or not," for payment of the sum of £8000 as damages for the stranding of his ship "Genista" at Silloth, which was due, as he alleged, to the fault of the defenders, but under deduction from that sum of such sum as should be decerned for under the original action, in which he had concluded for payment of £5000 only; or otherwise for payment of £3000.

The summons in the present supplementary action was signeted on 4th March 1899.

The summons in the original action was signeted on 9th July 1896. By interlocutor in that action dated 27th October 1896 the Lord Ordinary (STORMONTH DARLING) allowed the parties a proof of their averments. It was thereafter agreed between the parties that the question of liability should be decided first, leaving the amount of loss and damage to be ascertained subsequently. Proof was accordingly led in the action on the question of liability, and on 18th March 1898 Lord Stormonth Darling pronounced an interlocutor, which was adhered to by their Lordships of the Second Division, of date 1st July 1898, finding that on 28th March 1896 the "Genista" went aground on a